Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02095/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 May 2019	**On 21 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR THEIVENDRAM SANTHARATNAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms F Shaw, Counsel, instructed by City Heights Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

The appellant, a citizen of Sri Lanka born on 17 July 1940, appealed to the First-tier Tribunal, on Article 8 human rights grounds, against the decision of the respondent dated 6 December 2017 to refuse to grant him entry clearance. The appellant claims to be an adult dependent relative and claimed that he satisfied the relevant requirements of Appendix FM and FM-SE and in the alternative relied on Article 8 with reference to GEN.3.2 of Appendix FM on the

basis that his circumstances were exceptional and the refusal of entry clearance would result in unjustifiably harsh consequences.

In a decision, promulgated on 23 January 2019, Judge of the First-tier Tribunal Hodgkinson dismissed the appellant's appeal.

The appellant appeals with permission on the grounds that:

Ground 1

The First-tier Tribunal erred in failing to apply the correct approach in adult dependent relative (ADR) cases as set out in the case of **BRITCITS [2017] EWCA Civ 368** (where the Court of Appeal considered that the question of whether care can reasonably be provided (in accordance with paragraph E-ECDR.2.5 of Appendix FM) allows for arguments about the emotional needs of the relative in question).

Ground 2

The judge failed to afford the sponsor an opportunity to respond to the appellant's objections in relation to the report of Dr Pathinathar dated 27 November 2018 (appellant's bundle, part D, pages 3 to 8), which the judge found not to be independent for the purposes of Appendix FM-SE, paragraph 35.

Ground 3

The First-tier Tribunal failed in the proportionality exercise to adequately address Article 8 outside of the Immigration Rules.

Relevant Provisions

Appendix FM

Section E-ECDR.2.1 provides including as follows:

> ***"Section E-ECDR: Eligibility for entry clearance as an adult dependent relative***
>
> *E-ECDR.1.1. To meet the eligibility requirements for entry clearance as an adult dependent relative all of the requirements in paragraphs E-ECDR.2.1. to 3.2. must be met.*
>
> ***Relationship requirements***
>
> *E-ECDR.2.1. The applicant must be the-*
>
> *(a) parent aged 18 years or over;*
>
> *(b) grandparent;*
>
> *(c) brother or sister aged 18 years or over; or*
>
> *(d) son or daughter aged 18 years or over of a person ("the sponsor") who is in the UK.*
>
> *E-ECDR.2.2. If the applicant is the sponsor's parent or grandparent they must not be in a subsisting relationship with a partner unless that partner*

is also the sponsor's parent or grandparent and is applying for entry clearance at the same time as the applicant.

E-ECDR.2.3. The sponsor must at the date of application be-

(a) aged 18 years or over; and

(b)

(i) a British Citizen in the UK; or

(ii) present and settled in the UK; or

(iii) in the UK with refugee leave or humanitarian protection.

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

5. **Adult dependent relatives**

"33. Evidence of the family relationship between the applicant(s) and the sponsor should take the form of birth or adoption certificates, or other documentary evidence.

34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:

(a) Independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and

(b) This must be from a doctor or other health professional.

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.

36. If the applicant's required care has previously been provided through a private arrangement, the applicant must provide details of that arrangement and why it is no longer available.

37. If the applicant's required level of care is not, or is no longer, affordable because payment previously made for arranging this care is no longer being made, the applicant must provide records of that payment and an explanation of why that payment cannot continue. If financial support has been provided by the sponsor or other close family in the UK, the applicant must provide an explanation of why this cannot continue or is no longer sufficient to enable the required level of care to be provided."

6. Appendix FM - Exceptional Circumstances:

"GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

Error of Law Discussion

7. In summary, Ms Shaw's submissions asserted that the judge materially erred and did not properly apply **BRITCITS** and had been distracted based on criticisms earlier in the decision, in relation to the second report of Dr Pathinathar. It was her submission that the only reference to the appellant's psychological and emotional needs, was at [36] of the Decision and Reasons whereas the majority of the decision, in Ms Shaw's submissions, had focused on criticisms of Dr Pathinathar's report.

It was her further submission, and she relied on the grounds of appeal, that reference to the psychological and emotional needs of the appellant were made throughout, including the sponsor's written statement, the reports and letters of Dr Balamuraly, the appellant's GP, dated 10 July 2017 and 23 October 2018, which said that the appellant has depression and senile dementia and the need for family support being essential, and the report of the social worker, P Sarmilan (although Ms Shaw conceded that the judge at [25] and [26] gave little weight to the evidence of the social worker and such has not been challenged).

In addition to the social worker's evidence, however, Ms Shaw relied on, and the skeleton argument referred to, the short report of Dr Pathinathar at appellant's bundle, part D, pages 1 and 2, which had said that the appellant

has dementia and depression, and that the appellant needed, most importantly, moral/psychological support from a close family member.

In respect of ground 2, it was Ms Shaw's submission, relying on the case of **O'Reilly v Mackman [1983] UKHL 1** (25 November 1983) that the decision breached the appellant's fundamental right of fairness and that the sponsor and the appellant's representative had no opportunity to address the concerns in relation to Dr Pathinathar's long report and that such an opportunity should have been afforded, particularly in the light of the judge's positive credibility findings in relation to the sponsor's evidence

Ms Shaw did accept, however, that the requirement that the requisite evidence in such cases be independent (paragraph 35 of Appendix FM-SE) is set out in the Immigration Rules and that it is for the appellant to discharge the burden of proof including to show that the report is independent, and she accepted that the appellant's representatives would have been aware of such a duty. Ms Shaw also accepted that there was no challenge in the grounds of appeal to the judge's findings (at [40] and [43]) that it had not been established that the requisite care was not affordable and the judge had found that the appellant's evidence that he could not afford a reasonable care home in Colombo was insufficient.

Ms Shaw confirmed that the main focus of her challenge was on the judge's approach to the **BRITCITS** case law and the alleged lack of consideration of the appellant's psychological and emotional needs.

In respect of ground 3, Ms Shaw, although she conceded that the judge had indicated at paragraph 2 that it was Mr Fripp's position that Article 8 outside the Rules was not relied on as GEN.3.2 of Appendix FM (on the basis that the appellant's circumstances were exceptional and the refusal of entry clearance would result in unjustifiably harsh consequences) made comprehensive provision for the appellant's circumstances; it was her further submission that this concession was implicitly withdrawn where at [8] the judge recorded that Mr Fripp needed further time to consider the issue of whether the appellant's relationship and claimed contact with the sponsor was properly established.

It was Ms Everett's submission that the judge was entitled to come to the conclusions he did in respect of all the reports, including the report in question from Dr Pathinathar, and that, in her submissions, there was not undue emphasis on this report. Ms Everett further submitted that the sponsor's witness statement, which the judge reproduced in large part in the Decision and Reasons at [9], is not geared towards the emotional and psychological needs of the appellant, notwithstanding the references to the appellant's upset and the impact on his mental health. It was her global submission that overall the emphasis was not on claimed psychological and emotional needs.

At paragraph 57 of the sponsor's witness statement, reproduced at page 8 of the Decision and Reasons, the sponsor indicated that he had considered getting the appellant into a care home with good facilities in Colombo and that: "In terms of quality and reputation, I could find only two kinds of care homes in

Colombo." He went on to state that of those two kinds of care home the second kind of care homes are the ones with "excellent quality and reliability" but that they are very expensive. It was also indicated specifically at paragraph 58 of that witness statement, at page 9 of the Decision and Reasons, that the sponsor had enquired about the care for his father's medical condition, including dementia and diabetes, and had been given a specific quote for the treatment of those conditions. It is significant that there was no mention in his witness statement that such good care homes could not care for the appellant's emotional and psychological needs. Clearly the sponsor's own evidence strongly suggests that he himself accepts they do but that the prohibitive element was the cost.

In respect of the Article 8 ground, Ms Everett's primary submission was that she was not persuaded that it was a live issue and it was her view that there was a concession at paragraph 2 and that this was not withdrawn, and that Article 8 outside the immigration rules was no longer relied on. In the alternative, it was her submission that it could not arguably have been successful and that there was nothing exceptional in the appellant's circumstances.

In reply, Ms Shaw highlighted paragraph 16 of the grounds for permission to appeal in respect of claimed references to psychological and emotional needs, including from the sponsor and the other witnesses (although she accepted that the social worker's evidence had been found not to have weight attached and did not add anything). She also relied on the letters of Dr Balamuraly and the other report of Dr Pathinathar. Although Ms Shaw made submissions that it might have been difficult for the representative for the appellant to respond to the respondent's submissions in respect of the report of Dr Pathinathar, she conceded that this may not be a good submission and did not make it with what I find to be any force. She conceded that there was nothing produced, for example, by way of a witness statement from Mr Fripp, to indicate any difficulties with dealing with this part of the appellant's evidence in submissions.

Conclusions

Ground 1

I am of the view that Judge Hodgkinson, in a careful and well-reasoned decision reached findings which were entirely open to him. Ms Shaw indicated that ground 1 was her strongest submission: that the judge failed to deal with the emotional and psychological requirements, which, it is confirmed, could be taken into account when considering E-ECDR.2.5 of Appendix FM. The judge had the relevant jurisprudence of **BRITCITS** (both Court of Appeal cases in 2016 and 2017) before him as set out at ([11]) and directed himself properly, including at [44], that the Rules had been held to be lawful by the Court of Appeal in **BRITCITS**. The Rules were clear and specific in their requirements. The fact that such (emotional and psychological) requirements can be taken into account does not of course mean that cases containing such elements must in every case be successful.

The judge was well aware of the appellant's difficulties which were not limited to physical care needs, which is highlighted by the judge's findings (as concluded at [42], that E-ECDR.2.4 is satisfied) that the appellant required long-term personal care to perform everyday tasks and the judge took into consideration in particular the evidence of Dr Balamuraly and that this was reiterated in Dr Pathinathar's evidence.

The judge highlighted at [38] that there was no challenge to the general medical expertise of Dr Pathinathar or Dr Balamuraly and the judge at [21] had set out the evidence of Dr Balamuraly in relation to the appellant's conditions, including his vulnerabilities, that he had mild depression and had exhibited symptoms of senile dementia.

It is entirely evident therefore, that it was central in Judge Hodgkinson's mind that the emotional and psychological difficulties experienced by the appellant must be taken into consideration in reaching findings under Appendix FM. At [36] the judge considered that Dr Pathinathar had indicated that the appellant would not receive any form of affectionate care, which, Judge Hodgkinson noted, was a very generalised comment not supported and that at paragraph 17 of that report Dr Pathinathar appeared to contradict paragraph 16 by indicating that even if the standard of care was adequate the sponsor could not afford it.

As indicated at paragraph 15 above, it was the sponsor's own evidence that there are care homes that can meet the appellant's needs and this was not qualified in his witness statement evidence, for example, by any indication that the care homes would not meet with the appellant's emotional and psychological needs. In fact in my view, the opposite is the case, as at paragraph 58 of the sponsor's witness statement, the sponsor specifically outlined his father's needs, including his dementia, and had identified an additional cost for such care. As already noted the sponsor's main substantive objection in respect of the care homes with 'excellent quality and reliability' was cost.

Although emotional needs may well go beyond the mere fact of the dementia diagnosis and the grounds for permission to appeal cite references in the evidence to emotional and mental health issues, the judge had this in mind throughout as demonstrated by his careful consideration of all the evidence. It has also not been the case of the appellant or the sponsor, prior to the Upper Tribunal appeal, that even with proper care the only place where the appellant's needs could be met would be with his family in the UK. Whilst undoubtedly that is their preference it was also the sponsor's evidence on appeal that the better care homes were not affordable, not that they were not suitable.

Whilst concerns were raised in relation to such care homes being Sinhalese speakers rather than Tamil speakers the judge dealt rejected this account, which was both in Dr Pathinathar's report and in the sponsor's witness statement.

At [34] the judge noted the similarities between the sponsor's evidence and Dr Pathinathar's evidence and found that there was no evidence, for example, of any close examination by the sponsor as to whether there were any care homes in Colombo which might offer Tamil-speaking services or that the sponsor has made any enquiries of any such care homes. The judge also noted that the sponsor did not appear to have viewed any care homes in Jaffna or Colombo.

The judge's consideration of the reports and other evidence provided necessarily required and included consideration of the appellant's emotional and psychological needs as they were 'part and parcel' of the appellant's needs. Additionally, at the conclusion of the decision, in considering GEN 3.2, the judge took into account the appellant's 'evident medical and living problems' which further demonstrates that the judge had been considering integral emotional and psychological needs throughout.

When considered fairly and holistically, the First-tier Tribunal, in reaching its conclusions that E-ECDR.2.5 was not satisfied, took into consideration all the aspects of the care that the appellant would require, including emotional and psychological. Ground 1 does not disclose any error of law.

Ground 2

In respect of ground 2, the appellant's criticisms of the judge's findings in respect of Dr Pathinathar's report of 27 November 2018 are unfounded. Ms Shaw went so far as to state that that these findings informed the "bulk" of judge's decision and that the judge had been distracted by this. That is not the case. Although Ms Shaw was able to refer to paragraphs which mentioned Dr Pathinathar's longer report, many of these paragraphs were also in the context of discussions and findings in relation to the sponsor's evidence as well as the findings on Dr Pathinathar, including at [34] and [38] to [40].

I accept Ms Everett's submission that, in addition to the fact it is for the appellant to discharge the burden of proof, including that the reports were independent and the appellant would have been aware of this, the Home Office Presenting Officer made submissions in this regard (as referred to at [31]). There was nothing in the grounds of appeal or otherwise, for example, a witness statement from Counsel, that might suggest that there were issues in dealing with this evidence and the submissions made at the hearing.

Although in the grounds for permission to appeal it was argued that these arguments were made by Mr Williams in his closing statement and had not been put to the sponsor in cross-examination, there was no request for an adjournment or any suggestion that this submission could not be relied on in light of the lack of cross-examination. It was for the appellant to discharge the burden of proof, including in respect of the independence of the reports relied on. The decision does not disclose an error of law under ground 2.

It was not the case that the appellant did not have an opportunity to address this concern. The judge noted the concerns of Mr Williams, the Presenting

Officer and it was submitted that the report was not objective, unbiased or independent, The judge found there to be merit in the argument that the report was prepared at the request of the appellant/sponsor for the evidence-based reasons that the judge gave. As already noted, the judge did not call into question the medical qualifications of Dr Pathinathar but rather that this report as a whole did not constitute independent evidence and presented as though it had been written to put forward the appellant's case in the most favourable light. Those findings were open to Judge Hodgkinson for the sustainable reasons he gave, which do not disclose any irrationality.

Although it was argued that the independence of the report was a key factor in the dismissal of the appeal, in fact, as set out at [41], the independence of the report was a secondary finding, as the judge found that the appellant's case inevitably foundered on the affordability point (at [40]), which has not been substantively challenged. Any alleged error therefore in the consideration of the independence of the requisite reports, which has not been established in my view, could not in any event be material. Ground 2 is not made out.

Ground 3

In respect of ground 3, I agree with Ms Everett that the ground does not withstand scrutiny, including given that it is recorded, by the First-tier Tribunal judge, that Article 8 outside the Rules was not relied on and there was no specific challenge to the judge's findings under GEN.3.2. including that there were no exceptional and/or compassionate circumstances which would warrant a grant of entry clearance.

I do not agree with Ms Shaw's interpretation of the judge's findings at [8] as a withdrawal by Mr Fripp of his earlier concession. This was not in the appellant's grounds and the issue at [8] of the Decision and Reasons was in relation to E-ECDR.2.1 and the first paragraph of the Entry Clearance refusal where the Entry Clearance Officer was not satisfied that there was any evidence of contact between the appellant and the sponsor to demonstrate an ongoing and genuine relationship. The judge found in the appellant's favour in this regard at [19]. The Judge was not, at [8] asking Mr Fripp to address whether or not there was family life for the purposes of Article 8 and it could not be said to be relevant to Mr Fripp's earlier concession that Article 8 outside of the Rules was not relied on (given the comprehensive provision of GEN.3.2 of Appendix FM).

In any event, given the judge's comprehensive findings, it is difficult to see how a specific finding that family life was established would take the appellant's case much further, given the judge's conclusions that, even allowing for the appellant's evident medical and living problems, this did not render the respondent's decision disproportionate, taking into account all the factors. It was further open to the judge to find, and indeed incumbent on him to do so, that the fact that the appellant did not meet the Rules was highly relevant to the assessment of proportionality ([44]). Ground 3 is not made out.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error of law and is preserved.

Anonymity Direction

None was sought and none is made.

Signed Date: 15 May 2019
Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed no fee award is made.

Signed Date: 15 May 2019
Deputy Upper Tribunal Judge Hutchinson