IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09454/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 9th September 2015	**On 23rd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NAWAL AL ABDIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ABU DHABI

Respondent

Representation:
For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Shuhaib Abdulla, the Sponsor

DECISION AND REASONS

Introduction and Background

1. The Entry Clearance Officer (ECO) appeals against a decision of Judge of the First-tier Tribunal J S Law promulgated on 11th February 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant.

3. The Claimant is a female Iraqi citizen born 22nd August 1950, who currently lives in Dubai. On 10th June 2014 she applied for entry clearance to the

United Kingdom as an adult dependent relative. The Claimant indicated that she wished to live with her daughter Khadija Sami who is married to the Sponsor. The Claimant indicated that she would be maintained and accommodated by the Sponsor and her daughter and she wished to live with them and their three children.

4. The Claimant indicated that she has two daughters living in the United Kingdom, and a total of five grandchildren. The Claimant was a teacher in Dubai but is now retired, and lives alone. She separated from her husband in 1995 according to her daughter's witness statement.

5. The application was refused on 23rd July 2014. Initially the ECO did not accept the claimed relationship between the Claimant and her family in the UK, but this was conceded when the application was reviewed. The main reason for refusal was that the Claimant did not satisfy the requirements of E-ECDR.2.4 of Appendix FM which is set out below;

> "The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks."

6. The ECO contended that no evidence had been submitted to prove this, and therefore the application must be refused.

7. The Claimant appealed maintaining that the refusal was not in accordance with the Immigration Rules, not in accordance with the law, and incompatible with Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention), as the Claimant is the mother of a British citizen.

8. The application was reviewed by an Entry Clearance Manager who conceded the claimed relationship, but maintained the decision to refuse, on the basis that the Claimant had not submitted evidence to satisfy E-ECDR.2.4.

9. In relation to Article 8 it was contended that if there was any interference with private or family life, this was justified for the purpose of maintaining effective immigration control, and was proportionate and appropriate.

10. The appeal was heard by Judge Law (the judge) on 30th January 2015 and allowed under the Immigration Rules, and under Article 8 of the 1950 Convention.

11. The ECO applied for permission to appeal to the Upper Tribunal. It was contended that the judge had failed to give reasons or adequate reasons for findings on the material matters.

12. It was submitted that the judge had failed to provide adequate reasons for concluding that the requirements of Appendix FM were satisfied. It was

submitted that the judge had speculated as to the Appellant's health, and the required medical evidence had not been provided.

13. In relation to Article 8, it was submitted that the judge had had no regard to section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and that the Article 8 assessment was legally flawed. It was submitted that the Claimant could remain in contact with her family in the United Kingdom via modern methods of communication, and visits which had taken place in the past.

14. Permission to appeal was granted by Designated Judge of the First-tier Tribunal J M Lewis who found it arguable that the judge did not have regard to the provisions of Appendix FM and proceeded directly to a freestanding Article 8 proportionality assessment, and that in considering Article 8 there was a failure to have regard to section 117B of the 2002 Act.

The Upper Tribunal Hearing

Error of Law

15. The Sponsor attended the hearing as the Claimant's representative. I explained to him the procedure that would be adopted, and ensured that he had seen the application for permission to appeal to the Upper Tribunal, and the grant of permission.

16. The Sponsor asked if the Tribunal had received further medical evidence from Prime Medical Centre dated 7th July 2015. I confirmed that this had been received but explained that this was not relevant to my consideration as to whether the First-tier Tribunal had erred in law, as this evidence had not been before the First-tier Tribunal.

17. I heard submissions from Mr McVeety who relied upon the grounds contained within the application for permission to appeal. The medical evidence which had been before the First-tier Tribunal were letters from Aster Medical Centre in Dubai dated 23rd and 26th January 2015. It was submitted that these letters did not prove that E-ECDR.2.4 was satisfied.

18. In relation to Article 8 Mr McVeety observed that the assessment was very brief, and no account was taken of the considerations set out in section 117B of the 2002 Act. I was asked to set aside the decision of the First-tier Tribunal.

19. I then heard from Mr Abdullah. He explained that he is a pharmacist by profession, and he could interpret the letters from Aster Medical Centre as meaning that the Claimant could not perform everyday tasks. He accepted that the letters did not specifically say this.

20. Mr Abdullah explained that he and his family visited the Claimant in Dubai twice a year, and that the Claimant has visited them a couple of times and that she has a very good relationship with her grandchildren. The Sponsor

confirmed that the Claimant has two daughters in the United Kingdom and five grandchildren.

21. Having considered the submissions I decided that the judge had erred in law in his consideration of E-ECDR.2.4. There is a requirement that specified medical evidence is provided to prove that E-ECDR.2.4 is satisfied and the evidence required is set out in paragraph 34 of Appendix FM-SE which I set out below;

> "34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:
>
> (a) Independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and
>
> (b) This must be from a doctor or other health professional."

22. The letters from Aster Medical Centre dated 23rd and 26th January 2015 were signed by a doctor. The letters confirm that the Claimant has suffered with bronchial asthma and chest infections, and confirmed that the Claimant had told the doctor that she was taken to hospital in an ambulance twice with breathing difficulties. The Claimant had also told the doctor that most of the time she needs help to administer her medication and she has disturbed sleep and has gained weight because of a lack of mobility. She explained to the doctor that she felt very depressed and lonely and wished to be with her family and grandchildren.

23. The judge erred by not adequately analysing the requirements of paragraph 34 of Appendix FM-SE, and erred in allowing the appeal under the provisions of Appendix FM, when the medical evidence produced, did not confirm that the Claimant required long-term personal care to perform everyday tasks. Because the specified medical evidence had not been submitted, the appeal should have been dismissed, and the judge materially erred in allowing the appeal in the absence of the required medical evidence.

24. I conclude that the Article 8 assessment was inadequate and did not follow a structured approach. The judge did not consider whether the Claimant had proved that she had a private or family life which engaged Article 8. Having assumed that Article 8 was engaged, there was thereafter no consideration of the factors set out in section 117B of the 2002 Act. I therefore have to conclude that the Article 8 assessment was legally flawed and must be set aside.

25. Having set aside the decision of the First-tier Tribunal, I was requested by the Sponsor to remake the decision without a further adjournment. Mr McVeety had no objection to that course of action, which seemed to me to be appropriate.

Re-Making the Decision

26. I indicated that I would take into account all the documentation that had been before the First-tier Tribunal. In addition I took into account the additional medical evidence from Prime Medical Centre, dated 7th July 2015, which had not been before the First-tier Tribunal. The evidence before the First-tier Tribunal on behalf of the Claimant was two bundles of documents, comprising 73 pages in total.

27. The Sponsor indicated that no further evidence would be called, but reliance was placed upon the evidence that was before the First-tier Tribunal. I therefore heard further submissions to assist me in re-making the decision.

28. Mr McVeety submitted that the medical evidence that had been submitted still did not satisfy the requirements of E-ECDR.2.4 and therefore the appeal must be dismissed in relation to the Immigration Rules.

29. In relation to Article 8 I was asked to find that there was no private or family life that engaged Article 8. Mr McVeety pointed out that the Claimant's daughters in the United Kingdom are adults, and relationships between adult family members did not amount to family life that engaged Article 8, unless something more existed than the normal emotional ties.

30. In the alternative if I found that family life did exist which engaged Article 8, I was asked to find that the decision to refuse entry clearance did not interfere with this family life, as the Claimant had not lived with her family in the United Kingdom for many years.

31. In relation to section 117B, Mr McVeety pointed out that there was no evidence that the Appellant could speak English and this was still a requirement, as she was not yet 65 years of age. I was asked to find nothing exceptional in this case, and to conclude that refusal of entry clearance did not breach Article 8.

32. I then heard from the Sponsor. I was asked to note the letter from Aster Medical Centre dated 23rd January 2015 indicated that the Claimant needed help to administer her medication and the Sponsor submitted that this satisfied the requirements of E-ECDR.2.4. The letter from Prime Medical Centre stated that the Claimant suffered from chronic hypothyroidism which the Sponsor explained made her lethargic and tired, and that she had a severe iron deficiency.

33. The Sponsor explained that the Claimant had been a teacher all her working life, but as she was no longer working she would not be able to continue to reside in Dubai. The Sponsor stated that his three children, aged 11, 9 and 4 years of age, have a very good relationship with the Claimant and are dependent upon her. The Sponsor said that the Claimant speaks English, and asked that I take into account that it was not contended that he could not adequately support the Claimant financially.

34. The Sponsor confirmed that he and his family visited Dubai although his wife and children spent more time there than he did, because of his business commitments.

35. I was asked to allow the appeal both with reference to Appendix FM of the Immigration Rules, and Article 8 of the 1950 Convention.

36. At the conclusion of submissions I reserved my decision.

My Conclusions and Reasons

37. I have taken into account all the evidence both oral and documentary that has been placed before me, and taken into account the submissions made by both representatives.

38. Because this is an appeal against refusal of entry clearance, I may only consider the circumstances appertaining at the date of refusal, which was 23rd July 2014. I can however take into account evidence arising after the date of refusal, if it is relevant to the circumstances appertaining at the date of refusal.

39. I firstly consider E-ECDR.2.4 of Appendix FM. The burden of proof is on the Claimant, and the standard is a balance of probabilities.

40. I have taken into account the two letters from Aster Medical Centre dated 23rd and 26th January 2015, and the letter from Prime Medical Centre dated 7th July 2015. I find that the letter from Prime Medical Centre is not relevant, as it refers to the Claimant visiting the medical centre in May 2015 complaining of severe dizziness with repeated episodes of syncope with severe palpitations. This does not relate to the date of refusal in July 2014.

41. In any event, taking all three of the letters into account, I am afraid that the medical evidence does not amount to medical evidence that the Claimant's physical or mental condition means that she cannot perform everyday tasks, and the evidence does not prove that as a result of age, illness or disability, the Claimant requires long-term personal care. The evidence before the Tribunal indicates that the Claimant has been living alone, without a carer, and although she has had admissions into the medical centre, the evidence does not prove that she cannot perform everyday tasks.

42. Therefore the appeal under Appendix FM of the Immigration Rules must be dismissed.

43. I am asked to consider Article 8 outside the Immigration Rules and find that it is appropriate to do so. In my view the correct approach is to adopt the principles set out in Razgar [2004] UKHL 27 which involves answering the following questions;

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

44. Although the guidelines set out above relate to a removal decision, I am satisfied that it is appropriate to apply them when considering an entry clearance application. The first issue to be decided is whether the Claimant has established a private or family life that engages Article 8. I do not find that there is any satisfactory evidence that she has a private life that engages Article 8. The private life that she has established is in Dubai. She has previously visited the UK, but I do not find that she has established a private life in this country.

45. In relation to her family life, the general principle when considering family life involving adult relatives was set out in paragraph 25 of Kugathas [2003] EWCA Civ 31 in which it was decided that a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties.

46. The Upper Tribunal in Ghising [2012] UKUT 00160 (IAC) found in paragraph 56 that the judgments in Kugathas had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg Courts. At paragraph 62 it was found that there should be no blanket rule with regard to adult children when considering family life, and each case should be analysed on its own facts to decide whether or nor family life exists within the meaning of Article 8(1).

47. The Court of Appeal in Gurung [2013] EWCA Civ 8 found in paragraph 50, in summary, that the critical issue in considering family life between adult relatives was whether there was sufficient dependence, and in particular sufficient emotional dependence by the Appellants on their parents to justify the conclusion that they enjoyed family life. The usual emotional bonds between parents and adult children may be present, but to engage Article 8 on a family life basis there must be a degree of emotional dependence.

48. In this case I find that the Claimant and her daughter (the sponsor's wife, as I did not receive evidence from the Claimant's other daughter in the United Kingdom) do have an emotional bond as mother and daughter. However I do not find that this amounts to family life what would engage Article 8. The Claimant's daughter in her witness statement confirmed that she has lived in the United Kingdom since 2003, and although there have been visits by the Claimant to the UK, and by the Sponsor and his family to Dubai, the family have not lived together as a unit.

49. I do take into account that the Claimant has five grandchildren who are all minors. I have taken into account the Sponsor's evidence that his children have a good relationship with the Claimant. I have considered the best

interests of those children as a primary consideration. The children have never lived with the Claimant. I do not find that the Claimant has established family life with her grandchildren. The best interests of the children would be for the status quo to be maintained, in that they continue to live with their parents and they are able to visit their grandmother during school holidays.

50. I therefore conclude as I have not found that Article 8 is engaged in relation to private or family life, that it is not necessary to go on and consider the third, fourth and fifth questions set out in Razgar.

51. However, if I am wrong in finding that family life is not engaged, I will go on in the alternative to consider those questions.

52. If there is interference with the Claimant's family life I find that it is in accordance with the law. This is because the Claimant cannot satisfy the requirements of the Immigration Rules in order to be granted entry clearance.

53. I find that the proposed interference is necessary in a democratic society in the interests of maintaining effective immigration control which is necessary to protect the economic well-being of the country.

54. I then have to consider whether the interference is proportionate to the legitimate public end sought to be achieved. This involves considering section 117B of the 2002 Act. Sub-section (1) states that the maintenance of effective immigration controls is in the public interest. Sub-section (2) states that it is in the public interest that persons who seek to enter the United Kingdom are able to speak English. The Claimant has not produced satisfactory evidence of her ability to speak English.

55. Sub-section (3) states that it is in the public interest that persons seeking to enter this country are financially independent. It has been accepted on behalf of the ECO, that the Claimant would be adequately maintained by the Sponsor and his family, but the Tribunal confirmed in AM Malawi [2015] UKUT 0260 (IAC) that a Claimant can obtain no positive right to a grant of leave to enter whatever the strength of their financial resources.

56. The Court of Appeal in SS (Congo) [2015] EWCA Civ 387 stated in paragraph 51;

> "51. In our judgment, the approach of Article 8 in the light of the rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence rules are not complied with."

57. In this case I appreciate that the Claimant wishes to live in the United Kingdom, and that the Sponsor and his family wish her to live with them. However I have to place very substantial weight upon the fact that the requirements of the Immigration Rules cannot be complied with. In effect,

I am being asked to disregard the requirements of those rules and to allow this appeal under Article 8 outside the rules. I do not find that to be appropriate. I do not find there are any compelling circumstances to allow this appeal outside the Immigration Rules. It is open to the Claimant to make a fresh application if she believes that medical evidence is available that would confirm that she can satisfy the requirements of the Immigration Rules. In my view, the weight that must be attached to the need to maintain effective immigration control outweighs the weight to be attached to the wishes of the Claimant to enter the United Kingdom notwithstanding that she cannot satisfy the rules. The refusal of entry clearance does not breach Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The Claimant's appeal is dismissed under the Immigration Rules.

The Claimant's appeal is dismissed on human rights grounds.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date

Deputy Upper Tribunal Judge M A Hall 15th September 2015

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date

Deputy Upper Tribunal Judge M A Hall 15th September 2015