Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05406/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated On 30 June 2021**
Remotely by Microsoft Teams	
On 17 June 2021	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Appellant

and

CHACKO ABRAHAM THENAKARAYL

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr H Kannangara, instructed by Primarc Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer (ECO), for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellant is a citizen of India who was born on 28 January 1953. At the time of the First-tier Tribunal he was 67 years of age.

3. On 6 February 2020, the appellant applied for entry clearance to settle in the UK as the Adult Dependent Relative ("ADR") of his daughter Mrs Blessy Puthanveettil ("the sponsor"), a British citizen under Section EC-DR of Appendix FM of the Immigration Rules (HC 395 as amended). On 19 March 2020, the ECO refused the appellant's application for entry clearance.

4. The appellant appealed to the First-tier Tribunal. In a determination sent on 19 January 2021, the First-tier Tribunal (Judge Rastogi) allowed the appellant's claim under Art 8 of the ECHR. The judge was satisfied that the appellant met the requirements of the ADR rules in Appendix FM and, as a consequence, his exclusion from the UK was a disproportionate interference with his family life with the sponsor. In addition, the judge also found, that if he was wrong about the appellant meeting the requirements of the ADR rules, nevertheless his exclusion was disproportionate as it would lead to unjustifiably harsh consequences and so would be a breach of Art 8 outside the Rules.

5. The ECO sought permission to appeal. On 10 February 2021, the First-tier Tribunal (Judge J M Holmes) granted the ECO permission to appeal.

6. Following directions issued by the Upper Tribunal, the appeal was listed for an error of law hearing at the Cardiff Civil Justice Centre to be heard remotely on 17 June 2021. I was based at the Cardiff CJC and Mr Whitwell, who represented the ECO, and Mr Kannangara, who represented the appellant, joined the hearing remotely by Microsoft Teams.

The ADR Rules

7. The appellant relied upon the ADR rules in Section EC-DR of Appendix FM. The relevant provisions, in issue before the judge, are set out in E-ECDR.2.4. and E-ECDR.2.5. as follows:

> "E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
>
> 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 –
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> (a) it is not available and there is no person in that country who can reasonably provide it; or
>
> (b) it is not affordable."

8. Appendix FM-SE sets out evidential requirements at paras 33–37. So far as relevant to this appeal, paras 34 and 35 provide as follows:

> "34. Evidence that, as a result of age, illness or disability, the applicant requires long-term person care should take the form of:

(a) independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and

(b) this must be from a doctor or other health professional.

35. 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."

9. In summary, therefore, the ADR rules require the individual to establish that as a result of their "age, illness or disability" they require "long-term personal care to perform everyday tasks" and the individual is unable to obtain the required level of care in their own country, even with the practical and financial help of the sponsor, either because it is not available and there is no person in the country who can reasonably provide it or it is not affordable.

10. The central issues must, as a result of paras 34 and 35 of Appendix FM-SE, be established by independent evidence from a doctor or health professional (in the case of the requirement that the individual cannot, as a result of their condition, perform everyday tasks) and from the NHS, a local authority or health professional (in the case of the requirement that they are unable to obtain the required level of care).

11. In BRITCITS v SSHD [2017] EWCA Civ 368, the Court of Appeal upheld the legality of the ADR rules in Appendix FM. At [58] – [59], Sir Terence Etherton MR (with whom Davis and Sales LJJ agreed) made the following general observations concerning the ADR rules:

> "58. First, the policy intended to be implemented by the new ADR Rules, as appears from the evidence, the new ADR Rules themselves and the Guidance, and confirmed in the oral submissions of Mr Neil Sheldon, counsel for the SoS, is clear enough. It is twofold: firstly, to reduce the burden on the taxpayer for the provision of health and social care services to those ADRs whose needs can reasonably and adequately be met in their home country; and, secondly, to ensure that those ADRs whose needs can only be reasonably and adequately met in the UK are granted fully settled status and full access to the NHS and social care provided by local authorities. The latter is intended to avoid disparity between ADRs depending on their wealth and to avoid precariousness of status occasioned by changes in the financial circumstances of ADRs once settled here.
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> 59. Second, as is apparent from the Rules and the Guidance, the focus is on whether the care required by the ADR applicant can be "reasonably" provided and to "the required level" in their home country. As Mr Sheldon confirmed in his oral submissions, the provision of care in the home country must be reasonable both from the

> perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed."

12. As the court there recognised, the standard of care available must be that which is required for the particular individual and must be reasonable both from the perspective of the person providing the care as well as the individual themselves. What is required is capable of embracing emotional and psychological requirements verified by expert medical evidence.

The Judge's Decision

13. In this appeal, the judge heard oral evidence from the sponsor and had a witness statement from the sponsor's sister (also the appellant's daughter) who had, at least for the moment, left her family in the USA and was caring for the appellant in his home in India. In addition, the judge had before him two letters from Dr Suresh dated 16 December 2019 and 28 November 2020 (at pages 28 and 29 of the bundle).

14. Before the judge, the ECO did not dispute the nature of the appellant's medical conditions but rather whether the effect upon him was that he required long-term care to perform everyday tasks and whether such care was available or could not reasonably be provided in India.

15. The judge dealt with the medical and other evidence in detail. The judge set out the evidence from Dr Suresh at paras 29 and 30 as follows:

> "29. Dr Suresh of the Carits Hospital, Kottayam, Kerala wrote on 16 December 2019 explaining that the appellant had been treated for his kidney disease since 2003 but in November 2019 he was admitted to hospital with creeping creatinine, breathlessness, chest discomfort and pericardial effusion and he had to be started on emergency dialysis, treated with antibiotics, undergo a pericardiocentesis and was treated with other supportive measures. He also referred to the other medical issues which the appellant has. He then explained that:
>
> > *'Over the years due to muscular wastage from the kidney disease and other age related issues, has aggravated his previous ankle fracture causing him difficulty to mobilise and attending his basic needs. He currently needs a lot of support due to his co-morbidities and in my opinion he won't be able to survive without support from his family. He needs to move in with his daughter given he lives on his own after his wife passed away and no close relatives to attend to his*

needs. Please do the needful as he is at serious risk of being on his own."

30. In his second letter dated 28 November 2020 Dr Suresh confirmed that the appellant is currently on dialysis three times a week and *'he still needs assistance with daily activities and moreover psychological support which only his family can provided … As a result of his age and illness he requires long-term personal care to help him perform everyday tasks'.* He repeated tha[t] this is due to the muscular wastage from the kidney disease which has compounded the ankle fracture. He continued *'he not only needs long-term care to meet his daily task but also the presence of his daughters to meet his psychological well-being as his wife has passed away.'* Finally he also he added *'Also to my knowledge his youngest daughter resides in the USA with a 8 year old son and husband. She had to come over to care and assist him with his daily task. This in itself is affecting her child's physical and emotional needs as they currently reside in the USA. Moreover it is unaffordable for them to meet the required level of care for him in here.'*

31. Although arguably, in his first letter, Dr Suresh did not quite state as expressly as he might that the appellant requires long-term personal care to perform everyday tasks, the essence of what he said implied as such. However, he remedied that in his second letter where the opinion is given expressly."

16. The judge then dealt with the other evidence in the appeal from the sponsor and the sponsor's sister who was looking after the appellant in India. At paras 32 – 38, the judge said this:

"32. His opinion is corroborated in a number of ways. Firstly by Ms Mulamootill's witness statement in which she says she has to assist the appellant with washing, dressing and bathing, to manage his special diet, especially the supplement drinks he requires; to help him mobilise as he is at increased risk of falling after the dialysis in particular and by way of psychological support.

33. The sponsor gave oral evidence in which she confirmed that she also travelled to India in 2019 where she stayed for fifteen days as her father had been taken unwell and required surgery. She said they had not realised how bad things had got until they arrived. They were not even away he had fractured his ankle previously. It was obvious he was not safe to be left which is why his sister stayed. She said the muscle wastage means he is not strong enough to lift things and his ankle fracture means he is very slow plus he suffers with balance issues after the dialysis. Therefore he needs help with daily tasks such as washing and dressing. She also confirmed that he needed help with his special diet. They had previously tried carers but they would not assist with such things and so they left the employment. Also they could not find carers that would stay overnight and they could not risk their father being left alone. Nursing homes were not the answer either as if there are problems, they expect the family to sort it out and there is no family in India. In any case, the

appellant is at risk of decline without one of them staying with them and she worries he would not make it. She explained later that he has always been a very independent person and he did not like to ask for help even if his dignity and personal issues had been compromised. She said he is more likely to succumb to death by giving up. She would not allow that to happen so if the appeal is refused she would leave her family to care for him even though that would break up her own family.

34. In response to a question I asked her, the sponsor confirmed that if appropriate care was available they could probably afford it but the care that is available is not appropriate as it is not safe. Later she clarified that she probably could not afford 24 hour care if it was available but her point was that the care her father actually required is not available.

35. The appellant filed a bundle of WhatsApp messages between the sponsor and her sister dating from 8 October 2019 to December 2020. They are an illuminating insight into the situation. The messages start as both sisters are planning their travel to India. The sponsor's outbound ticket was booked for 19 October and she was due to stay for three weeks. Ms Mulamootill travelled on 26 October. There are no messages between 26 October and 23 November 2019 as presumably both sisters were together in India at the time. Ms Mulamootill has remained in India since then.

36. The messages reveal some of the physical difficulties the appellant has with balance and showering and in respect of which he requires assistance and also refers to his presentation after a dialysis [AB88/117]. They also reveal occasional worsening of health resulting in the need for extra hospital attendances [AB90]. There are also numerous messages about money revealing the sponsor's entire response for the cost of the appellant's dialysis and most other large household expenses such as the costs of repairing household items and the bills. There is reference to the lack of additional support [AB 92] and brief references to securing some health albeit not working out or not being long-term [AB96/AB111]. There is also reference to the appellant's mental health and tendency not to ask for help and towards depression and loss of hope [AB98/99/102/112/132]. There are numerous messages from Ms Mulamootill about the terrible impact the separation from her family is having on all of them yet her insistence that she cannot leave the appellant as she is terrified that he would rapidly decline and would not make it [AB101/115/117/120/124/130/132/135] and that but for the pandemic the plan was that the sponsor would have taken over a couple of months in Summer 2020 [AB102/106].

37. I find the WhatsApp messages to corroborate what the sponsor has said about the care her sister gives to the appellant and their concerns about him. Her evidence was also consistent with that of her sister and broadly speaking with Dr Suresh. On the latter point, I identified a potential inconsistency between the sponsor's evidence and that of Dr Suresh as to whether the care she said her father required was unavailable or unaffordable. I raised this with her as I had understood her evidence to be that it was the

former yet in his second letter Dr Suresh said it was the latter. That gave rise to the appellant clarifying her evidence in the way that I have set out at [34] above.

38. Overall I found the sponsor to be a credible witness and I attach significant weight to the evidence she gave. I also attach significant weight to the WhatsApp messages as a contemporaneous account of the situation which the appellant and her daughters have been facing since October 2019."

17. The judge then returned to Dr Suresh's letters at para 39:

"39. I also attach reasonably significant weight to both of Dr Suresh's letters. They are consistent with each other in terms of the main thrust of what they say. The second letter was obviously commissioned to rephrase Dr Suresh's opinion with the wording required by the Rules. However, insofar as the appellant's need for care to perform everyday tasks is concerned, the evidence as a whole supports such a finding and it accords with the opinion Dr Suresh has expressed in both letters. The only reason which leads me to reduce the weight I would otherwise attach to his letters is they are unclear as to whether the type of care the appellant needs is unavailable in India or unaffordable and if it is the latter he has not explained the basis for such an opinion. However, reading the two letters as a whole I find the thrust of what Dr Suresh says is that the appellant does not just need long-term personal care to perform everyday tasks but also his mental health and that is why he needs the support of his family members. To that extent, the care he needs is unavailable in India, aside from Ms Mulamootill's, but he addresses the reasons why she cannot continue to provide such care."

18. At paras 40 – 41, the judge referred to the evidence of Ms Mulamootill and the impact, which he accepted, upon her and her family of her separation from them in the USA whilst she is caring for the appellant in India. He concluded that, as a result of Ms Mulamootill's evidence:

"It is more likely than not that the appellant requires the care that Ms Mulamootill has been providing".

19. At paras 44 – 48, the judge gave his reasons, based upon the evidence from Dr Suresh and the supporting evidence of the sponsor and her sister, why he was satisfied that the appellant met the requirements of the ADR rules. At para 43, the judge stated:

"Taking his two letters as a whole I find that Dr Suresh has addressed the criteria contained within para 34 of Appendix FM-SE."

20. At paras 44 – 47, the judge said this:

"44. Accordingly, I find as a fact that the appellant has difficulty mobilising and this is worse after dialysis when he suffers with poor balance and he is therefore at increased risk of falling and it is not safe to be left alone until that passes. As he needs dialysis three times a week, this is a regular and long-term problem. In any event, the muscle wastage and mobility problems means that

the appellant cannot safely manage other of his daily tasks such as washing and dressing and so he also needs care to perform such tasks safely. The muscle wastage is as a result of his chronic kidney disease which is now deteriorating and therefore I find it unlikely to improve. Accordingly the appellant has satisfied me that this too is a long-term problem and so his need for personal care to help him in these tasks is also long-term. I also find as a fact that the appellant requires long-term personal care to assist him to prepare and eat his specialised diet. The type of care he needs here is more nuanced. It includes care in the form of prompting and encouraging as the evidence is that without the presence of his daughter he would give in to his illnesses and let nature take its course. The worsening of the appellant's medical condition appears to have been the catalyst for a decline in his mental health too. This is another aspect of the appellant's condition in respect of which I find as a fact that he needs long-term personal care to meet his psychological and emotional needs. In the light of the nature of the assistance the appellant requires, some of it is of a personal nature and it is important that the appellant feels comfortable that the care he needs is provided in a way which maintains his dignity. If not, in the light of the evidence about his character and his tendency to slip into low mood and hopelessness, I find it is more likely than not that he will reject such care and that will result in him being unable to meet his own needs. I find as a fact that the appellant's need for long-term personal care, as I have outlined, arises from his age, illness or disability.

45. For the same reasons I set out at [41] above, the appellant has satisfied me that the particular care he requires in India is not available or otherwise his daughters would not have made the sacrifices they have or would care for him. However, in order to meet the requirements of the Rules, the appellant needs to satisfy me of this factor by way of specified evidence as prescribed in para 35 of Appendix FM-SE."

21. The judge then dealt with that latter issue including consideration of Dr Suresh's evidence at paras 46 – 47 as follows:

"46. Referring back to [39] above, this is a case where the medical evidence about the lack of appropriate care in India is a little unclear. However, when read as a whole the evidence of Dr Suresh is the appellant needs to be cared for by his family as that is the only way that he can not only receive the long-term personal care he requires to perform everyday tasks but also the necessary emotional and psychological support. Dr Suresh addressed why Ms Mulamootill cannot continue to provide that care. Paragraph 35 of Appendix FM-SE does not provide any additional requirements as to the content of the specified evidence form a Doctor other than that they should provide *'evidence that the appellant 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.'* On balance, I find that Dr Suresh has done that in his second letter. The reality is that as Dr Suresh's opinion is that the appellant's care needs to

be from family members. I find this to be the 'required level of care' the appellant needs adopting the terminology of para EC-ECDR.2.5. There is a limit as to how much else he can say about the availability of that in India beyond what he is told by the appellant but to the extent that he is aware of the family situation, he has referred to it and therefore I find he has addressed the fact that the required level of care is not available and that there is no-one in India who can reasonably provide it. Therefore I find that the appellant has provided the specified evidence as required by para 35 of Appendix FM-SE.

47. I have not just considered Dr Suresh's evidence in isolation. I have considered it alongside the other evidence in the appeal and I am easily satisfied that the long-term personal care the appellant requires to perform everyday tasks is not reasonably available in India. I do not find it reasonable for Ms Mulamootill to remain in India any longer to provide that care. She and her family have made a significant sacrifice to care for the appellant thus far and the evidence of the impact upon all of them of that sacrifice is overwhelming. In summary, the WhatsApp messages reveal that Ms Mulamootill's husband, who is currently on a work visa in America and who works in a lab has had to juggle work and childcare which has at times resulted in leaving work early, having to take the child into the lab with him and facing potential disciplinary proceedings as a result. Therefore, the child has had to be cared for by numerous different friends and acquaintances, including during the pandemic, which has highlighted anxiety about the health implications. The child has at times been very upset by his mother's absence and this has in turn increased her distress. For similar reasons, nor do I find it reasonable for the sponsor to leave her family and relocate to India to provide the appellant's care. She has three children age 9, 6 and 9 months old. She is a Critical Care Nurse currently working at weekends and her husband works full-time during the week as an engineer. Therefore there is always someone around to care for the children (and if the appeal is allowed, the appellant), or that is primarily the sponsor and so if she had to relocate that would be contrary to the best interests of the three children. Finally I am satisfied in the totality of the evidence that the paid care the family have tried was not appropriate but, in any event, I do not find that such care can meet the appellant's emotional and psychological needs or even his physical needs if he rejected it."

22. Having then reached the conclusion that the appellant met the requirements of paras E-ECDR.2.4. and 2.5., the judge went on in para 51 to conclude that even though the sponsor was the appellant's adult child, applying Kugathas v SSHD [2003] EWCA Civ 170, family life was established on the basis of "more than normal emotional ties" between them. The judge said this:

> "In this appeal, I have regard to the fact that the appellant and sponsor do not live together and in fact live in separate countries. However, the striking feature here is the extent to which the appellant is financially dependent upon the sponsor. In addition to the bank statements which the appellant provided showing the money

> transferring from the sponsor to the appellant, the WhatsApp messages reveal that but for the money she provides, the appellant has practically nothing. Often the messages were along the lines of asking for money as the balance in the account was very low. As mentioned, she pays for all his dialysis treatment. Added to that is the sponsor's willingness to leave her own family and employment in the UK to care for the appellant in India if the need arises. Taken together, I am satisfied there are features of dependency which go beyond the normal emotional ties and I am satisfied that a family life exists between the appellant and sponsor."

23. Then, applying what was said in TZ (Pakistan) v SSHD [2018] EWCA Civ 1109 at [34], the judge found that, given Art 8.1 was engaged and the appellant met the requirements of the ADR rules, the appellant's exclusion was disproportionate as there was no public interest to justify interfering with his family life with the sponsor.

The ECO's Challenge

24. On behalf of the ECO, Mr Whitwell relied upon the grounds of appeal. In those grounds, it is contended that the judge failed to give adequate reasons for finding that the appellant requires long-term personal care based upon Dr Suresh's evidence and further that any care required was not available in India. Secondly, it is contended that as care is currently being provided by the sponsor's sister (the appellant's other daughter) then, applying the present tense in the ADR rules, it cannot be said that care "is not available". It was wrong for the judge to look at the situation as if the sponsor's sister had returned to the USA. Thirdly it is contended that as the judge had reached an unsustainable finding in relation to the Rules, his conclusion that the appellant should succeed outside the Rules on the basis that any interference was disproportionate was infected by that error.

25. In adopting those grounds, Mr Whitwell reaffirmed the contention that Dr Suresh's evidence did not support the judge's findings. He referred me to the Court of Appeal's decision in Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611 at [45] – [52] to emphasise the need for the requirements of the Rules to be satisfied by independent evidence, here medical evidence.

26. When I enquired from Mr Whitwell whether he maintained the contention in the grounds that the Rules could not be met because the sponsor's sister, (the appellant's other daughter) was presently providing care and so it could not be said that it "*is* not available" in India (my emphasis), Mr Whitwell made no specific oral submissions in respect of that. He indicated that he had no instructions on what the Secretary of State's position was on this general issue.

27. Further, Mr Whitwell drew attention to para 3 of Judge Holmes' grant of permission which raised an issue not found in the ECO's grounds, namely whether the judge had erred in law in finding that there was "family life"

between the sponsor and the appellant based upon mere financial dependence. Again, Mr Whitwell did not, having considered para 51 of the judge's decision, seek to make any additional oral submissions in relation to this.

28. Finally, however, Mr Whitwell recognised that the judge had allowed the appeal under Art 8 not only on the basis that the appellant met the requirements of the ADR rules but, even if he did not, on the basis that there were "unjustifiably harsh consequences" such as to outweigh the public interest. Mr Whitwell accepted that the judge's reasoning in this regard at paras 56 – 63 was not challenged in the ECO's grounds and he was not, therefore, in a position to contend that the judge erred in law in allowing the appellant's appeal under Art 8 outside the Rules. He accepted that, whatever the position was in relation to the judge's decision that the appellant met the requirements of the ADR rules, his appeal was allowed by the judge on another basis and, as I understood his submissions, as that was not challenged in the Upper Tribunal, the ECO's appeal necessarily fell to be dismissed on that basis alone.

The Appellant's Submissions

29. On behalf of the appellant, Mr Kannangara submitted that the judge's decision was a detailed one and he had made clear findings on both the Rules and on the existence of family life. He submitted that the judge had considered the two letters of Dr Suresh and had properly concluded that the evidence satisfied paras 34 and 35 of Appendix FM-SE. The judge was entitled to take into account that what was said by Dr Suresh was supported by the evidence of the sponsor and indeed her sister. He submitted that, in any event, the judge had allowed the appeal under Art 8 outside the Rules even on the basis that the appellant, contrary to his primary finding, could not meet the requirements of the Rules.

Discussion

30. I will deal first with the ECO's contention that the judge failed to give adequate reasons based upon the required evidence under Appendix FM-SE in finding that the appellant requited long-term care which was not available in India.

31. The judge dealt very fully with Dr Suresh's evidence which I have set out above. At para 31, the judge noted that Dr Suresh's second letter dated 28 November 2020 dealt specifically with his need for the appellant's long-term care in order to perform daily tasks which required the presence of his daughters to meet his psychological wellbeing.

32. The Court of Appeal identified in the BRITCITS case, that the ADR rules are not only concerned with the physical needs of the individual but also their psychological and emotional needs. Consistent with paras 34 and 35 of Appendix FM-SE, Dr Suresh's evidence, in my judgment, did deal with the appellant's needs, both physical and psychological, arising from his

physical and mental health conditions. Appendix FM-SE does not require evidence of a particular quality but rather supporting evidence from a particular source, here a health professional such as Dr Suresh, attesting to the individual's need for long-term care in order to deal with everyday tasks arising from his physical and mental health conditions. The judge was entitled to accept Dr Suresh's evidence as satisfying the requirements of Appendix FM-SE as establishing the substantive requirements of the ADR rules. Subject to the point about whether the care provided by the sponsor's sister presently prevents the Rule being met, the evidence from Dr Suresh supported by the sponsor and her sister entitled the judge to find that the personal care required by the appellant was not available nor could be reasonably provided in India as it needed to be provided *by family* such as the sponsor and her sister.

33. The Court of Appeal in the BRITCITS case reminds us that the ADR rules look to the provision of a reasonable level of care "both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant" (at [59]). Here, the judge was entitled to accept, on the basis of the evidence before him, that the care required by the appellant could only be reasonably provided by a family member such as the sponsor or her sister. To the extent that the perspective of the provider is taken into account, as the BRITCITS case acknowledges, the judge was undoubtedly entitled to conclude that it was not reasonable to expect the sponsor's sister to continue to reside in India separated from her family in the USA and it was not reasonable to expect the sponsor to live in India to provide the care given her circumstances in the UK.

34. As Mr Kannangara submitted, and is plain from the extensive extracts from the judge's decision that I have set out, the judge dealt very carefully indeed with the evidence and made clear findings based upon that evidence, not shying away from any points of difficulty raised by the evidence.

35. For these reasons, I reject the ECO's ground that the judge did not have the required evidence to be satisfied that the substantive requirements of the ADR rules were met or that he failed to give adequate reasons for finding that was the case.

36. As regards the construction of the Rules, whilst they stipulate that the required level of care "*is* not available" in India nor could reasonably be provided or is not affordable, that should not be interpreted to exclude the appellant's situation in this appeal. The Rules look to the appellant's circumstances in his own country and the availability of the provision of care in that country. It would, in my judgment, run counter to the policy underlying the ADR rules if an individual, who needed long-term personal care in order to deal with everyday tasks, could not obtain that care in their own country but, because relatives from abroad had travelled to support the individual on a temporary basis, it could now be said that care "*is* … available". The underlying policy of allowing an individual to come

to the UK to join family in the UK under the ADR rules would be subverted if the requirements of the Rules could not be met where, on a temporary basis, those family members travel to the individual's country in order to provide support that would not otherwise be available in the individual's own country. As I have said, Mr Whitwell did not seek to pursue this aspect of the grounds, not least because he had no instructions as to the Secretary of State's position on this point. For the reasons I have given, I reject what is said in the grounds to be the proper construction of the Rules.

37. The final point concerns the judge's finding in para 51, that there is family life established between the appellant and sponsor. As I have indicated, this was not challenged by the ECO in the grounds of appeal. It was raised, for the first time, by Judge Holmes when granting permission to appeal.

38. Plainly, the judge in this appeal had well in mind the correct approach to whether family life existed between a parent and an adult child set out in Kugathas which he cited at para 51. The judge did not, as Judge Holmes suggests in his grant of permission, determine that there was family life between the appellant and sponsor simply on the basis of financial dependency. Indeed, the evidence before the judge, given orally by the sponsor, was of a considerably greater involvement in the appellant's life and support of him including travelling to India with her sister in 2018 (see para 33 of the decision). The relationship between the appellant and sponsor was plainly a close one given his physical and mental health problems and the continuing involvement of the sponsor in providing support for him. There was, in my judgment, ample evidence before the judge to sustain his finding that "family life" was established with the sponsor. That may, perhaps, explain why the ECO did not seek to challenge that finding in the grounds of appeal.

39. For these reasons, therefore, the judge did not err in law in finding that the appellant had established the requirements of the ADR rules, in particular in E-ECDR.2.4. and 2.5. of Appendix FM.

40. Applying the approach set out in TZ (Pakistan) at [34], having sustainably found that there was family life between the appellant and sponsor and that as the requirements of the Rules were met, the judge found it would be disproportionate to exclude the appellant from the UK. On that basis, the judge was entitled to allow the appellant's appeal under Art 8 of the ECHR.

41. However, as I have already indicated, the judge also allowed the appeal under Art 8 outside the Rules even if he was wrong that the appellant satisfied the requirements of the ADR rules. The judge's findings and reasoning in paras 56 – 63 were not challenged in the grounds of appeal and Mr Whitwell acknowledged that, as a consequence, he was in some difficulty in seeking to set aside the judge's decision to allow the appeal under Art 8.

42. I agree. On that basis alone, the ECO's appeal to the Upper Tribunal cannot succeed and the judge's decision to allow the appeal under Art 8 stands.

Decision

43. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 did not involve the making of a error of law. Consequently, that decision stands.

44. Accordingly, the ECO's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
23 June 2021

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and, as that decision has not been challenged, it also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
23 June 2021