IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06035/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st June 2015	**On 29th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS PEARL BARBARA DE SILVA
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Martin, Counsel instructed by Indra Sebastian Solicitors
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Sri Lanka born on 19th October 1941 and she appeals the decision of the respondent dated 9th January 2014 refusing to vary her leave to remain and deciding to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant arrived in the United Kingdom as a visitor on 1st December 2012 and on 29th May 2013 she made an application for indefinite leave to remain in the UK outside the Immigration Rules on compassionate grounds.

3. The respondent refused her application. It was decided that there were no sufficiently compelling reasons or compassionate factors which justified allowing her to remain outside Appendix FM. She did not fulfil the requirements under paragraph 276ADE. There was no evidence that she was suffering from any physical or other condition notwithstanding her age of 72. She did not appear to require care and support and there was nothing to prevent her from returning to Sri Lanka to live independently. She was living independently in Sri Lanka as recently as November 2012 prior to her arrival in the UK and there was nothing to indicate that the financial support from her daughter could not continue as it had prior to her arrival. Her relationship with her daughter and her other daughter in the UK could be maintained.

4. The appeal came before Judge Nightingale of the First-tier Tribunal. She identified it was no longer permitted by the Immigration Rules to switch from visitor status to adult dependent relative "in country". There was a clear requirement at E-ECDR for prior entry clearance.

5. Judge Nightingale considered the matter outside the Immigration Rules and was urged, by the appellant's representative, to consider the matter in relation to the **Chikwamba** principle (that the appellant fulfilled all but the formalities of the immigration rules, save for failing to return to make an application from abroad, and this should reduce the weight of the Secretary of State's position).

6. The judge identified that the appellant had arthritis and stated:

> "I have no doubts that her mobility is not as it was as a younger woman, but like Ms O'Sullivan I, too, found that the appellant presented as a bright and articulate older woman clearly able to engage with the questions put to her and with no difficulties understanding the proceedings. I note that she has been suffering from diabetes and hypertension, but this has been for over ten years."

Application for Permission to Appeal

7. An application was made to the First-tier Tribunal on the basis that the judge overlooked key evidence and that the judge concentrated on physical problems rather than her mental state which placed her at risk and the judge also erred in her assessment of Ms O'Sullivan's (Chartered Psychologist) report placing little weight on it on the basis that Ms O'Sullivan did not have country evidence to support her opinion. Ms O'Sullivan did assume that the care in Sri Lanka would be provided by a competent carer rather than a family member. There was no reason not to accept the basis of Ms O'Sullivan's assessment and the judge had erred by failing to put considerable weight on it.

8. In carrying out the necessary proportionality exercise the judge's assessment would be undermined if the errors set out above were made out. The appellant's needs may not be on a par with the appellant in **Akhalu** (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC) but this did not mean that they could be ignored.

9. The judge also erred by failing to consider the effect of removal on all the people who shared family life following the principles in **Beoku-Betts (FC) [2008] UKHL 39**.

10. The application was initially refused by Judge of the First-tier Tribunal Frankish but the application was renewed to the Upper Tribunal in the following terms.

11. Whilst it was correct to observe that there was no provision to make an in country application for leave to remain as an adult dependent relative **Chikwamba** principles still applied and the fact that the appellant was in poor health and need of support provided good reasons why they should not be required to leave the UK just to meet the formal requirements of having entry clearance.

12. It was again asserted that the judge had failed to take account of all the evidence, in particular Ms O'Sullivan's report, and the findings showed that the judge had misunderstood the report. Ms O'Sullivan had assumed that there was competent care in Sri Lanka and contrasted that to the care provided by family members. In those circumstances it was immaterial that she did not have country evidence. The assessment should have been given more weight.

13. In the event permission to appeal was granted by Deputy Upper Tribunal Judge McWilliam on the basis that the judge did not properly engage with clinical opinion of psychologist.

14. In his submissions before me Mr Martin relied on the written grounds of appeal and in particular referred to the table in Ms O'Sullivan's report and referred to the issues whereby she had doubled the risk such as money management, transportation, shopping, laundering and home maintenance. Ms O'Sullivan explained why they carried more risk and how her family was concerned that she would be at risk of coping in relation to the particular tasks. The judge did not identify the difference between the assistance given between family members and someone not well-known. The judge had not properly taken into account the report on a misapprehension of the report.

15. Also, having accepted family life she had not looked at the adverse impact on those family members.

16. Ms Fijiwala submitted that following the case of **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR)**

[2015] UKUT 00189 (IAC) Chikwamba clearly did not apply. The Rules could not be met. Financial documents had not been submitted and there was no significant interference with family life through a temporary removal.

17. This was merely a disagreement with the findings. The judge did place weight on the report. She found that the appellant was bright and articulate. At paragraph 35 the judge recorded that the expert assumed that care was not available and this was what the appellant and sponsor had told her.

18. The judge had looked at the overall mental state of the appellant and taken this into account and indeed at paragraph 46 referred to **Akhalu**.

19. Further she did go on to consider family life. The judge factored in that the appellant had entered the UK as a visitor and used this as a vehicle to seek leave to remain whilst in the country and circumvent the Immigration Rules.

20. Mr Martin submitted that the judge accepted the qualifications but what was central to the assessment is that the care was from a family member and the table should have been given greater weight.

Conclusions

21. I find no merit in the assertion that the judge failed to apply the **Chikwamba** principle appropriately. As Mr Martin stated, the judge correctly approached the appeal on the basis that the appellant could not meet the Rules because there is a clear requirement for prior entry clearance. Nonetheless the judge took into consideration E-ECDR.2.4 and E-ECDR.2.5 when considering the appeal outside the Immigration Rules, which is what she must do, **SS Congo v SSHD** [2015] EWCA Civ 317.

22. As Ms Fijiwala pointed out, no financial documentation had been submitted in relation to the financial requirements and the documents in relation to long-term care were not part of the medical evidence. It was not a mere formality that the appellant needed to return to make an application and indeed the judge found that this was not even a 'near miss' case at [41].

23. It was advanced that the judge had failed to take account of all the evidence, and give weight to Ms O'Sullivan's report that assumed competent care in Sri Lanka, and had misunderstood the report, as it was immaterial that she did not have country evidence. The assessment should have been given more weight.

24. To that end the judge stated at paragraph 35:

> "In particular, I find nothing in Ms O'Sullivan's qualifications that indicates she has any in-depth knowledge of, or experience in, the provision of social services to elderly people in Sri Lanka. Indeed, there is nothing in the evidence before me which emanates from Sri Lanka, or any medical

> organisation in Sri Lanka, or elsewhere, or any person in Sri Lanka who has any knowledge whatsoever of the social services available there. Her assumption is based on what she has been told by the appellant and the witness; that is to say that social services care of any type for the elderly is not available in Sri Lanka. I am therefore un-persuaded on balance that this table is based on evidence of an objective nature. Consequently, I find this of little weight."

25. **BN (psychiatric evidence – discrepancies) Albania [2010] UKUT 279 (IAC)** confirms that a judge is entitled to reject a clinical diagnosis supported by expert evidence but she "must give clear reasons for doing so which engage adequately with a medical opinion representing the judgment of a professional psychiatrist on what he has seen of the appellant."

26. The judge did not dismiss the case on the basis of the lack of Ms O'Sullivan's knowledge of country guidance alone. The judge had clearly stated that she did not consider the information, which contributed to the report, to be factually reliable because of the desire of the witness and the appellant to remain in the UK. The judge weighed the evidence comprehensively. She rejected the table incorporated within the report for reasons which can be discerned from an overall reading of the decision (and to which I return below).

27. It can be seen from paragraphs 34 and 35 of her decision that the judge did consider the physical and mental health of the appellant and those elements of the care required and available to the appellant and the judge from a comprehensive assessment of the evidence, which she is bound to undertake, stated:

> "I am satisfied that the appellant is 72 years of age and that she suffers from arthritis. I have no doubts that her mobility is not as it was as a younger woman, but like Ms O'Sullivan I, too, found that the appellant presented as a bright and articulate older woman clearly able to engage with the questions put to her and with no difficulties understanding the proceedings. I note that she has been suffering from diabetes and hypertension, but this has been for over ten years, according to the doctor's letter at page 26, and it appears that she has been treated for those conditions in Sri Lanka satisfactorily. She takes some painkilling and anti-inflammatory medication, ibuprofen and, on occasion, diclofenic, for her arthritis. There is no indication that she had needed anything stronger than this by way of medication for her arthritis."

28. From this it can be seen that the judge had made a finding that the appellant appeared to be a bright and articulate older woman and with the background of that finding went on to consider Ms O'Sullivan's report. **Miao v Secretary of State for the Home Department [2006] EWCA Civ 75** at paragraph 17 states:

> "A medical expert witness's function is precisely to give an opinion on the basis of his clinical knowledge of the patient and of his field. That is what Dr B… had done. He could do no more, and in the absence of some good reason for doubting his expertise or the factual or logical foundation of his

opinion, the Immigration Judge was wrong to dismiss it as merely an opinion, much less to treat it as speculative or conjectural."

29. There can be no criticism that Judge Nightingale failed to take into account or consider the Chartered Psychologist's report. Having considered the CV the judge recognised [35] that the expert was suitably qualified and experienced to provide an expert opinion on the

> "basis of the information with which she has been provided'.

She added

> 'However, I note that that information is provided by the appellant and by the witness, both of whom wish the appellant to remain living in the UK."

30. Clearly the judge doubted the factual basis upon which the evidence was given and that said the judge proceeded

> "Ms O'Sullivan spent no more than a couple of hours with the appellant and, indeed, not much more with the witness."

It can be seen from the table with which the judge failed allegedly to engage that there were tasks such as telephoning, transportation, shopping, laundering and home maintenance, with which the expert cannot have had within the space of two hours the opportunity to have a comprehensive assessment. The judge added at [35]:

> "Her opinions are based in the main on what she has been told by the appellant and by the witness. I had some difficulty with the table to which I was referred by Mr Martin. In particular, I find nothing in Ms O'Sullivan's qualifications that indicates she has any in-depth knowledge of, or experience in, the provision of social services to elderly people in Sri Lanka."

31. At paragraph 36 the judge made a credibility finding against the appellant and the witness and specifically found that:

> "I am urged to find that this has not been a situation whereby a visit visa has been abused in order to facilitate entry for the purposes of settlement. I am far from persuaded that this is so. It is said that the appellant signed over her home to her grandson, Joseph, at some time in 1990. No evidence to this effect has been produced, and I can find no reason as to why she would do such a thing. I can also find no reason as to why her husband, who was alive at this time, would have consented to such an action. It is said that she also gave away all her land and property to her children and grandchildren previously. I therefore find it entirely inconsistent that the witness should have said that neither she nor her siblings had any land or interests in Sri Lanka. I also note that the appellant says that her house had been signed over to her daughter-in-law by her grandson prior to her travelling. This transaction had caused a falling out, and her daughter-in-law had started to stay at her father's house and only 'come and go' from the appellant's home. Firstly, the appellant clearly managed to live alone in that house, being visited only occasionally by a sister-in-law, for some months prior to her arrival in the United Kingdom. It certainly seems that she was capable of living independently for this time. Further, if the appellant is as close to the witness as claimed, then I can find no reason as to why the witness would have been unaware of this family altercation or

> why she would have not have taken steps to ensure that her mother's situation in Sri Lanka was safeguarded."

32. The judge proceeded at paragraph 37 to find doubts as to whether the appellant had indeed divested herself of property as there was no evidence provided to show this and added

> "I find it rather more likely than not that the matter of the appellant's house is no more than a contrivance in order to circumvent the requirements of the Immigration Rules for entry to the United Kingdom as a dependent relative."

33. The judge also found, taking into account Ms O'Sullivan's report, at 38 that the appellant was during the assessment *"neat, alert, able and engaged in the process of the assessment and co-operative and polite throughout maintaining appropriate eye contact"*. She was orientated in time and place. The judge proceeded:

> "I find nothing in Ms O'Sullivan's report which leads me to find on balance that this appellant requires presently long-term personal care to perform everyday tasks."

34. Quite clearly the judge found on the evidence before her that she could not find that she required long-term personal care, a factor in the assessment of proportionality.

35. It was alleged that the judge had failed to understand the table as the expert did not need to have knowledge of the services available in Sri Lanka to make such an assessment. The fact is that the judge doubted the factual information which was clearly key and instrumental in the assessment of the report and I note that both Mr and Mrs Perera attended the actual assessment and gave information thereto. At paragraph 6 the psychologist is clear that her assessment derives from the views of Miss De Silva and Mr and Mrs Perera, together with her own observations.

36. Specifically at paragraph 6.8.2 of the report the expert stated: "This assessment was assisted with the input of Mr and Mr [sic] Perera." There can be no doubt that the level of risk may be more outside the family but it is clear that the judge did take this into account but without any knowledge of the standard of input in Sri Lanka to assess the increase in risk. At [43] and [47] the judge accepted that there would be interference caused to the family or private life of the appellant and to her daughter and wider and extended family but made a specific reference to the finding that this was proportionate to the aim pursued.

37. There is no foundation to the assertion that the judge failed to take into account the mental health issues of the appellant and indeed the decision makes numerous references to the mental state of the appellant including, no less, extensive reference to the Clinical Psychologist's report. This expert's remit is in essence a report in relation to the mental capacity of the appellant. At [38] the judge refers to her becoming forgetful and saddened but that she "*ceased her antidepressants some time ago*".

38. As in **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 00189 (IAC)** it was open to the judge to take the view that it would be proportionate to require the applicant to make an application for entry clearance from abroad but in this particular instance on the facts of the case the judge found that the appellant was in the UK on a temporary basis for a temporary purpose and that taking all the evidence in the round she found that the circumstances did not compel a grant of leave outside the requirements of the Immigration Rules which reflected the respondent's Article 8 obligations.

39. I do not accept that the judge failed to take into account the medical conditions of the appellant and she addressed the question of the care offered –or rather the evidence or lack of it relating to that - in her home country which was the correct approach. As stated in **Akhalu** at [2] of the headnote

> *'The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal'.*

40. The arguments raised are merely disagreements with the weight attributed to the evidence by the judge, who adopted the correct approach to the proportionality exercise, and an overall reading of the decision discloses no error of law.

41. I find no error of law in the decision of the First-tier Tribunal and it shall stand.

Signed Date 27th June 2015

Deputy Upper Tribunal Judge Rimington