



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

Appeal Number: IA/40329/2014

THE IMMIGRATION ACTS

**Heard at Birmingham ET
On 22 January 2016**

**Decision & Reasons Promulgated
On 26 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR KARNA SUDNHANA SARKAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Sarwar, counsel instructed by Malik Law Chambers
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of FTTJ Pooler, promulgated on 13 January 2015.

Background

2. The appellant, aged 71, entered the United Kingdom with limited leave to remain as a visitor, on 25 March 2014. On 18 June 2014, he sought leave to remain on the basis of his private life. That application was refused on 28 August 2014 because the respondent considered there were not very

significant obstacles to the appellant's integration in India, where he had lived for "74" years and from where he had been able to maintain his relationship with his family. It was also considered there were no exceptional circumstances involved because medical treatment was available in India to treat the appellant's condition.

3. In his grounds of appeal, the appellant argued that the respondent failed to consider his application under paragraph 317 of the Immigration Rules; that a discretion should have been exercised differently in view of the fact that the appellant suffered from medical conditions and had no family members in India to provide support and the respondent had failed to consider the cultural aspects of the case, in that there was an expectation that in Indian culture a son would provide care and accommodation to his parents in their old age.

The hearing before the FTTJ

4. The appellant, his son and daughter-in-law gave evidence before the FTTJ. The FTTJ concluded that the respondent's decision was in accordance with the law and declined to remit the matter to the Home office on the basis that duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 had not been complied with. He dismissed the appeal under paragraph 276ADE(vi) of the Rules; and Article 8 ECHR outside the Rules.

Error of law

5. The grounds of appeal resurrect the argument that paragraph 317 of the Rules, notwithstanding that this was not relied upon by counsel for the appellant at the hearing before the FTTJ. It was further argued that the FTTJ's findings that the appellant could receive personal care in India were illogical given it was undisputed that the daughter-in-law had cared for the appellant in India for 8 months prior to his arrival in the United Kingdom. Criticism was made of the failure of the FTTJ to consider the appellant's case in line with Appendix FM even if this was not pursued at the hearing.
6. FTTJ Baker granted permission, finding there to be an arguable error of law for the FTTJ not to make findings under Razgar and not to have considered the appeal under paragraph 317 of the Rules.
7. The Secretary of State's response of 11 March 2015 submitted that the FTTJ directed himself appropriately and that paragraph 317 did not survive the changes to the Immigration Rules, which took place on 9 July 2012 except for those with a prior application under that category.

The hearing

8. Mr Sarwar expanded on the three grounds of appeal, the first of which he considered to be the strongest. In addition, while noting that permission to appeal had been granted on the basis that Razgar was not taken into account, he commented that it was clear that the FTTJ had done so. Mr

Sarwar insisted that findings of fact in relation to the requirements of paragraph 317 ought to have been made and should have guided the judge's Article 8 consideration outside the Rules. He conceded that all references to paragraph 317 should in fact be to the new Rules, that is E-ECDR 2.1 to 3.2. With regard to the other two grounds, he accepted that the sponsor's changing financial circumstances were taken into account at [36] of the decision and that the FTTJ had indeed considered that the appellant's daughter in law had provided care to the appellant in India at [14] and that the appellant suffered from chronic kidney disease, at [15].

9. In response, Mr McVeety stressed that the appellant's representative before the FTTJ had conceded that the appellant did not meet the requirements of the Rules. It was open to the FTTJ to consider that submission and simply reject the case, however he had undertaken a Razgar analysis approached through the prism of the Rules. The FTTJ had considered entry clearance rules. The relevant Rules posed many hurdles to cross including whether care was available in the country of origin, could the appellant access it and whether it was affordable. Furthermore, at no stage has any part of the Rules been identified which it is said the appellant met. He concluded by describing the appellant's challenge as merely a disagreement with a well-determined decision.
10. Mr Sarwar replied by simply maintaining that the FTTJ failed to look at the Rules first.

Decision on Error of Law

11. At the end of the hearing, I decided that the FTTJ had made no error of law and upheld his decision. My reasons are as follows.
12. It is apparent from [8] of the FTTJ's decision that the appellant's counsel before the FTTJ "*placed no reliance on paragraph 317.*" While this Rule would never have applied to the appellant given the time of his application, I take this as a reference to E-ECDR of Appendix FM. The FTTJ did likewise. From [35] of the decision onwards, the FTTJ examined whether the appellant required long-term care. He carefully considered the medical evidence before him and concluded on the basis of that evidence that there was no indication as to "*precisely what care would be required by the appellant such that a comparison of the levels of care available can be properly made.*"
13. The FTTJ also considered whether care would be available and whether it would be affordable at [36] of the decision. He clearly acknowledged that the appellant would have to rely on others for help if his son and daughter in law chose to remain in the United Kingdom, however the FTTJ was not satisfied, on the evidence before him, that such care could not be obtained.
14. The FTTJ also rejected the claim that care for the appellant would be too expensive on account of her failure to make any enquiries as to the

availability of care. It was at this stage, that the FTTJ took into consideration the fact that the sponsor had recently moved to a larger property and had larger mortgage payments. This also disposes of ground 2, at paragraph 6 of the grounds.

15. As conceded by Mr Sarwar, the FTTJ fully considered the appellant's kidney complaint at [15] of the decision.
16. The appellant's appeal is dismissed.

Conclusion

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I uphold the decision of the FTTJ.

No anonymity direction was made by the FTTJ and I am aware of no reasons for making such a direction now.

Signed

Date: 24 January 2016

Deputy Upper Tribunal Judge Kamara