Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05417/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 March 2019	**On 05 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MRS SURJIT KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M. Murphy, Counsel, instructed by Eagles Solicitors
For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

REMAKE DECISION AND REASONS

1. This is the remaking of the decision in the Appellant's appeal against the Respondent's refusal of her human rights claim (made via an application for entry clearance).

2. The Appellant, a national of India, made the claim on 20 December 2016, asserting that due to various medical conditions she required personal care with everyday tasks, and that such care was not available in India. Her claim was sponsored by two of her children ("the Sponsors"), both British citizens and resident in this country.

3. The Appellant's appeal was originally dismissed by a First-tier Tribunal Judge in a decision promulgated on 28 August 2018. The decision was challenged and at a hearing on 23 January 2019 I concluded that the judge had materially erred in law. As a consequence I set this decision aside and adjourned the case for a resumed hearing. A copy of my error of law decision, which was promulgated on 8 February 2019, is annexed to this remaking decision.

4. In summary, I concluded that the judge had failed to provide adequate reasons in respect of his conclusion that appropriate care would be available to the Appellant in India.

The core issues in the appeal

5. The judge had accepted that the Appellant did require "personal care" in order to perform everyday tasks and thus E-ECDR.2.4 of Appendix FM to the Immigration Rules ("the Rules") was satisfied. I expressly preserved that finding and it is no longer a live issue (see [13] of my error of law decision). Insofar as the Rules are concerned, the remaining core issue relates to E-ECDR.2.5 of Appendix FM, 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.

6. In the context of this case, it has not been suggested that the Appellant could succeed under Article 8 if she were not able to meet the provisions of the relevant Rules.

The evidence before me

7. In remaking the decision in this appeal I have taken full account of the relevant evidence contained in the Respondent's bundle and three bundles provided by the Appellant. The first of these (A1) was before the First-tier Tribunal, and is indexed and paginated 1–283. The second (A2) was submitted in preparation for the error of law hearing in January of this year and I have already admitted this evidence. A2 is indexed and paginated 1–40. The third bundle (A3) was provided in advance of the resumed hearing and I have also now admitted this. It is indexed and paginated 1–21. A3 contains an expert report from Dr Rozmin Halari, a Consultant Clinical Psychologist. The Sponsors, Mr [PS] and Ms [MK], both attended the resumed hearing and gave oral evidence before me. A full note of this evidence is contained within the Record of Proceedings and I

do not propose to set it out here. I will refer to aspects of this evidence, where necessary, when setting out my findings of fact below.

Submissions of the parties

8. For the Respondent, Mr Tarlow relied on the Entry Clearance Officer's refusal notice. He emphasised the fact that the family had not in fact looked for alternative live-in carers for the Appellant during the course of the last three years, nor had they attempted to try and find any form of residential care. Whilst he accepted the cultural preference for the Appellant to be looked after by her children, Mr Tarlow submitted that this was insufficient to meet the high threshold relating to adult dependent relatives under Appendix FM. He referred me to and relied on the Court of Appeal's judgment in Ribeli [2018] EWCA Civ 611 and emphasised the high threshold and the fact that a choice made by family members in this country not to go to the country in which the Appellant lives would not normally be enough to succeed in a case. In respect of the expert report from Dr Halari, contained in A3, Mr Tarlow confirmed that there was no proper basis to challenge its contents but he submitted that notwithstanding this, the evidence was insufficient to meet the relevant threshold.

9. For the Appellant, Mr Murphy submitted that it would not be reasonable for any members of the Appellant's family residing in the United Kingdom to go and live in India on a permanent basis in order to provide care for her. Saying this, he relied on what he described as the important family connections of the two Sponsors in the United Kingdom.

10. Mr Murphy referred me to a number of paragraphs of the expert report and submitted that this evidence, combined with that of the Sponsors, went to show that the Appellant would become socially isolated if unable to be with her family and her health would deteriorate. Mr Murphy acknowledged that if it were sufficient simply to say that the Appellant's basic everyday needs were met by being in a residential home, the test under the Rules may not be met. However, he submitted that the wider picture needed to be considered. The evidence suggested that the absence of familial care would result in her having no motivation and possibly not even wishing to get out of bed on a regular basis. Finally, Mr Murphy sought to distinguish the Appellant's case from the facts in Ribeli.

My findings of fact

11. As mentioned earlier, I have expressly preserved the finding of the First-tier Tribunal Judge that the Appellant requires personal care in order to perform everyday tasks.

12. In respect of the evidence now before me as it relates to the core issue of the nature and location of appropriate care for the Appellant, I find it to be reliable, insofar as it goes and subject to particular matters set out below.

I therefore take as my starting point the essentially credible evidential-base set out in the three Appellant's bundles and as presented to me in the oral evidence of the two Sponsors.

13. I make the following findings of fact.

14. I accept that the Appellant's state of mental health has deteriorated since the passing of her husband (the Sponsor's father) in 2015.

15. I find that she continues to live in the home in which she has resided for many years. Following the death of the husband, the Appellant had received care from individuals who had come into the home on a daily basis to assist her. However, one of these carers passed away in 2016 and I accept that at least one other had actually, or at least sought, to steal from her.

16. I find that over the last two years or so it has been Sponsors, together with their sibling, [HS], who have travelled over to India in order to help the Appellant. It does not appear as though one or other of her children has been with the Appellant on a constant basis, but it is likely that there has been someone there for the significant majority of the time.

17. I fully accept that the Appellant's children feel a strong sense of duty towards their mother, both on a familial and cultural basis: they clearly genuinely believe that she would be better cared for by them in the United Kingdom than anywhere else.

18. On the Appellant's part, I accept that she holds a strong desire to be with one or more of her children in United Kingdom. This is as understandable as the feelings of her children.

19. On the basis of the oral evidence, I find that the Sponsors have not considered employing a live-in carer in the last couple of years. I accept they hold a genuine belief that adopting this course of action would not be in the Appellant's best interests.

20. Again in light of the oral evidence, I find the Sponsors have not made any enquiries into the possibility of the Appellant going to live in a residential care home in India. I accept the reasons given for this - the strong familial and cultural norms already mentioned - have been genuinely expressed.

21. I turn to the particular type of personal care required by the Appellant, her current health, and the reasonably foreseeable consequences of remaining in India.

22. I accept Dr Halari's opinion that the Appellant suffers from "moderate" levels of depression (paragraph 5.5 of his report).

23. The following paragraphs from Dr Halari's report are also of relevance to my assessment. At 5.11.3 it is said that being cared for by her children would amount to a significant factor in the improvement of her health. At 5.10.6 and 5.11.5 Dr Halari concludes that the Appellant's mental and physical wellbeing would be likely to deteriorate if she were to be cared for

by a live-in carer or in a residential care home. This conclusion is based, at least in part, on what is said in 5.10.4:

> “Ms Kaur is extremely scared of strangers, she does not trust them nor does she trust or feel comfortable with care homes in India. She is likely to experience significant anxiety, confusion and panic if she had a live-in carer or if she had strangers approaching her in a care home.”

At 5.9.1 and 5.9.2 the expert states that the Appellant would:

> “Not be able to carry out day-to-day tasks if for example she was in a care home or if she had a live-in carer. She would not be in any way physically, mentally or cognitive (sic) well enough to be able to care for herself or to perform everyday tasks.”

24. Paragraph 5.10.2 states:

> "If she were in a care home or had a live-in carer with her, has significant mental, physical and cognitive difficulties would not allow her to access help or get the required support from a carer."

25. Finally, within paragraph 5.11.5, Dr Halari makes the following observation:

> "There would be a significant risk to both her emotional and physical well-being if she remains in India and were to reside in a care home or with a live-in carer."

26. With due respect to Dr Halari, I am not clear as to some aspects of his evidence. For example, it is unclear to me why the Appellant would not be able to undertake day-to-day tasks (assuming that term is used to denote aspects of personal care) if she were living in a residential care home. By its very nature, one of the purposes of such an institution would be to provide the relevant assistance in order to ensure a proper level of care. Following on from that, it is unclear why he believes the Appellant would not be able to access help or get required support if she were in a home. As with my previous observation, the help and required support would be on site.

27. I place weight on Dr Halari’s view that the Appellant would not want to have a live-in carer or be resident in a care home. It is likely, based on her overall circumstances, that the Appellant would be fearful, at least initially, about being cared for by strangers. Dr Halari’s view that her mental health would deteriorate is clearly deserving of weight when seen in that context.

28. There are, however, three considerations which have a bearing on my view of Dr Halari’s evidence and indeed my overall assessment of the Appellant's case. First, the Appellant has never of course actually resided in a care home. Whilst I am not criticising either her or sponsors for this, it is a fact.

29. Second, and linked to the first point, there have been no investigations by either the family or relevant professionals in either the United Kingdom or India, about the possibility of residential care homes with either

specialities in treating elderly people with mental health needs, or the availability of specialist mental health treatment being provided in the home from an outside source (for example, psychiatrists or psychologists from clinics/hospitals who might be able to go into see a resident).

30. The third matter is the effect of the first two. Whilst I fully acknowledge that Dr Halari has applied his professional judgment to the Appellant's circumstances, in respect of the specific issue of residence in a care home, his opinions are, to a material extent, speculative. His view cannot of course have been based upon the Appellant's past experiences of having lived in the home because this has never occurred. Further, he has been unable to factor in the possibility of either a more specialist care home or the provision of relevant treatment from outside because he has not been provided with any information on these options and has not undertaken any research of his own (I make it clear that no criticism of him is meant by this).

31. Fourth, in the absence of any evidence from the Appellant side, I am not prepared to accept that there is no residential care home provision in India (or indeed simply within Punjab) which either specialises in elderly people with mental health problems, or at least provides access to mental health treatment from outside sources. In my view, it is extremely unlikely that a complete absence of such care exists.

32. If it were said that I have engaged in impermissible speculation as to the possibility of the relevant provision for the Appellant's mental health needs (as opposed to her physical needs, which, at least on the evidence before me, could clearly be adequately provided for in a residential care home), I would respond as follows. The burden of showing that the relevant provision of the Rules satisfied rests with the Appellant. On appeal, an essential, if not the only, issue which has been put forward as the basis upon which she can succeed is that of mental health. It is not a peripheral matter. I am fully entitled, indeed I am bound, to address my mind to the core issues in the case; these include the adequacy of prospective care for the Appellant in India. The points I have set out above simply relate to that issue.

33. In light of the above, I find that Dr Halari’s view that the Appellant's mental health would "significantly deteriorate" if she were to be in a residential care home is undermined. To put it another way, I find that, given the existence of appropriate residential care home provision, it is unlikely that the Appellant's mental health and overall well-being would be as significantly jeopardised as described by Dr Halari in his report.

34. I turn to the circumstances of the United Kingdom-based family. It is quite clear that they are a close-knit extended family unit. I find that the first Sponsor, Mr [PS], works in this country and is a devoted husband, father and, importantly, grandfather. I accept his evidence that his wife plays an active role in the lives of their grandchildren. I find that his brother, [HS], is also married and is similarly a very engaged grandparent. As for the second Sponsor, I accept that her husband is currently undergoing kidney

dialysis on a very regular basis and that she quite obviously needs to be with him at this very difficult time.

35. Overall, it is clear that family in this country have significant ties here. It is also clear that, taking the extended family unit together, there are significant financial resources available to them and the Appellant, and that neither the first Sponsor nor [HS] are effectively precluded from visiting India on a fairly regular basis by reason of particularly important responsibilities in the United Kingdom.

36. I find that if the Appellant were to reside in the United Kingdom, it is very unlikely that there would be any recourse to the NHS, as I accept the Sponsor's word that they would fund any necessary medical treatment for her.

Conclusions

37. In applying my findings of fact to E-ECDR.2.5 of Appendix FM I set out the following self-directions:

    (i) the threshold imposed by this provision is avowedly "rigorous and demanding" ([43] of Ribeli);

    (ii) the test is an objective one ([67] of Ribeli);

    (iii) the focus of the provision is on the ability of the subject to receive appropriate care in their home country and that that care must be connected to the need to perform everyday tasks. To that extent, there is a clear nexus between E-ECDR.2.4 and E-ECDR.2.5.

38. I have found that the two Sponsors and their brother quite clearly and understandably wish to have the Appellant with them in the United Kingdom and that they would indeed be able to provide her with excellent care. I fully appreciate the strength of their cultural inclinations as well. I have found that the Appellant herself would much rather be cared for by members of her own family than by strangers. Again, this is entirely understandable. However, as I have stated previously, the test is an objective one. In and of themselves, preferences will, with respect, carry little weight.

39. I conclude that it would not be reasonable for either of the two Sponsors or [HS] to go and reside in India on a permanent basis in order to care for the Appellant. In my view, their ties and overall circumstances in this country are such that a permanent move would have unjustifiably significant consequences not only for them as individuals, but also other members of their families here.

40. Despite that conclusion, in my judgment the Appellant's appeal must fail. This is because, even discounting the possibility of live-in care at home, appropriate personal care for the Appellant (both in respect of her physical

and mental health needs) in a residential care home would be available in India. In so saying, I apply my findings as set out in [20]-[33] to the objective and demanding test required under the Rules.

41. An element of my considerations, albeit not one of central importance, is the fact that family members from the United Kingdom would be in a position to visit the Appellant on a regular basis, albeit that they would not be residing there permanently.

42. I appreciate that my decision will come as a real disappointment to the Appellant and her family. I emphasise once again that the test in cases such as this is a very stringent one and I bound to apply the law as I find it to be.

43. As mentioned previously, it has not been suggested that the Appellant could succeed on any other basis if the provisions of the Rules could not be satisfied.

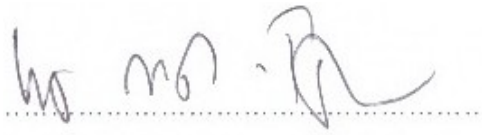
44. The Respondent's decision to refuse the Appellant's human rights claim does not breach her Article 8 rights and is therefore not unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and I have set it aside.

I re-make the decision by dismissing the Appellant's appeal.

No anonymity direction is made.



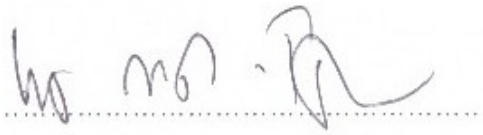
Signed Date: 4 April 2019

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.



Signed Date: 4 April 2019

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05417/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2019	**On 05 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MRS SURJIT KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Murphy, Counsel, instructed by Eagles Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Howard (the judge), promulgated on 28 August 2018, in which he dismissed her appeal against the decision of the Respondent, dated 6 March 2017, refusing to grant entry clearance and thereby also refusing her human rights claim. That claim had been based upon the Adult Dependent Relatives provisions under Appendix FM to the Immigration Rules.

2. In essence it was said that the Appellant suffered from several medical conditions and required personal care. It was also said that appropriate care was not available in India.

The judge's decision

3. In light of the medical evidence before him the judge concluded that the Appellant did in fact require personal care and that the requirements of E-ECDR.2.4 of Appendix FM were met [19]. However at [20] he goes on to say the following:

> "… however, it is clear from the evidence I heard that such appropriate care is available in India and the family has the resources to pay for it."

4. The judge then concluded that the requirements of E-ECDR.2.5 of Appendix FM were not met.

5. Having gone on to consider Article 8 in its wider context, the judge follows the Razgar methodology and takes account of the various factors in section 117B of the Nationality, Immigration and Asylum Act 2002. In doing so he concludes that it was the expectation of the Appellant's family in the United Kingdom that relevant medical care for her would be provided by the NHS.

The grounds of appeal and grant of permission

6. The grounds of appeal to the First-tier Tribunal are succinct. They assert that the judge failed to provide any or any adequate reasons in support of his conclusion at [20] that appropriate care was available in India. Second, the judge's conclusion that the family expected medical care in this country to be provided by the NHS was contrary to the evidence.

7. Permission to appeal was refused by the First-tier Tribunal but on renewal was granted by Upper Tribunal Judge Blum in a decision dated 13 December 2018.

The hearing before me

8. Mr Murphy relied on the grounds of appeal and his skeleton argument.

9. Mr Wilding, quite sensibly in my view, accepted that there was a lack of reasoning in [20] and that the error was very probably material.

Decision on error of law

10. I conclude that there are two material errors of law in the judge's decision.

11. The first relates to [20]. There are simply no reasons provided for the important finding that there was appropriate care for the Appellant

available in India. The Appellant's children in the United Kingdom had given evidence to say that there was no such appropriate care, given the history of the carers previously employed (see [13]) and the fact that they were having to go over to India themselves to provide appropriate assistance to the Appellant. There was nothing in the judge's decision to suggest that the evidence of the family members was deemed untruthful.

12. The second error relates to the NHS medical care. The judge had already found that the family members in this country were fairly well-off. In addition, as far as I can see there was no evidence whatsoever to indicate that these family members expected any future medical treatment to be provided by the NHS. The judge's conclusion that there was such an expectation appears to be unsupported by an evidential basis. This was a factor that the judge had taken into account when considering Article 8 in its wider context and is therefore in my view material.

13. In light of the above I set the judge's decision aside. In so doing I expressly preserve the findings and conclusions that E-ECDR.2.4 of Appendix FM had been met. There was no objection to this from Mr Wilding.

Disposal

14. I am going to retain this appeal in the Upper Tribunal and have it set down for a resumed hearing before me in due course.

15. The core issue in the appeal is whether or not E-ECDR.2.5 of Appendix FM has been satisfied, although this is not necessarily determinative of the Article 8 claim.

16. Two important questions arise: first, what is the appropriate care needed to meet the Appellant's difficulties; second, is such appropriate care available in India. In answering the second question, thought will need to be given as to whether residential care might be possible.

17. In terms of ensuring that all relevant evidence is obtained at the resumed hearing I will issue directions to the parties, below.

Notice of Decision

The decision of the First-tier Tribunal Judge contains material errors of law and I set it aside.

I adjourn this appeal for a resumed hearing before me in the Upper Tribunal.

Directions to the Parties

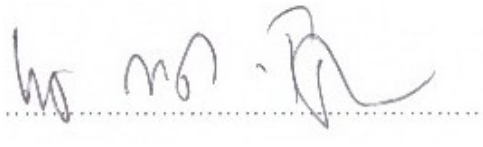
(i) the Appellant shall submit any further evidence relied on at least ten working days before the resumed hearing;

(ii) further evidence must include updated statements from the family members in the United Kingdom addressing the issues set out in paragraph 16, above;

(iii) oral evidence at the resumed hearing is permitted but only if updated statements have been provided in advance in compliance with direction 2;

(iv) an expert report on the Appellant's circumstances may be obtained but this appeal will not be adjourned again solely on the basis that the provision of such evidence is awaited.

No anonymity direction is made.



Signed Date: 8 February 2019

Deputy Upper Tribunal Judge Norton-Taylor