IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00907/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 April 2015	**On 04 June 2015**
Prepared on 30 April 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

DR RAHMATULLAH HAMDARD
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr Spart Hamdard, Sponsor
For the Respondent: Mr P. Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Afghanistan born on 17 June 1937 and is therefore now aged 78 years. He appealed against a decision of the Respondent dated 17 December 2013 which was to refuse his application for entry clearance as an adult dependent relative of a British citizen pursuant to Appendix FM section E-ECDR. His appeal was allowed at first instance by Judge of the First-tier Tribunal Phull. The

Respondent appeals with leave against her decision. Thus whilst this matter came before me initially as an appeal by the Respondent, for the reasons which I have set out below I set the decision of the First-tier Tribunal aside on the grounds of error of law and reheard the matter. I therefore continue to refer to the parties as they were known at first instance for the sake of convenience.

Immigration Law and Rules relevant to the Appellant

2. Section E-ECDR of Appendix FM sets out the requirements to be met by a person seeking entry clearance as an adult dependent relative. The burden of proof of establishing that the requirements of the paragraph are met rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. E-ECDR 2.5 states that for entry clearance to be granted 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.

3. Appendix FM-SE paragraph 34 prescribes, in the case of adult dependent relatives, what form the evidence should take to show that as a result of age, illness or disability the applicant requires long-term personal care. This should be medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks and must be from a doctor or other health professional. Evidence is also required that the applicant is unable, even with the practical and financial help of the Sponsor in the UK, to obtain the required level of care in the country where they are living and it should be from a central or local health authority, a local authority or a doctor or other health professional. Where the Appellant's required care has previously been provided through a private arrangement the applicant must provide details of that arrangement and why it is no longer available.

The Hearing at First Instance

4. The evidence before the Judge came from the Appellant's son, Mr Spart Hamdard, the Sponsor in this matter who also appeared before me. The Judge summarised the Sponsor's evidence at paragraphs 5 to 10 of her determination as follows:

> "5. In answer to my questions the Sponsor said that his father requires help on a daily basis to perform everyday tasks. He also travelled to India when his father travelled there for medical treatment in 2013. He had to take care of his father, taking him to the bathroom, help with washing, changing, dressing, help with heating food and drinks. His father needs this help because he is blind in one eye and has a cataract in the other. His father is very weak and cannot walk. This was his father's situation in December 2013. His father had to return to Kabul after his visa was refused. His father had a supply of medication with him.
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> 6. In cross-examination the Sponsor said that his father's lung disease started in December 2012. His father returned to Afghanistan at the beginning of 2012 to run his clinic. He then travelled to India for medical treatment because his situation was very serious. His father's friends and colleagues transferred him to Kabul. The journey to Kabul is approximately ten or eleven hours by car. When

his father went to India friends and colleagues helped with the flight and a neighbour travelled with him.

7. The Appellant's application was made whilst he was in India. The Sponsor travelled to India. The Appellant was in India from May to December 2013 but had to return to Afghanistan when his application was refused. Normally they ask friends to provide that care but they can only provide short-term care. There is no private or government organisation to help with long-term care.

8. His father went to hospital in Kabul for the lung disease in June 2012 from his home town. He remained in hospital until he went to India. He submitted a petition written to the local provincial council to ascertain whether they could accommodate the elderly. The petition was put to the governor who sent it to various departments in Afghanistan. They have said they cannot help.

9. Care facilities are unavailable in their home town and even Kabul. His father needs care on a daily basis because of his age and illness; friends and neighbours cannot help on a long-term basis. He has a letter from the doctor in India that says his father needs attention and someone to look after him and may require two people to attend if he does any heavy exertion. His father has serious health problems, is 77 years of age and requires help to perform everyday tasks. The clinicians cannot confirm the services his father requires. They have submitted all the evidence which speaks for itself. His father is currently in Kabul receiving medical treatment. They have a young student helping his father on a temporary arrangement. He will leave to continue with his studies.

10. The Sponsor submitted that his statement deals with the issues raised by the Respondent who has not considered the case on its merits. He has provided evidence from clinicians that his father's health is not in a good condition, he is 77 years old, isolated because he lives in a remote corner of Afghanistan, which is affected by the war. As the eldest child he is the only one that can provide care for his father. He is in full-time employment, has a family here and cannot relocate to Afghanistan because he has employment and family commitments. He has given assurances that he will care for his father without recourse to public funds and healthcare insurance. He wants a chance to care for his father."

5. The Judge accepted the medical evidence of the treatment which the Appellant had received and found that the Appellant required long-term personal care to perform everyday tasks. The Appellant was unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in Afghanistan because it was not available and there was no-one in Afghanistan who could reasonably provide it. The Appellant's lung disease was incurable and impacted on the Appellant's other activities. The Appellant lived in a very isolated and rural part of Afghanistan, the nearest hospital being 95 kilometres away. It was not a requirement of Appendix FM that the Appellant should apply to move to Germany where other members of his family were and the argument that the Sponsor should move to Afghanistan ignored the fact that he was a British national and was not required to leave the UK. Despite the Sponsor's practical and financial help the Appellant could not obtain the required level of care. The Judge allowed the appeal under the Immigration Rules.

The Onward Appeal

6. The Respondent appealed against that decision, arguing that the Judge had overlooked the requirements of Appendix FM-SE that evidence was required of the Appellant's long-term personal care needs. Permission was initially refused by Judge of the First-tier Tribunal Chambers on 5 January 2015, who held that the Judge had fittingly explained her findings. The Respondent renewed the application and the matter came on the papers before Upper Tribunal Judge O'Connor on 4 March 2015. He granted permission to appeal, stating:

> "It is arguable as a consequence of the operation of paragraph b to Appendix FM-SE of the Rules that the First-tier Tribunal was required but failed to consider the evidential requirements set out in paragraphs 34 to 37 of Appendix FM-SE [which are incorrectly set out in the grounds the amendments made on 6 April 2014 by HC 1138 wrongly being included therein] despite such evidence not being specified as being required by Section E-ECDR of Appendix FM."

7. As I explained to the Sponsor during the hearing, there were two points which arose from that grant of permission. The first was that in his onward appeal the Respondent had stated that what was required was independent medical evidence that the Appellant's physical or mental conditions meant that he could not perform everyday tasks. The word independent had been asserted into Appendix FM-SE by HC 1138 from 6 April 2014. As this application was made in 2013 and the transitional provisions were not clear, it would appear that the evidential requirements which govern this application were for medical evidence not independent medical evidence (it is of course arguable as to what practical difference the insertion of that word independent actually makes).

8. The second point was that Section E-ECDR of Appendix FM does not refer in terms to Appendix FM-SE, there is no direct link between the two appendices in that Section E-ECDR does not state that this Section will be satisfied provided that the evidence in Appendix FM-SE is produced. This can be contrasted to the wording in points-based system provisions. I indicated that there was nothing to suggest that one part of the Immigration Rules was superior to another part. The two Sections in Appendix FM and Appendix FM-SE were not in contradiction to each other and therefore both applied. It was not therefore strictly necessary for Appendix FM to state in terms that the Section would be complied with provided that the evidence in Appendix FM-SE was provided.

The Error of Law Stage

9. As a result of the grant of permission the matter came before me to determine whether there was an error of law. Judge O'Connor had also made certain directions that the parties should prepare for the forthcoming hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any evidence that the Upper Tribunal might need to consider if it decided to remake the decision should be so considered at that hearing. Thus if I found that there was a material error of law in the Judge's determination I would go on to rehear the matter. If there was no material error then the decision would stand.

10. In oral submissions the Presenting Officer stated that the issue of the evidence to support the Appellant's care needs was highlighted in the Entry Clearance Manager's response to the appeal. Although it was argued that the Appellant's situation had deteriorated, there was no evidence to show that. The Respondent's case was that the Appellant was not living in unacceptable conditions.

12. The Sponsor in reply stated that as the case had progressed the Respondent had formulated a number of different reasons. His father had now been diagnosed with atherosclerosis. Evidence had been produced confirming his father's lung disease from the hospital. The evidence that had been produced was as much as it was possible for him to produce. His father's condition of atherosclerosis meant that there was a flow of blood to his brain and this had been diagnosed in the last two months, he was paralysed now. He was being treated in hospital but that was difficult because the hospitals in Afghanistan were inundated with casualties from the war. The Appellant was a doctor and he had ex-colleagues in the hospital so he could get help but this was only a short-term fix. His colleagues could not provide the long-term care that the Appellant needed. The situation at the moment was that he was bed-bound and the disease he had would lead to a stroke or heart attack.

13. He, the Sponsor, had asked for the appeal to be expedited in the light of this deteriorating situation. He was not sure that the family could provide any further evidence to convince the Home Office. He had received independent legal advice from solicitors who had told him that he had a genuine case to care for his father in this country. The Judge had allowed the appeal at first instance and permission to appeal had then been refused. The Sponsor, would provide all necessary support to his father once his father was here. That care was not available in Afghanistan. His father required complex treatment. The Appellant was a 79 year old man. He needed to be kept as comfortable as possible, hospitals would not provide that level of care. Doctors could only do basic things.

14. I raised with the Sponsor the documents in the Appellant's bundle which referred to previous appeals when the Appellant was seeking entry clearance as a visitor. At that time in 2007 his father had been working in a hospital in Russia and spoke Russian. When the situation in Afghanistan improved his father went back to Afghanistan and opened his own clinic and after a while started to get the health problems that he now suffers from, although he did work for a while in Afghanistan. His father's speciality was as a urologist but the clinic which he opened in Afghanistan was basically a GP practice dealing with minor issues. It was not a complex or big facility.

15. At the end of submissions I indicated that I found there was an error of law in the determination at first instance. The Judge had overlooked the requirements in Appendix FM-SE for evidence to support the Appellant's requirements for long-term personal care. The Judge had before her evidence of the Appellant's serious medical conditions including his lung disease but that did not stretch to documentation showing what the care needs were. Indeed the Sponsor frankly accepted that he could not obtain that evidence. The evidence which the Judge received was from the Sponsor, it was not medical evidence. The only medical evidence referred to in the determination which had any bearing on the Appellant's need for personal care was

a reference to the letter from the doctor in India, Dr Maini, dated 10 October 2013. This set out the Appellant's requirement of one attendant to look after him and that he might require two whilst climbing stairs.

16. What was needed, however, was evidence from a doctor or other health professional that the Appellant's physical or mental condition meant that he could not perform everyday tasks. Climbing stairs or heavy exertions might or might not be everyday tasks depending on the circumstances. I indicated that I found an error of law in the Judge's determination because she had not considered the requirement for evidence under the Rules and indicated therefore that I set her decision aside and would rehear the matter. The Judge had not considered Article 8 because the case had not reached that far as she had allowed the appeal under the Immigration Rules but I indicated that I would consider the case on both bases.

The Substantive Hearing

17. The Sponsor gave oral testimony, adopting the statement he made for the proceedings at first instance, in which he had argued that there was no-one who could reasonably provide the required level of care to his father. His father was single, elderly and severely ill. His advanced lung disease meant he was in need of a regular supply of oxygen cylinders which were not readily available in the area where he lived. The care he was trying to obtain for his father was badly affected by corruption. For example, his father was entitled to a pension after long service as a doctor but this had been refused a number of times with no official explanation. There were no private, professional, reliable and trusted providers of domestic care. The hospital dealing with his father's lung disease was a makeshift building and basic in terms of the provision of healthcare. His father had had to travel to India to get urgent treatment. Whilst it was possible to get cheaper care in Afghanistan (cheaper than say in the UK), the care providers were unable to deliver the complex demanding and specialist care that the Appellant's father needed. Relocation of other family members to Afghanistan was out of the question due to the poor security situation in Afghanistan. According to the World Health Organisation the average life expectancy in Afghanistan was 65.5 years and the Appellant's father was already 78. His father was in need of 24 hour care.

18. In oral testimony the Sponsor said that the only evidence he could give was in his statement. His father's recent condition of atherosclerosis for which he was currently being treated at a hospital in Kabul had occurred three weeks ago. The Appellant had travelled from the north of the country to Kabul with the help of an ex-colleague who unfortunately had had a heart attack himself two weeks ago. The Sponsor could not approach that person's family for confirmation of the hospital visit.

19. In closing the Presenting Officer stated that the issue was one of evidence. There was a requirement to follow the Immigration Rules. The test in a leave to enter case outside the Immigration Rules was a need to demonstrate exceptional circumstances and that was a matter for the Tribunal. In closing the Sponsor stated that whilst he might not be able to meet some of the requirements, what the case was about was he wished to be able to look after his father in the last few years of his life. He had

given all the information he could. There would be medical health insurance cover for his father.

Findings

20. The Appellant suffers from a number of serious medical conditions for which he requires treatment. Although he lives in a remote part of Afghanistan he is able to access hospital treatment, indeed I am told he is currently undergoing treatment at a hospital in Kabul at the present time.

21. To be able to satisfy the Immigration Rules the Appellant must show that he is unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in Afghanistan because such care is not available and there is no-one who can reasonably provide it. The alternative limb that it is not affordable appears not to be in dispute in this case, the Sponsor acknowledging in his statement that cheaper personal care (that is cheaper than in the United Kingdom) is available in Afghanistan. The cost to the Sponsor in looking after the Appellant in this country would be more expensive than if the Appellant continued to live in Afghanistan and the Sponsor sent funds to enable that to continue. It is the Appellant's case, as articulated by the Sponsor, that the level of care is not available and there is no-one who can provide it.

22. The first issue to decide is the level of care that the Appellant actually needs. The second issue is to see whether there is no other way the needs can be met other than by the Appellant coming to the United Kingdom. I accept the point that it is not a valid argument for the Respondent to make that the Appellant could go to Germany instead of the United Kingdom as that is not the test contained in the Section. There is an argument that as the Section requires that there be no person in Afghanistan who can reasonably provide treatment one can look at whether there is anyone who could reasonably be expected to go to Afghanistan to provide treatment. The Judge at first instance did not consider that it was reasonable to expect the Sponsor nor any of the family members in Germany to go to Afghanistan and I see no reason to disturb that finding.

23. This case falls into difficulties on the question of evidence of what level of care is required. What was needed in this case was a proper medical report on the Appellant setting out what he can and he cannot do, what care he needs and how that care is to be given to him and who can provide it. That evidence has not been made available either at first instance or to me. The Sponsor states that that evidence cannot be obtained but the Sponsor was able to obtain other evidence from Afghanistan such as a petition to the Governor of Jawzjan Province that there were said to be no facilities to accommodate the elderly in that province. The letter from Dr Maini is lacking in detail and it is difficult to see why a fuller letter could not have been obtained from a medical practitioner.

24. The Appellant as a result of his years working as a doctor, and indeed setting up his own clinic, has access to a number of healthcare professionals who are willing to assist him, whether it is on a short-term basis as the Sponsor says or otherwise. In those circumstances it is difficult to see why the Appellant has been unable to produce the kind of evidence required by the Immigration Rules and in particular

why a medical report or some such similar evidence cannot be obtained setting out what the Appellant requires for long-term personal care. In the absence of such evidence the case under the Immigration Rules cannot be made out and I therefore dismiss the appeal under the Rules.

25. As I have indicated that means that I must now proceed to consider the case outside the Rules under Article 8. This is an application for leave to enter in order to obtain care. The Appellant's case is that he is dependent upon his son the Sponsor and that his remaining years will be severely affected by not being able to enter the United Kingdom. In considering the issue under Article 8, I bear in mind the **Razgar** step by step approach (while bearing in mind that this is an out of country appeal not a removal appeal).

26. The Appellant has a family life with his son the Sponsor but that family life is at present being conducted at a distance and it is hard to see on what basis it can be argued that there is an obligation on the United Kingdom to promote that family life by facilitating the entry of the Appellant into the United Kingdom.

27. What is apparent is that when the Appellant has required hospital care he has been able to access it either in Afghanistan as at present or in India as two years ago. He still has a network of friends in the medical profession from his time as a doctor who he can turn to for assistance. He has had the benefit of individuals providing him with personal care. Those arrangements have not perhaps been as long-term as either the Appellant or the Sponsor would want but that is a matter of organisation. The cost of care is significantly cheaper in Afghanistan then it would be in the United Kingdom. The Appellant has serious health concerns and it may be that the level of care available in Afghanistan is not at the same level as that in the United Kingdom but there is no obligation on the United Kingdom under Article 8 to treat the world, just as in **EV (Philippines)** it was said there is no obligation to educate the world. Either the Appellant would need to access National Health Service treatment once in this country, which would be a burden on public funds, or he would need private treatment which given his various medical conditions would be at significant cost. It is difficult to believe (without evidence) that the cost of private medical treatment in this country for the Appellant would be less than the cost of someone to provide care for the Appellant in Afghanistan. The Sponsor's reference to medical insurance was somewhat vague and it is difficult to see how the Appellant's medical treatment could be dealt with other than under the NHS.

28. The Entry Clearance Manager recognised the humanitarian issues raised in this case stating, "I appreciate that [the Appellant] is elderly and unwell and I genuinely feel for him but he is not living in exceptionally unacceptable conditions". The Appellant has access to a personal carer or carers and has access to hospital treatment.

29. The refusal of entry clearance interferes with the Appellant's Article 8 rights because it means that he cannot come to the United Kingdom for the care he states he needs. That refusal is pursuant to the legitimate aim of immigration control because of the potential cost of care in this country and the fact that the Appellant cannot meet the Rules for the reasons which I have set out above. The issue is the proportionality of the interference. The Appellant is applying outside the Rules because he cannot meet

them. The Court of Appeal recently analysed those Article 8 cases where the application is for leave to enter in the case of **SS (Congo)**. The Court of Appeal held that what was required to succeed outside the Rules in an out of country case is that there should be some exceptional circumstance. In this case I do not consider there are such exceptional circumstances. The Appellant is an elderly man with the medical conditions that might be expected of someone of that age. He is financially supported by his son the Sponsor in the United Kingdom but he is able to access hospital treatment and he could access a carer. In those circumstances I do not consider that the interference with the Appellant's Article 8 rights is disproportionate and I dismiss the appeal on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the Appellant's appeal under both the Immigration Rules and Article 8.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 2nd day of June 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The Judge made a full fee award having allowed the appeal. As I have found that the Judge erred in law in allowing the appeal and have set aside her decision, I also set aside her decision to make a fee award.

Signed this 2nd day of June 2015

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Deputy Upper Tribunal Judge Woodcraft