Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15560/2014

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 27 July 2017	**On 27 September 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ENTRY CLEARANCE OFFICER - MUMBAI

Appellant

and

MRS SWATI KARI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr McVeety, Presenting Officer
For the Respondent: Mrs N Drawid, Sponsor

DECISION AND REASONS

1. The Entry Clearance Officer appeals with permission against the decision of First-tier Tribunal Judge Farrelly promulgated on 22 April 2016 allowing the respondent's appeal against the decision made on 30 November 2014 to refuse her entry clearance to the United Kingdom as an adult dependent relative.

2. The respondent is a citizen of India born 14 September 1947. She owns her own apartment but having previously tried to reside in a residential home, found herself unable to do so and returned to her own apartment in

June 2014 before making the present application. She has a sister who is older than her and who lives in Pune. The sister is widowed; she also has a younger sister living in Australia.

3. The sponsor is the respondent's only child. She came to the United Kingdom on 23 April 2000 and currently works in a local hospital as a physiotherapist. She and her husband lived in Belfast with their two children; he is also employed in the local hospital.

4. The Entry Clearance Officer refused the application on the basis that the applicant did not fulfil the requirements of EC-DR.1.1(d) on the basis that she was not financially dependent on the sponsor for day-to-day requirements and that there were no exceptional circumstances such that any grant of entry clearance outside the Immigration Rules was warranted.

5. It is, however, asserted in the Entry Clearance Manager's review that the only matter in question is whether care is not available in India or that there is no-one who can provide it, it being noted there are adequate care homes in India where the respondent would receive appropriate care and treatment and whilst that might not be the respondent's preferred choice of care it is available and is the level which she requires.

6. The judge found that the applicant did not fulfil the requirements of E-ECDR.2.5 which provides as follows:-

> 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 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.

7. The judge directed himself in line with AD (Pakistan) v SSHD [2016] EWCA Civ 313 and Dasgupta (Error of law – proportionality – correct approach) [2016] UKUT 00028 finding [22] considerable factual similarities with Dasgupta, the distinguishing feature here being that the sponsor had not threatened to uproot her family to be with her mother. He found that there was a very close bond between the sponsor and the respondent given she is an only child and that her father had been absent all her life but that the mother's ability to function independently had reduced and, whilst comparatively young. the evidence indicated she has experienced difficulties psychologically impacting on her physical health and while she did not meet the requirements of E-ECDR.2.5 and the respondent and sponsor are in a position to finance care in India and that whilst there are care homes available that should take care of the immediate physical needs, including feeding and supervision, the emotional support that could

be provided on a day-to-day basis would be missing concluding that the Rule had yet to be tested in court [23] appeared to be restrictive, focusing upon material needs.

8. The judge found that family life did exist between the respondent and the sponsor; that consideration outside the Immigration Rules was required [25] and, that the decision was disproportionate [26].

9. The Entry Clearance Officer sought permission to appeal on the grounds that the judge had erred:-

   (1) in failing to consider the relevant case law when finding that family life existed between the respondent and the sponsor;

   (2) that the judge had failed to make a reasoned assessment following **Razgar** in that as family life had been maintained by regular visits a refusal of entry clearance did not prevent the respondent from making a visit application or from the sponsor visiting the appellant and that this did not amount to compelling circumstances such as to justify a departure from the Immigration Rules.

10. On 25 October 2016, Upper Tribunal Judge Martin granted permission to appeal concluding that it was arguable that the judge had failed to identify why Article 8 was engaged and in failing to identify the compelling circumstances.

11. Mr McVeety accepted that the grounds appeared not to have engaged with the more recent case law. I agree. It cannot be argued though that on the facts of this case the judge erred in concluding, recognising this was a highly fact-sensitive issue, that unusually that family life did exist between the adult respondent and her daughter. That was clearly a conclusion open to him on the evidence and is adequately and sufficiently reasoned. Contrary to what is averred the judge did have regard to the principles as set out in **Ghising** in the Court of Appeal. If anything it is the Secretary of State who, in drafting these grounds, simply ignored the more recent jurisprudence.

12. The sponsor explained that her mother is depressed but that given the stigma attached to mental illness was not prepared to obtain a diagnosis. She said that she struggles in living a normal life and that the respondent can no longer cope. She said that the only option now is for her to return to India with one of the children, her husband remaining here in the United Kingdom with the other.

13. I am satisfied that although the judge gave adequate and sustainable reasons for concluding that the respondent had a family life and that Article 8 was engaged, there is no indication that he had proper regard to the public interest in this case in assessing proportionality. Whilst it was not incumbent on him to set out Section 117A and 117B of the 2002 Act, it has to be evident that he had taken that into account. There is no such

indication and whilst he does make reference to the similarities with Dasgupta, equally there were on the evidence before him significant differences in that the family would not be split. It cannot be argued that the situation here is one where control is maintained. On the contrary, Article 8 is being used here as a means of dispensing with the clear policy of the United Kingdom government to exclude people in the respondent's situation. While the judge does find that the respondent is unlikely to be a burden on the public purse and has some command of English, this is not entirely clear. The failure to engage with the public interest is all the more stark when considering the policy considerations identified in BRITCITS v SSHD [2017] EWCA Civ 368.

14. Accordingly, for the reasons set out above I am satisfied that the decision of the First-tier Tribunal must be set aside.

15. In deciding how the decision should be remade, I bear in mind that I do have jurisdiction to reopen the issue under the Immigration Rules, albeit that there was on cross-appeal on that issue. It is notable from the judge's decision that he concluded, that the approach to paragraph ECDR was limited to medical needs. That appears now to have been in error, given what was stated in BRITCITS at [76]: -

> "76. Thirdly, for the reasons I have given the appellant has not established that the conditions for entry and right to remain for ADRs under the new ADR Rules are incapable of practical fulfilment in virtually all cases for parents, let alone for all the categories of ADRs entitled to apply, whose family life engages Article 8. In particular, rejection on the basis of the availability of adequate care in the ADR's home country turns upon whether the care which is available is reasonable for the ADR to receive and of the level required for that applicant. Contrary to the submission of the appellant, those considerations are capable, with appropriate evidence, of embracing the psychological and emotional needs of elderly parents."

And also paragraph 59:-

> "59. Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be 'reasonably' provided and to 'the required level' in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of

> care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed."

16. Further, the nature of any findings in respect of the Immigration Rules which may however need to be addressed by the provision of additional evidence relating to the situation of the respondent at the date of refusal, such as any medical reports or other reports commenting on her psychological and emotional needs, may now be necessary. These considerations would of necessity inform a consideration of Article 8 outside the Rules.

17. Whilst I am aware of the difficulties that there may be given the restrictions of what can and cannot be taken into account in an appeal against entry clearance to which Section 85 of the 2002 Act applies, I nonetheless, consider that the matter needs to be remitted to the First-tier Tribunal for fresh consideration. I am also satisfied that extraordinarily, it would be appropriate to remit the case back to Judge Farrelly for him properly to carry out the exercises identified above.

SUMMARY OF CONCLUSIONS

18. The decision of the First-tier Tribunal involved the making of an error of law, and I set it aside. The findings of fact in respect of family life existing are preserved.

19. I remit it to the same judge, First-tier Tribunal Judge Farrelly for a further consideration of the case under the Immigration Rules and on human rights grounds

Signed Date 25 September 2017

Upper Tribunal Judge Rintoul