Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01016/2019 (V)**

THE IMMIGRATION ACTS

Heard at: Field House
On: 16 March 2021

Decision & Reasons Promulgated
On: 25 March 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

LI JINGLAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Z Harper, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision refusing her application for entry clearance under Appendix FM as the adult dependant relative of her son, Kevin Lee.

3. The appellant is a citizen of Tanzania of Chinese origin, born on 13 November 1946. She applied for entry clearance to the UK on 5 October 2018, to join her son in the UK. Her application was refused on 20 December 2018 on the basis that she had not provided any documentation to demonstrate that she required long-term care to carry out every day personal and household tasks and that, as a result of age, illness or disability, required a level of long-term personal care that could only be provided in the UK by her relative there and without recourse to public funds. The respondent noted that there was evidence to show that there were elderly homes in Tanzania and considered that the appellant's son could pay for her medical treatment as well as for a place where she would receive assistance with her daily care in Tanzania.

4. The appellant appealed against the respondent's decision and her appeal was heard in the First-tier Tribunal on 3 September 2019 by First-tier Tribunal Judge O'Garro. The sponsor, the appellant's son, appeared before the judge and gave oral evidence. He confirmed that his mother was a widow, that his father died in 2003, and that he was an only child. He had lived with the appellant in Tanzania from 1994 to 1998 and had then come to the UK to study. He had completed his studies and currently managed his own company as a software engineer and he sent the appellant money for her upkeep, £500 a month. He was married with two children who attended nursery school. He had last visited the appellant in 2005. The appellant had an ongoing dispute in Tanzania about land and property she owned there, which started in 2006, and had revealed a lot of corruption among government officials and local businessmen, which had resulted in her being threatened and attacked. He also feared being attacked or kidnapped and so had not returned to Tanzania since 2005. The sponsor said that he spoke to the appellant once or twice a week and she would tell him about her ailments and her struggles to do shopping and cooking. He had had a cousin in Tanzania who, together with his wife, had helped to take care of his mother, by shopping and cooking and taking her to hospital appointments, but they had then moved to Sweden in 2017. His mother's landlord had found a young girl to assist his mother but that was a temporary arrangement. There was no-one in Tanzania to support her and his attempts to employ someone to look after her had been unsuccessful. There were friends there who would check on her, but on one to provide her with the care and support she needed.

5. The judge found that the medical evidence provided by the appellant with her application did not meet the requirements of Appendix FM-SE of the immigration rules. There was nothing to show that the report from Dr Riaz Ratansi was an independent report, as required by paragraph 34 of Appendix FM-SE. The letter provided from Dr Naftali B Ng'ondi on behalf of the Ministry of Health Permanent Secretary of Tanzania did not meet the evidential requirements in paragraph 35 as it did not show that the appellant was unable, even with the practical and financial help of the sponsor, to obtain the required level of care needed in Tanzania. The appellant therefore did not meet the burden of proof to show that the requirements of paragraph E-ECDR of Appendix FM were met. As for 'exceptional circumstances' under GEN.3.1 and 3.2 of Appendix FM, the judge did not accept that the appellant had established that she had family life with her son and found, in any event, that her circumstances did not come close to being exceptional. The judge considered that the evidence showed that the appellant was mobile, that there was

some security at her place of residence, that she was able to access medicines for her ailments and that it was not shown that she required long-term personal care. The judge considered that the appellant could obtain a reasonably good level of personal and professional care and assistance with the financial assistance of her son and rejected the claim that there were no individuals to assist for payment. The judge, relying on the case of Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611, considered that there was also a choice and the sponsor and his family could relocate to Tanzania to care for the appellant. The judge found that the respondent's decision was not disproportionate and she accordingly dismissed the appeal.

6. The appellant sought permission to appeal Judge O'Garro's decision to the Upper Tribunal on the following grounds: that she had failed to consider all the evidence in the assessment of the appellant's care needs and to provide adequate reasons for rejecting that evidence, including evidence that the appellant had sustained a fracture to her arm and head injury during an assault in 2017 and had been found collapsed in her home and unable to move in May 2019; that she had failed to make findings on whether care abroad was affordable; that she had failed to reach sustainable conclusions on the existence of family life; and that she had failed to take account of all material matters in assessing whether the sponsor could care for the appellant abroad.

7. Permission to appeal was granted in the First-tier Tribunal on 26 February 2020 and the matter then came before me.

Hearing and submissions

8. As a preliminary matter, Ms Harper sought to rely upon recent evidence showing the appellant's much deteriorated state of health. She submitted that that evidence was admissible in considering the error of law matter as it showed the significance and materiality of the judge's failure to consider the case before her about the deterioration in the appellant's health. Ms Cunha objected to the evidence being admitted as irrelevant to the error of law, since it was evidence which had not been before the First-tier Tribunal. I made it clear that I would not take that evidence into account in considering a challenge to the judge's findings on the appellant's state of health, as it post-dated her decision, but that I would hear submissions about the deterioration in the appellant's health at the time of the First-tier Tribunal hearing and consider the evidence on that very limited basis.

9. Ms Harper submitted that the first ground was the judge's failure to take account of all the evidence or her failure to provide proper reasons for rejecting the evidence. The judge failed to consider the appellant's injuries and difficulties arising from her falls and from being assaulted and failed to consider the evidence about her being found collapsed in her house in May 2019. The evidence before the judge was that the appellant's condition was deteriorating and the new evidence showed that that was correct as she currently suffered from dementia and could not look after herself. Therefore, there were aspects of the appellant's care which were not addressed in the judge's decision. The second ground was the judge's failure to consider whether the provision of care was affordable for the sponsor. The judge made no findings at all whether the sponsor could afford to employ a

domestic carer. The £500 a month which the sponsor sent covered the appellant's basic costs and medication and there were no further funds available to employ a domestic carer. The third ground was the judge's failure to make sustainable findings on whether there was family life between the appellant and the sponsor and her failure to take account of relevant factors as set out in ZB (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 834, including the appellant's stage of life and care needs. The fourth ground was the judge's failure to take account of material matters when concluding that the sponsor could relocate to Tanzania to look after his mother. Such a requirement was unrealistic as the sponsor was not a Tanzanian national and could not work there and he had a wife and two British children in the UK. The appellant's case could not be compared to that of Ribeli and the judge's reliance on that case was a material error of law.

10. Ms Cunha submitted, with regard to the challenge based on the judge's failure to consider whether the provision of care was affordable for the sponsor, that the judge did not need to go that far because the sponsor's position was that he was providing sufficient money for her care. The judge did not need to take into account future care needs, but was entitled to consider that the sponsor was currently financing her care needs. Ms Cunha submitted that the judge was entitled to rely on Ribeli in finding that the sponsor had the option of going to Tanzania to look after his mother. The judge considered all the evidence and balanced the sponsor's evidence against the doctor's statement that the sponsor was mobile. The sponsor's evidence was also that his mother took taxis to get around and do shopping. The judge was therefore entitled to find that the appellant could meet her own care needs.

11. Ms Harper, in response, submitted that the failure to consider affordability of care was a material failure by the judge. The appellant's collapse in May 2019 gave rise to a certain level of care which had not been fully considered by the judge. The sponsor's evidence was that the money he had been sending to his mother was for her daily needs in terms of rent and food, but did not extend to paying for a carer. The judge did not consider the history of the appellant's falls and deterioration.

Discussion and conclusions

12. Since the decision of Judge O'Garro on 24 September 2019, further evidence has been produced to show the deterioration in the appellant's health. Some of that evidence was sent to the Upper Tribunal in October and November 2020 and the rest was sent on 11 March 2021 and referred to by Ms Harper at the beginning of the hearing. The evidence includes a statement from the sponsor dated 8 March 2021 referring to his mother becoming seriously ill from October 2020, suffering from confusion and malnutrition and evidence of a further period of hospitalisation in October 2020 and a diagnosis of senile dementia in addition to her previous conditions.

13. That is a very different situation to the one before Judge O'Garro and, as I pointed out to Ms Harper at the hearing before me, I fail to understand why that evidence was not produced as part of a fresh entry clearance application rather than as part of this appeal which, at first instance, is concerned only with the First-tier Tribunal Judge's findings on

the evidence before her. It seems to me that that would have been a quicker route and possibly a more cost effective one, in achieving the desired outcome. As much as I have sympathy for the appellant and sponsor, given this development, I cannot see how that assists in undermining Judge O'Garro's decision and I cannot set aside Judge O'Garro's decision simply on the basis that there is new evidence which may lead to a different outcome in the appeal. That is particularly so when, contrary to the assertion in the grounds, Judge O'Garro took account of all the evidence available at that time and made full and proper findings on that evidence. Ms Harper submitted that the new evidence was relevant in so far as it supported the claims made before Judge O'Garro that the appellant's condition was deteriorating. However, the judge was not able to, or required to, speculate about the nature or extent of that deterioration and about the appellant's future condition, when none of the evidence before her provided any specific information or prognosis in that regard.

14. Indeed, the evidence before the First-tier Tribunal was, in parts, inconsistent and ambiguous, as the judge pointed out at [24] and [39] to [43]. The evidence from the sponsor and the accompanying statements suggested that his mother required constant care and assistance yet the doctor's letters and other evidence indicated that she was mobile and able to attend to her own personal living needs, as the judge properly found. The evidence about access to care was not at all clear, with some evidence such as the letter of 21 June 2018 from Dr Ratansi stating that there was no social support available for elderly people in Tanzania, but the somewhat ambiguous letter from Dr Ng'ondi dated 12 September 2018 stating that there were elderly homes available for the elderly who had no access to support.

15. It is asserted in the grounds that the judge erred by failing to consider the impact of the serious injuries sustained by the appellant in accidents and when assaulted, and the deterioration in her condition when she was found collapsed in her home in May 2019. However, those were matters which the judge took into account. At [39] the judge considered the impact upon the appellant of a stroke in 2005 and injuries from assaults in 2017 as referred to in Dr Ratansi's letter and at [41] she considered the evidence of Caroline Maumba who found the appellant lying in bed at her home in May 2019. It was not for the judge to speculate, without there being any satisfactory and comprehensive supporting medical evidence, that that was the start of a decline in the appellant's health to the extent suggested by the most recent evidence. That was the point made by the judge at [43], whereby she made her findings within the confines of the evidence available to her and was entitled to reach the conclusions that she did.

16. The grounds also challenge the judge's decision on the basis that she failed to consider whether the provision of care for the appellant was affordable. That was the basis upon which permission was essentially granted. Ms Cunha's submission was that that was not a material omission because the appellant's case did not get that far given the lack of evidence to demonstrate that she required long-term personal care. There is indeed some merit in that submission, particularly as the sponsor's second statement, of 21 August 2019, in relation to his finances and ability to fund a carer was in the context of funding a qualified professional round-the-clock carer, whereas the judge found that the evidence

did not suggest that such a level of care was currently required by the appellant. Indeed, a lack of funds was not a reason given by the sponsor in his first statement of 5 October 2018 for having difficulty finding care for his mother, but rather that he had not been successful in finding a reliable carer. His evidence was that he had employed several carers previously, although none had worked out and there was no suggestion that he did not have adequate funds for that purpose. The matter was fully and properly considered by the judge at [43] of her decision, with cogent findings made in that regard. Accordingly, I do not consider that ground of challenge to be made out.

17. Neither do I find merit in the third ground, which challenges the judge's findings on family life for the purposes of Article 8(1). The judge clearly had regard to all relevant matters when considering whether family life was established, applying the guidance in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and having full regard to the appellant's circumstances. In any event, as the judge made clear at [38], she went on to consider proportionality under Article 8(2) on the basis that there was an established family life and gave detailed consideration to the appellant's medical condition and living circumstances in her assessment.

18. The only ground which I find to have any merit is the fourth ground, whereby I agree with Ms Harper that the judge's findings as to the sponsor having the option to relocate to Tanzania are unrealistic and failed to take account of his family life and other ties in the UK and the full impact of such a move. However, it is clear by the brevity of that finding and the way in which the judge expressed herself at [45] and [46] that that was a passing observation made in the alternative. The judge had already reached a fully and cogently reasoned decision on proportionality under Article 8 prior to those paragraphs and accordingly any failings and omissions in her observations at [46] were entirely immaterial to the outcome of her otherwise comprehensive and properly made decision.

19. In all of the circumstances it seems to me that the judge's decision is a sound and comprehensive one including a full and careful assessment of the evidence and clear and cogent findings. The evidence before the judge was unarguably lacking and the conclusions she reached on the appellant's case in the light of that limited evidence were fully and properly open to her. I do not find any material errors of law requiring the decision to be set aside.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: *S Kebede* **Dated:** **17 March 2021**
Upper Tribunal Judge Kebede