



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/10143/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 15th August 2014**

**Determination
Promulgated
On 8th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE ENTRY CLEARANCE OFFICER- NEW DELHI

Appellant

and

**MRS RANI SAXENA
(NO ANONYMITY DIRECTION MADE)**

Claimant

Representation:

For the Appellant: Mr H Kannangara, Counsel

For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Mrs Rani Saxena date of birth 3 June 1941, is a citizen of India. Having considered all the circumstances I do not make an anonymity direction.

2. This is an appeal by the Entry Clearance Officer [ECO] New Delhi against the determination of First-tier Tribunal Judge Herbert OBE promulgated on 15th of May 2014. To avoid confusion I have for the purposes of the present proceedings referred throughout to the person making the original application for entry clearance as the claimant.
3. The judge allowed the appeal of the claimant against the decision of the ECO dated 18th June 2013. The decision by the ECO was to refuse to the appellant entry clearance to the United Kingdom as a dependent relative under Appendix FM section EC-DR.
4. By decision made on 23 June 2014 permission to appeal to the Upper Tribunal was granted. The matter appeared before me to determine in the first instance whether or not there was a material error of law in the original determination. Directions sent out prior to the hearing stated that if any further evidence was to be lodged it had to be lodged prior to the hearing so that the Upper Tribunal, if it was appropriate, could re-determine the appeal.
5. During the course of the hearing I asked the claimant's representative to look at the provisions within paragraph E-ECDR.2.5. of the Rules and paragraph 16 of the determination to assist me to understand how they presented their case to say that the rules had to be interpreted such that care could not be provided by a paid help but had to be provided by a family member.
6. The sponsor, Mr Vishal Saxena, who was present at the hearing, interrupted the proceedings. The sponsor indicated that he was paying for the representation and that he wanted to speak instead of the legal representative. After further discussion between the legal representative and the sponsor the legal representative decided that he could no longer represent and with the consent of the sponsor withdrew from the proceedings. I did warn the sponsor that these with legal issues but he was insistent upon being allowed to speak. I permitted the sponsor thereafter to address the issues in the case. I also heard from the representative of the ECO.
7. The claimant applied for entry clearance to the United Kingdom as a dependent relative of a person present unsettled in the United Kingdom, the sponsor, her son. The claimant is 73 years of age. According to the medical reports submitted the claimant suffers from arthritis and hypertension, both conditions which were being "treated" in India. In the past the claimant had a maid who appears to have helped her. It is now claimed that the maid has left and they cannot obtain a replacement.
8. It is the claimant's case that due to age, ill-health or disability she requires long-term personal-care to perform everyday tasks. The claimant and the sponsor claimed that those needs cannot be met in India even by the provision of a maid and in any event they cannot find a maid or a person to undertake such duties.

9. The provisions under consideration are paragraphs 2.4 and 2.5 of E-ECDR Relationship and requirements. Paragraph 2.4 and 2.5 provide:-

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 and 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 for 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.

10. In allowing the appeal the judge at paragraph 16 of the determination states the following:-

“ I find that on the medical evidence before me that the appellant does meet the criteria for consideration and that the long-term personal-care means care to be given by member of their immediate or extended family, rather than long-term ' *professional care* ' which would suggest a nursing service being provided for her.

11. It is submitted on behalf of the ECO that in coming to that conclusion the judge has misinterpreted the provisions as not permitting such care to be provided by third parties, who are paid for their services. It is asserted that the judge failed to take into account paragraph E-ECDR.2.5. of the rules. It is claimed that that paragraph 2.5 makes clear that any care needed must not be available or not affordable. It is claimed that it is clear from the provision that the care can be provided by persons other than family members.
12. One has to look at the degree of care needed by this claimant. Within the body of the determination itself in paragraphs 8 to 13 the judge has acknowledged that the hospital letters from Lucknow Hospital and Neera Hospital confirmed that the conditions, from which the claimant was suffering, were hypertension and arthritis and that those conditions were treatable in India. The judge has gone on to indicate that for a number of years the claimant had had a maid, who had managed to provide the day-to-day care needed.
13. There was no evidence that the claimant required day-to-day medical care, which required the attendance of the nurse. Indeed in paragraph 17 of the determination the judge had referred to the fact that the sponsor, the claimant's son, were both working during the day but refers to the fact that they could provide the care needed by the claimant. Whilst there is reference thereafter to a nurse being provided, there was no indication of any specific need that necessitated the claimant having a nurse.

14. By comparison consideration had to be given to the fact that the claimant had over a number of years been assisted by a maid who had managed her day-to-day needs. There was no indication of any worsening in the claimant's condition such that such a maid could not continue to meet her day-to-day needs.
15. There is no justification to read into the rule a requirement that the personal care has to be provided by a member of a family whether immediate family member or extended family member. Clearly the paragraph E-ECDR.2.5 is clearly framed on the basis of care being provided by an individual being paid.
16. In the circumstances the judge within paragraph 16 has in deciding that the rules require care by a family member has failed to apply the rules properly.
17. Further within the paragraph cited from the determination there is a suggestion that there is a need for professional long-term-care in the form of the nursing service in respect of this appellant. That does not appear to be the case given the references to the medical report set out within paragraph 8 of the determination. Paragraph 8 states:-

The hospital letters from Lucknow hospital and Neera Hospital confirmed that she suffered from hypertension and arthritis and that those conditions were treatable in India.

18. There is no suggestion within the reports that the appellant requires nursing services.
19. With regard to the claimant's medical condition I have letters from Lucknow hospital, Neera Hospital and SKD Hospital which provide as follows:-

Lucknow Hospital

Mrs Rani Saxena aged 72 is suffering from Arthritis and Hypertension

She is having Chronic Arthritis and having Functional Disabilities and requires regular personal care by some attendant for her day-to-day activities.

Such personal-care is not available where she is living.

Neera Hospital

This is to certify that Mrs Rani Saxena ... is suffering from OA both knees & HT & other old page problems due to which she is not able to perform oh routine daily activities and needs help & aid for the same.

[OA, I take to be osteo-arthritis & HT, I take to be hypertension]

SKD Hospital

Mrs Rani Saxena... who is aged 72 is suffering from Chronic arthritis of multiple joints and hypertension

She experiences pain and stiffness in her knee, ankle joints and spine in everyday routines such as bathing, dressing and toileting the meal preparation.

20. Paragraph 9 of the determination recognises that in the past the appellant managed her daily life with the help of a maid, who had served the family for a number of years.
21. There is no limitation in E-ECDR2.4. or 2.5. which requires that the care has to be provided by a family member. To read into the provision such a requirement constitutes a clear error of law on the part of the judge. From reading paragraph E-ECDR 2.5. it is clear that the care can be paid for and as such that would include payment to a maid or other personal carer.
22. I invited the parties to address me as to how this matter should be dealt with on the basis that there was an error of law in the determination. It was the case on behalf of the ECO that the case could be re-determined on the basis of the evidence presently before the tribunal. These sponsor also accepted that the appeal could be re-determined on the basis of the evidence presently before the Tribunal. Having considered the submissions I determined to deal with this appeal on the basis of the evidence already presented.
23. In so doing I would draw attention to Appendix FM – SE which requires specific evidence from specific sources to be provided [see the extract from the rules in the papers]. In respect of confirmation that an individual requires long-term personal-care the provisions under the heading of Adult Dependent Relative provide:-

34 Evidence that, as a result of age, illness or disability, the applicant requires long-term personal-care should take the form of:

- a) 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.

35 Evidence that the applicant is unable, even with practical financial help the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

- a) a central or local health authority;
- b) a local authority; or
- c) a doctor or other health professional

36 If the applicant required care has previously been provided through a private arrangement, the applicant must provide details of that arrangement and white is no longer available.

24. It is the claimant's case that whilst previously she did have the assistance of a maid that assistance is no longer available and there is no alternative assistance available.
25. The evidence discloses that the claimant has conditions which are "treatable" by the hospitals in India insofar as such things as osteoarthritis are treatable. Osteoarthritis is a degenerative condition the symptoms, aches and pains, lack of movement, which may be alleviated but which at the moment cannot be resolved by medical treatment.
26. There is no evidence that the claimant requires the day-to-day nursing care. Indeed the letter from Lucknow hospital refers only to some attendant and not medical care.
27. The sponsor and his wife both work. They would not be present on a daily basis to meet the needs of the claimant. There would be a requirement of providing some help and assistance during the daytime but such would not need nursing care.
28. In the past in India the claimant had a maid and there is nothing to suggest that the day-to-day needs of the claimant were not met provided she had such assistance.
29. The evidence from the medical professionals gives no reason why the type of assistance previously available to the claimant is not now available.
30. On the basis of the medical evidence I accept the claimant is suffering from chronic arthritis and has functional disabilities. I accept that she requires day-to-day assistance to enable her to carry out her every day activities. No reason is given however why such assistance could not be provided in India. Such assistance has been provided in the past and was sufficient to enable the claimant to carry on her daily activities. I take account of what is said in the hospital letters but give that a maid could be found in the past I see no reason why such should not be available.
31. There is no requirement for any professional assistance. In the circumstances I find that it has not been proved that the required level of assistance and care could not be provided in India at a price.
32. In those circumstances the claimant has failed to prove that she meets the requirements of the immigration rules. For that reason this appeal has to be dismissed on immigration rules grounds.
33. I have considered in the circumstances whether or not Article 8 is engaged on the facts as presented.
34. I take account of the cases of Haleemudeen 2014 EWCA Civ and MM v SSHD 2014 EWCA Civ 985. The case law examines whether the rules are Article 8 compliant and whether there is any need for an intermediary test requiring that consideration under Article 8 be warranted. As stated by LJ Aikens at paragraph 128:-

“... I cannot see much utility in imposing this further, intermediary, test. If the applicant's cannot satisfy the rule then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.

35. I also draw attention to paragraph 134 and 137 of MM where it is made clear that there is no absolute right for any British citizen to found a family in the United Kingdom and bring his/her spouse into the country. The same must apply in respect of other family members and in respect of persons with settled status in the UK.
36. I also take account of the case of Kugathas 2003 INLR 170. The case makes clear the degree to which in dealing with adults there has to be not only financial dependency but also other elements of dependencies such as emotional dependency.
37. The claimant has not lived with the sponsor or the sponsor's family in the United Kingdom and has not lived otherwise with the sponsor for some years.
38. The claimant has a pension and has her own accommodation and home in India. There is some financial support provided by the sponsor but in the main the claimant has her own income from the pension. I take such into account. I also take into account other factors including the relationship between the parties.
39. Given all the circumstances I do not find that it has been established that there is a family life of such a quality as to engage Article 8. Even if I were to be wrong with regard to that and the decision is such as to materially and significantly interfere with family life, the decision is clearly in accordance with the law and for the purposes of maintaining immigration control as an aspect of the economic well-being of the country.
40. As a final matter I have to determine whether or not the decision is proportionately justified. I take account of all the matters that have been advanced. There is a means by which the claimant can enter the United Kingdom under the rules but the appellant does not meet the rules. The claimant has a home and her day-to-day needs can be looked after in her home country. In such circumstances I find that the decision is proportionately justified.
41. There is a material error of law in the determination. I substitute the following decision
 - a) The appeal is dismissed on Immigration Rules grounds.
 - b) The appeal is dismissed on ECHR grounds.
 - c) I make no fee award

Signed

Date

Deputy Upper Tribunal Judge McClure