



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

Appeal Number: OA/01136/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 15<sup>th</sup> July 2015**

**Decision & Reasons**

**Promulgated**

**On 20<sup>th</sup> July 2015**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**ENTRY CLEARANCE OFFICER - COLOMBO**

Appellant

**and**

**MRS MUTHUTHANTHRI PATABANDIGE MONICA LUSLYN BERNARD**

**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Ms F Beach, Counsel instructed by Rex Jeon Mendis

**DECISION AND REASONS**

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Sri Lanka born on 7<sup>th</sup> May 1939. Her appeal against the refusal of entry clearance as a dependent relative was allowed by First-tier Tribunal Judge Symes on 5<sup>th</sup> March 2015 under the Immigration Rules and on Article 8 grounds.

2. The Respondent applied for permission to appeal on the grounds that there was no medical evidence from a doctor or other health professional before the Tribunal to show that the Appellant's physical or mental condition meant that she could not perform everyday tasks or that she required long-term care, nor was there evidence from an appropriate body listed in the Immigration Rules to show that the Appellant was unable, even with the practical and financial help of the family members in the UK, to obtain the required level of care in Sri Lanka.
3. Permission to appeal was granted by Designated First-tier Tribunal Judge McClure on 28<sup>th</sup> April 2015 on the grounds that it was arguable the medical condition of the Appellant had not been substantiated so as to meet the requirements of the Rules. Also there was clear evidence that help and assistance was available in Sri Lanka such that it was arguable that the Appellant could not meet the requirements of the Rules. The arguable error of law with regard to the Immigration Rules impacted on the approach to be taken with regard to Article 8.
4. The Appellant submitted a Rule 24 response which in summary stated that First-tier Tribunal Judge Symes made reference to the expert evidence which was before him and which was not substantially challenged by the Respondent. The Judge had carefully considered and assessed all the relevant issues prior to finding that the Immigration Rules were met.

### Submissions

5. In submissions, Mr Jarvis for the Respondent stated that there were plain errors of law in the Judge's findings. The approach to Appendix FM-SE had been endorsed by the Court of Appeal in SS (Congo) [2015] EWCA Civ 387 and in the interests of consistent decision making the requirements of paragraph FM-SE had to be strictly applied. The expert report of Dr Chris Smith did not satisfy the requirements of paragraphs 34 or 35 of Appendix FM-SE.
6. The evidence at page 255 of the Appellant's bundle from Dr Mendis, a medical assessment of the Appellant, also did not satisfy paragraph 35 because, although the doctor dealt with the Appellant's inability to perform everyday tasks, there was nothing in the report to show that the Appellant could not obtain care and support in Sri Lanka. The Appellant had the assistance of a local carer, but the local carer was taking advantage of her. Therefore, there was available care. The Rule was strict in this sense. There was nothing from the doctor to show that the Appellant could not be cared for outside of the family.
7. In relation to Article 8, Mr Jarvis submitted that the Judge had proceeded on the wrong footing having effectively allowed the appeal on the basis of the Immigration Rules. Applying SS (Congo), there had to be compelling circumstances in order to succeed under Article 8 and for leave to be granted outside the Immigration Rules. The Judge made no reference to any compelling circumstances and there was no reason why this

Appellant's appeal should be allowed when she did not meet the evidential requirements of the Immigration Rules.

8. On behalf of the Appellant, Ms Beach submitted that there was sufficient medical evidence before the First-tier Tribunal to support the finding that the Appellant satisfied the Immigration Rules. At page 135 of the Appellant's bundle Dr Mendis recommended that the Appellant should be with one of her children. At page 255 of the Appellant's bundle Dr Mendis confirmed that there were no children living locally and that the Appellant's state of depression was such that she needed the care of her family. It was not safe that she was left unattended and the care that had so far been provided was insufficient to support her needs. The Appellant did not need a domestic worker but emotional support and care, which could only be provided by family members. Accordingly, the Appellant had satisfied paragraph 35 of Appendix FM-SE in that she was not able to obtain the required level of care. She required the emotional care of her family and none of her family lived in Sri Lanka in order to be able to care for her.
9. The First-tier Tribunal accepted the evidence of both Sponsors, the Appellant's daughter and son-in-law, and their evidence was consistent with the medical evidence provided. The evidence of Dr Chris Smith was additional evidence which supported the Sponsor's evidence of the difficulties in getting domestic help and the fact that the Appellant was being taken advantage of. It was not suggested that his evidence was sufficient to fulfil the requirements of paragraph 34 or 35 of Appendix FM-SE.
10. Ms Beach submitted that the letter at page 255 of the Appellant's bundle, the medical assessment of the Appellant by Dr Mendis, was sufficient to satisfy the requirements of the Immigration Rules. In addition, the Judge was entitled to look at all the evidence before him. There was sufficient evidence to satisfy the specified documents under Appendix FM-SE and sufficient evidence before the Judge to allow the appeal. It was clear from the Judge's findings that the required level of care for the Appellant was to have a caring family looking after her and this was not possible if she remained in Sri Lanka.
11. In relation to Article 8, Ms Beach submitted that this was not relied on in the grounds of appeal, although it was raised in the grant of permission. It was not the case that the Judge had proceeded on the basis that the Appellant could satisfy the Immigration Rules because he quite clearly stated that he was considering Article 8 in the alternative and in undertaking such a consideration he found that the Respondent's decision was in accordance with the law. Accordingly, it was quite clear that the Judge considered Article 8 and a grant of leave outside the Immigration Rules. The Judge had given adequate reasons for why the refusal of entry clearance would be disproportionate in his decision.
12. In response, Mr Jarvis submitted that the emphasis of the Immigration Rules was not whether the Appellant needed to be with her family. It was

not a case of whether the Appellant's depression could be treated more easily if she came to the UK. The Appellant had to show that there was no one in Sri Lanka to assist her and nobody that could deal or engage with her mental health disorder. That evidence, from a medical professional in compliance with the specified documents, was not before the Judge.

13. If the Appellant failed under the Immigration Rules then the Judge had also erred in his assessment of Article 8 because he had failed to engage with why there were compelling reasons for entry clearance to be granted outside the Immigration Rules. The Judge had not engaged with how the Appellant had failed to satisfy the Rules or why she had failed to do so and had not provided evidence as to her reasons for her inability to comply.

### Discussion and Conclusions

14. The Judge accepted the evidence of the Sponsors, the Appellant's daughter and son-in-law, Mrs Maresky Mendis and Mr Rex Mendis. At paragraphs 25-27 the Judge made the following findings:

- (i) "The medical reports clearly set out that the Appellant's mental health problems cannot be realistically catered for without family support. This was a longstanding situation, hence the report from Professor Kathriarachchi stated that her depression is of persistent low mood."
- (ii) "The evidence is that the health condition of the Appellant has deteriorated since her husband's death. The real issue is that an elderly, recently-bereaved woman with serious health problems requires significantly more help than simply physical support. Only the proximity of close family members can provide the human and emotional support she needs on a regular basis."
- (iii) "Her care regime has been found inadequate because of the culture amongst domestic carers in Sri Lanka of which she has had specific and unsatisfactory experience, who are in general too poorly educated to ensure that her health care should she enter hospital is carried out with the necessary focus and expertise, and who are as likely to prey on their elderly charges where they are unsupported by local family members as they are to secure their welfare. The expert evidence to such effect is unrebutted by contrary material from the Respondent and was not seriously challenged in the submissions made for the Secretary of State."

15. The Judge's decision was based on the medical evidence and the evidence of the Sponsors. It was clear from paragraph 20 of the decision that the Judge relied on three doctors' letters from two different practitioners and evidence in the report of Dr Smith who commented on the availability of healthcare.

16. The Appellant suffered from mental health issues, which meant that she required more help than merely physical support. If admitted to hospital paid carers, who were generally poorly educated, would be unable to deal with such procedures with the necessary focus and expertise.
17. After hearing submissions, I am of the view that the issue in this case is essentially whether the evidence at page 255 of the Appellant's bundle, the medical assessment of the Appellant by Dr Mendis, is sufficient to satisfy paragraphs 34 and 35 of Appendix FM-SE which states:

**“Family members: specified evidence: adult dependent relatives**

34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks and this must be from a doctor or other health professional.
  35. Evidence 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 should be from a central or local health authority, a local authority or a doctor or other health professional.”
18. The Judge found that the Appellant's mental health problems could not realistically be catered for without family support. The Rules clearly state that the Appellant is to provide evidence that she is unable to obtain the required level of care. The Appellant could not get the required level of care because her family were not present in Sri Lanka. Medical opinion was that the Appellant required the care of her family.
  19. Accordingly, I find that the evidence before the First-tier Tribunal was sufficient to satisfy Appendix FM-SE and the Judge was entitled to conclude that the Appellant satisfied the relevant requirements of the Immigration Rules. I find that there was sufficient medical evidence to show that the Appellant required help with everyday tasks and that she was unable even, with the practical and financial help of the Sponsors, to obtain the required level of care in the country where she was living. I find that there was no error of law in the Judge's decision under the Immigration Rules.
  20. However, if I am wrong about this, then I make the following findings in relation to Article 8. It is clear from paragraph 30 that the judge considered Article 8 in the alternative. He states:

“In the alternative I consider the appeal under the Human Rights Convention. I bear in mind that the Rules set a high threshold which represents government policy as to the limited circumstances in which a parent can join children here.”

21. I find that the Judge's consideration of Article 8 was not inconsistent with SS (Congo) as submitted by Mr Jarvis for the following reasons. At paragraph 52 of the judgment the Court of Appeal held that:

"The evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and to put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts."

22. At paragraph 53 of the judgment the Court held:

"Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules"

23. And at paragraph 56:

"If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of leave to enter outside the Rules, the fact that their case is also a 'near miss' may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case the applicant will be able to say that the detrimental impact on the public interest in issue if leave to enter is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the Rules is great and the risk that they may end up having recourse to public funds and resources is therefore greater."

24. The Judge made the following findings at paragraph 33 of the decision dated 5<sup>th</sup> March 2015:

"In assessing whether the interference is disproportionate, I consider the following factors:

- (a) Far from being a case where the Appellant might be thought to be a burden on public funds in the future, the Sponsors are able to maintain and accommodate her at an adequate level applying the test set out under the nearest comparable Rule, given that the maintenance test for adult dependent relatives is simply whether they can be adequately maintained, accommodated and cared for in the UK by the Sponsor without recourse to public funds.
- (b) Whereas the Appellant if she remains in Sri Lanka is likely to live out her days alone and fearful, in an increasingly poor state of mental health which is stigmatised by society, here there is a

real prospect that, with the company of her grandchildren she may be able to enjoy an active family life: as the European Court said in *Pretty v United Kingdom* [2002] 35 EHRR 1, paragraph 65, 'the very essence of the Convention is respect for human dignity and human freedom'."

25. I find that it is clear from this paragraph that the Judge has taken into account the public interest and the weight to be attached thereto. The Appellant has shown good reason why she was entitled to preferential treatment and the circumstances set out at paragraph 33 of the First-tier Tribunal decision are sufficiently compelling to justify a grant of entry clearance outside the Immigration Rules.
26. I find that if the Judge made an error of law in his application of the Immigration Rules there was no error of law in his assessment of Article 8. Accordingly, I find that there is no error of law in the decision of the First-tier Tribunal and the Respondent's appeal is dismissed. The decision of 5<sup>th</sup> March 2015 shall stand.

### **Notice of Decision**

The Respondent's appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date 20<sup>th</sup> July 2015

Upper Tribunal Judge Frances