Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02404/2014
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THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons Promulgated**
On 24 March 2015	**On 26 March 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Dharam Vir Singh
Mohinder Kaur
[No anonymity direction made]

Claimants

Representation:

For the claimants: Ms E Harris, instructed by MK Gill Solicitors
For the appellant: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Quinn sitting with First-tier Tribunal Judge Plumtre promulgated 3.12.14, allowing the claimants' appeals against the decisions of the Secretary of State to refuse their applications made on 3.12.13 for entry clearance as adult dependant relatives. The First-tier Tribunal panel heard the appeal on 13.11.14.

2. First-tier Tribunal Judge Cruthers granted permission to appeal on 21.1.15.

3. Thus the matter came before me on 24.3.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out herein, I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of the First-tier Tribunal should be set aside and remade.

5. The relevant background is that by application dated either 29.11.13 or 3.12.13 the claimants, husband and wife, sought entry clearance to the UK as the dependent adult relatives of their son and sponsor in the UK, Mr Chran Jit Singh. The Entry Clearance Officer considered that there was insufficient evidence to show that the claimants were fully financially supported by the sponsor; that despite their medical problems they were receiving adequate level of medical care in India; that they have extended family and friends to help; and that domestic help is available in India at modest cost. The Entry Clearance Officer was not satisfied that the claimants were unable to obtain the required level of care, with reference to EC-DR.

6. The First-tier Tribunal purported to allow the appeals under the Immigration Rules and in consequence there was no need to go on to consider article 8 in the decision.

7. The grounds of appeal complain that it is not clear from the decision whether the appeals were allowed by reference to paragraph 317 or the requirements of Appendix FM, but that in either case the reasoning is inadequate.

8. In granting permission to appeal Judge Cruthers found the grounds arguable and in particular that inadequate reasons were given for the findings, reference being made to R (Iran) [2005] EWCA Civ 982.

9. It is something of a mystery why the First-tier Tribunal made reference to paragraph 317 of the Immigration Rules, since the correct provisions are those under section EC-DR of Appendix FM, which were not addressed. Paragraph A277 sets out that from 9.7.12 Appendix FM will apply to all applications to which Part 8 applied on or before 8.7.12, except where the provisions of Part 8 are preserved and continue to apply as set out in A280 to A280A. Those provisions do not preserve paragraph 317 for applicants matching the circumstances of the claimants, applications made after 9.7.12 from outside the UK. Ms Harris agreed that there was no purpose in the Tribunal considering the requirements of paragraph 317at §26 of the decision. The applications were refused by reference to EC-DR and the First-tier Tribunal should have carefully considered the requirements of both EC-DR 2.4 and 2.5, as well as the evidential requirements under paragraphs 33-37 of Appendix FM-SE, which was not done.

10. It is clear that the First-tier Tribunal did not consider either the requirements of EC-DR 2.4 and 2.5 or the specified evidence requirements under Appendix FM-SE. In the circumstances, the decision of the First-tier Tribunal was flawed for want of adequate reasoning and must be set aside and remade.

11. It is also clear that the application was poorly prepared with inadequate evidence to meet the requirements of EC-DR of Appendix FM and paragraphs 33-37 of Appendix FM-SE, to the extent that the application as made could not possibly have succeeded.

12. Under EC-DR 2.4 the claimants have to demonstrate that by reason of age, illness or disability they require long-term personal care to perform everyday tasks. This requires independent medical evidence. There was no expert evidence and the claimants rely on the medical records and two letters or notes. First, a handwritten letter/note at A79, in relation to the male claimant only, that he suffers from progressively deteriorating vascular dementia, requiring daily care by family members. It states that he is not able to carry out his daily household work, and needs support for bathing, toilet or walking. "He should stay with his family member for better care and betterment of his mental health." Second, a similar note at A82 in relation to the female claimant states that she is not able to carry her daily household works easily and needs permanent help to take care of her. "It is advisable that she should stay with the family and may be allowed for indefinite stay with the son and his family."

13. That evidence may be sufficient to meet the evidential requirements of EC-DR 2.4, but under EC-DR 2.5, the appellant has to demonstrate that each is unable, even with the practical and financial help of the sponsor, to obtain the required level of care in India, because either it is not available and there is no person in that country who can reasonably provide it, or it is not affordable. Paragraph 36 of Appendix FM-SE requires that evidence that the appellant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care should be from either a central or local health authority, a local authority, or a doctor or other health professional. However, no satisfactory evidence was adduced relating to the ability of the claimants at the date of decision to access the necessary level of care in India. Whilst the doctor may think it desirable that the claimants be looked after by family members in the UK, the evidence falls far short of demonstrating that any necessary care is not available in India with the practical and financial help of the sponsor, or that there is no person in India who could reasonably provide such care, or that it is not affordable. The evidence suggested that in addition to the pension income and regular money transfers from the sponsor, the sponsor also gave his parents lump sums "to ensure that they are not left wanting." Further, the property occupied by the claimants is worth £30,000 and could be sold to help pay for care, or enable them to move into a retirement home. Daily domestic assistance is also available in India.

14. In summary, the evidence before the First-tier Tribunal does not meet the requirements of EC-DR or Appendix FM-SE and in the circumstances the application and appeal were doomed to failure from the outset.

15. Further, by reason of paragraph 37 of FM-SE if it is suggested that the level of care is not, or is no longer, affordable, the appellant must provide records of what care has been provided and an explanation of why that cannot continue. If financial support has been provided by the sponsor or other close family in the UK, the claimants must provide an explanation of why this cannot continue or is no longer sufficient to

enable the required level of care to be provided. None of these considerations have been addressed in the documentation submitted with the application or for the appeal. It appears that these requirements have been overlooked in the preparation of both application and appeal.

16. For the reasons set out herein, I find that the appellants have failed to demonstrate that even if they do require long-term personal care to perform everyday tasks, taking the evidence in the case as a whole, in the round, I find that they have failed to demonstrate that they are unable to obtain the required level of care, given that practical and financial help is available through the sponsor, and indeed other family members. They thus do not meet the threshold requirements of the Immigration Rules for entry in the capacity of dependent adult relatives. In the circumstances it is very clear that at the date of decision of the Entry Clearance Officer the claimants did not qualify for entry clearance under EC-DR.

17. By reason of section 85A the Tribunal can only consider the circumstances prevailing at the date of decision. Thus the fact that the second claimant is now said to be in the ICU in hospital in India is not relevant to the immigration issues in the appeal.

18. Ms Harris relied on article 8 family life. I note that article 8 was not raised in the grounds of appeal to the First-tier Tribunal and there is no section 120 notice, though Ms Harris maintains that article 8 was raised during the First-tier Tribunal hearing. Therefore, after setting aside the decision for error of law and before remaking the decision in the appeal I heard submissions in relation to article 8, considering the Razgar stepped approach.

19. I am not satisfied that the decision of the Entry Clearance Officer to refuse the application causes such grave interference with the claimants' family life so as to engage article 8 at all. In my view, there is no merit in any article 8 claim outside the Rules. Ms Harris suggested that there were emotional ties and dependency going beyond the normal emotional ties to be expected between adult relatives and I have borne in mind the Kugathas principles and that in cases such as Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), and Gurung and others [2013] EWCA Civ 8, it was held that it is possible for family life to continue even though family members have voluntarily separated. Whilst I accept that there is a degree of family life between sponsor and parents, the decision in question does not alter the family life situation at all, and leaves the status quo intact. The claimants have lived in India all their lives and their children chose to settle in the UK. Their separation is not an enforced one. There never was any intention that they should live together in the UK. The type and extent of family life between the claimants and their family members in the UK is the same as it has been for many years, with the claimants in India and the sponsor and his family in the UK. I accept that as they have aged, the claimants wish to depend more on their family members for support. However, that does not mean that article 8 entitles them to come to live in the UK. It is entirely open to the sponsor to continue to visit the claimants in India and indeed I was told that he was there now, explaining his absence from the appeal. Further, there is no reason why financial sponsorship and occasional visits cannot continue.

20. Even if article 8 is engaged, following Razgar the crucial issue would be the proportionality balancing exercise between the family life rights of the claimants on the one hand and on the other the undoubted legitimate and necessary public interest in protecting the economic well-being of the UK through immigration control. I bear in mind that when an applicant has shown that there is family/private life and the decision made by the Entry Clearance Officer or Secretary of State amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate.

21. I take into account all that has been urged on behalf of the appellants and in particular their mental and physical health conditions as outlined in the medical records, together with the extent of their close bond with family members in the UK. However, I also have to take into account that through financial and practical assistance of the sponsor they can have access to domestic help and as the sponsor conceded in his oral evidence to the First-tier Tribunal their home could be sold to fund residence in a care home. Suggestions that the claimants would not trust someone to come into their home or not be safe with such carers carry little weight in the absence of cogent evidence. It remains the case that the claimants have failed to demonstrate that they cannot have the care they need in India, which is a highly relevant

22. In favour of the public interest in that balancing exercise I am required to take account of section 117B of the 2002 Act, which states that immigration control is in the public interest. More significantly under section 117B(2) it is also in the public interest and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English— (a) are less of a burden on taxpayers, and (b) are better able to integrate into society. Further, under 117B(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons— (a) are not a burden on taxpayers, and (b) are better able to integrate into society.

23. There is no evidence that the claimants speak English and it is certainly the case that they are not financially independent. With their ill-health it is undoubtedly the case that they will wish to access NHS medical treatment and thus will likely be a burden on the state, regardless of any claim to state financial assistance.

24. Article 8 is not a shortcut to compliance with the Immigration Rules and the claimants are not entitled to settle in the UK just because that is their desire or the will of their family members in the UK. There is a route for entry clearance in the capacity of an adult dependant relative and the claimants have failed to demonstrate that they meet the requirements of those Rules, which is the Secretary of State's proportionate response to family life claims in such situations. If the claimants believe that they can muster the necessary evidence, it is open to them to make a further application, ensuring on this occasion that those acting on their behalf understand and address the evidential requirements under both Appendix FM and the specified evidence requirements under Appendix FM-SE.

25. Given that it is open to the claimants to make such a fresh application, I find it difficult to understand how the decision to refuse to grant the inadequately evidenced application could be disproportionate to the claimants' rights under article 8 ECHR. There is no reason why article 8 should exempt the claimants from making a settlement application in the same way as any other adult dependant relative, addressing the evidential requirements. Taking all the factors into consideration together, in the round, it is clear that the decision was entirely proportionate to the claimants' rights under article 8 ECHR.

Conclusions:

26. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside set aside the decision.

I re-make the decision by dismissing the appeal of each claimant.

Signed:

Deputy Upper Tribunal Judge Pickup Date: 24 March 2015

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a no fee award.

Reasons: The appeals have been dismissed and thus there can be no fee award.

Signed:

Deputy Upper Tribunal Judge Pickup Date: 24 March 2015