The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/02681/2014**
OA/02617/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On February 26, 2015	**On March 5, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MRS GAGAKALA UPADHAYA
MR DHARMA RAJ UPADHAYA
(NO ANONYMITY DIRECTION MADE**)**

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Hodgetts (Counsel)
For the Respondent: Ms Pal (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellants are citizens of Nepal. The first-named appellant (hereinafter referred to as "the appellant") is 65 years of age and applied for entry clearance under the Immigration Rules. Her husband, the second-named appellant, also applied at the same time but sadly he died on October 14, 2014 (prior to this hearing but after the original hearing). The respondent refused both applications on January 20, 2014 on the grounds they did not satisfy the requirements of Appendix FM Section E-ECDR.

2. The appellant (and her husband) appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on February 17, 2014.

3. The matter came before Judge of the First-tier Tribunal Vaudin d'Imecourt (hereinafter referred to as the "FtTJ") on June 18, 2014 and in a decision promulgated on June 20, 2014 he dismissed the appellants' appeals under both the Immigration Rules and article 8 ECHR.

4. The appellant (and her husband) lodged grounds of appeal on July 10, 2014. Judge of the First-tier Tribunal Davidge refused permission to appeal on September 2, 2014 finding that the FtTJ made findings that were open to him.

5. The appellant (and her husband) renewed their grounds to the Upper Tribunal and on January 8, 2015 Upper Tribunal Judge Chalkley granted permission finding it was arguable the FtTJ had erred.

6. The respondent filed a Rule 24 response dated January 16, 2015 in which she submitted correctly addressed all the issues.

7. The matter came before me on the date set out above and on that date the appellant was represented by direct access Counsel as detailed above.

8. I was handed the second-named appellant's death certificate and I placed that document on the court file.

PRELIMINARY ISSUE

9. Mr Hodgetts initially sought permission to rely on the unreported decision of Timiro Osman (contained in appellant's undated bundle). He submitted that the decision was on E-ECDR 2.5 and would be of assistance. Ms Pal objected and submitted that in order foe an unreported decision to be relied the President's Practice direction had to be followed and it had not so no regard should be had to its contents.

10. I considered Guidance Note 2011 No 2 and in particular paragraph [4] which states "…By the terms of the Senior President's Practice Direction 11 unreported decisions of the Chamber may not be cited as authority without permission of the judge that will only be granted sparingly where there is good reason to do so."

11. No such permission had been sought and I indicated to Mr Hodgetts that no weight would be attached to the decision although there was nothing to prevent him from making similar submissions if he felt it was appropriate.

ERROR OF LAW SUBMISSIONS

12. Mr Hodgetts adopted his grounds of appeal and submitted Section E-ECDR 2.5 of Appendix FM required the decision maker to make explicit findings on what was the required level of care. The required level of care refers back to Section E-ECDR 2.4 and both sections need to be considered together. He submitted the care that had to be provided was "personal" rather than support provided by mechanical aids or medication and should be provided by a person. He submitted the personal care included both emotional and psychological care. At date of decision the second-named appellant was suffering from a serious illness and the FtTJ failed to have regard to what was meant by palliative care. Personal care is care package for the whole family and he submitted the FtTJ failed to engage with what the required level of care was at the date of decision. The FtTJ did not demonstrate from paragraph [22] onwards any engagement with the medical evidence that had been submitted. The FtTJ failed to have regard to paragraph [4] of the second-named appellant's statement in which he described the problems the appellant was experiencing or the content of the medical report contained at pages C5 and C6 of the original appellants' bundle. At paragraph [22] the FtTJ made no findings on this medical evidence or have regard to the fact the appellant was unable to perform everyday tasks because the second-named appellant was seriously ill at the date of decision and the appellant had to deal with the fact the second-named appellant was dying. The FtTJ failed to deal with required level of care or have regard to the emotional levels of palliative care package. The FtTJ totally ignored the medical evidence that suggests there is no one able to provide the affectionate and loving care needed and the fact the second-named appellant's cancer affected the wife and caused her abdominal pain. Mr Hodgetts submitted palliative care was needed to reduce the appellant's stress and the FtTJ failed to have regard to this. The FtTJ also wrongly concluded there was evidence of nursing homes when the medical report and the letter from the District Health Office suggested there were no such facilities. The FtTJ failed to have regard to cultural issues and failed to have regard to the level of care the appellant required. As regards the FtTJ's approach to article 8 he submitted the FtTJ had erred because he had not followed the approach suggested in in Ganesabalan, R (On the Application of) v SSHD [2014] EWHC 2712 (Admin) where it was found there was no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations. Whilst the FtTJ dealt with article 8 he did so in one short paragraph and found they were a complete code. The Rules in this appeal were not a complete code. The proportionality test he applied in paragraphs [10] and [11] was not wide enough and his reasoning was incomplete. The FtTJ failed to have regard to the granddaughter's letter and the fact she had lived with the appellant for the first ten years of her life. Her letter and his response (in his statement) amounted to compelling and compassionate circumstances.

As the economic well-being of the country was protected the appeal should have been allowed.

13. Ms Pal relied on the Rule 24 letter dated January 16, 2015 and submitted the FtTJ had regard to the appellants' full medical conditions and whilst there was only a brief reference in paragraph [22] of his determination the FtTJ accepted they needed care. The FtTJ then considered their position in paragraph [24] of his determination where he found that the care needed did not need to come from relatives or friends but could be provided by other persons. In doing so he had regard to the IDI guidance. His finding about long-term care was open to him because the appellants, at the date of decision, were receiving care from carers and the sponsors were paying for such care. There was no error in law in respect of the decision under the Immigration Rules. As regards article 8 she submitted his findings in paragraph [26] demonstrated the appellants did not meet the Immigration Rules and he then considered their circumstances outside of the Immigration Rules and he found that even if did consider their circumstances outside of the Rules the outcome would be the same. She referred to the decision of Singh & Khaled [2015] EWCA Civ 74 where the Court of Appeal held there was no need to fully examine all of the issues afresh where they had been properly considered under the Rules. There is limited family life between a grandchild and grandparent. The child's primary family life must be with her parents in the United Kingdom as they provided both financial and emotional support. She can maintain contact with the appellant in Nepal in much the same way she had been doing since she came here. There was no material error.

14. Mr Hodgetts responded to these submissions and argued the decision of Singh did not mean a court should never consider the circumstances afresh because in this appeal the Rules did not take into account the extent of family life for the grandchild and the reasonableness of relocation. The Respondent accepted the FtTJ did not take into account all of the appellants' symptoms and he did not comment on the required level of care. His findings that people other than family and friends can provide assistance failed to have regard to emotional support that was needed.

15. I reserved my decision.

ERROR OF LAW ASSESSMENT

16. The appellants were husband and wife and together they applied for admission under the Immigration Rules. It was agreed that if the appellants met the requirements of Section E-ECDR 2.5 of Appendix FM then the appellant's appeal (her husband is now deceased) should be allowed.

17. In considering whether there is an error of law I have to have regard to the position facing the FtTJ and I have to disregard the second-named appellant's death.

18. I have set out above Mr Hodgett's submissions and in considering his submissions I have also had regard to the grounds of appeal that he drafted following the FtTJ's decision. I have also considered both the Rule 24 response and Ms Pal's oral submissions.

19. For the reasons set out in paragraphs [10] and [11] above I do not place any weight on the decision of Timiro Osman but I see no reason why I should not consider Mr Hodgetts's submissions on the points raised in that decision. However, those points have to be considered alongside the approach the FtTJ was invited to take by the appellants' original counsel. In particular, he referred the FtTJ to the IDI guidelines and they are set out in paragraph [21] of the FtTJ's determination.

20. Mr Hodgetts submitted the FtTJ failed to make findings on what the required level of care was. Section E-ECDR 2.5 makes clear that in order to meet the Immigration Rules the appellants 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".

21. There was no dispute that the sponsor was financially able to meet the cost of any care as he had demonstrated an ability to support his parents for a number of years.

22. Mr Hodgetts argued that the FtTJ failed to have regard to the fact the second-named appellant was terminally ill and needed emotional and psychological care. I disagree with Mr Hodgetts.

23. In paragraph [22] the FtTJ acknowledged both appellants' medical conditions and was aware that the appellant was suffering considerable stress as a result of her husband's condition. The FtTJ noted in paragraph [23] that the sponsor paid for two carers and in addition to the funds available to him there was a sum in excess of £40,000 following the sale of the appellants' property.

24. In paragraph [24] the FtTJ spelt out why he concluded that Section E-ECDR 2.5 was not met. He noted the second-named appellant had been hospitalised as a result of his condition and there were clearly nurses available to provide the appropriate care.

25. Mr Hodgetts submitted the FtTJ was wrong in stating there was no evidence that there were any nursing homes available and he referred me to the medical report and a letter at page D5 of the original bundle. The letter at page D5 does not say there were no nursing homes. The

letter refers to there being no agencies or state run assistance. Neither of those statements undermines what the FtTJ found. The letter from the hospital found on pages C5 to C7 indicates there are no geriatric and terminal care homes. Section E-ECDR 2.5 does not require such places. There is no dispute there are both nurses and hospital facilities who provide medical assistance and care and I am satisfied that even if there are no places that it is submitted the second-named appellant should have been placed in there is nevertheless places where the second-named appellant was being cared for. The FtTJ was entitled this satisfied the requirement in Section E-ECDR 2.5.

26. Mr Hodgetts also argued that the FtTJ failed to have regard to palliative care. There is a difference between what a person may want and what is being offered. There is nothing in the medical evidence that suggests the appellants were not offered assistance or care. The FtTJ was aware of the level of care available and he was also aware of the second-named appellant's condition.

27. Mr Hodgett's submitted that "best medical practice" was to provide family support. However, the FtTJ was not concerned with what was best but merely whether the second-named appellant could receive the required level of care. There is nothing in the medical report that suggests the hospital could not treat him if he had to be admitted. There is no doubt that his wish was to pass away with his son by his side but that is not the test to be applied. The IDI guidelines make it clear that not only family members but also professionals can provide care.

28. Mr Hodgetts argued that personal care means exactly and I am satisfied the FtTJ had regard to that fact. The FtTJ was satisfied he could be properly cared for by carers and this is not a case where his care was going to be based on a mechanical aid. The nature of the second-named appellant's condition was that he would need medication but that was a part of his care.

29. Whilst the FtTJ had sympathy for the second-named appellant's condition there were people able to care for him and taking into account his condition it may well be that they were the most appropriate people to be providing that help.

30. Having carefully considered Mr Hodgett's submissions I am satisfied that all of the findings made were open to the FtTJ. In considering this appeal under the Immigration Rules I am satisfied he made findings that were open to him. There was no error in law.

31. The second aspect of the appeal related to the FtTJ's assessment on human rights. Mr Hodgetts submitted the correct approach as set out in Ganesabalan had not been followed. Again, I disagree.

32. In considering the FtTJ's approach to article 8 it is necessary to consider his overall approach. Whilst I accept he began paragraph [26] applying a two-stage test he nevertheless went on to find that even if article 8 was engaged it would not be disproportionate to refuse the appeals. The FtTJ carefully considered all of the medical evidence and whilst I accept he did not place any weight on the granddaughter's wishes I do not overlook Ms Pal's submission that she has lived apart from the appellants for around six years and he best interest are with her parents-with whom she lives. She receives emotional and financial support from her parents and whilst clearly she wants her grandparents with her I am not satisfied that the failure to specifically consider this amounts to an error in law. The FtTJ took into account the granddaughter could visit her grandmother with her family and of course as stated before they had lived apart for six years and they had maintained family life in the years they had been apart.

33. I am satisfied the FtTJ did consider the claims under article 8 and reached findings that were open to him.

Decision

34. The decision of the First-tier Tribunal did not disclose an error in law and I uphold the original decision and I dismiss the appellants' appeals.

35. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier and I see no reason to amend that order.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the original decision on fees.

Signed: Dated:

Deputy Upper Tribunal Judge Alis