Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06997/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 14 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MRS SHAFIQA HASHEME
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Ms M Vidal, counsel, instructed by Haris Ali Solicitors
For the Respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Afghanistan, date of birth 6 September 1943, appealed against the ECO's decision dated 5 August 2015 to refuse entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules HC 395 (as amended). Her appeal was dismissed by F-t T Judge Paul (the Judge) on 25 April 2017. Permission to appeal was given by F-t T Andrew on 31 May 2017. The Secretary of State ,on behalf of the ECO made a Rule24 response on the 20 June 2017

2. Refusal was on essentially three bases the first of which is no longer significant in relation to the relationship between the Sponsor and his mother. The second basis of refusal was that the Appellant had failed to satisfy the requirements of paragraph E-ECDR.2.4, which states: "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." Refusal was also effectively with reference to E-ECDR.2.5, which provides that the Appellant is unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in Afghanistan, 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." There is no issue that (b) is not pertinent.

3. It was accepted by Mr Bramble, wholly correctly, that the Judge, simply failed to address the correct version of the provisions within the Rules, particularly paragraph E-ECDR.2.4. It was argued by Mr Bramble that in any event the Judge looked at the evidence and whilst not correctly referring to the right Rules nevertheless applied them as a fact. Therefore there was no arguable material error of law which would mean that a different outcome of the appeal would be reached.

3. Whilst the Judge said, of the matter, that the requirements of the Rules were clear: He thereafter made it plain he did not understand the Rules or apply them. Nevertheless the Judge does correctly summarise E-ECDR.2.4 at least so far as stating "… The Appellant would have to demonstrate that the Appellant required long-term personal care to perform everyday tasks." He does also recite in its generality the question of whether or not care could be provided by an appropriate person in Kabul. However, at paragraph 16 of the decision the reasoning elides to mix the two points together: The Judge concluded that the Appellant had not crossed a threshold of requiring 24 hour care to help her conduct normal tasks but reached no conclusion on the reasonableness of the care that could be provided, which was an issue clearly raised by the Sponsor before the Judge. Unfortunately, the Judge did not really consider reasonableness he simply asked the question as to whether or not care is available, not was there a person who could provide it i.e. at a reasonable level of care, which is the second part of the limb of paragraph ECHR 2.5(a).

4. I have looked at the decision as a whole and it is clear that the Judge received the evidence from the Sponsor. He recited that evidence and indeed the evidence that confirmed the Appellant's ill health. The Judge does not doubt that evidence or even criticise it in terms of the views expressed by the Sponsor concerning either the Appellant's health, her worsening condition, the problems of caring for her on a daily basis and the difficulties of obtaining such appropriate care from third parties. For reasons that I do not speculate, having not criticised the Sponsor's evidence on material issues I do not understand the Judge's reasoning as to why at least the questions could not be better addressed than they were.

5. It seemed to me the critical element is the reasonableness of obtaining the care provided to the appropriate standard that is undoubtedly fact-driven.

6. In these circumstances I am satisfied that the Original Tribunal made a material error of law in the reasoning and the Original Tribunal's decision cannot stand.

7. In the circumstances the parties are agreed that I can remake this matter and do so taking into account a second witness statement made by the Sponsor, dated 7 July 2017. The Sponsor, a British national, date of birth 30 November 1972, both adopted his earlier witness statement, of 27 March 2017, to which I have referred but also identified how his continued presence was necessary to care for his mother in Afghanistan: But that he had the particular financial burden of managing his own life, his employment, more particularly the care of his mother and its costs over in Afghanistan. There are also practical difficulties over his being able to communicate with his family in the UK.

8. I therefore, for my own part, conclude that the Sponsor met paragraph E-ECDR.2.3 of Appendix FM and I find that, on the evidence that was before the Judge, and before me it is clear his mother does require long-term personal care to perform everyday tasks. I find further that the attempts which have been made including using third parties as opposed to simply the Sponsor's efforts have shown that the required and reasonable level of care is not available to this lady with her serious health conditions and that there is no-one in the country who can reasonably provide it: Bearing in mind it is 24 hour care needs to be called upon. The fact is that the jobs which the Sponsor has done spoken to in his statement of 27 March 2017 have been the responsibility of others, including another family member when she was present there, but when in the hands of third parties quite simply the care has not been of a reasonable standard. In those circumstances I take into account the evidence from the hospital, Appellant's bundle (A18), which confirms that the Appellant suffers from a range of illnesses including hypercholesterolaemia, hypertension, Alzheimer's disease and high depression. It also confirms given the nature of her illnesses and the fact that in the past she has failed to properly self-medicate it is suggested that she is looked after by a carer and/or a member of her family to ensure her wellbeing and her recovery. The letter continues: "She is elderly, fragile and requires regular intake of medication therefore, failure in monitoring her closely may result in further complications in her condition."

9. The hospital affirms that they have done what they can but that the Appellant no longer requires the environment of the hospital but rather the close practical and emotional support and assistance which she needs on a daily basis. In those circumstances I find on the evidence bearing in mind the apparent high threshold being applied under E-ECDR.2.5 that nevertheless the Appellant has adduced sufficient evidence to discharge the burden of proof upon a balance of probabilities that she meets the requirements of Appendix FM of the Immigration Rules. I therefore consider the present circumstances warrant consideration of Article 8 ECHR.I do so in the context of the consideration of Section 117A-117B of the NIAA 2002 as amended. At the age of the Appellant and given her health she will be supported and cared for by family in the UK. It does not seem likely that she will

need English language skills or to work in the UK or be taking steps to integrate here. I apply the approaches set out in Razgar [2004] UKHL 24 and Huang [2007] UKHL 11.

10. I find private/family life rights are engaged and the ECO's decision to refuse entry is a significant interference with Article 8 ECHR rights for the Appellant to be reunited with her family in the UK. I find the ECO's decision is lawful and serves Article 8(2) ECHR purposes. I find the appellant ability to comply with the requirements of the Immigration Rules is a material consideration. In this case I find the public interest is outweighed by the Appellant's personal circumstances. I find the ECO's decision is disproportionate

NOTICE OF DECISION

The appeal is allowed under Article 8 ECHR.

ANONYMITY ORDER

No anonymity order is required or necessary.

Signed Date 8 August 2017

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

A fee of £140 was made.

In the circumstances I make a fee award, the appeal having succeeded in this case, in the sum of £140.

Signed Date 8 August 2017

Deputy Upper Tribunal Judge Davey