Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16073/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8 September 2014	**On 15 December 2014**
Prepared 8 September 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

ENTRY CLEARANCE OFFICER BOMBAY

Appellant

And

VINAYA VIDYADHAR PATNE

Respondent

Representation:
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms Bustani, Counsel, instructed by Paul John & Co Solicitors

DETERMINATION AND REASONS

1. The Respondent, born on 21 May 1946 is a citizen of India. On 10 April 2013 she applied for a grant of entry clearance as a dependent parent pursuant to paragraph EC-DR.1.1 (d) of Appendix FM to the Immigration Rules.

2. In her application the Respondent said that she suffered from diabetes and high blood pressure, which was treated with

medication. She said she found it very difficult to care for herself on a daily basis, and there was no one who was able to provide her with the care and emotional support that she required. She said that she had required care (including emotional support) since being widowed in June 2010, and that she had no-one in India who could care for her. Whilst she did have a sister in India, she lived "far away", and had her own family, so that she was unable to care for the Respondent, or meet her needs. It was asserted that the Respondent required "personal care emotionally, physically and financially" and that such care was not available to her in India. She had two sons; one who lived in the UK and was the sponsor to the application, and the other who lived in the USA. Her sons shared her financial support equally between them, although she had some financial resources of her own in India. She visited her two sons and their families every year.

3. The application was refused on 10 July 2013 on the basis the Appellant was not satisfied that the Respondent met the requirements of paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules. The Appellant took a number of points.

4. The Appellant noted that in a previous application for entry clearance made in June 2011 the Respondent had claimed to be financially self sufficient, although she now claimed to financially dependent upon her son living in the UK, the sponsor, and a second son living in the USA. She had not provided adequate evidence of her financial circumstances to explain any change, or to identify precisely what her financial position was.

5. Although the Respondent claimed to suffer from diabetes and high blood pressure, which was treated with medication, she had not provided evidence to suggest that due to age illness or disability her medical condition was such that she required long term personal care to perform everyday tasks. The medical evidence did not indicate a need for long term personal care, or explain why if she did, such care was not available to her within India. On the face of the evidence provided the medical care that she required was available to her, and was accessible by her, in India.

6. Although the Respondent claimed to require emotional support from the sponsor and his family, and the Appellant accepted that there would be a negative impact consequent upon one son having emigrated to the UK, and another having emigrated to the USA, she had offered no explanation as to why neither of those sons were able to return to settle in India in order to provide the support that she claimed to need. Indeed the evidence was that when she did from time to time live in India she was accompanied by a member of the extended family, from either the USA or the UK. Nor did the decision prevent the Respondent from continuing to visit her sons and their families in the UK and the USA as she had been doing to date.

7. In her grounds of appeal against that decision the Respondent baldly asserted that she did meet the requirements of paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules. It was argued that the sponsor had provided an undertaking that the Respondent would have no recourse to public funds for a period of five years after the grant of entry clearance, and thus Article 8 was raised on the basis the decision constituted a disproportionate interference in the Respondent's ability to pursue her "family life".

8. The ECM reviewed the refusal in the light of the grounds of appeal on 17 January 2014. He noted that no new evidence had been produced in support of the appeal, and thus maintained the decision to refuse the application.

9. The appeal was dismissed under the Immigration Rules but it was allowed on Article 8 grounds in a Determination promulgated on 26 June 2014 by First Tier Tribunal Judge Chana.

10. By a decision of First Tier Tribunal Judge Grant-Hutchinson promulgated of 17 July 2014 the Appellant was granted permission to appeal to the Upper Tribunal.

11. The Respondent filed no Rule 24 Notice. Neither party has applied for permission to rely upon further evidence pursuant to Rule 15(2A) of the Upper Tribunal Procedure Rules 2008.

12. Thus the matter comes before me.

The Immigration Rules

13. The Judge found at paragraph 19 of the Determination that the Respondent did not meet the requirements of the Immigration Rules. That finding was couched in the present tense rather than being directed to whether she met the requirements on 10 July 2013. In my judgement, although that displays an error of law in the Judge's approach, it is not a material error because Ms Bustani is recorded as having conceded before the Judge on behalf of the Respondent that the requirements of paragraph E-ECDR.1.1(d) of Appendix FM were not met.

14. Upon enquiry of Ms Bustani in the course of the hearing, the concession is maintained, specifically in relation to the date of the decision on two bases. It is conceded that the Respondent failed to establish on the balance of probabilities that at the date of decision she "*as a result of age, illness or disability require long term personal care to perform everyday tasks*", and, that she was at that date "*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*."

Error of law in the Judge's approach to the Article 8 appeal?

15. In my judgement a fair reading of the Determination discloses a number of obvious errors of law in the Judge's approach to the evidence placed before her;

First, as disclosed by paragraph 37 of the Determination the Judge failed to restrict herself to considering the Respondent's position as it was at the date of the decision under appeal (10.7.13), and embarked upon speculation as to what it might be, or become, at some unspecified point in the future. Thus on the one hand the Judge appears to have accepted that the Respondent was at the date of decision able to undertake longhaul air flights to visit her sons in the UK and the USA, but speculated that she might be unable to continue to do so in the future.

Second, again as disclosed by paragraph 37 of the Determination she approached the appeal on the basis that at the date of the hearing the Respondent had no "settled status" in any country. That was wrong; the Respondent has at all material times been a citizen of India.

Third, having directed herself in paragraph 20 that her first step in the consideration of an Article 8 appeal under Razgar principles should be to determine whether the Respondent has "an existing and effective family life in the United Kingdom" she failed to make any finding in the course of her Determination that "family life" existed between the Respondent and the sponsor at the date of decision. It was of course the Respondent's case that her adult son had left India, and emigrated to the UK, as long ago as 2006. Whilst the Judge did make the finding in paragraph 38 of the Determination that the Respondent had established that her emotional ties with her son and his family in the UK were "at present" over and above normal ties between a mother and son, that finding was entirely unreasoned, and there would appear to have been no proper evidential basis for it.

Fourth, having identified that it was conceded the Respondent did not meet the requirements of the Immigration Rules at the date of decision it is not at all clear from the Determination that the Judge engaged adequately with the reasons why the Respondent was unable to do so. Thus she failed to place the Article 8 appeal into its proper context.

Fifth, having identified that the Respondent had family in both India, and in the USA, in addition to the sponsor in the UK, the Judge failed to engage with why it was disproportionate to refuse her entry clearance for the purposes of settlement if she needed the emotional support that would come from living within a household of family members, as opposed to expecting those needs to be met in either India by the family members who continued to live there, or who could visit or return there, or even in the USA by those who lived there.

Sixth, having identified that the Respondent as a widow had divided her time between India, the UK, and the USA, the Judge had failed to engage with the status quo that had been established thereby. Arguably the reality was that the Respondent was living for periods of six months at a time in the UK and the USA, returning to India only for relatively short periods between such visits.

The decision remade?

16. In the light of the concessions the decision upon the appeal under the Immigration Rules is confirmed. I am satisfied however that individually and cumulatively the effect of the errors set out above requires me to set aside the decision upon the Article 8 appeal, and to remake it.

17. The parties were agreed that if this were my conclusion there would be no need for me to hear evidence, because there was no need to revisit the primary findings of fact.

18. In my consideration of the Article 8 appeal I have to determine the following separate questions:

- Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
- If so will such interference have consequences of such gravity as to potentially engage Article 8?
- Is that interference in accordance with the law?
- Does that interference have legitimate aims?
- Is the interference proportionate in a democratic society to the legitimate aim to be achieved?

19. Since the Judge appears to have accepted that the Respondent enjoyed “family life” with the sponsor at the date of decision, and that the interference would have such consequences as to potentially engage Article 8, I will proceed on the basis that this is the case.

20. As set out above I am satisfied that the decision was made in accordance with the law. There can be no issue that the decision under appeal was made by the Appellant in the pursuit of a legitimate aim; the protection of the economic security of the UK, and the maintenance of public confidence in immigration controls.

21. Nevertheless, given the nature of the admitted failures to meet the requirements of the Immigration Rules and the findings of primary fact that were made by the Judge, it is extremely difficult to see any basis upon which the Respondent should nonetheless be entitled to succeed in her appeal on Article 8 grounds. The decision under appeal does not affect the status quo that has been established since the Respondent was widowed in 2010, and was being pursued at the date of decision. The refusal

of entry clearance for the purpose of settlement did not affect the ability of the Respondent to continue to pursue her established lifestyle of visiting the USA and the UK in rotation. The decision only prevented her from settlement in the UK. If, and when, her circumstances changed she would be entitled to make a fresh application. There is simply no place in a case such as this for speculation as to how her circumstances might change at some unspecified point in the future.

22. The evidence did not establish that the Respondent was unable to access any care she required in India, and nor did it establish that the sponsor was required to return to India to settle there in order to care for the Respondent if the decision were maintained.

23. Accordingly I am not satisfied that the Judge's findings permit a conclusion that the Respondent is entitled to a discretionary grant of entry clearance outside the Immigration Rules. Ultimately, as the Appellant has argued, at the heart of this appeal is the choice that the sponsors have made to emigrate to the UK, and to the USA, and their reluctance to return to live in India. The mere fact that the sponsor is now a British citizen does not entitle him to insist that entry clearance be granted to his mother, even though she does not meet the requirements of the Immigration Rules; MM & Others [2014] EWCA Civ 985.

24. In my judgement the evidence falls well short of establishing that there were at the date of decision any compelling compassionate circumstances that meant the refusal to grant to the Appellant entry clearance led to an unjustifiably harsh outcome.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 26 June 2014 did not involve the making of an error of law in the dismissal of the appeal under the Immigration Rules. The decision to dismiss that limb of the appeal is accordingly confirmed.

The Determination did contain an error of law in the decision to allow the Article 8 appeal, which requires that decision to be set aside and remade. I remake that decision so as to dismiss the Article 8 appeal.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity direction was made by the First Tier Tribunal, and none is sought from the Upper Tribunal. There is no good reason for the Upper Tribunal to make one of its own motion.

Deputy Upper Tribunal Judge JM Holmes

Dated 8 September 2014