Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26322/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5 November 2018

Decision & Reasons Promulgated
On 12 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MOHINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr R A Rai, of Counsel instructed by Gills Immigration Law
For the Respondent: Ms Julie Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Suffield-Thompson who, in a determination promulgated on 26 October 2017 dismissed the appeal of the appellant against a decision of the Entry Clearance Officer, New Delhi who refused his application for entry clearance as an adult dependent relative.

2. The appellant is a citizen of India, born on 5 May 1929. He had applied for entry clearance as a dependent relative of his son, Mr Ranbir Baria, who has been settled in

Britain for many years. The appellant is a widower who is suffering from cerebral atrophy, a form of dementia, eyesight and hearing loss, and mobility issues, and who has had spells in hospital because he was not eating or caring for himself properly. He has a maid to cook and clean for him but it was claimed that he is not able to wash, bath or dress himself. Neighbours check on him. The sponsor has visited India on many occasions spending time with his father, helping him with basic needs such as washing and dressing.

3. The judge set out her findings of fact in paragraphs 30 onwards. She accepted that the appellant suffered from cerebral atrophy and had had various stays in hospital and had had times when he was bedridden, and that his wife had died of cancer in 2016. She accepted that financial assistance was provided for the appellant by the sponsor.

4. She considered the issue of what care the appellant has. She found that the appellant had a maid who cooked and cleaned, and that neighbours would also give some assistance and that the sponsor gave money to the village elder and another friend in the village for his father's needs. The judge found that the sponsor had not been "entirely candid" with the Tribunal as to the level of care and support his father actually needed or has.

5. The judge looked at an advertisement placed for carers by the sponsor and considered the level of care that was needed. Her conclusion was:-

> "As I have already said it is, I find either the case that the appellant has more help than the court were told about or he does not need the amount of care that the sponsor states. I find this because the appellant has not been to India since February 2017 so it is apparent that despite the issues the appellant has and the lack of care that the sponsor claims, he is managing to take care of himself with the help the sponsor says he has".

With regard to the advert the judge stated:-

> "He (the sponsor) produced for the court an advert in a local Indian paper that he placed for a carer. He produced the original and it was dated May 2017. I took great note of this date. If the appellant were indeed struggling as badly as the sponsor says then I would have expected him to place the advert immediately after the wife's death and not wait until a short while before the Tribunal hearing".

6. The judge then considered the issue of care homes and found the sponsor had made no efforts at all to look into care homes on the basis that he said that the doctor had said there were no local ones and the family should care for the appellant. She added that she had no evidence before her that care homes were not affordable in India and that as the sponsor and his wife had a joint income of £50,000 and owned a six bedroomed house, she found that they had ample funds to pay for the sponsor to have care in India.

7. The judge then went on to look at medical evidence. She stated that the note from the appellant's general practitioner was brief, without details of all the appellant's

ailments and was not a comprehensive medical report and gave no details as to how long the doctor had known the appellant for, his various conditions or his home circumstances, and noted moreover that the doctor had made no mention of the possibility of carers at home or nursing homes. She concluded:-

> "I cannot give this letter much evidential weight as it gives so few details about the appellant and his health. The sponsor told the Tribunal his father is going blind and deaf and yet I had no evidence before me of either of these conditions. He also said he is losing his mobility, which at his age may well be the case but again I had no medical evidence before me to confirm this".

8. The judge concluded that the appellant did not meet the requirements of the Immigration Rules – that finding was not contested before me.

9. In paragraphs 45 onwards the judge set out the structured approach in the judgment in **Razgar [2004] UKHL 27** to the issue of the appellant's rights under the ECHR. She noted that the sponsor had lived in Britain for 45 years but accepted that he was an only child and said that there had been continuous contact. The judge concluded that there was family life in existence.

10. Having referred to the case of **MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040** and the judgment of the Court of Appeal in **Kugathas [2003] EWCA Civ 31** the judge concluded that the appellant and the sponsor had a relationship which goes over and above that which is normal for an adult child and parent.

11. The judge then went on to consider the issue of proportionality, applying the decision in **Mustafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)**. The judge felt that although there was an element of dependency, both financial, practical and emotional, between the appellant and the sponsor it was appropriate to give great weight to Section 117B(1) of the Nationality, Immigration and Asylum Act. She noted the appellant did not speak any English and considered that he would not integrate into UK society due to his dementia. She went on to say that although the sponsor had said that he could support his father, the appellant had complex medical needs and it was inevitable that he would become a person who will need enormous input from the NHS which then has an impact on the availability of services to British residents and taxpayers. She stated that she had found that there was care available in India that could be paid for by the sponsor which would be adequate for the appellant at this stage in his life. She referred to the importance of protecting the economic welfare of Britain including the impact on the NHS and social care and medical services and stated that having weighed up all the evidence the balance came down in favour of the state's legitimate aim to control immigration and to protect the economic welfare of Britain and that therefore there was no breach of the appellant's or sponsor's Article 8 rights. She therefore dismissed the appeal.

12. An application for permission was made which referred to the facts as found by the judge and made the assertion that the judge was wrong to assume that the applicant would require medical treatment under the NHS as he had received private medical

treatment when he had previously been in Britain. The judge, it was argued, had failed to consider the effects of removal on the human rights "of the applicant and her family members in the UK between whom the judge accepted were close emotional ties". They argued that the judge had not properly considered the issue of proportionality. Upper Tribunal Judge Kekić granted permission stating that the judge had failed to consider the sponsor's evidence that he would pay for his father's treatment privately if required, and had not properly considered the burden on the sponsor and his family of having to make regular extended trips to India.

13. A Rule 24 notice stated that the judge reached conclusions which were open to her on the evidence.

14. In his submissions Mr Rai stated that the judge, having found that the appellant and the sponsor were exercising family life and that the appellant was dependent on the sponsor, had been wrong, when considering the issue of proportionality, to place weight on the fact that the appellant could not speak English and to find that the appellant's medical needs would be an undue burden on the NHS. He argued that it was irrelevant given the appellant's mental health as to whether or not he could integrate into Britain, and furthermore the judge had erred in not assessing the impact on the sponsor who had a business here and a life in Britain. These, he argued, were material errors of law.

15. Ms Isherwood argued that there was no material error of law. She relied on the judgment of the Court of Appeal in **Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611** which reached a conclusion that the Upper Tribunal had been correct to set aside a determination of a judge in the First-tier Tribunal who had allowed an appeal under the Rules and therefore not gone on to consider the Article 8 rights of that appellant, and upheld the decision in the Upper Tribunal judge, finding that the Upper Tribunal Judge, in re-making the appeal had considered the appellant's "unmet needs" and that there was no evidence that suitable care was not available in that appellant's home country. The Court of Appeal found that the judge had been correct to dismiss the appeal under the Immigration Rules and emphasised that the burden lay on the appellant to show that she qualified for entry clearance. With regard to the rights of the appellant in that case under Article 8 the Court of Appeal emphasised, at paragraph 67, that the test under Article 8 was an objective one and that as that appellant's daughter could reasonably be expected to go back to the appellant's own country to provide the emotional support and practical support needed and that there was no reason why that sponsor could not live and work in the appellant's home country to supervise arrangements made for the appellant, the Upper Tribunal had been correct to dismiss the appeal on Article 8 grounds. The Court of Appeal t emphasised that the case was about the choice which the sponsor had exercised and wished to be able to continue to exercise, of living in Britain rather than in the appellant's country of origin, and said that "in those circumstances the Upper Tribunal cannot be faulted for having come to the conclusion that any interference with the appellant's right to respect for family life conforms to the principle of proportionality".

16. Ms Isherwood went on to emphasise that weight should be given to the fact that the appellant could not meet the Rules and the acceptance that the sponsor had not looked at care facilities for his father. She referred to the delay in placing the advertisement for carers, and stated that in fact the conclusions of the judge regarding the medical evidence was not challenged. In these circumstances she argued that there was no error of law in the determination of the judge.

17. Mr Rai emphasised again the rights of the sponsor.

Discussion

18. I consider that there is no material error of law in the determination of the First-tier Judge. She properly did consider all the relevant factors and reached a conclusion which was fully open to her thereon. Following the judgment in **Ribeli** the reality is that although it would be inconvenient for the sponsor to live in India, that is obviously something which he could do should he wish to personally care for his father. Moreover, the appellant's life is clearly bound up with his life in his own surroundings with family friends and indeed he has the help of the local headman and other friends there. I would add that the sponsor's income would not necessarily be ab sufficient to look after his father in hospital here. I consider that the judgment of the First-tier Judge was fully open to her and indeed, following the determination of the Court of Appeal in **Mukarkar [2006] EWCA Civ**, I consider that it would be incorrect to upset that decision. The decision was reached having applied the correct test and the judge properly placed weight on the fact that the appellant could not meet the requirements of the Rules.

19. I therefore find that there is no material error of law in the determination of the First-tier Tribunal and I therefore dismiss this appeal.

20. No anonymity direction is made.

Signed:  Date: 7 November 2018

Deputy Upper Tribunal Judge McGeachy