Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/21447/2013**
OA/21449/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2015	**On 17 March 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MAHESHA KAUSHIKKUMAR SHAH
KAUSHIKKUMAR HIMATLAL SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - BOMBAY

Respondent

Representation:
For the Appellants: Mr A Slatier, Counsel instructed by Richmond Chambers LLP
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for and do not make any order restraining publication of the details of this case.
2. The appellants are citizens of India and are married to each other. The first appellant was born on 9 January 1958 and so is now 57 years old. Her husband was born on 23 November 1953 and so is now 61 years old.
3. They appeal with leave decisions of the First-tier Tribunal to dismiss their appeals against decisions of the respondent to refuse them entry clearance to join their son and other relatives in the United Kingdom because they could not care for themselves in India. In each case the

refusal was under paragraph E-ECDR.2.5 of Appendix FM to the Immigration Rules. This provides that:

> "The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, 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."

4. However it is a requirement of E-ECDR that in order to establish eligibility for entry clearance as an adult dependent relative or of the requirements of E-ECDR.2.1 to 3.2 must be met. It is a requirement of E-ECDR.2.4 that:

> "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."

5. The applications were refused on 22 November 2013 and the First-tier Tribunal Judge, correctly, reminded himself that he was concerned with facts in existence at the date of decision.

6. I set out below the Entry Clearance Officer's reasons for refusal. Although the sense is plain enough, I do not find the reasons equally valid. The reasons are:

> "You and your spouse both state that you are unable to care for yourselves on a daily basis, and both state that the required care cannot be delivered in India. It is unclear why this is the case. Your proposed sponsors in the UK have not submitted any evidence of medical qualifications and it is unclear therefore whether you and your spouse both require care that requires specific medical training. I am mindful that two doctor's notes have been received, from different doctors in different locations with their belief that care is not available in India. I note however that these letters are written in extremely similar ways, with identical sentence structure and description of the perceived lack of care in India. I am not satisfied therefore that these letters have not been provided with the specific intention of facilitating your application. The care discussed by both doctors relate to everyday tasks, washing, dressing, and cooking. Again it is unclear why this care cannot be provided by carers in India. I note that both doctors have stated that this care is not available in India, but they have not given any reason why it is not. Carers are widely available in India, as well as personal help, at a relatively low cost. I note the documentation from your daughter who is based in India who acknowledges that help can be acquired (in the form of maids) but states that they don't provide personal care. I acknowledge this but again, I am mindful that personal carers are available in India. Your daughter also states that you are vulnerable to people that they cannot trust but it is unclear why you would choose not to interview and vet potential employees, prior to employment. In light of the lack of evidence to show why the care you require is not available in India, and mindful that you do have direct descendants in your home country, and receive money from your UK sponsors which can be utilised for personal care, I am not satisfied that you are unable to obtain the required level of care in India. I therefore

> refuse your application under paragraph EC-DR.1.1(d) of Appendix FM to the Immigration Rules. (E-ECDR.2.5)."

7. The First-tier Tribunal Judge considered evidence including oral evidence from the sponsor which he found to be "thoroughly credible" and concluded that on 22 November 2013, being the date of decision, each appellant with the assistance of a cook, cleaner and driver, their daughter in India and, in the case of the second appellant help from his wife, was able to carry out everyday tasks. The First-tier Tribunal Judge therefore found that the appellants did not meet the requirements of paragraph E-ECDR.2.4 and dismissed the appeal for that reason.

8. He also considered the appeal on human rights grounds.

9. The appellants were given permission to appeal by First-tier Tribunal Judge Colyer.

10. One of the reasons for giving permission to appeal is that it was arguable that the First-tier Tribunal Judge's finding under E-ECDR.2.4 was wrong. Arguably the judge had only reached his conclusion by considering the care available rather than what care, if any, the appellants needed and so had misdirected himself in concluding that they had not shown the required long-term personal care to perform everyday tasks.

11. It was also arguably perverse, said to be "**Wednesbury** unreasonable" for the First-tier Judge to have found that the appellants were capable of carrying out daily tasks when that was contrary to the medical evidence.

12. It was also arguable the judge had reached his findings taking into account post-decision evidence and had misdirected himself when considering the claim with reference to Article 8 of the European Convention on Human Rights because he had not reminded himself there was a positive duty to show respect for family life.

13. Regrettably, a detailed and apparently quite helpful bundle prepared for the First-tier Tribunal had not found its way onto my file with the result that I was not as prepared as I wanted to be at the hearing room. I was given a copy during the course of the morning. I regret that the need to consider that bundle meant I could not give an extempore judgment.

14. The applications were supported by medical reports. In the case of the first appellant there is a report dated 19 September 2013 from Dr Nayan H Shah. Dr Shah said that the first appellant suffers from high blood pressure, diabetes, thyroid and high cholesterol and has a history of her Triglycerides level increasing to a level which showed an increased risk of heart attack or stroke. This led to mobility problems so that in the opinion of the doctor "she is unable to walk or move around and she need complete rest". This led to the conclusion that she "requires long-term personal care and she is unable to perform everyday tasks, e.g. washing, dressing and cooking".

15. This report also offered the comment that she was:

> "unable to obtain the required level of care in India because it is not available and there is no person in that country who can reasonably provide

> it even with the help of financial support. I must stress that she cannot acquire any suitable care in India."

16. In the case of the second appellant there was a report from Dr J Kothari who, in a report dated 6 December 2013, confirmed that the second appellant is a cancer patient. It is said elsewhere that he has had much of his oesophagus removed. Dr Kothari said the second appellant "requires long-term personal care. He is unable to perform everyday tasks, e.g. washing, dressing, driving and cooking."
17. There was also evidence in the form of letters from members of the family saying broadly similar things.
18. The appeal was supported by statements dated 10 October 2014.
19. There the first appellant explained that she had mobility problems combined with high blood pressure, diabetes, hypothyroidism and high cholesterol. She was expecting to have replacement surgery on both knees. She was unable to carry out household tasks including cleaning, washing or cooking.
20. She was in no position to look after her husband.
21. She accepted that carers could be hired in India but did not accept that the people who could be hired would be capable of doing their jobs.
22. The second appellant's statement confirmed the extent of the surgery he had undergone in an effort to defeat cancer of the oesophagus.
23. It explains that as a result of his illness the second appellant cannot perform everyday tasks like washing, cleaning, cooking and he found it difficult to look after himself.
24. His wife was not able to look after herself never mind look after him.
25. The sponsor made a statement on 14 October 2014. His statement explained how the sponsor wanted to support his family and the emotional stress of not being close to his parents. The sponsor told the First-tier Tribunal that the second appellant's general health has improved since the date of decision so he was now a little more able to look after himself. For example he could now dress himself. He could not do that when the case was decided. His mother, the first appellant could use the toilet on her own.
26. At paragraph 87 of his determination the First-tier Tribunal judge concluded:

> "Upon the totality of the oral and written evidence received the Tribunal finds as a fact that as of 22 November 2013 each appellant, together with assistance from the cook, the cleaner, the driver and, at that time it still being received, from their daughter in India and, in Mr Shah's case from his wife, was able to carry out everyday tasks."

27. This is an extremely significant finding. I agree with the grounds and the reasons given for permission to appeal that this finding reflects a misdirection. Paragraph E-ECDR.2.4 is not about an applicant's ability to

cope with or without assistance but whether in fact the applicant requires long-term personal care to perform everyday tasks.

28. Given the terms of refusal the appellants were entitled to assume that their ability to satisfy Paragraph E-ECDR.2.4 was not in issue. Paragraph E-ECDR.2.5 is only relevant where a person requires care. When care is needed Rule 2.5 requires the person seeking to enter the United Kingdom to show that the level of care cannot be obtained in the country where they are living.

29. The ability to use a toilet unaided is not determinative. The evidence that was accepted by the First-tier Tribunal Judge is that the appellants are managing with help that they obtain in India.

30. Mr Avery submitted that the First-tier Tribunal Judge was entitled to conclude that the appellants had not satisfied the requirements of E-ECDR.2.4. Mr Avery was right to the extent that it is trite immigration law that a First-tier Tribunal Judge cannot allow an appeal unless satisfied that an appellant meets all of the requirements of the Rules. Sometimes it is necessary to make findings on things that had not been considered by Entry Clearance Officers and sometimes it is necessary to disagree with the Entry Clearance Officer's findings. However, it is very unwise to consider a requirement of the rules that was not doubted by the Entry Clearance Officer without putting the appellant on notice. Such a failure will often lead to a decision being challenged because it is thought to be unfair.

31. I am satisfied that the First-tier Tribunal Judge should have concluded on the evidence before him that at the date of decision each appellant required long-term personal care to perform everyday tasks. The evidence does not suggest that they are severely disabled. Neither do I accept that neither of the appellant's can ever carry out any of their everyday tasks. However findings about this must be made "in the round". The sparse nature of the medical evidence has to be considered against a background of the appellants not realising that their need for help was in dispute. Their health had improved by the time the appeal was heard in the First-tier Tribunal but they still had the help of a cook, a driver and a cleaner as well as some help from the daughter. I find it probable that they could not manage without such help.

32. Where two applicants are married to each other it is not necessary for them both to require such care in order to satisfy the Rules. Obviously in many cases where there is a marriage where only one party to the marriage is in need of long-term personal care, the other partner to the marriage can provide it and so a married coupled will not normally satisfy the Rules where only one applicant is disabled.

33. However, I find the First-tier Tribunal Judge had in fact found that the appellants, far from showing they were unable to obtain the required level of the care in the country in which they were living had in fact obtained it. This is what he meant at paragraph 87 where the Tribunal said:

> "Upon the totality of the oral and written evidence received the Tribunal finds as a fact that as of 22 November 2013 each appellant, together with

assistance from the cook, the cleaner, the driver and, at that time it still being received, from their daughter in India and, in Mr Shah's case from his wife, was able to carry out every day tasks."

34. The evidence that such care is unavailable in India is very unsatisfactory. The respondent has not provided any evidence at all and although the burden of proof is on the appellants if, as the respondent claims is the case, such care is available in India there would be no harm in producing evidence on the point.

35. The evidence relied on by the appellants is not satisfactory. The medical practitioner's opinion concerning the unavailability of hired help is clear but wholly unexplained. I accept that the appellants may very well prefer the care of a close family member to that of hired help and that it is not practical to obtain the desired care from the relatives in India. I also accept that there is a cultural presumption that care will be provided by the elder son and that, whether it is a cultural requirement or not, it is something the sponsor is endeavouring to do in accordance with the Rules if that is permissible.

36. India is a country with an enormous population and an entrepreneurial tradition. It also has excellent centres of healthcare. Whilst I am perfectly prepared to accept that there are bad, inadequate or downright dishonest so-called carers available in India, just as I suspect there are in every society in the world, I do not see how I can conclude rationally that that kind of care need *cannot* be obtained in India on the evidence that is before me.

37. I recognise that the medical practitioners who have expressed an opinion are in a position to know. It just might be that they are right and see no need to explain their opinion because it is so obviously right. However, although their opinion is clear it is perfunctory and unexplained. Although I would have appreciated some more help from the respondent the contention that such care is unavailable is, I find, so counter-intuitive that it must be proved strictly. I would have appreciated, for example, a detailed expert report from a health worker in India explaining what kind of care is available, what it costs and how it can be obtained or why such a large population has not stimulated demand for the kind of care that these appellants need.

38. There is additional evidence before me. I make it clear that I do not admit that evidence because I see no reason why it could not have been made available for the First-tier Tribunal hearing if the case had been prepared properly on that occasion. The object of a re-hearing after an error of law has been established is to decide the case properly and not to give the parties an opportunity to prepare their cases. However I have considered the evidence and I do not think it would have made any difference if I had admitted it. Dr Kothari and Dr Shah really do not add to anything they have said before. I accept that the appellants each require full-time personal care. I do not understand why such care is not available in India.

39. I have seen the letter from M L A Gujarat dated 1 September 2014 from a Mr Rakesh Shah who introduces himself as a member of the Legislative

Assembly in Gandhinagar. This asserts that there is "no facility like nursing care home over here, which can provide full-time care." I hesitate to be critical of Mr Gujarat. I have no reason to think him dishonest or mischievous. However, the suggestion that such care cannot be found astonishes me. Mr Gujarat did say that "they have to find various people to do washing, cooking or driving from personal resources like neighbour or friends as there is no employment agency available to provide this kind of labour jobs".

40. Again I find that an astonishing claim but, more importantly, it does not assist the appellants because the First-tier Tribunal accepted evidence that they appellant had obtained the care that they needed.

41. I have reminded myself the burden of proof on the appellant is discharged if the case is proved on a balance of probability and I reminded myself of the favourable impression the sponsor made when he gave his evidence. Nevertheless I am not persuaded that the appellants are "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". It may not be as easy as it would be in the United Kingdom. It may require the use of several different suppliers of care. Nevertheless adequate care is available. The appellants are coping. They are able to get that care in India and it has not been suggested that it is not affordable.

42. It follows that I must dismiss the appeal under the Rules.

43. The appeal is also pursued on human right grounds. Mr Slatier also argued the case on Article 8 grounds. He very helpfully reminded me of the decision of the Court of Appeal in **ZB (Pakistan) [2009] EWCA Civ 834**. This case is a firm reminder of the need to consider Article 8 in the case of adult children and their dependant or becoming dependent parents.

44. I remind myself that Article 8 protects a person's "private and family life", home and correspondence. "Private and family life" is not to be understood as two separate concepts despite the apparently contrary insistence in the Immigration Rules. A person's private and family life has sometimes been translated as a person's physical and emotional integrity. Article 8 is about restraining the state from interfering with a person's life and rather requiring the state to let a person get about his or her lawful business without hindrance. It is a qualified right. Immigration control can usually be justified because it is necessary for promoting the economic wellbeing of the United Kingdom and for the prevention of disorder or crime. This is not to suggest that the appellants would be disorderly. Far from it, the evidence points in entirely the contrary direction. However the United Kingdom has decided, as it is entitled to do, that immigration has to be controlled because a free for all would be disorderly.

45. It does not follow from this that anything that anybody might want to do comes within the scope of Article 8(1). Removal will almost always interfere with a person's private and family life. A person wants to be somewhere where the government says he must not be. In many cases such interference is wholly justified, lawful, proportionate and in every

other way acceptable but it is an interference. Refusal of entry clearance is not so clear cut. There are some relationships which the United Kingdom has to promote. Typically these are relationships between a husband and wife and parent and minor child. These are very special relationships that require particular respect. Here the appellant's children have chosen to live away from the appellants in the United Kingdom. They clearly continue a healthy, respectful and supportive relationship. The fact that they chose to live in a different country from the appellants should not be seen as a sign of abandoning their relationship with the appellants any more than would be the fact that they chose to live in a different house. However, without some particular level of dependency or other unusual feature,, it is not a relationship which generally has to be promoted by the United Kingdom/

46. I have noted the reference in the grounds to **Advic v United Kingdom** [1995] EHRR 57 mentioned in **ZB (Pakistan)** [2009] EWCA Civ 834 at paragraph 38. The European Court of Justice did not decide in **Advic** that a relationship between adults would attract the protection of the Convention where there was financial dependency. Rather it decided that in the absence of such dependency a Tribunal was entitled to conclude that a relationship was not protected. In **MT (Zimbabwe)** [2007] EWCA Civ 455 the Court of Appeal approved the need show that a relationship is "Beyond what would normally be accepted between adult family members in an adult child and parent" before Article 8 was engaged. In an out of country case, such as this, it seems me that something very much out of the ordinary will be needed before there is any duty on the United Kingdom to promote the relationship. A human right to enter the United Kingdom, even a right that is qualified, cannot be bought simply by proving a degree of financial dependency. Relationships between adult children and their parents are not part of the essential building blocks of society and so are not analogous to relationships between life partners or parents and minor children.

47. Here I am satisfied that the sponsor wants to do the best that he can for his parents. The concern that is expressed is natural between adults and their parents where there is respectful and loving relationship. It is established that there is some financial dependency. The sponsor wants his parents to live near to him now that they need him. The fact that that was not thought appropriate when they were healthier is not particularly illuminating. There is clear evidence they are willing to make considerable financial sacrifices in the United Kingdom.

48. However this is not something over and above the ordinary emotional ties. Rather it is an likely consequence of these ordinary emotional ties. I do not accept that on these facts there is any obligation on the United Kingdom to promote the admission of the appellants to the United Kingdom. If I might be permitted a convenient term of art, Article 8(1) is not engaged.

49. However even if I am wrong about this then refusing the appellants permission is proportionate. The United Kingdom has devised a series of Rules that concern certain circumstances. The Rules require a person

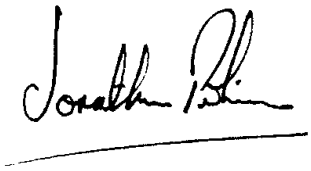
seeking admission to show that proper provision cannot be made in the country of origin and this the appellants failed to do. The decision is proportionate.

50. Mr Slatier has made me consider very carefully the decision in this case. He has also provided invaluable assistance. The bottom line is that although the appellants and their children in the United Kingdom would like the appellants to be in the United Kingdom at a difficult time in their lives they have not been able to show, as required by the Rules, that arrangements cannot be made locally.

51. In short, although I set aside the decision of the First-tier Tribunal I come to the same conclusion and I dismiss the appeal.

52. Although I have set aside the decision of the First-tier Tribunal I dismiss the appeal. I have not given an anonymity direction and I make no fee award.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 12 March 2015