Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15247/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 July 2014	**On 4 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS LALITA RAMCHANDRA MUDHOLKAR

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Not represented

DETERMINATION AND REASONS

1. The respondent, whom I shall refer to as the appellant as she was before the First-tier Tribunal, is a citizen of India and her date of birth is 29 August 1938. She made an application for entry clearance as the adult dependent relative of her son, the sponsor, Mr Uday Mudholkar.

2. The application was refused by an Entry Clearance Officer in Mumbai in a decision of 23 July 2013. The reason for refusal was that the appellant had stated in her application that she did not have a medical condition and that she was able to care for herself. An Entry Clearance Manager reviewed the decision on 7 January 2014 and conceded that the appellant was suffering from a medical condition, but refused the application on the basis that care is available to the appellant in India.

4. The appellant appealed against the decision of the Entry Clearance Officer and the appeal was allowed of Judge of the First-tier Tribunal Gillespie in a determination that was promulgated on 22 April 2014, following a hearing at Hatton Cross on 7 April 2014, when the sponsor attended and gave evidence. The Secretary of State was granted permission to appeal by Judge Heynes on 28 May 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

5. The Judge made findings at paragraphs 7 to 10 of the determination as follows:

> "7. Under this head are embraced various requirements labelled E-ECDR.2.1 to E-ECDR.2.5. The specific provisions at issue are stated as follows:
>
> > 'E-ECDR.2.4. The applicant … must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
> >
> > E-ECDR.2.5. The applicant … 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.'
>
> There can be dispute as to rule E-ECDR.2.4. I am satisfied that as a result of age, the appellant requires long-term personal care to perform everyday tasks. She has described her inability to carry her shopping upstairs. She has recently suffered accident, fall and fracture of limbs in her attempts to go about her daily life. The respondent accepts that she 'may be suffering from several medical conditions'. Indeed, the basis of the respondent's decision is that the appellant can obtain the care she requires in a care home or from a personal carer in India. She needs the long-term personal care under 2.4. The only issue

is whether she can obtain it in India in the terms provided under 2.5. I turn to address this rule.

8. Rule 2.5 provides that the inability of an applicant to access the necessary long-term personal care must be caused by one of two reasons. Either it is not available and there is no person in the country who can reasonably provide it; or it is not affordable. The use of the expression 'even with the practical and financial help of the sponsor' in the rule shows that one must take into account in applying the provision the financial or other assistance available from the sponsor by which such care might be facilitated.

9. It is clear to me that the appellant does not, and if she did, could not properly rely upon the assertion that it is 'unaffordable'. She has her own income and enjoys support from her children abroad. The case for the appellant is that the help is 'not available and there is no person who can reasonably provide it'. The case for the respondent is that legislation and provision in India for the care of the elderly is such that the care is available and must be accessed by the respondent in India rather than seeking to migrate to the United Kingdom. This, however, is not a complete answer.

10. Rule 2.4, on a proper reading of its terms, requires that an adult dependant relative abroad should be expected to seek long-term personal care in her own country, rather than join in the United Kingdom a relative upon whom she is dependant, only to the extent that it is reasonable to expect her so to do. An element of reasonability is expressly imported into the rule. The position of the respondent is that, notwithstanding that the appellant has an adult son in settled circumstances in the United Kingdom, able to take the appellant into his home, the appellant must enter a care home or rely on a servant, and not even a trained carer, to provide long-term personal care. I hold that this is in the appellant's individual circumstances unreasonable. She is elderly, with a history of recent falls causing injury, she has strong family connections to the relative in the United Kingdom, despite the distance. He, and other relatives in other countries, travel regularly to see the appellant. Her circumstances are now that increasingly frequent travel is required. It is no longer reasonable to expect this to continue. The purpose of immigration regulations remains to facilitate family connections. Recognition of a duty of support by children to parents is not confined to any single or few races or cultures but is part of the human condition. While that support might well be given in a care home or through servants, where the natural children are at hand to support and assist, and to intervene where necessary, it is scarcely reasonable to hold that a child who has lawfully

> migrated, and how has made his life and livelihood in another country, is barred from taking his parent into his own home in his own country where he can maintain her without recourse to public funds. It might be reasonable so to do, depending on the circumstances, if there were another child or close family member in India and able to provide the care. I hold that it is not reasonable to expect the appellant to rely upon a stranger to provide the long-term personal care she now requires. I hold that the appellant meets the requirements of rule 2.4 and 2.5. No other requirement being at issue, she is entitled to entry clearance as sought."

The Grounds Seeking Leave to Appeal and Oral Submissions

6. The grounds seeking permission to appeal assert that the Judge misapplied the guidance in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)**. Mr Tarlow sensibly withdrew this ground of appeal accepting that the Judge allowed the appeal under the Immigration Rules. However, it is argued by the Secretary of State that the Judge misapplied the Immigration Rules. The Judge accepted that care was affordable and that facilities were available. A carer would provide a reasonable level of care for the appellant.

7. The hearing was attended by the sponsor who submitted a written response under Rule 24 of the 2008 Rules. The essence of this is that the reasonable requirement in the Rules requires consideration of the emotional and mental needs of an appellant who has a genuine need to be physically close TO and cared for by relatives. Mr Mudholkar accepted that care was available to the appellant for her physical needs, but not her mental needs because she needs to be with her family with whom she can talk and reminisce. In the Rule 24 response reference is made to Mark Harper MP, Minister for Immigration, and his response to a letter from the prime minister. In relation to the Immigration Rules Mark Harper MP stated that only those who have a genuine need to be physically close to and cared for by a close relative in the UK are able to settle here. In Mr Mudholkar's view the appellant is precisely the kind of person that the minister was referring to.

The Immigration Rules and IDI

8. The decision was made pursuant to the Immigration Rules contained in Appendix FM relating to entry clearance as an adult dependant. The relevant Rule in issue is E-ECDR.2.5. which reads:

> "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."

9. There are Immigration Directorate Instructions relating to the relevant Immigration Rule contained in guidance which has effect from 13 December 2013 and the guidance reads as follows:

"2.2.2 Unable to receive the required level of care in the country where they are living

The ECO needs to establish that the applicant has no access to the required level of care in the country where they are living, even with the practical and financial help of the sponsor in the UK. This could be because it is not available and there is no person in that country who can reasonably provide it, or because it is not affordable. The evidence required to establish this is set out below. If the required level of care is available or affordable, the application should be refused.

2.2.3 No person in the country who can reasonably provide care

The ECO should consider whether there is anyone in the country where the applicant is living who can reasonably provide the required level of care. This can be a close family member:

- son
- daughter
- brother
- sister
- parent
- grandchild
- grandparent

or another person who can provide care, e.g. a home help, housekeeper, nurse, carer or care or nursing home. The ECO should bear in mind any relevant cultural factors, such as in

countries where women are unlikely to be able to provide support."

Conclusions

10. In my view the Judge erred in law by importing reasonableness into the Rules in relation to the type of care available to the appellant and whether or not it is reasonable to expect the appellant to be cared for by a third party. Third party care is available to the appellant in India. In my reasonableness relates to whether the third party can reasonably provide the care and this is to be considered in the context of whether it is practicable for that person to provide care. The IDIs make reference to cultural factors which do not apply here. There is no requirement under the Rules as they now stand (or the IDIs) for the appellant to decide who should care for her and where this care should take place. In my view the Judge materially erred and I set aside the decision to allow the appeal under the Rules and remake the decision dismissing the appeal on the basis that care is available to the appellant in India.

11. There are no compelling circumstances that would justify granting leave outside the Immigration Rules. The appellant requires long term care as a result of her age and it is affordable and available. That she would prefer to be with her family in the UK does not, in my view, amount to compelling circumstances. I appreciate that the appellant's condition may have deteriorated and further evidence was relied upon by the sponsor. However, this is an application for entry clearance and I must consider the circumstances at the date of the decision, and in these circumstances the appeal is dismissed under Article 8 of the 1950 Convention on Human Rights. It is open to the appellant to make a further application for entry clearance.

Signed Joanna McWilliam Date 30 July 2014

Deputy Upper Tribunal Judge McWilliam