



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03224/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21st March 2019

Decision & Reasons Promulgated
On 03rd April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS QINGHAO ZHANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tarlow, HOPO

For the Respondent: Mr Wu

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Anthony made following a hearing at Birmingham on 22nd February 2018.

Background

2. The claimant is a citizen of China born on 3rd March 1949. She applied for entry clearance on 15th December 2016 to settle in the UK as an adult dependent relative of

her daughter. The application was refused on 26th January 2017 and it was this refusal which was the subject of the appeal before the Immigration Judge.

3. There are no credibility issues in this appeal. The sponsor was accepted by the judge to have given wholly credible evidence and there is no challenge to this aspect of the appeal by the Secretary of State.
4. The claimant suffers from cerebral infarction, early Alzheimer's disease and hypertension. Her daughter, the sponsor, came to the UK in 2000 when her mother was in good health. However the claimant now not only has the classic symptoms of early onset Alzheimer's but also suffers from low mood and depression. She struggles to care for herself. The judge accepted that she is unable to buy and prepare food safely without assistance and requires help to safely perform everyday tasks. He was satisfied that she met the requirements of paragraph E-ECDR.2.4.
5. The judge then considered whether the claimant could obtain the care which she needs in China with the practical and financial help of the sponsor. He wrote as follows:

"Whilst the appellant does assert that family members can no longer look after her and that they are doing this on a temporary basis she does not argue that such care is not available in China and that there is no person who can reasonably provide it. The sponsor's evidence is that such care is available in the form of government and privately managed residential care homes and live-in carers. However her evidence is that such care is not affordable. The sponsor's evidence is that care costs for a government managed residential care home is between two and three times the amount the appellant receives from her monthly pension. This equates to approximately £600 a month. Although it is accepted that the financial requirements are met in this case the sponsor's evidence is that she cannot afford to remit such funds to her mother. The appellant has not provided any background material to demonstrate the affordability of purchasing care in either a government or privately managed residential care home or alternatively to purchase care from an individual paid carer. Whilst I have found the appellant and sponsor to be a truthful witness in relation to her mother's symptoms and ability to care for herself I find that I cannot accept her assertion as to the cost of such care in the absence of any documentary evidence. I find that it is entirely reasonable for the appellant through her representations to provide such evidence especially as it is the sponsor's evidence that they have looked into this. For reasons unexplained these have not been provided to the respondent or the Tribunal. I find that the appellant has failed to discharge the burden of proof to the balance of probabilities that such care is not affordable in China. The appellant cannot satisfy the requirements of E-ECDR.2.5."

6. The judge then turned to Article 8. He accepted that there was family life between the claimant and the sponsor. He said that the support which the claimant currently requires is being provided by her niece and that the sponsor's evidence was that her cousin could no longer care for her because she has recently undergone a kidney transplant. However there was no medical evidence to confirm that the kidney

transplant had impacted on the niece's ability to continue to care. Neither was there any letter from her to confirm that she could not do so.

7. Nevertheless the judge concluded as follows:

"I regard the following factors as significant: the sponsor's length of residence in the UK; her economic contribution to the UK; the fact that the financial requirements have been met in this case and the fact that the appellant is financially and emotionally dependent on the sponsor. I find that the presence of the appellant will not be damaging to the UK's economy. I accept that the appellant is distressed at her separation from the sponsor. Due to her advancing age, low mood and Alzheimer's she is now dependent on the sponsor emotionally. I find that contact via modern means of communication would be a wholly insufficient substitute for family life to be enjoyed between the appellant and the sponsor. Given the evidence which I have considered and discussed above I find the evidence establishes that family life is infringed and continues to be infringed by the continued separation. I find that this is a truly compelling case for the grant of entry clearance."

8. On that basis he allowed the appeal.

The Grounds of Application

9. The Secretary of State sought permission to appeal on the grounds that the judge had used Article 8 as a general dispensing power in order to allow the appeal contrary to Patel and Others v Secretary of State for the Home Department [2013] UKSC 72. Outside of the factors under the Rules the judge does not establish any basis on which the current status quo of the family life between the claimant and sponsor would be disrupted by refusing entry clearance. Family life could continue as in the past.
10. Second, the judge had failed to factor in the significant weight which should be given to the public interest and the inability of the claimant to show that she meets the requirements of the Rules. The judge sought to minimise this by finding that the sponsor's length of residence and contribution to the UK meant that she could not leave the UK but these matters carry limited or no weight since there was no removal decision against the sponsor. If she chose to leave the UK that was a matter for her and it does not entitle the claimant to succeed outside the Rules in order to obtain a more favourable outcome.
11. Whilst the decline of the claimant is unfortunate and saddening, given that there is provision of care in China and contact can be maintained in the same manner as it did immediately prior to the application the judge failed to give adequate reasons to show how the Article 8 balance could realistically outweigh the strong public interest firstly demonstrated under the Rules and then within the framework of Section 117B of the Nationality, Immigration and Asylum Act 2002.
12. Permission to appeal was granted by Designated Judge Woodcraft on 18th June 2018 for the reasons stated in the grounds.

13. The claimant served a Rule 24 response arguing that the grounds were a simple disagreement with the sustainable conclusions of the judge and an attempt to reargue the appeal. There was an obligation to promote family life rather than to maintain the status quo. It was evident that the judge had considered the relevant public interest factors and the weight which he gave to them were a matter for him. The decision was neither irrational nor perverse.

Submissions

14. Mr Tarlow relied on his grounds. He confirmed that there were no credibility issues in this appeal and whilst it was not always impermissible to allow an appeal on Article 8 grounds where the Rules had not been met, in this particular case it was not open to the judge to reach the conclusion which he did, since the evidence was insufficient for an outcome in the claimant's favour.
15. Mr Wu, who is the sponsor's husband, confirmed that his wife wanted to be reunited with her mother in the UK. She was now in China looking after her mother who did not have many years left to her. Her retirement wages were low and care homes were expensive.

Findings and Conclusions

16. The judge accepted that the claimant's medical conditions were as presented. That is that she suffers from poor memory and low mood. He also accepted that she needed help to safely perform everyday tasks. Crucially however, he did not accept that it would not be possible for the help which the claimant needs could not be obtained in China. He was not satisfied that there was evidence to show that she could not afford privately managed residential care homes or a live-in carer. Moreover there was no evidence that the claimant's niece could no longer care for her, either from the niece herself or from elsewhere.
17. Having found that the claimant could not meet the requirements of the Rules it was incumbent on the judge to identify compelling factors which required a grant of entry clearance outside them. In this case, because there was a reasonable alternative open to the claimant, there are no such compelling factors. Family life has continued for many years through visits, both the sponsor visiting China and the claimant visiting the UK. The sponsor can also choose whether she spends longer time with her mother or whether she arranges for alternative care to be provided for her in China.
18. It was therefore not open to the judge to allow the appeal on Article 8 grounds. He erred in doing so by using Article 8 as a general dispensing power which is unlawful.

Notice of Decision

The original judge erred in law. His decision is set aside. It is remade as follows. The claimant's appeal is dismissed.

No anonymity direction is made.

Deborah Taylor

Signed

Date 31 March 2019

Deputy Upper Tribunal Judge Taylor