Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12976/2019

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2021, via *Microsoft Teams*

Decision & Reasons Promulgated
On 1 March 2022

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

NASREEN FATIMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Z. Raza, Counsel instructed by Marks & Marks Solicitors
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge M. P. W. Harris ("the judge") promulgated on 9 February 2021, dismissing an appeal brought by the appellant, a citizen of Pakistan born 17 July 1960, against a decision of the Entry Clearance Officer dated 24 January 2019 to refuse her human rights claim made in the form of an application for entry clearance. The Entry Clearance Review Manager upheld the decision on 25 November 2019.

Factual background

2. On 3 November 2018, the appellant, Fatima Nasreen, applied for entry clearance as the adult dependent relative of her son, Haider Abbas Shah, a British citizen residing in this country ("the sponsor"). Since being divorced by her husband in acrimonious circumstances in 1996, the appellant has lived with

her brother, Tassawur Shah, and his son and other family members in Pakistan. Unfortunately, in 2016 the appellant fell from the roof of the family's single story property. She suffered multiple broken bones and injured her back. She was kept in hospital for 12 weeks and had surgery. It is as a result of the injuries sustained following that fall, and the general care needs that the appellant now claims that she has, she made her human rights claim for entry clearance.

3. Before the First-tier Tribunal, the appellant's case was that she had not fully recovered from her fall, and is now a significant burden on her brother in Pakistan, such that she is largely neglected by him and his family. She needs assistance with washing and cleaning, but is only assisted with showering once each month. Her brother and his son were hostile to the sponsor when he returned to Pakistan to visit her in October 2019. Relations between the sponsor and the appellant's family in Pakistan have been strained by the appellant's need to be housed and cared for by Tassawur. She is desperate to live here with her son, receiving the emotional and practical support she needs, but does not have, in Pakistan.

4. The Entry Clearance Officer, and subsequently the judge, approached the human rights claim under paragraph E-ECDR of Appendix FM of the Immigration Rules (entry clearance for adult dependent relatives). The judge did not consider that the evidence relied upon by the appellant demonstrated that she required long-term personal care to perform everyday tasks, as required by paragraph E-ECDR 2.4 of Appendix FM, in light of the evidence required under paragraph 34 of Appendix FM-SE. The judge considered a letter dated October 2019 from the Chief Medical Officer at the hospital that had treated the appellant. It said that the appellant could not survive in Pakistan without an assistant, or someone to take care of her. At [31] the judge concluded that the letter did not provide sufficient detail to support that claim. It simply addressed the prognosis concerning the appellant's mobility. It did not identify any specific tasks impacted by the appellant's disability, such as an inability to wash, dress or feed herself. At [34] the judge noted that there were no observations from the doctor about whether there would be any further recovery by the appellant, nor whether the disability described in the letter (which was written 15 months before the hearing) was permanent. The judge said that there was no clear statement to the effect that any personal care needed by the appellant for everyday tasks was long-term: see [35].

5. The judge observed that those findings precluded the appellant from succeeding under the Immigration Rules, but nevertheless analysed the appellant's case under paragraph E-ECDR 2.5 of the rules in any event. At [43] the judge addressed the appellant's case that she was being neglected by her son and his family in Pakistan. The judge said that it was 'noticeable' that the doctor's letter made no mention of the claimed neglect or poor care at the hands of her relatives. The doctor held weekly consultations with the appellant and would, said the judge, be in a position to notice signs of such a situation.

6. The evidence from the Tassawur, observed the judge, was silent as to the issue of neglect, and in his statement he described the appellant's condition as 'paralysed', which went further than the doctor's letter, which suggested that the appellant had at least some mobility. Accordingly, the judge said he was not satisfied that the appellant had demonstrated that she was suffering mentally or physically from neglect while living with her brother and other relatives in Pakistan. In relation to the availability of alternative care, there was no evidence

of the claimed limited provision in Pakistan, and the sponsor appeared not to have done any research into the possibility. Neither the sponsor nor the appellant's brother had addressed whether the provision of such alternative care would be able to alleviate any tensions in the family arising from the need to care for the appellant. See [44] to [46]. The judge found that the appellant could not meet the requirements of the immigration rules.

7. In relation to Article 8 outside the rules, the judge conducted a balance sheet analysis. The factors in favour of the appellant did not weigh those militating against granting her entry clearance. As part of that analysis, the judge observed that it would be open to the appellant to make a fresh application, based on up-to-date medical evidence.

8. The judge dismissed the appeal.

Grounds of appeal

9. There are two grounds of appeal. Ground 1 contends that the judge erred in his application of paragraph 34 of Appendix FM-SE, which merely provides the form of specified evidence that applicants under the rules '*should*' provide, rather than imposing a mandatory requirement. The judge failed to reflect the 'discretionary' requirement of the rule. That being so, the judge excluded from his analysis other, material evidence that had been provided by the appellant, and failed to conduct a proper analysis of the appellant's case under the rules.

10. Ground 2 contends that the judge failed to make findings in relation to, or otherwise take into account, certain elements of the sponsor's evidence.

11. Permission to appeal was granted by Upper Tribunal Judge Owens on both grounds.

12. There was no rule 24 response from the respondent.

Legal framework

13. The appeal before the judge was against the refusal of a human rights claim. Whether the United Kingdom is subject to a positive obligation to facilitate the appellant's entry to its territory for the purposes of continuing the family life she claims to enjoy with her son fell to be considered by the judge under the Immigration Rules in the first instance, and "outside" the rules if their requirements could not be satisfied.

14. Paragraphs E-ECDR.2.4 and E-ECDR.2.5. provide that two of the eligibility criteria are as follows:

> "E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
>
> E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because-

> (a) it is not available and there is no person in that country who can reasonably provide it; or
>
> (b) it is not affordable."

15. Appendix FM-SE makes provision for the 'specified evidence' to be provided by applicants under Appendix FM. Paragraph 34 makes provision for the evidence required to establish paragraph E-ECDR.2.4 in the following terms. The specified evidence is:

> "34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:
>
> (a) Independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and
>
> (b) This must be from a doctor or other health professional."

Discussion

Ground 1

16. I do not consider that paragraph 34 of Appendix FM-SE admits of the possibility of demonstrating that an applicant requires long-term personal care through anything other than independent medical evidence from a doctor or other health professional.

17. First, a textual analysis of paragraph 34 demonstrates that it features precisely the mandatory language that Mr Raza's submission contends is absent. Sub-paragraph (b) provides that the independent medical evidence '*must* be from a doctor or other health professional' (emphasis added). On Mr Raza's proposed construction, the mandatory 'must' is subsidiary to a general discretionary 'should' in the opening words of the paragraph. That construction would not make sense; if correct, it would require decision makers to choose whether to require independent medical evidence under sub-paragraph (a), while simultaneously imposing a mandatory requirement that such evidence *must* be from a doctor or health professional under sub-paragraph (b). If the rule intended only to impose a discretionary requirement, sub-paragraph (b) would not have used the mandatory term '*must*'.

18. The way in which paragraph 34 is structured is such that the sub-paragraphs do not list cumulative or alternative substantive requirements of the rule (in contrast, for example, to paragraph 35). Rather, sub-paragraph (b) stipulates the provenance of the evidence required by sub-paragraph (a): 'this must be from a doctor or other health professional'. That structure is a further indication that the use of the word 'should' in the opening words of paragraph 34 is not intended to confer a discretion on the decision maker.

19. Secondly, a purposive interpretation of the rules is inconsistent with the result for which Mr Raza contends. In *Wang & Another v Secretary of State for the Home Department* [2021] EWCA Civ 679, Underhill LJ described the approach of a court when construing the meaning of the Immigration Rules in these terms, at [45]:

> "The Court's task is to discover what the SSHD [the Secretary of State for the Home Department] must be taken to have intended from the words used in the Immigration Rules, construed objectively according to the natural and ordinary meaning of the words, recognising that they are statements of the SSHD's administrative policy, against the background of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy…"

20. The adult dependent relative rules, and the underlying policy rationale, were challenged, unsuccessfully, in *R (oao BritCits) v Secretary of State for the Home Department* [2017] EWCA Civ 368, [2017] 1 W.L.R. 3345. Sir Terence Etherton MR described part of the policy reflected the adult dependent relative rules in the following terms, at [58]:

> "[The policy] is twofold: firstly, to reduce the burden on the taxpayer for the provision of health and social care services to those ADRs [adult dependent relatives] whose needs can reasonably and adequately be met in their home country; and, secondly, to ensure that those ADRs whose needs can only be reasonably and adequately met in the UK are granted fully settled status and full access to the NHS and social care provided by local authorities."

21. At [59] the Master of the Rolls said that the care needs of a putative adult dependent relative may embrace "emotional and psychological requirements **verified by expert medical evidence**" (emphasis added).

22. In *Cheryl Ribeli v Entry Clearance Officer, Pretoria* [2018] EWCA Civ 611, Singh LJ endorsed a description by a different constitution of this tribunal of the adult dependent relative rules as "rigorous and demanding", in light of the judgment in *BritCits*, at [56]:

> "As I have already mentioned, those Rules, as amended from 2012, are 'rigorous and demanding'. That was the policy decision of the Secretary of State and was endorsed by Parliament in approving the change to the Rules in 2012. A challenge to that change has been considered and rejected by this Court in *BritCits*."

23. Against that background, the context for the prescribed evidential requirements contained in paragraph 34 of Appendix FM-SE is to inform adult dependent relative applicants how they are to demonstrate that they meet the substantive (and 'rigorous and demanding') requirements of E-ECDR.2.4, and to guide the Secretary of State's officials in their assessment of such applications. The language of paragraph 34 chimes with the substantive requirements contained in E-ECDR.2.4; those requirements concern matters which, by their very nature, the Secretary of State is entitled to expect medical evidence from a doctor or a health professional. The substantive requirements of paragraph E-ECDR.2.4. require an assessment of an applicant's illness or disability, and the applicant's requirements for long-term personal care. Mr Raza's attempts to characterise the requirements of paragraph 34 of Appendix FM-SE as stipulating a merely discretionary evidential requirement fail to engage with the underlying specialist knowledge and expertise required to demonstrate that the substantive requirements of paragraph E-ECDR2.4. are met.

24. The ordinary meaning of the wording of paragraph 34 is therefore as follows: there should be independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks, and that evidence *must* be from a doctor or other health professional. The judge was obliged to approach paragraph 34 of Appendix FM-SE on the footing that it required objective medical evidence of the 'rigorous and demanding' requirements of the adult dependent relative rules.

25. It was not, therefore, open to the judge to approach paragraph 34 as imposing only a discretionary requirement, and it was not an error of law for him not to do so. The paragraph imposes a mandatory requirement, which reflects the substantive eligibility criteria contained in paragraph E-ECDR.2.4, whose requirements may only be met by the provision of independent medical evidence. The appeal is dismissed under ground 1.

Ground 2

26. Under ground 2, the appellant challenges the judge's treatment of the sponsor's oral evidence. Mr Raza submitted that the judge failed to address the sponsor's evidence concerning the care that the appellant reasonably requires, either from her perspective, or that of the caregiver in Pakistan. He also submitted that the judge failed properly to take into account background evidence concerning the societal discrimination faced by women in Pakistan.

27. While the sponsor's oral evidence sought to make good the deficiencies in the medical evidence, in my judgment the judge was entitled to reject it for the reasons he gave at [34] of his decision. The judge said:

> "The sponsor has told me that the appellant is not expected to get any better but his evidence is not specified expert medical evidence which I can take into account here. It is to be noted that, in terms of the pain and lack of mobility [the appellant] is described as suffering, there is no comment from the doctor about whether or not there will be any further recovery by the appellant. Indeed, there is no clarification from the doctor whether the disability suffered by the appellant as of October 2019 is permanent or not."

28. There was no additional medical evidence that the judge failed to have regard to. The findings he reached were open to him on the evidence he heard, for the reasons he gave. While the sponsor sought to give evidence concerning the matters that should have been covered by independent medical evidence, by definition his evidence was neither independent, nor medical, with the consequence that it was not an error of law for the judge to reach the conclusions he did.

29. The eligibility requirements of paragraph E-ECDR are cumulative, with the consequence that the appellant's failure to meet paragraph E-ECDR.2.4 was fatal to his appeal 'under' the Immigration Rules. See paragraph E-ECDR.1.1, which provides:

> "To meet the eligibility requirements for entry clearance as an adult dependent relative all of the requirements in paragraphs E-ECDR.2.1. to 3.2. must be met."

30. Further, the requirements of paragraph E-ECDR.2.5 build upon those contained in paragraph E-ECDR.2.4. Paragraph E-ECDR.2.4. requires an applicant to establish their need for long-term personal care to perform everyday tasks, and paragraph E-ECDR.2.5 requires the applicant to demonstrate that such care, once the need for it has been established, is either not available in the country of origin, or is not affordable (to paraphrase). If an applicant has failed at the hurdle of paragraph E-ECDR.2.4., paragraph E-ECDR.2.5 is incapable of being met.

31. While Mr Raza correctly highlights that in *BritCits* at [59] and [76], the Court of Appeal emphasised the subjective dimensions to the assessment of what is 'reasonable' under paragraph E-ECDR.2.5, those questions only arise when an applicant has already demonstrated that they meet the requirement for long-term personal care. Paragraph E-ECDR.2.5. addresses the question of the comparative provision of care in the country of origin by reference to 'the *required* level of care'. As set out above, 'the required level of care' is a cross-reference to the criterion contained in E-ECDR.2.4, which this appellant had failed to meet on account of the deficiencies (and the age) of the medical evidence she relied upon.

32. In my judgment, taken to its logical conclusion Mr Raza's submission seeks to read paragraph E-ECDR.2.5. as though the reference to a 'required level of care' were a reference to the '*desired* level of care'. Understandably, the sponsor's evidence set out a range of subjective reasons why both he and his mother considered that the care available in Pakistan would be insufficient, and why they both thought it would be imperative for the appellant to relocate to this country. But in the absence of the required medical evidence, their subjective views were, with no discourtesy intended, of marginal relevance to the judge's analysis.

33. Similarly, while many women in Pakistan do experience gender-based discrimination, the relevance of that reality to the question of the reasonableness of the care provision available in Pakistan only arises in the context of paragraph E-ECDR.2.5 once an applicant has established that they have care requirements, by reference to the specified medical evidence, in the first place. It follows that nothing turns on the judge's approach to the well-established societal position of women in Pakistan.

34. To the extent that Mr Raza's submissions seek to challenge the judge's findings of fact, it is important to recall that appeals lie to this tribunal on the basis of errors of law, rather than disagreements of fact. At [43] the judge highlighted how the letter from the Chief Medical Officer at the appellant's treating hospital had made no mention of the neglect she claimed to suffer. At [44], the judge said that Tassawur had been silent in his written evidence concerning the claimed family dispute that the appellant said had arisen as a result of her care needs. The letter from Tassawur was also inconsistent with that from the Chief Medical Officer, overstating the appellant's medical condition by describing her as 'paralysed'. That analysis led to the judge reaching the following operative findings at [45]:

> "These differences and/or gaps in the evidence caused significant doubt in my mind. In the circumstances, I am not satisfied on the evidence before me in this appeal that it is demonstrated that the appellant is suffering mentally or physically from neglect while living with her brother and other relatives in Pakistan."

35. In my judgment, those were findings open to the judge on the evidence he heard.

Conclusion

36. In summary, the judge correctly approached paragraph 34 of Appendix FM-SE as imposing a mandatory requirement for an applicant under the adult dependent relative rules to provide independent medical or other health evidence concerning their long-term personal care requirements. It was not an error of law for the judge to find that the sponsor's non-medically qualified opinion about the health needs of his mother did not meet the 'rigorous and demanding' requirements of the rules, specifically paragraph E-ECDR.2.4. The judge's findings concerning the comparative care provision in Pakistan were open to him, particularly as they were parasitic upon his earlier findings that the appellant had not established that, as a result of age, illness or disability she required long-term personal care to perform everyday tasks.

37. There was no challenge to the judge's assessment of Article 8 outside the rules.

38. This appeal is dismissed.

Postscript

39. The day before the hearing in the Upper Tribunal, 20 December 2021, the appellant's solicitors applied to adduce further medical evidence. Mr Raza did not advance the application orally. The error of law jurisdiction of this tribunal is to be exercised by reference to the evidence that was before the judge below. Further evidence would only be relevant in this tribunal in the event the decision of the First-tier Tribunal had been set aside, and retained to be remade at this level. As such, the written application is of no relevance, and I do not address it further. It may be relevant to a future application to the Entry Clearance Officer, but that is not a matter for this tribunal.

Notice of Decision

The appeal is dismissed. The decision of Judge Harris did not involve the making of an error of law.

No anonymity direction is made.

Signed Stephen H Smith Date 16 February 2022

Upper Tribunal Judge Stephen Smith