



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/06708/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2019**

**Decision & Reasons Promulgated
On 29 October 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**FENGQIU WU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T Murshed instructed by Caveat Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of China. She appealed to a Judge of the First-tier Tribunal against the decision of the Secretary of State of 26 March 2019 refusing to grant leave to remain on the basis of private and family life in the United Kingdom.
2. The appellant was aged 80 at the time of the judge's decision. She had most recently entered the United Kingdom on 8 April 2018 having been granted leave to enter as a visitor valid from 7 December 2016 until 7 December 2018. She applied within time for leave to remain.

3. The judge noted that the appellant could not meet the requirements pertaining to adult dependant relatives under the Rules because such an application can only be made out of country, but accepted that E-ECDR 2.4 and 2.5 of Appendix FM were relevant insofar as they could inform the assessment of the proportionality of the respondent's decision.
4. The evidence of the appellant (who did not give oral evidence but provided a statement) and of the sponsor was that the appellant was widowed in 2016 and since then has lived alone and was being looked after by a neighbour. The evidence was that the neighbour told her in March 2018 that she could no longer look after the appellant due to work commitments and the sponsor thereafter brought the appellant to the United Kingdom.
5. The appellant had previously visited the United Kingdom in April 2017 and returned to China. She said in her statement that her medical conditions were not so bad in 2017 but had deteriorated subsequently. She said that the sponsor had been taking care of her. She suffered a cerebral aneurism and underwent surgery in 2017 and continues to take medication for high blood pressure. She has mobility difficulties, blurred vision, headaches and ringing in her ears. She stated that she will be at the mercy of care homes and would be abused, just as her late husband was abused in such a setting. She was reluctant to be placed in a care home because of her late husband's experiences. The sponsor said she could not live independently, and had no close relatives nearby who could assist her and provide her with the care she requires.
6. The judge took into account the medical evidence from the appellant's doctor in China. The doctors had diagnosed osteoarthritis of both knees, hypertension and coronary heart disease. Whilst in the United Kingdom the appellant had been seen by a GP who diagnosed her as having headaches with an unknown cause, possible depression and knee pain. There was no mention of any issues with self-care in the GP's letter. The GP noted that the appellant was always worried about the risk of abandonment and stays at home all day and sometimes someone is there but not always.
7. There was also a discharge summary from a hospital in the United Kingdom following an elective admission of coiling of an unruptured aneurism in September 2017 and there were said to be no issues with mobility, washing, dressing, incontinence or eating and drinking.
8. The judge also took into account a report from Dr Balu, a consultant psychiatrist. Dr Balu said that the appellant fulfils the criteria for depressive disorder, moderate to severe depression without psychotic symptoms. He considered that in his opinion the appellant was at high risk of self-neglect, and her health would deteriorate rapidly without the support of her immediate family, her only daughter and her grandson. He noted that according to her family her condition had been worsening over the last year and she had become frailer, losing her ability to care for herself.

9. The judge commented that Dr Balu did not say in what way he had come to the conclusion that the appellant was at high risk of self-neglect other than the assertions made by her daughter and her grandson. Apart from that, the only specific help mentioned in the report was that the appellant had to be supported to get to appointments with healthcare providers due to her mobility issues.
10. The judge concluded that Dr Balu's conclusion was heavily reliant on the reports of the sponsor and the appellant's grandson. There had been no objective assessment of her ability to self-care either from a physical or mental health perspective. He concluded that what weight he could place on Dr Balu's report would depend on the reliability of the witnesses' evidence.
11. He noted from the sponsor's witness statement that there was no mention of help with bathing and toileting but she did mention such needs in her examination-in-chief. The judge found there was no good reason for that not being in the witness statement. He found that the medical evidence from the doctors in the United Kingdom and China did not discuss objectively the level of personal care required by the appellant. There was a contrast between the sponsor's statement that the appellant was not left alone and the GP's letter that she stayed at home all day and sometimes someone was there but always. He found there was clearly some exaggeration in the levels of care needs claimed.
12. The judge however proceeded on the assumption that the appellant did require long term personal care to perform everyday tasks.
13. No issue had been raised as to affordability of the care being provided in China. He found from the background material that care is available in China through the provision of registered nursing homes. It was argued on the appellant's behalf that such homes do exist but that the appellant had a subjective fear of residing in such a care home as a result of the experience of her late husband. It was also arguable that there was a risk of abuse.
14. The judge noted evidence of a campaign of improving the quality of nursing institutions for the elderly in 2017 in China and noted that the medical evidence did not specifically refer to the appellant's subjective fear of residing in a residential care setting. He found that in the alternative there had been no exploration of other types of care available such as home care or home health. There was nothing to suggest that a paid carer could not be engaged to care for the appellant in her own home. There was no evidence to show that her health had deteriorated since her arrival in the United Kingdom in 2018 and the judge felt the conditions from which she suffered were the same as those for which she had been receiving treatment in China. Having concluded that care was available in China in the form of nursing care and paid in home carers he felt that she could reasonably access care to the required level in China.

As a consequence she did not meet the requirements of paragraph E-ECDR.2.5 of Appendix FM.

15. The judge also found there were not very significant difficulties to the appellant resuming life in China given that the family in the UK could continue to support her on return and that she had previously accessed medical care in China and the difficulties she might encounter were unlikely to be very significant.
16. As regards Article 8 outside the Rules, the judge considered the evidence and although he said at one point at paragraph 35 that any family life that the appellant has with her daughter and grandson, given that they had lived apart for nearly a decade, was limited, he went on to find that there was not family life, in that the relationship between the sponsor and the appellant was simply the ordinary relationship between a mother and adult daughter. He considered that there was nothing to indicate that the relationship was anything unusual although there were elements of dependency that made it untenable for them to live separate lives, maintaining communication through other means. Hence he came to the conclusion at paragraph 39 that the appellant had not shown that she had established family life with the sponsor within the meaning of Article 8(1). The appeal was accordingly dismissed.
17. The appellant sought and was granted permission to appeal, first on the basis that the judge had erred with regard to the expert evidence and had failed to give proper reasons for rejecting Dr Balu's conclusions and secondly had erred in finding there was not family life.
18. In her submissions Ms Murshed relied on her skeleton argument and developed the points made there. Dr Balu's report was relevant to the question of the appellant's emotional and psychological needs and whether they were reasonable. The judge had erred in his approach to the evidence. He had concluded that the weight he would give to the medical report was dependent on the credibility of the evidence of the daughter and the grandson and this had failed to take into account that it was an independent assessment. Dr Balu had clearly given his opinion and what he had to say was clearly not wholly based on information from the daughter and the grandson. He had clearly heard from the appellant and made his own assessment. It could be seen from her statement at paragraphs 8, 11 and 12 to have referred to her psychological vulnerabilities, but the judge had focused on personal care and accepted that she needed that. Clearly Dr Balu had assessed the appellant himself and his report was made on the psychological aspects.
19. With regard to ground 2, the judge applied too high a threshold. There was a question of real committed effective support. There was no requirement of exceptionality as held in **Singh**. The references to "untenable" set a higher test than that required, and the judge was inconsistent as to whether or not there was family life.

20. In his submissions Mr Lindsay argued that the judge was entitled to find there was no independent assessment of the key issues in the appeal. There was a significant volume of medical evidence about the appellant's conditions and needs since she left China. The key point was the appellant's and the sponsor's evidence that the appellant's conditions had worsened since she came to the United Kingdom but the judge noted that there was no independent evidence of that. The judge was entitled to say that there was a lack of evidence from, for example, a GP which was very much notable by its absence. Questions of weight were for the judge. Dr Balu had not said why there was a high risk of self-neglect. There was some limited direct assessment at page 68 of his report but the key points were that her condition was worsening and a higher risk of neglect which lacked a basis: the judge was entitled to find that that was the case. The judge had fairly found that the care needs could be funded in China. Importantly the judge also found the appellant had not shown why she could not access other forms of care such as residential care or in-home care and that had not been shown not to be affordable.
21. The judge had considered all the evidence. He was entitled to note exaggeration, at paragraph 18 of the decision, and that was not solely directed to the sponsor's evidence but had to be in respect of the evidence of the appellant and the sponsor. He was entitled not to make specific reference to what the appellant had said to Dr Balu as it was not repeated to the judge and so it had no more weight than any of the appellant's other unsupported claims. The report had been dealt with properly.
22. With regard to Article 8 outside the Rules and family life, the judge attached weight to the failure to meet the requirements of the Rules and that was right. The use of the word "untenable" simply meant that it was unable to be maintained and that was with regard to whether the decision of the Secretary of State was untenable. The judge could not properly be criticised for using plain English. The correct test had been applied in substance and it was open to him to find that there was no family life, on the evidence. The relevant factors had been considered. The exaggeration point was relevant here also.
23. The judge had in effect made an alternative finding at paragraph 35 that if there were any family life it was limited. It was precarious from the outset and was of relatively short duration and in the awareness that the appellant might have to leave the United Kingdom. The alternative findings showed clearly that even if there were family life it was so limited that the decision remained reasonable. If the Tribunal disagreed, the findings on the nature and extent of family life should be preserved and it should be decided on the current evidence.
24. By way of reply Ms Murshed argued that it was clear from paragraph 37 that the judge found there was not family life when addressing the question of whether Article 8 was engaged. Paragraph 35 showed the decision was confused. The judge had accepted that the appellant

required long term physical care and the issue was whether there had been a deterioration or not. The error lay with regard to the appellant's psychological needs. Her physical issues were less relevant given what was accepted in the evidence concerning her needs. The judge had failed to consider that the report was adduced with regard to the appellant's psychological and emotional needs and had focused it on the physical needs which had been accepted. The judge had failed to take into account Dr Balu's own assessment of the appellant's needs. The sponsor had clearly set out the appellant's emotional and physical needs and the judge had focused on the latter.

25. I reserved my decision.
26. I consider that there is a difficulty with the judge's decision in his conclusion that the only way he could place on Dr Balu's report depended on the reliability of the witnesses' evidence. It is in my view sufficiently clear from Dr Balu's report that he came to his own conclusions on the appellant's condition, rather than limiting himself to what had been said to him by the sponsor and the appellant's grandson. He came to a professional judgment as a consequence of observing her and speaking to her. The judge was required to give weight to that rather than simply limiting it to the extent to which the witnesses' evidence was reliable. In that latter regard the only issue arises in connection with some exaggeration as noted as to the level of personal care needed. That by itself, and it seems to be the only adverse point, cannot render essentially redundant the report from Dr Balu.
27. This point has to be seen however in the context of the judge's findings that the appellant could be funded to live in a care home or in the alternative have care in her own home. The appellant clearly has concerns about the quality of care homes in the light of her husband's experience, and to that extent the point made in the grounds arising from the Britcits case [2017] EWCA Civ 368 has force. But, even if one takes the case at its highest in terms of the very high risk of self-neglect and the need for support of immediate family as concluded by Dr Balu, this does not provide an effective response to the judge's conclusion that the appellant could be cared for in her own home. Dr Balu's report does not contain reasoning that could or should have led the judge to conclude that the appellant would not maintain a reasonable quality of life in the absence of her family if she were benefiting from paid care in her own home, and the judge was entitled to find that that was the case. In particular, his report says nothing to indicate that the appellant could not be properly and acceptably looked after in her own home by a paid carer. Her concerns, as noted by him, were in respect of being in a nursing home, bearing in mind her late husband's experience, but that, as the judge in effect found, would not be a concern if she were being cared for in her own home. As a consequence, though I consider that the judge's approach to Dr Balu's evidence contains flaws, overall the finding that he came to with regard to the ability of paid care to provide adequate provision for the appellant is sound.

28. Nor do I consider that the point made as regards the Article 8 finding is made out. I think Mr Lindsay is right to say that the finding at paragraph 35 is essentially in the alternative and the finding of the judge was that there was not family life for the reasons given, bearing in mind that it has lasted for a relatively short period time, it has always been on a precarious basis and with the likelihood that the appellant would be returning to China. The use of the word “untenable” at paragraph 38 does not in my view indicate that too high a test was applied. It was open to the judge to find that the relationship between the appellant and the sponsor is no more than expected between adult relatives and that there was no evidence to show dependency beyond normal emotional ties. Accordingly I consider that the judge was entitled to find as he did in respect of Article 8 and the appeal is dismissed in that regard also.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.



Signed

Date 18 October 2019

Upper Tribunal Judge Allen