Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01518/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2018	**On 1 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MRS MINOTI RANI SAHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr E Fripp instructed by Morden Solicitors
For the Respondent: Mr E Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Bangladesh, whose date of birth is 2nd January 1946, appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer dated 12th December 2016 to refuse her application for entry clearance as an adult dependent relative of her son in the United Kingdom. First-tier Tribunal Judge Swaniker dismissed the appeal in a decision promulgated on 9th April 2018. The Appellant now appeals to this Tribunal with permission granted by Judge Hollingworth on 1st August 2018.

2. The background to this appeal is that the Appellant applied for entry clearance as an adult dependent relative. It is claimed that her husband died in 2012 and that two of her children live in Canada and the other two in the UK. It is claimed that she has a

number of medical conditions which indicate that she requires long term personal care and that she is a Hindu and requires personal care only from within the Hindu community and that this is not available to her in Bangladesh.

3. The First-tier Tribunal Judge heard oral evidence from the Sponsor. The judge concluded that the Appellant met the requirements of paragraph E-ECDR 2.4 of Appendix FM of the Immigration Rules and that as a result of age, illness or disability she requires long -term personal care to perform everyday tasks. However the judge did not accept that the Appellant had demonstrated that she met paragraph E-ECDR 2.5 on the basis that she had not provided the specified evidence set out in paragraph 35 of Appendix FM-SE of the Immigration Rules. The judge accordingly considered that the Appellant had not submitted any of the documents specified to demonstrate that she is unable to obtain the required level of care in Bangladesh. The judge went on to consider Article 8 outside of the Immigration Rules and found on the evidence that the Appellant's relationship with the Sponsor is not such as constitutes family life within Article 8. However, in the event that he was wrong in that conclusion, the judge went on to consider proportionality and concluded that the Appellant had not established that there were exceptional circumstances warranting the issue of entry clearance on Article 8 grounds outside of the requirements of the Immigration Rules.

The grounds of appeal and submissions

4. The Grounds of Appeal set out five grounds challenging the decision of the First-tier Tribunal. The first ground contends that the judge does not state in terms that she found paragraph E-ECDR 2.5 of Appendix FM to be unmet instead focusing on the evidential requirements set out in paragraph 35 of Appendix FM-SE. It is contended that it appears from paragraphs 24 to 26 of the decision that paragraph E-ECDR 2.5 was not met even though the judge found at paragraph 24 that, as a devout Hindu the Appellant required care to be provided by a member of the Hindu community. It is contended that the judge was preoccupied with the evidential requirement at paragraph 35 of Appendix FM-SE and that this dominated her resolution of the substantive question at paragraph E-ECDR 2.5. The grounds of appeal highlight that the judge accepted that the Sponsor was a credible witness whose evidence was truthful at paragraph 15 and that the Appellant's family had approached the temple in Bangladesh who had been unable to find a carer for her from the Hindu community.

5. It is contended that there was evidence that the judge had failed to consider which showed that family members had gone to substantial lengths to provide care for the Appellant in Bangladesh. There was evidence that the Appellant's nephew had provided care for her in 2016 until he was unable no longer able to do so. The Appellant's son in Canada had to go in December 2017 to support her. It is contended that the judge appeared to consider that the evidence only showed an approach to the Hindu temple whereas the oral evidence from the Sponsor showed prolonged attempts to obtain care in Bangladesh extending to enlisting assistance from relatives. It is contended that the judge failed to take account of the Sponsor's evidence in his witness statement that he could not place an advert for a carer

because there were constant attacks on the Hindu community and, as a lonely elderly person, his mother was vulnerable and would have been an easy target. It is argued that the judge failed to address the evidence from the Temple as regards to the breadth of their efforts to seek assistance for the Appellant through worshippers and through their own staff.

6. It is argued in the grounds that it is difficult to see how the judge could justify a conclusion that the measures taken seeking a local carer were insufficient or unreasonable given that the Temple which had been approached is the leading Hindu institution in Bangladesh. It is contended that the judge also failed to take into account that the Sponsor's evidence about his reluctance to advertise more widely which was supported by evidence about violence against members of the Hindu community in Bangladesh. It is argued that the failure to address all of the evidence undermines the judge's conclusion that the Sponsor had not done enough to locate a local carer. It is contended therefore that insofar as the judge did address paragraph E-ECDR 2.5 of Appendix FM her reasoning and conclusion was unsustainable.

7. The second Ground of Appeal contends that the judge erred in her approach to Appendix FM-SE paragraph 35. The grounds highlight that there was evidence satisfying this requirement before the First-tier Tribunal Judge including evidence from Dr Alam and Dr Begum.

8. In his submissions Mr Fripp highlighted that the judge had found the Sponsor to be credible at paragraph 15. He pointed out that the judge found that the Appellant requires long term personal care and that she met the requirements of paragraph E-ECDR 2.4. He highlighted that the judge accepted the medical evidence. He contended that the judge considered paragraph E-ECDR 2.5 at paragraph 21 but failed to take account of the finding made later at paragraph 24 where she found; "I also find no reason to disbelieve the evidence that as a devout and strict Hindu she requires such care to be provided by a member of the Hindu community. I find that this is the only limit put on the type of care required by the Appellant."

9. Mr Fripp contended that the judge's findings and the evidence which the judge failed to address did in fact show that the requirements of paragraph 35 of Appendix FM-SE were met. In his submission the judge was preoccupied with the evidential requirement over the substantive requirements of paragraph E-ECDR 2.5. He accepted that both provisions have to be met but contended that the judge materially erred in allowing the evidential requirements to obscure the substantive requirements. In his contention there was abundant evidence all of which had been accepted by the judge that went to show the satisfaction of the substantive aspect of paragraph E-ECDR 2.5.

10. Mr Fripp referred to two letters from the Temple at pages 25 and 27 of the Appellant's bundle. He pointed out that at paragraph 10 of the decision the judge had noted that the evidence from the Sponsor that the Temple from which the evidence had been obtained was the main temple in the whole of Bangladesh. He highlighted in addition the letter from the Appellant's nephew at paragraph 24

saying that he used to assist her in 2016 but was unable to do so any more. The evidence also showed that relatives have travelled from abroad to look after the Appellant. Mr Fripp pointed to the letter at page 20 of the Appellant's bundle from the Appellant's second son which he submitted was consistent with the Sponsor's evidence. He submitted that the judge had dealt with the issue of paragraph E-ECDR 2.5 very shortly at paragraph 21 given that she had already accepted evidence which incorporated or endorsed the evidence of the son in Canada, the Appellant's nephew and the Temple committee. He submitted that it is clear that the substantive test was met.

11. Mr Fripp submitted that an adequate examination of the evidence demonstrated that the requirements of paragraph 35 of Appendix FM-SE were met. He referred to the letter at page 31 of the Appellant's bundle from Dr Alam and the psychiatric evidence at pages 34 and 35 of the Appellant's bundle which indicates that it is essential for the Appellant to live with family members. In his submission the evidence from the family doctor and from the psychiatrist were endorsed by the judge.

12. In response Mr Tufan submitted that paragraph 35 was not met on the basis of the evidence before the judge. He submitted that the evidence before the judge from the Sponsor recorded at paragraph 10 that Hindus make up only 1% of the population in Bangladesh whereas objective evidence shows that it is actually 10%. In any event he submitted that the evidence submitted does not come within paragraph 35 of Appendix FM-SE. In his submission on the basis of the evidence submitted to the judge the Appellant did not make out her case under the Rules and the conclusions were open to the judge.

Error of Law

13. I deal with grounds 1 and 2 together. The relevant provisions of the Immigration Rules are as follows:-

> **Appendix FM**
>
> "**E-ECDR.2.4.** 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.
>
> **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."

Appendix FM-SE

"Adult dependent relatives

…

35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

(a) a central or local health authority;

(b) a local authority; or

(c) a doctor or other health professional.

…"

14. The judge accepted at paragraph 20 that the Appellant met the requirements of paragraph E-ECDR 2.4 and found that, as a result of age, illness or disability the Appellant required long term personal care to perform everyday tasks. That finding has not been challenged.

15. The judge went on to consider the provisions of E-ECDR 2.5 at paragraph 21 of the decision. As set out above, in this case that paragraph required the Appellant to show that she is unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in Bangladesh because it is not available and there is no person in that country who can reasonably provide it.

16. Mr Fripp asserted that the judge failed to engage with that part of the assessment. Instead he submitted the judge allowed the consideration of the provisions of the specified documents under Appendix FM-SE paragraph 35 to obscure consideration of the substantive issue. However, I note that Mr Fripp properly accepted that both provisions had to be met.

17. In considering the substantive provisions I accept that, at paragraph 21, the judge did focus on the requirements of paragraph 35 of Appendix FM-SE. However it is clear from the consideration elsewhere that the judge had in mind the factors relevant to the substantive issues. At paragraph 24 the judge accepted the evidence that, as a devout and strict Hindu, the Appellant required that her care be provided by a member of the Hindu community.

18. At paragraph 25 the judge considered the efforts to obtain such care. The judge accepted that the family had approached the Hindu Temple. That the judge found "I do not consider that this evidence is sufficient to demonstrate that a local Hindu carer could not/cannot be found for the Appellant". The judge found that little if any real evidence pointed to efforts made directly by the Sponsor and/or family members to try to find a suitable carer themselves for the Appellant. The judge considered it reasonable to expect that the Sponsor and family would look to secure such help themselves outside of looking to the Temple to help find them a carer. In the judge's view the Sponsor is familiar with life in Bangladesh and she considered it

reasonable to expect him to carry out his own enquiries and make efforts himself to seek the appropriate care for his mother in Bangladesh. She considered it likely that the Sponsor would have his own network of friends and indeed relations in Bangladesh who he could reasonably be expected to consult to help him seek out and obtain a carer from within the Hindu community. The judge did not find any evidence or any credible evidence to demonstrate any such efforts being made by the Sponsor to find a suitable carer for his mother. Although the judge considered it commendable that the Sponsor sought the assistance of the Hindu Temple, she found that this effort fell far short of supporting the argument that suitable care cannot be found for the Appellant.

19. The judge went on at paragraph 26 to consider this issue further reiterating that there was no reliable evidence to demonstrate that the Sponsor and/or other family members had themselves actively looked into identifying and arranging suitable care for the Appellant and considered it reasonable to expect greater efforts to be made and shown in this regard.

20. The judge considered the Sponsor's evidence about the fact that all of the poor people were working in the ready-made garment industry and that Hindus only made up 1% of the population in Bangladesh was "a sweeping and unsupported generalisation"[26]. The judge accepted that the Hindu community is in a minority in Bangladesh and had faced some discrimination and attacks but did not find credible evidence to substantiate or indicate that this had a meaningful impact on the prospects of sourcing a carer from within the community. The judge did not accept that the fact that the Temple Committee was unable to find a Hindu carer sufficient to support a conclusion that there are exceptional circumstances to the extent that the Appellant is unable to obtain the required level of care in Bangladesh.

21. Accordingly, whilst at paragraph 21 the judge focused on the specified documents required by paragraph 35 of Appendix FM-SE, it is clear from paragraphs 25 and 26 that the judge did consider the substantive elements of E-ECDR 2.5 and was not satisfied with the evidence before her as to the efforts made to find a suitable carer in Bangladesh.

22. In the grounds and in his submissions Mr Fripp referred to evidence from the Temple but it is clear from paragraphs 25 and 26 that the judge did not consider that this evidence was sufficient to demonstrate that the Appellant was unable to obtain the required level of care in Bangladesh.

23. Mr Fripp referred to the letter from the nephew at page 24 of the Appellant's bundle. While the letter talks about how he had previously sometimes assisted his aunt the nephew stated that he no longer travelled to Dhaka to assist her any more. Although he refers to the fact that his cousins travelled from abroad to look after the Appellant he makes no reference to efforts to obtain the required level of care in Bangladesh. Mr Fripp also referred to the letter from the Appellant's son who lives in Canada at page 20 of the Appellant's bundle. That letter asserts that it is impossible to find suitable Hindu nursing support in Bangladesh and indicates that "we have tried every possible way to arrange nursing support for her in Bangladesh". However no

details are given as to what efforts have been made by the family apart from the enquiries with the Temple and no evidence was provided to substantiate the assertion that the family had tried 'every possible way' to obtain appropriate care.

24. Accordingly, I find that, in considering E-ECDR 2.5, it is clear that the judge took into account the factors and the evidence set out at paragraphs 25 and 26 and the conclusion that the substantive requirements have not been met were open to the judge on the basis of this evidence.

25. The judge considered at paragraph 35 of Appendix FM-SE which sets out the specified documents in considering whether the Appellant met the requirements of E-ECDR 2.5. Paragraph 35 sets out the evidence required in relation to obtaining the level of care in Bangladesh and states that independent evidence that the Appellant is unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in Bangladesh should be from a central or local health authority, a local health authority, or a doctor or other health professional. The judge referred to the letter from the Temple at paragraph 21 and considered that this did not fall within the specified documents at paragraph 35.

26. Mr Fripp referred to other evidence before the judge and submitted that there was evidence which met the requirements of paragraph 35. He referred to the letter dated 20th August 2016 from Dr Alam, a diabetologist, at page 31 of the Appellant's bundle. That letter states that the Appellant is no longer able to undertake her regular day-to-day activities and requires assistance for her everyday household tasks and states "as a family physician, I understand that, unfortunately there is no-one to assist her, which is very alarming". Mr Fripp suggested that this sentence is reflective of an inability to obtain a carer. He also referred to pages 34 and 35 of the Appellant's bundle which contains evidence from a psychologist Dr Begum which states that for the Appellant "to be mentally healthy, it has now become essential for her to live with family members. So, we strongly recommend her family members to arrange this without further delays". Whilst this emphasises that support is required from family members, in my view this does not strictly meet the requirements of paragraph 35 in relation to the inability of family members to obtain the required level of care in Bangladesh. I do not accept Mr Fripp's submission that this evidence is conclusive of the specified evidence requirements set out in paragraph 35 of Appendix FM-SE. I accept that the judge did accept the medical evidence as set out at paragraphs 17 to 19 of the decision. However this evidence is not conclusive of paragraph 35 and in my view it was open to the judge to find that the Appellant had not submitted the specified documents under paragraph 35.

27. I now turn to the third, fourth and fifth grounds. These relate to the consideration of Article 8 outside the Immigration Rules.

28. The third ground contends that in finding that there was no relevant family life between the Appellant and her family members in the UK the judge raised a new point which had not been raised by the Entry Clearance Officer or the Entry Clearance Manager. Reliance is placed on **RM (Kwok-on-Tong: HC 395 para 320) India [2006] UKAIT 00039** which stated that if new elements of the Immigration

Rules come into play at the time of a hearing the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise. It is contended that if the Appellant had been aware that the issue of family life was in issue it would have been addressed in evidence and submissions and that the judge could not fairly take a new point in the absence of any representative of the ECO at the hearing and without notice.

29. I do not accept that this ground has been made out. The only Ground of Appeal open to the Appellant in relation to the decision under appeal is a human rights ground. The Grounds of Appeal to the First-tier Tribunal relies on Article 8 and the steps set out in **R v SSHD ex parte Razgar [2004] UKHL 27**. The skeleton argument submitted to the First-tier Tribunal sets out the relevant Immigration Rules and sets out the **Razgar** steps. It is very clear that, as this was an appeal based on Article 8, the judge was required to undertake a proper assessment of Article 8 which includes the first assessment as undertaken by the judge at paragraph 22 as to whether the family life exists in accordance with Article 8.

30. In any event the judge went on to consider at paragraphs 23 to 27 proportionality and therefore if there was any error as to the assessment of family life it is not material.

31. In any event Mr Tufan highlighted the decision in **Britcits v Secretary of State for the Home Department [2017] EWCA Civ 368**. That decision considered the provisions of Appendix FM in relation to adult dependent relatives. In looking at Article 8 Sir Terence Etherton, MR said at paragraph 61:

> "Nor do I accept the submission that there is always family life which engages Article 8 of the Convention whenever a UK citizen with an elderly parent resident outside the UK wishes to bring the parent to the UK to look after the parent. Whether or not there is family life at the moment of the application will depend on all the facts as to the relationship between parent and adult child and its history …".

32. This is reiterated at paragraph 74 where reference is made to the decision in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 170** where the court found that, with regard to an adult, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, enough to constitute family life and that there is no presumption that a person has a family life even with the members of a person's immediate family. The court has to scrutinise all the relevant factors and there must be something more than normal emotional ties and at paragraph 86 where Lord Justice Sales said:-

> "In my view there is likely to be a significant number of cases even within a paradigm type of situation involving elderly parents abroad … in which Article 8 rights will not be engaged and where for that reason the application of the ADR Immigration Rules would not contravene Article 8."

33. The judge considered family life under Article 8 at paragraph 22 where she took into account the fact that the Sponsor is living an independent life with his own nuclear

family in the UK. The judge accepted that the Sponsor has a good relationship with his mother and is clearly concerned about her health and welfare. The judge accepted that the Appellant benefits from the presence of her family members in terms of the positive effects their visits to her in Bangladesh have had on her mental health but did not accept that the evidence demonstrates that the Appellant's relationship with the Sponsor goes beyond the normal emotional ties between a parent and adult child and what she considered to be a child's natural affection for and concern about the parent's welfare, wellbeing and support. The judge found nothing in the evidence to point to the Sponsor playing a role in the Appellant's life so as to elevate his relationship with his mother beyond that naturally to be found between a parent and adult child and the judge noted that he has his own family in the UK and has lived apart from the Appellant for some years now. The judge considered it perfectly natural for a parent to be bouyed by the presence of a child or grandchildren and considered that the evidence supports the natural consequences of such interaction between a parent and child. The judge also found no credible reason why the Appellant and Sponsor could or should not be able to continue and maintain and sustain this positive effect by continuing with visits to each other so as to properly and effectively address any related mental health issues the Appellant may suffer. For these reasons the judge did not consider that in this case the relationship amounted to family life within Article 8. In my view these findings were open to the judge and the judge has given adequate reasons for these findings.

34. In the Grounds of Appeal in developing the fourth ground it is asserted that reliance is placed on the case of **Pawandeep Singh v ECO New Delhi [2004] EWCA Civ 1075** where the Court of Appeal applied the jurisprudence of the European Court of Human Rights said that the existence or non-existence of family life for the purposes of Article 8 is essentially a question of fact depending on the real existence in practice of close personal ties. In my view the judge undertook such analysis of this case on its facts and reached a conclusion open to her on the evidence.

35. The fifth Ground of Appeal contends that the judge erred in her alternative finding that the decision to refuse entry clearance is proportionate. It is contended that the judge erred in requiring the Appellant to show exceptional circumstances. However as is clear from my assessment in my view the findings in relation to the Rules were open to the judge. In these circumstances it was open to the judge to treat the failure to meet the Rules as a significant factor in assessing proportionality. In my view this is exactly what the judge did at paragraphs 25 and 26 of the decision. In these circumstances in my view the judge's proportionality assessment was open to her on the evidence before her. This ground has not been made out.

36. I find that the judge reached conclusions open to her on the evidence in relation to the Immigration Rules and Article 8. In these circumstances the Grounds of Appeal have not been made out.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 26th September 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed Date: 26th September 2018

Deputy Upper Tribunal Judge Grimes