



IAC-FH-AR-V1

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

Appeal Number: IA/33714/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd December 2015**

**Decision & Reasons Promulgated
On 5th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS SAHUNTHALADEVI MAHANDRANATHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss N Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Miss C Bayati, Counsel, instructed by Jein Solicitors

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in these proceedings I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of Sri Lanka, appealed to the First-tier Tribunal against a decision of the Secretary of State for the Home Department dated 12th August 2014 refusing the Appellant's application for leave to remain under paragraph 51 of the Immigration Rules and for an extension of stay as a visitor for private medical treatment. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge Eldridge allowed the

Appellant's appeal. The Secretary of State appeals with permission to this Tribunal.

3. The background to this appeal is that the Appellant entered the UK on 19th November 2013 on a 180 day multi-visit visa valid until 12 May 2014. On 10th May 2014 she applied to the Secretary of State for further leave to remain. The application was based on her physical and mental health difficulties and the fact that she was living in the UK and being maintained by her daughter and son-in-law who were covering all of her medical expenses.
4. The judge heard evidence from the Appellant and from her daughter and from her son-in-law. The Secretary of State was not represented at the hearing before the First-tier Tribunal. The judge noted that the Appellant did not rely upon any provisions of the Immigration Rules and considered the appeal on the basis of Article 8 of the ECHR. The judge found that the Appellant would meet the provisions of Section EC-DR of Appendix FM of the Immigration Rules which applies to applications for entry clearance from adult dependant relatives. In particular he found that the Appellant would meet E-ECDR 2.4 as someone requiring personal care and she probably now needs long term care. He found that she meets E-ECDR2.5 in that she had shown that she is unable, even with the financial help of the sponsor, to obtain the required level of care in Sri Lanka. He found "that given no relative can do so I consider it unlikely that a stranger, even for sensible payment, could provide the total care (including emotional support) needed" [22]. The judge went on to find that the Appellant would meet the requirements of E-ECDR 3.2 and E-ILRDR.1.2. The judge considered Section 117B of the 2002 Act. The judge concluded "this is a case in which there are compelling circumstances to justify the conclusion that removal breaches Article 8". The judge therefore allowed the appeal under Article 8 of the ECHR.
5. In her grounds of appeal to the Upper Tribunal the Secretary of State firstly contends that the First-tier Tribunal Judge erred in that it was unclear from the evidence whether or not the Appellant would meet the requirements in relation to an adult dependent relative. It is contended that the judge found that GP visits are not being paid for and therefore it is contended the Appellant is dependent on public funds. It is contended that the judge erred in that he found that he had no doubt that the families would give the required undertakings required in E-ECDR3.2 but it was submitted that there was no such evidence before the First-tier Tribunal to make this finding. The second ground contends that there was no evidence to show that the Appellant would meet the requirements of Appendix FM-SE in relation to adult dependent relatives and the Secretary of State relied on the case of **SSHD v SS (Congo) and Others [2015] EWCA Civ 387 [52-53]**. It is thirdly submitted that the First-tier Tribunal Judge did not fully engage with the public interest factors contained within the Rules when considering proportionality and the Secretary of State relied on the case of **PG (USA) v Secretary of State for the Home Department [2015] EWCA Civ 118**.

6. In granting permission to appeal Deputy Upper Tribunal Judge Rimington noted that, although the judge found that the Appellant was financially independent, there was extensive evidence of NHS medical treatment at tax payers' expense within the UK and it was arguable that the judge had not engaged appropriately with the public interest factors.
7. A Rule 24 response was submitted on behalf of the Appellant. In that Rule 24 response it is submitted that the First-tier Tribunal Judge's conclusion that the family would providing the necessary undertaking was not based on assumption and it was pointed out that in fact the necessary undertaking was provided with the application (albeit that it would have been for the duration of a shorter period as the application was made for a limited period). It is further contended that in the witness statements of the Appellant's daughter and her son it was expressly stated that the Appellant would be maintained and accommodated without recourse to public funds and that the necessary undertakings would be provided. It is therefore submitted that the Secretary of State's contention that the First-tier Tribunal Judge's conclusion was based upon assumptions and that evidence was factually incorrect.
8. In terms of public funds, it is contended that the judge correctly noted that GP visits are not being paid for but the judge had regard to the fact that the Appellant was paying for hospital treatment, counselling and prescriptions as evidenced in both the Home Office bundle and in the Appellant's bundle. It is further submitted that the judge made clear findings of fact on the evidence before him, both documentary and oral, having had the benefit of a considerable amount of medical evidence in relation to the Appellant's physical and mental health. The judge had also considered two reports from an independent social worker. It is submitted that the judge expressly considered whether the Appellant would satisfy the Rules if she returned and applied for entry clearance and that the conclusions that the family would provide the necessary undertakings was one open to him having regard to the evidence.
9. At the hearing before me Miss Willocks-Briscoe submitted that the judge had not taken into account factors in relation to the respondent's legitimate aim. In relation to the Immigration Rules Miss Willocks-Briscoe submitted that paragraph 51 of the Rules was initially before the judge and that it was accepted and noted by the judge at paragraph 5 of the determination that the Appellant could not meet the requirements of that paragraph. The judge was therefore obliged to consider that matter when considering the appeal outside of the Immigration Rules and that should have carried some weight in relation to the proportionality assessment. She submitted that the judge made reference to the fact that the Appellant would succeed under the adult dependent relative route but had not engaged with any of the evidence in relation to that issue.
10. In any event she submitted that an application as an adult dependent relative can only be made outside the country. In relation to the GP visits, she submitted that the judge did not engage with the issue as to whether

GP visits had been paid for and that this shows that the balancing exercise was accordingly skewed in favour of the Appellant.

11. Miss Bayati submitted that when the application was made it was originally for further limited leave to remain and that was why there was a reference to paragraph 51. However she submitted that it was clear in the Grounds of Appeal and at the hearing before the First-tier Tribunal that that is not how the case was being put. The case was actually put in terms of Article 8 and proceeded on the basis the Rules around adult dependent relatives rather than on paragraph 51. She submitted that the only reason the Appellant could not succeed under the adult dependent relatives provisions is because it is not possible to switch to that status in-country and it requires an out of country application. She submitted that the judge took the correct approach in this case in that he considered the evidence, made clear findings of fact, accepted the medical evidence and the social worker's evidence, made clear findings that the Appellant would be unable to look after herself and that the required support of the family here would not be available in Sri Lanka. She submitted that the judge found there was no additional recourse to public funds and that the judge found that the GP was not being paid for. She submitted that the judge looked at the adult dependent relative provisions and reached the view that those requirements were met.
12. Ms Bayati submitted that the judge then went on to look at Article 8 and concluded there would be interference to the family life. The judge accepted that the decision was lawful and justified. The judge went on to consider proportionality and considered Section 117B in that context. The judge said why, despite the public interest, there were compelling circumstances in this case why the Appellant could not return to Sri Lanka to make an entry clearance application [26]. She submitted that when the determination is looked at the judge has clearly adopted the correct approach. She submitted there was evidence before the Tribunal that counselling and hospital appointments and medication were all paid for but that GP visits were not paid for. She submitted that her instructions were that the oral evidence before the judge was that the GP had not billed the family for the visits and that that is a matter of discretion for GPs. She submitted that it was clear from the other medical evidence that the Appellant has paid for her treatment and the Appellant cannot be criticised in relation to the GP's failure to bill her. She submitted therefore that permission to appeal was granted on the basis of a misunderstanding as to the evidence before the judge.
13. Miss Willocks-Briscoe submitted that the judge cherry-picked one element of the Rules but did not consider the entirety of the provisions of the adult dependent relative Rules. However, when I asked her what other elements of the provisions in relation to adult dependent relatives should have been considered she was unable to point those out. She submitted that the judge said that there were no relatives and that caring could not take place in Sri Lanka but that the judge had no documentary evidence before him in relation to the provision of care in Sri Lanka. This was just a

mere assertion of the family and that evidence would have an element of bias. She submitted further that the judge did not consider the precarious nature of the Appellant's ties in the UK when they were created. She submitted that the judge made no consideration of the case of GS in relation to medical grounds.

14. Miss Bayati objected that the additional matters referred to by Miss Willocks-Briscoe in her reply were not in the grounds. Miss Willocks-Briscoe submitted that these come under ground 3 which contends that the judge failed to properly engage with the public interest. I gave Miss Bayati the opportunity to respond to the new matters raised. She objected to these further grounds being relied on but in any event she submitted that the grounds had been addressed and that the case had been put to the First-tier Tribunal Judge on the basis of Articles 3 and 8 and that the judge made clear determinations in relation to Article 8. In relation to the **GS** case she submitted that that was a private life case involving health where it was recognised that Article 8 would not resolve the issue if an Appellant had failed under Article 3 unless the Appellant had family life and the medical treatment was considered as a part of the proportionality exercise. She submitted that this is the case in this appeal where this Appellant has a case of family life and dependency. She submitted that the judge considered all factors relevant in relation to proportionality. She submitted that the judge did conclude that the Appellant required care and did consider whether care could be provided in Sri Lanka in the context of the Appellant's physical and mental health needs.

Error of Law

15. I have considered all of the submissions made by both parties and all of the material before me. I am satisfied that the judge made no error of law in this decision. The evidence before the judge was that the GP visits were not being paid for but prescriptions, her hospitalisation and counselling were all being funded by the family [23]. I am satisfied that the judge had sufficient evidence to make this finding and also I accept Miss Bayati's submission, which was not disputed by Miss Willocks-Briscoe, that there was evidence before the First-tier Tribunal Judge that the GP had not billed the family for visits. In these circumstances the judge's conclusion was open to him and in these circumstances it was open to the judge to conclude on the basis of all of the evidence that the Appellant is financially independent in terms of Section 117B of the 2002 Act.
16. The judge found at paragraph 23 that he had no doubt that the two families in the UK would give the required undertakings as to future financial requirements for the five year period mentioned in E-ECDR3.2. I am satisfied on the basis of the evidence before him as to the undertakings already given by the Appellant's son and daughter and their clear intentions as expressed in the evidence before the judge that this was a finding open to the judge and therefore a finding relevant to Section 117B that the Appellant is financially independent[25].

17. I am therefore satisfied that the judge made no error in terms of the assessment of the Appellant's financial independence and in terms of this element of the public interest requirements.
18. The judge considered the provisions of Appendix FM in relation to adult dependent relatives. I am satisfied that the judge undertook this exercise properly. Although Miss Willocks-Briscoe submitted that the judge had not engaged with all elements of Appendix FM in relation to adult dependent relative she was unable to point to any particular aspect that the judge had omitted. I accept the submission put forward by Miss Bayati that the findings in paragraph 22 made by the judge in relation to the availability of care in Sri Lanka were open to him on the evidence. It was open to the judge to conclude that appropriate care, including the emotional support required in light of the Appellant's mental health issues, could not be provided in Sri Lanka. In these circumstances I am satisfied that the judge did properly consider the provisions of Appendix FM which were the appropriate Immigration Rules in this case in his assessment of proportionality under Article 8.
19. In the Grounds of Appeal the Secretary of State relied on the case of PG (USA). However I note that that was in the context of migrant workers and the family of migrant workers temporarily living in the UK. In this case the Appellant's daughter is British and her son is settled in the UK and I am satisfied that the judge took into account all of the circumstances of the Appellant and of her son and daughter in assessing proportionality in this case.
20. I find that the First-tier Tribunal Judge did engage with all appropriate issues in this case. The First-tier Tribunal Judge looked at the relevant Immigration Rules in this case, the adult dependent relative provision of Appendix FM, the judge considered Section 117B of the 2002 Act and the judge considered all of the evidence in the context of the proportionality assessment under Article 8.
21. I am satisfied that the judge made a decision open to him on the evidence and the grounds disclose no material error of law.

Notice of Decision

22. The decision of the First-tier Tribunal Judge contains no material error of law. The decision of the First-tier Tribunal Judge shall stand.

No anonymity direction is made.

Signed

Date: 22 December 2015

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The fee award made by the First-tier Tribunal shall stand.

Signed

Date: 22 December 2015

Deputy Upper Tribunal Judge Grimes