IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03969/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th February 2016	**On 4th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS KULDEEP KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N S Ahluwalia instructed by Hounslow Legal Services
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier

Tribunal, that is Mrs Kuldeep Kaur as the appellant and the Secretary of State as the respondent. The respondent applies with permission to appeal against the decision of the First-tier Tribunal promulgated on 4th September 2015 allowing the appellant's appeal against the Entry Clearance Officer's decision to refuse leave to enter as an adult dependent relative.

2. The grounds requesting permission to appeal to the Upper Tribunal noted that the judge had allowed the appellant's appeal under paragraph E-ECDR of Appendix FM but asserted the judge had failed to give adequate reasons, failed to apply the correct standard and burden of proof and failed to make a finding on a material fact.

3. The judge had failed to record and failed to make any findings on the submissions raised by the respondent's representative at the hearing and the application relied on the case of **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)** which stated:

"it is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost".

4. The respondent submitted that as a party to the proceedings she was entitled to know why the submissions were not considered. There was no record of any submissions made and indeed from an initial reading of the determination there was no indication the respondent even attended the appeal and therefore indicated that the judge had materially erred in law.

5. The respondent's representative submitted that the sponsor had confirmed in his evidence there were potential care facilities available to the appellant if she relocated to Delhi but the judge had made no findings on this submission and not even recorded the submission and had failed to consider the obvious point that poor service from one single care agency in India did not in any way meet the requirement for there to be no person in India who could reasonably provide the care.

6. It was further submitted that the judge had failed to adequately address and consider the required standard and burden of proof. The judge appeared to accept without supporting evidence the claim that in Sikh culture daughters in effect abandon all responsibility for their parents. The respondent submits this claim was unsupported by any objective evidence, which it was submitted, would be easily available if indeed this was a cultural norm accepted by the Sikh community. On the balance of probabilities the absence of any evidence to support such a claim did not discharge the burden of proof.

7. There was before me indeed a minute from the Home Office Presenting Officer, Ms Stacey-Ann Willoughby relating to submissions that had been made, which included that it should be open to the appellant to move to Delhi where the sponsor had also advised that there were agency services that provided medical treatment. Further it was submitted that it could not be found that the care was not affordable as the sponsor was currently financially supporting the appellant.

8. The decision had not engaged with the points made by the presenting officer in the first tier tribunal and which included why the appellant could not move to Delhi or why the daughter could not move to where the mother was to provide care. From the oral evidence the sponsor stated that care was available in Delhi but stated it was too far away to get it. It was submitted that the appellant could move to Delhi to get care. It was stated by the sponsors that it was culturally unacceptable for care to be undertaken by the daughter and should be undertaken by the elder son. It was quoted that the doctor had stated that the appellant needed care of the family and if that was the case, the appellant's sponsor could relocate to India.

9. At this point I was reminded by Mr Ahluwalia that the claim was made under the Immigration Rules and not Article 8 and there is no requirement that the sponsor should move to India.

10. That said, the submissions for the respondent include that it is the appellant who is required to show that there is no available care in India and that there appeared to be an inconsistency in that presently the appellant was indeed securing agency care and that it could not be shown that there is no available care in India for the appellant because of some difficulties in the provision of that care. Further it was submitted that the appellant had not provided evidence of what 24 hour care would be provided and could not say it was not affordable.

11. Mr Ahluwalia contested that there was reference to the Entry Clearance Officer's position as this was set out at paragraph 31. He submitted that the key conflicts of evidence had been explained, and the judge had set it out in a properly structured manner and rehearsed the evidence and set out the relevant Immigration Rule. Mr Ahluwalia submitted that the judge applied the civil standard and burden of proof, analysed the form of Rules at paragraph 22 and the entry clearance guidance at paragraph 31 and had note of the medical reports regarding the physical difficulties. There was no challenge in relation to the issue at paragraph 26. Crucially at Paragraph 30 the judge had set out the oral evidence and indeed there was much evidence regarding cost during the case before the First-tier Tribunal. The medical evidence accepted that the appellant required full-time care and the sponsor was just able to afford the lower care of two hours per day. The £300 he sent each month only covered the part-time nurse.

12. Mr Ahluwalia advanced that there was no evidence provided by the Secretary of State to the effect that the appellant's sponsor could afford it. Even absent the finding that the appellant should go to a different agency he could still not meet the cost of 24 hour care. In relation to cultural factors there was evidence from the family member that this was the cultural reality and for this daughter and this family living in the circumstances that she did it was clear that she would not be able to be responsible for the appellant. The judge had set out the reasoning at paragraph 32.

13. I find that there is an error of law in that it is clear that the submissions of the Presenting Officer had not been adequately dealt with or at least the findings in relation thereto have not been made. The submissions recorded from the Home

Office Presenting Officer in the record of proceedings run to two and half pages of hand written script and appear to reflect the points made in the application for permission to appeal. These include whether the appellant could move to Delhi where care is available, the fact that at present the appellant was receiving care, the lack of evidence in relation to the availability and cost of care and the lack of affordability.

14. At paragraph 30 the judge does state that the staff provider for the appellant was often unreliable but the submission made by the Home Office Presenting Officer was that the mother could move to Delhi to be nearer the sister, and I note from the witness statement that the appellant's daughter in Delhi does not say that she does not see her mother at all but rather that it is a long way away. In particular the judge seems to rest the decision on the "unreliability of the carers". The submission by the Home Office Presenting Officer that the appellant could move to Delhi was one which was a fact which should have been taken into account by the judge even if only to reject it. As stated, there was no objective evidence to the effect that the cultural factors relating to the female family members in India and it should be noted that the guidance refers to whether someone can "reasonably provide a required level of care". This applies to "home help, housekeeper, nurse, carer or care or nursing home".

15. Even though the guidance refers to relevant cultural factors such as in countries where women are unlikely to be able to provide support, there appeared to be no evidence provided in relation to this.

16. With regard to the burden and standard of proof it is not the responsibility of the Entry Clearance Officer to provide evidence of the full-time care affordable in Delhi.

17. It was put clearly in the frame by the Entry Clearance Officer that he was not satisfied the appellant was unable to obtain the required level of care in India and that any care, if required, could be provided through financial help from the sponsor. I find that the judge did not make the appropriate and relevant findings in relation to the issues, particularly in the context of the Home Office Presenting Officer's submissions which the judge recorded.

18. I therefore find that the judge made and error of law which is material and I set aside and re-make the decision.

19. The relevant Immigration Rules are found at EC-DR 1.1(d) and refer to

> *E-ECDR 2.4*
>
> *The applicant or, if the applicant and their partner are the sponsor's partner or grandparents, the applicant's partner, must as a result of age illness or disability require long-term **personal** care to perform everyday tasks*
>
> *E-ECDR.2.5*

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 were 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."

20. The relevant date for my decision is the date of the decision of the Entry Clearance Officer which is 20th January 2014. The detailed medical evidence from the Apollo Clinic dated 5th March 2015 postdates that decision by over a year. The issue is the personal care that is needed and would be available to the appellant as at the date of the decision. The appellant stated that she had a double hip replacement and walked with a zimmer frame. From the medical evidence supplied it would appear that the replacement took place in 2013. A report from Escorts Hospital dated 28th January 2014 stated that the appellant had been operated on twice for fracture hips due to severe osteoporosis and that

'patient is now dependent on external support for day to day activates. She also needs moral support to keep her going as she can not do her dally chores on her own. She will need day to day active care in view of her age and osteoporosis to rehabilitate her'.

21. This referred to rehabilitation but not long term personal care. Further there was no reason given as to why this personal care could not be given by a nursing carer or home help at her home. The sponsor gave evidence that she needed assistance with cooking cleaning, bathing shopping and washing. The sponsor pays for a part time maid /nurse who attends to the appellant a couple of hours a day to do such tasks but that once the maid goes the appellant is on her own for the rest of the day and the entire night. The helper, the sponsor asserted, was not always reliable and sometimes did not turn up or come later than agreed. On those occasions the appellant has to turn to one or two neighbours who are able to offer limited assistance. This does not suggest that the care was fundamentally unsuitable or unreasonable. Further, there was no firm evidence that the appellant had cognitive needs or required 24 hours or night care. Nor was there any firm financial assessment of that cost and thus any detailed or firm assessment of the sponsor's financial ability (albeit bank statements were produced) to meet this save for his assertions that he would not be able to meet 24 hour care.

22. I find that the evidence for the need for care when viewed in the context of the applicant's own statements is limited indeed. At paragraph 1.16 of the application when asked "could your UK sponsor or another close relative/person pay for your care arrangements in the country where you are living?", the appellant replied 'yes'. She added "my son can pay but to get *quality* and long-term care is not possible as I am getting very old and need proper care and emotional support which is only possible by staying with family".

23. There was no evidence of the cost of full-time care as at the date of decision. With reference to that date, the Entry Clearance Manager review stated

> *"No evidence has been submitted now to show that she does indeed require constant care or to show why she cannot secure full-time domestic help. It would seem that the appellant would prefer not to have live-in care .... the Rules are not in place to suit individual people's individual preference"*.

24. There was a suggestion that the daughter in Delhi could not assist because of cultural reasons. No firm objective evidence to that end was submitted and additionally this is not what the appellant records in her application form because at paragraph 1.14 the appellant states "daughter in India cannot provide care because she is married and busy with her own family and cannot come and stay with me". There was no mention of cultural factors at that point. The appellant does see her daughter as confirmed in her application albeit on an irregular time scale as she lived far away. A witness statement of the daughter dates from March 2015, which is after the refusal, and this asserts that 'as per our culture mothers don't live with daughters after the marriage'. This is merely a general assertion and even if that were accepted, it is not a requirement that she should *live* with the daughter merely that she might wish to live closer to supervision. There was no evidence submitted as to why the appellant herself could not move to Delhi and indeed it was suggested that she was going to be relocated to the United Kingdom, much further than Delhi, and all the disruption and costs that that entailed.

25. The key issue in this is that there was no medical or other firm evidence as at the date of decision that the appellant actually did require 24 hour care or indeed, or the level of care required, was unsuitable and could not be provided for financially. The guidance cited in relation to Family Members Under Appendix FM of the Immigration Rules appendix FM Section FM 6.0- Adult Dependent Relatives' identifies that care does not need to come only from relatives and refers rather at 2.2.3 to '*no person in the country who can reasonably provide care*'. The guidance continues that this may derive from a home help or carer. When addressing the cultural factors, even if the appellant has no close family members in India who are able to assist in providing the care she needs, it was not demonstrated that care could not reasonably be provided by the home help or carer.

26. I find that on remaking the decision the appellant has not fulfilled the requirements of the Immigration Rules. I am not persuaded that there are further relevant matters to be considered in relation to Article 8 which have not already been addressed under the Rules. Even if that were incorrect and family life were engaged, applying **R (Razgar) v SSHD [2004] UKHL 27,** the decision was in accordance with the law and necessary for the protection of rights and freedoms of others through the maintenance of immigration control. The starting point must be the Immigration Rules which sets out the position of the Secretary of State. As to proportionality the appellant has a daughter in India and neighbours to whom she can turn, home help, and the financial assistance of the sponsor in this country which could continue. I have considered the interests of the family in the United Kingdom, **Beoku-Betts (FC)**

(Appellant) v SSHD [2008] UKHL 39, and I note that the sponsor may have difficulty in visiting but as at the date of decision is able to keep in contact via modern methods and visits are possible. I must also engage Section 117B of the Nationality Immigration and Asylum Act 2002 and there was no indication that this appellant could speak English and this is a factor which I take into account when balancing the rights of the individual against the public interest. Although there was an indication that private health care could be enlisted when the appellant was in the United Kingdom, I am not persuaded that she would not be a burden on the NHS system when located n the United Kingdom. At the date of decision I conclude that it would be reasonable to expect the appellant and sponsor and family to continue conduct family life as has been done hitherto. That said, if the medical conditions are now such that they meet the Immigration Rules it is open to the appellant to make a fresh application.

27. Following **Huang v SSHD [2007] UKHL 11**, and taking full account of all considerations, I did not consider that any family or private life of the claimant was prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.

28. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and dismiss the appeal.

Order

I dismiss the appeal under the Immigration Rules and on Human Rights grounds.

No anonymity direction is made.

Signed Date 22nd March 2016

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 22nd March 2016

Deputy Upper Tribunal Judge Rimington