**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-002298**
**First-tier Tribunal No:**
**HU/51268/2021**
**IA/05333/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House IAC**
**On the 31 January 2023**

**Decision & Reasons Promulgated**
**On the 13 February 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MS FOUZIA KHALIQ**
**(Anonymity order not made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr D Coleman, counsel
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

**DECISION AND REASONS**

## The Appellant

1. The appellant is a citizen of Pakistan born on 17 December 1973. She applied for entry clearance as an adult dependent relative to join her daughter Sonia Kamal Khan, date of birth 27 May 1994 who is the sponsor. The application was refused by the entry clearance officer on 20 March 2021. The appellant appealed against this refusal and her appeal was allowed by Judge of the First-tier Tribunal Wilsher sitting at Taylor House on 25 April 2021. Permission was granted to the respondent to appeal that decision and thus the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was not then the decision of the First-tier Tribunal would stand. Although therefore this appeal came before me as an appeal by the Secretary of State I have for the sake of convenience continued to refer to the parties as they were known at first instance.

## The Appellants' Case

2. The judge summarised the evidence supporting the appellant's case at [7] to [11] of the determination. The appellant has suffered from depression and anxiety for over twenty years with varying degrees of severity. Following the death of her brother in 2019 her depression became much more severe. The appellant is at present staying with her sister in Pakistan but the sponsor has been told expressly by the appellant's sister that she wishes to be released from her obligations for caring for the appellant. The appellant is a disruptive influence on the sister's household because of her depression and anxiety. There have been attempts at providing the appellant with professional care over the past couple of years since her condition worsened. She has had 24 different carers but because she is so resistant to care they have all left. She needs care with being fed, clothed, bathed and is generally lacking in the motivation to engage in any of these tasks. She is reliant on personal care for basic tasks such as eating, washing, dressing and getting up in the morning. Her case was supported by a medical report from Dr Syed Ali from the Bilal Hospital, dated 21 April 2022.

## The Decision at First Instance

3. At [14] the judge summarised his findings: "I am satisfied on the basis of the medical evidence that I have seen and the evidence of the sponsor that this appellant is suffering from severe depression which has effectively rendered her entirely dependent for personal care on those around her. She does not have the support that she needs from her family members in the house. Instead, professional care has been sought but even that has failed to provide her with the care that she needs because she is hostile to the carers and requires personal care from someone that she knows and trusts. There is no such care available in her home country that is accessible to her. The sponsor is ideally placed

to provide this and is able to do so. I find that efforts have been made over the past few years to pay for the professional care for her but these have failed to meet her needs adequately or on a sustained basis."

## The Onward Appeal

4. The respondent appealed the decision making the following points: the Appellant was previously cared for by her eldest brother who died in 2019. Another brother is retired and lives alone. The Appellant was presently residing with a sister and her family. It was claimed there was tension in the house due to her mental health issues.

   (i) The issue of the relationship between the Appellant and Sponsor was disputed and this was maintained in the Respondent's Review for the hearing (Para 5-9). The FTTJ did not resolve this conflict. The FTTJ's finding that the asserted facts were made out was devoid of reasoning.

   (ii) The determination was silent on why the Appellant could not live and be emotionally supported (one assumes) by her other brother who was retired and lived alone with the Sponsor continuing to provide financial support. There was no evidence why they would be unable/unwilling to care for the Appellant in a similar manor to the way the now deceased 'eldest' brother had.

   (iii) At the date of hearing the Appellant's current 'paid' carer was still employed and had been in post for a month. The assertion of 24 previous carers is referenced but the FTTJ does not refer to any specific independent evidence as to numbers or their reasons for leaving beyond the oral assertions of the Sponsor. There was no explanation why inadequately trained casual carers were relied upon as opposed to trained professionals. There was no evidence from the current carer as to any difficulties faced.

   (iv) The judge had inadequately reasoned (and arguably failed to consider) why alternative close family members in Pakistan could not provide the necessary emotional support and why only untrained professional carers had been utilised. There was no consideration of the suitability or availability of residential care in Pakistan.

   (v) There was no reference to any evidence directly from the Appellant's sister or why in the absence of the same, when it could have reasonably been obtained, the oral evidence of the Sponsor alone was accepted?

   (vi) The judge attached weight to a speculative future business and operating practices of the Sponsor. The Adult Dependant Relative route is intended as a matter of last resort, not personal preference.

5. Permission to appeal was refused by Judge of the First-tier Povey who stated: “The Judge heard from the Appellant’s daughter, who was able to provide more details of the Appellant’s health and circumstances. That evidence was untested and the Judge was entitled to afford it appropriate weight. The Judge set out in sufficient detail his findings, the evidence to support those findings and the reasons for his decision that the Immigration Rules were, in fact, met (at [5] – [14]). The Judge’s reasoning was sufficiently detailed and cogent, such that the basis for his decision and how he resolved any conflicts in the evidence could be ascertained.”

6. The respondent’s application for permission to appeal was renewed to the Upper Tribunal. UTJ Blundell granted permission stating: “It is arguable that the judge failed to give adequate reasons for his conclusion that there is no suitable care available in Pakistan. The judge arguably failed to consider the possibility that other family members could provide the necessary care or that it could be provided in a residential setting. It is arguably unclear how the judge was satisfied that the evidential requirements of paragraph 35 of Appendix FM-SE were satisfied in this respect. Whilst the respondent was unrepresented at the hearing, I am satisfied that it is arguable that it was in any event for the judge to address his mind to these matters whether or not they were raised by an advocate. The relevant requirements of the Rules were placed in issue in the original decision and in the respondent’s review and the requirements of Appendix FM-SE were clear and mandatory. In the circumstances, the grounds of appeal warrant the scrutiny of the Upper Tribunal.

7. The appellant filed a rule 24 response to the grant of permission to appeal which said that the judge had accepted the relationship between the appellant and the Sponsor who had produced her WhatsApp records which showed communication between mother and daughter. The relationship only had to exist, it did not have to be genuine and subsisting. The existence of a brother was not a matter previously relied upon by the respondent at any point. The appellant could not reside with her brother. The nature of care that the appellant requires includes being bathed and clothed. It was deeply inappropriate and unreasonable to expect the brother to undertake these tasks.

8. The rule 24 submission continued: the judge was perfectly entitled to be satisfied with the Sponsor’s consistent and credible evidence, which stood entirely unchallenged. The grounds amounted to a number of disagreements by asserting that the judge failed to deal with particular evidence more fully. The test for the Upper Tribunal was whether the decision under appeal was one that no reasonable judge could have reached.

9. Finally the submission concluded: Upper Tribunal Judge Blundell was wrong to grant permission on a ground that was not advanced by the respondent. In any event, para 35 of Appendix FM-SE states that 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." The letter from Dr Akhtar dated 10 April 2021 stated that the required 'social and financial support' was not available. Para 35 of Appendix FM-SE of the Rules was thus met.

## The Hearing Before Me

10. The presenting officer indicated that she relied on the grounds of appeal, and confirmed that the medical evidence was challenged in the respondent's review. It was an error of the judge to say it was not. Adequate reasons had not been given and the judge had not made findings why the appellant could not be supported. There was no explanation why the judge had concluded that there were no alternative sources of care in Pakistan. It was inadequate to only rely on the sponsor's evidence in coming to the conclusion that no other options were available. It appeared that the appellant had only used untrained carers.

11. In reply counsel for the appellant relied on (i) the Rule 24 response to the grant of permission and (ii) the appellant's skeleton argument which I have summarised above, see paragraphs 7 to 9. Four days before the hearing at first instance a further report had been filed, this was from Dr Ali and the judge had had the benefit of that document whereas the Home Office had not seen it. The judge had found the sponsor to be a most compelling witness but had asked further questions to test her veracity. The issue with whether the appellant and sponsor were related was not a valid point. The appellant had been ill for 20 years and under the care of Dr Akhtar in particular for over 10 years. Her condition had worsened when a brother died in 2017 and she required day-to-day care to function. It was ridiculous that a retired brother could take over the care of the appellant when the appellant's own sister had failed to be able to do that. The appellant required close family members to care for her. The doctor said the appellant was not responding to treatment. She needed to be with her daughter, the sponsor as soon as possible. It was conceded that some of the 24 carers were inadequately trained but others were professional carers yet they had still all failed.

12. Nor was it correct to say that the judge had wholly relied on the sponsor's evidence. The judge had relied on the reports of two different consultant psychiatrists the appellant's mental illness was getting worse. Dr Ali had recommended a change of environment for the appellant. There was nothing plainly wrong with the decision, the judge had given clear reasons. The respondent herself gave scenarios in which an application for entry clearance as an adult dependent relative might succeed or fail. This was one of those rare cases where an ADR appeal should succeed. The emotional support which the appellant needed was not available to her in Pakistan. The respondent's grounds of appeal were a mere disagreement with the determination.

13. In conclusion the presenting officer said that there was a lack of holistic reasoning in the determination. The ADR route for settlement was a last resort, the appellant had been cared for in Pakistan. Although it was being said that only the daughter in the United Kingdom could look after the appellant, there was a lack of evidence of visits by the sponsor to Pakistan to look after the appellant.

## Discussion and Findings

14. The appellant claimed to be able to demonstrate that the respondent's decision to refuse entry clearance breached article 8 the right to respect for private and family life. If the appellant could show that she otherwise satisfied the immigration rules in relation to adult dependent relatives that would go a significant way towards establishing that the respondent's decision under appeal wrongly interfered with protected rights. The appellant and sponsor are mother and daughter as the judge found and therefore there will be family life. By proving dependency the appellant could show it went beyond more than normal emotional ties.

15. There was a twofold test which the appellant had to satisfy under the immigration rules. The first test under E-ECDR.2.5 of Appendix FM was that the appellant had to be unable even with the practical and financial help of the sponsor to obtain the required level of care in Pakistan because either it was not available and there was no person in Pakistan who could reasonably provided or it was not affordable. The second test under E-ECDR.3.1 was whether adequate arrangements had been made for her future care in the United Kingdom. Although this latter point was raised in the respondent's grounds of onward appeal, I do not consider that it has particular merit. The sponsor appears to be able to support the appellant at the present time and it would be speculation to suppose that the sponsor's financial position would deteriorate in the future in the event she were to set up a new business.

16. The two fold test established by appendix FM is a difficult one to pass. The appellant's case was that because of her condition carers did not stay to look after the appellant and that was why the sponsor had now come to the view that only she could look after the appellant which would have to be in the United Kingdom. The judge's determination needed to show what the evidence was that no one could look after the appellant in Pakistan but also that the sponsor could look after the appellant in the United Kingdom. If the family in Pakistan had not been able to find a suitable carer, what was the likelihood that the family in the United Kingdom would be able to? The medical evidence from the doctors in Pakistan could indicate what care the appellant needed and could where appropriate criticise shortcomings in the care she was actually receiving but this still begged the question whether the sponsor would succeed in the United Kingdom where family members in Pakistan had not succeeded. Ultimately this was a matter for the judge who had the advantage of seeing the witness and could form an evaluation of whether

the sponsor was genuinely concerned to find adequate care for her mother.

17. The second issue in this case turns on subsection 2.5 that the appellant could not obtain the required level of care in Pakistan because it was unavailable. Given that the sponsor was already financially supporting the appellant it would be difficult to say that the required level of care in Pakistan if available would be unaffordable. What therefore the appellant had to demonstrate at first instance was whether care was not available at all and there was no one who could reasonably provide it.

18. The respondent's objections in this case were that the judge had accepted the sponsor's evidence and did not probe the case significantly further giving inadequate reasons for his conclusions as a result. The appellant argued that given the large number of carers who had been tried and who had failed it was clear that suitable carers were not going to be found in Pakistan. The respondent argued in submissions to me there were potential difficulties with this line of argument. Firstly there was no supporting evidence from either the sister with whom the appellant continued to live or the present carer who whilst not having been in post for very long was still in post. As to this, see [13] of the determination, the judge accepted the sponsor's witness statement on the issue.

19. The judge was placed in a difficult situation by the absence from the hearing of a presenting officer. It was an exaggeration for the appellant to say that the medical evidence was not challenged but the lack of representation for the respondent weakened the respondent's criticisms of the medical evidence as they could not be followed up in closing submissions at first instance. A medical report was filed four days before the hearing which the respondent would have known nothing about. However that lack of knowledge of the report was caused by the decision of the respondent not to send a presenting officer along to the hearing.

20. The appellant had to show that the required level of care in Pakistan would not be obtained. The appellant had apparently been cared for by an older brother who passed away and the respondent queried whether a surviving brother could have taken over that role. There were good reasons why it would be difficult for the second brother to take on a caring role given the level of intimate care the appellant presently requires. The threshold to be overcome to establish that an appellant is an adult dependent relative within the meaning of appendix FM is a difficult one but it is not impossible and exceptional cases will arise where the appellant can show that he or she can bring themselves within the rules. The appellant's argument in this case is that this is just such an exceptional case and that the First-tier judge was right to allow the appeal.

21. Overall this was a generous decision by the judge who accepted the evidence of the sponsor seemingly at face value. The respondent's

remedy would have been to have sent representation along to challenge the sponsor but for whatever reason the respondent chose not to do so. Judge Blundell referred to whether the judge at first instance had considered paragraph 35 of appendix FM-SE which provides that independent evidence from a doctor or other health professional must be produced to show (in this particular case) that the appellant is unable to obtain the required level of care in Pakistan. Although the respondent objected to the production of a medical report four days before the hearing which the respondent as a result did not have sight of, that could have been remedied by the respondent sending a presenting officer along to the hearing. I disagree that it was not open to judge Blundell to raise paragraph 35 when granting permission to appeal. Where a rule mandates evidence as paragraph 35 does, the tribunal must have regard to it otherwise an error of law occurs. In this particular case however it is not a valid criticism of the determination because the judge did have supporting evidence acceptable under paragraph 35 of appendix FM-SE. I find that such evidence included the most recent report of Dr Ali which was properly available to the judge.

22. This was an unusual case. The judge accepted that strenuous efforts had been made to care for the appellant in Pakistan but had been unsuccessful. There were as I have indicated certain gaps in the evidence such as something from the sister confirming the difficulties experienced in looking after the appellant and more evidence could have been sought from the sponsor as to whether she provided care for the appellant in the event of visits to Pakistan. However I remind myself that the test at error of law stage is whether there is a material error of law. The respondent's challenge is a reasons based one and is in my view largely a disagreement with the findings of the judge. Another judge might have reached a different conclusion but that does not of itself mean that this judge was wrong. It is not the case that the judge should set out each and every piece of evidence.

23. It is speculative to consider what another judge might have done for another reason namely that the absence of a presenting officer meant that the sponsor's evidence could not be fully tested. The respondent had made clear what her objections to the appellant's case were in documentary evidence during the course of the proceedings but it was still a matter for the judge at trial to decide what evidence he did or did not place weight on. Whilst another judge might well have come to a different conclusion to the one arrived at by this judge and whilst in the ordinary course of events the threshold to be crossed for an appellant to satisfy the adult dependent relative test is a high one I find that in this case the judge was able to show that the appellant could do that. As a result I do not find that there was a material error of law in the decision of the judge in the first-tier and I therefore dismissed the respondent's onward appeal.

## Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to allow the appeal of Ms Fouzia Khaliq who I have referred to as "the appellant"

The onward appeal of the Secretary of State, who I have referred to as the respondent is dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 7th day of February 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**
**FEE AWARD**

There was no fee award made by the judge in the First-tier and I see no reason to revisit that decision.

Signed this 7th day of February 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge