



IAC-FH-CK-V1

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

Appeal Numbers: OA/08714/2013
OA/08708/2013

THE IMMIGRATION ACTS

Heard at Field House

On 1 October 2014

**Determination
Promulgated**

On 11 November 2014

Before

**THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE D E TAYLOR**

Between

**MRS VIDA MOLES D'SOUZA (FIRST APPELLANT)
MR ISIDORE D'SOUZA (SECOND APPELLANT)
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER - MUMBAI

Respondent

Representation:

For the Appellants: Mrs J Rothwell, Counsel

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Grimmett promulgated on 3 March 2014. The appellants are citizens of India and are husband and wife. They appealed against a decision of the Entry Clearance Officer at Mumbai dated 4 March 2013 to refuse them

entry clearance to the UK as dependants of the sponsor, their daughter, and her husband, their son-in-law.

2. At the date of the decision the first-named appellant was 78 and the second nearly 85. It is not disputed that both appellants suffer from a variety of age-related illnesses including dementia. For a time the first appellant was looking after and caring for her husband, the second appellant. However, in about 2012 her health deteriorated to the point where she was no longer able to provide such care. Both now require long-term care.
3. The couple have three daughters one of whom is the sponsor. None of them live in India. The sponsor's sisters live in Canada and Dubai. They have for some time returned to India on a six week rotational basis to look after their parents. This arrangement puts a strain on the appellants' daughters, who have families of their own. The sponsor herself has two children who in January 2013 were aged 6 and 9. It has not been suggested that this arrangement involving rotational care by the daughters offers a long-term solution to the appellants' required care needs.
4. The sponsor is a geriatric nurse working in the NHS and her husband is a general practitioner. They wish the appellants to come and stay with them in the UK where they can be provided for in their home. They are arranging for their house to be converted to provide an annex suitable for their needs.
5. The relevant Rules which the respondent applied are EC-DR.1.1, EC-DR.2.4 and EC-DR.2.5. EC-DR.2.4 provides that the applicant must as a result of age, illness or disability require long-term personal care to provide everyday tasks. EC-DR.2.5 provides:

“The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because -

 - (a) it is not available and there is no person in that country who can reasonably provide it; or
 - (b) it is not affordable.”
6. It is not disputed that as a result of age, illness and disability both appellants require long-term care. The issue before the ECO and on appeal Judge Grimmett was whether the applicant, even with the practical or financial support of the sponsor, would be able to obtain the required level of care because it was not available and there was no person in that country who could reasonably provide it. The sponsor and her husband are relatively well-off, at least by Indian standards, and it is not suggested that any care that is available in India is not affordable.

7. Judge Grimmett in her findings accepted that at the date of the decision by the ECO both appellants were in need of some care and that it was foreseeable that the care needs of both appellants would increase over time. She accepted that there were currently few care homes for those with dementia and few people formally trained in the care of those with dementia or indeed the elderly. She found that most elderly family members were cared for in India by extended family members.
8. Judge Grimmett, however, was not satisfied that the appellants had shown that they were unable to obtain the required level of care in India. Carers could be trained by the sponsor. Although there were insufficient doctors and nurses for the Indian population as a whole there were well-qualified doctors in India. The sponsor and the appellants were able to afford the required level of care.
9. Extensive grounds of appeal were lodged by the appellants and supplemented by written submissions. Before us Mrs Rothwell submitted that the issue was whether the required level of care was available in India and whether there was anyone capable of providing it.
10. Mrs Rothwell submitted that First-tier Judge Grimmett had erred in law by finding that the sponsor and her husband could go to India and train sufficient staff to undertake the care. She said that this would involve not only training regular staff but additional staff to care for holidays, illnesses etc. In any event the undisputed evidence, recorded at paragraph 14, was that a family member needed to be present to coordinate the care. At paragraph 16 First-tier Judge Grimmett had said that the evidence produced by the appellants suggested that they would be best looked after by their family members. She went on, however, that it was clear that this was not necessarily the view of the sponsor who said that she wished to return to work part-time and have other care for her parents while she was not there. This it was submitted was a misunderstanding of her evidence and she referred to the sponsor Diana Ray's statement at paragraphs 50 and 51. This was to the effect that she may go back to work part-time if the appellants were well enough.
11. Mr Melvin, the Home Office Presenting Officer, relied on the Rule 24 response and his written submissions. He submitted that there was no error of law. He ventured to suggest that it would be unusual for somebody in this country with these care needs to obtain the specialist care that was being suggested was required for the appellants. He submitted that a decision to allow the appeals would open the floodgates. The family, presumably the daughters, had all left India by choice. There was a difference in any event between rural India and what was available in urban centres such as Mumbai where there were well-qualified doctors as evidenced by the expert reports in this case. There were also care homes as the respondent had found. The family have provided care on a rotational basis. The requirements of the Rule had not been fulfilled.

Decision on Error of Law

12. EC-DR.2.5 requires the applicant to show that even with the practical or financial help of the sponsor they were unable to obtain the required level of care in India because it is not available. Financial support from the sponsor is available. Given that the Rule also refers to practical support we do not think that it was an error of law or unreasonable to consider whether or not the sponsor and/or her husband might provide some training for carers in India. However, the undisputed evidence was that a family member required to be present to coordinate care. It is also clear that First-tier Judge Grimmett misunderstood the evidence about the sponsor's intentions about going back to work. Her witness statement says that if she is able to go back to work this would help cover the cost of a reputable nursing agency to provide care for her parents. Crucially, however, she goes on "as their nursing needs inevitably increase this is something that I do not wish to delegate to anyone but myself." The important point from her evidence is that whether or not she worked two to three days a week she would nevertheless be on hand to supervise and coordinate any care. As her parents' needs increased she herself would be involved intimately in providing that care.
13. The requirement for a heavy family involvement in the care of the appellants is emphasised by the rotational nature of the care being provided by the appellants' daughters. First-tier Judge Grimmett did not suggest that this was a long-term solution.
14. Accordingly we have come to the view that in assessing the evidence the First-tier Tribunal Judge failed to recognise the requirement in the evidence of an ongoing involvement by a relative in the provision of care for the appellants. This in our view amounts to a material error of law. We shall accordingly allow the appeal and set aside the judgment of First-tier Judge Grimmett.

Fresh Determination

15. Having set aside the determination it falls to be remade. No new evidence was presented to us but we heard submissions on the evidence which was before the First-tier Tribunal Judge.
16. A number of medical reports were supplied in respect of both appellants.
17. The appellants' general practitioner Dr Priya Gokhale provided a report dated 24 November 2012 in respect of both appellants. The second appellant, the husband, has suffered from type 2 diabetes from 1985. This has been insulin-controlled since 2004. He has had hypertension since 2008, ischemic heart disease - angina from 2008, benign prostatic hypertrophy from 2006. He suffers from osteoarthritis of multiple sites including the lumbar and cervical spine and shoulders. From 1998 he has suffered from senile dementia (likely vascular dementia) and it is now moderately severe. At that time his diabetes, angina, hypertension and benign prostatic hypertrophy were controlled within satisfactory levels. With regard to his osteoarthritis he is generally in severe pain, mainly from

his lower back. He tends to be most comfortable when he is lying down. He can only stay upright for short periods and cannot walk beyond a short distance without needing to stop and rest. He is restricted in his ability to do household tasks. With regards to his senile dementia his memory is poor and this means that he cannot be allowed to be unsupervised with regard to his medication, especially his insulin. He needs to be constantly reminded to inject his insulin which should be taken prior to his meals and reminded to take other medication. Failure to take medication would have serious consequences to his health, especially his diabetes.

18. Turning to the first appellant, the wife, Dr Gokhale notes that until recently she acted as a main carer for her husband. However, her present medical problems encompass type 2 diabetes since 1994 which is tablet-controlled and essential hypertension since 2002. She also has cataracts. In about June 2012 she suffered an acute myocardial infarction. It appears that this was not properly diagnosed at the time. It is noted that she becomes tired and breathless easily because of her poor cardiac function. She cannot walk very far and cannot do any household task without getting breathless and tired. Her memory is poor and she cannot be left unsupervised to take her medication. She has lost the insight to take care of herself in terms of her personal safety, personal care, hygiene and bathing. She needs help for this and supervision on a daily basis. It is noted that this is presently being provided by her family.
19. In her recommendations for future care Dr Gokhale notes that both her patients require supervision with their medications and the first appellant requires continuing help with her personal care, hygiene and bathing tasks which are best provided by a family member. In her experience the same standard of care cannot be provided by a carer or even a qualified nurse since the personal nature of the help required would be distressing and embarrassing if received from a stranger. It is noted that she is capable of accepting the necessary care if given by her daughters. She is supportive of the proposal that they should move to the United Kingdom to be cared for by the sponsor and her husband.
20. A report from Dr Vinay S Chauhan, a consultant neurologist, dated 20 March 2013 examines the second appellant, the husband's clinical history. In his recommendations he notes that the second appellant has minimal cognitive impairment with physical disability of osteoporosis and lumbar canal stenosis. He requires considerable help for activities of daily living. He notes that his wife suffers from dementia and is unable to look after him. He then recommends that he lives with his children and close family members for both mental and physical assistance. An orthopaedic surgeon, Dr Jawahar S Panjwani, made a similar recommendation in respect of the second appellant in his report dated 16 March 2013.
21. So far as the first appellant is concerned there is a report from a clinical psychologist, Siddika Panjwani, dated 16 March 2013 which notes that current cognitive testing reveals borderline global cognitive functioning with difficulties in the areas of calculations, verbal fluency and language

ability. It noted that she would need help to perform her self-care effectively and also to do household chores. Her daughter reported that she was averse to the idea of having a full-time person to take care of her and hence her daughters have to regularly keep travelling from abroad to take care of her.

22. Dr Vinay S Chauhan has also provided a report in respect of the first appellant. He notes that she is emotionally, psychologically and physically dependent on her close relatives and family members to look after her daily living. She refused any external help and external assistance agitates and confuses her. This adversely affects her mental health and may worsen her dementia. He recommends that she should be cared for and looked after by her family members and children with whom she is most comfortable. Familiarity with people and surroundings is extremely important to avoid further decline of her mental health. Within the papers there is a further report from Dr Nitin S Gokhale dated 24 March 2013 which confirms the first appellant's ischemic heart disease.
23. The First-tier Tribunal Judge also had sight of a report from Dr Amit Dias. He is an epidemiologist and geriatrician and has an expertise in dementia care in India. He has published a number of papers on the care of patients suffering from dementia. He had not met either appellant personally but had had access to the medical reports and to the reasons for the respondent's refusal of the appellants' applications.
24. Reviewing the medical opinions Dr Dias concluded that both appellants were currently unable to do a number of household tasks without the help of carers including cooking, washing clothes, shopping for provisions or management of finances. They both had nursing requirements including the administration of regular medication and encouragement for them to do so, monitoring of blood sugar levels, supervision with bathing and help with personal hygiene and monitoring of urinary incontinence, specifically for the first appellant. Both required medical input including regular reviews by a doctor of their medical conditions, in particular the heart disease, diabetes and dementia for the first appellant and diabetes, pain management and dementia for the second appellant.
25. He concluded that any caregiver for the appellants required to have a degree of special training. He noted a number of therapies which may be of assistance. He concluded that in his opinion family members were an integral part of the care for both appellants which they required on a daily basis. The family members needed to be present to ensure better outcomes. He noted that the documentation suggested that if the appellants' sponsor is a nurse with experience in geriatric and dementia care and their son-in-law is a general practitioner he would have thought it best for them to be looked after for their long-term care by them. That would be the best outcome. He reviewed the expectations of future long-term care needs. He then asked the question as to whether or not the level of care that the appellants require is available in India. Under reference to chapter 4 of the Dementia India report he noted that the

support services necessary for the estimated 3,700,000 people with dementia in India are miniscule and grossly inadequate. In 2010 there were around ten long-term care facilities which provided care for people with dementia. These homes were spread across the country and language would be a barrier for this couple from Mumbai. (The appellants are both native English speakers). He considered whether or not a nursing home could be considered. He concluded that there were insufficient trained nurses available and that there is often a big falloff in a person's health when they are placed into a nursing home. This would be a particular problem for the first-named appellant.

26. Dr Dias notes that in principle dementia care in India is almost entirely home-based. Patients with dementia continue to live with their families and their care is usually a joint effort by the adult members of the family who stay in the same household. Dr Dias then went on to consider various options. The first one was that they continued to live on their own with the help of a live-in maid and nurses now with the supervision of medical doctors specialised in geriatric care and dementia. Having examined the option at some length he concluded:

“The missing link is the presence of a family member. A family member who could be Mr and Mrs D’Souza’s coordinator of these different threads of their care at home. Without a family member being present this is impossible.”

27. He then considered the option of the appellants being placed in a nursing home. He considered firstly that they must be placed in a location together. This could be a genuine problem as many nursing homes are unisex and will not accept couples or insist on nursing them in separate rooms. There are around six nursing homes in the country which could reach the standard of care required. Four are in Kerala, one is in Karnataka and one is in Maharashtra. Language would be a particular difficulty especially for those in South India where English is the second or third language for many people. All these facilities have long waiting lists which can be measured in years. He concluded that nursing home facilities suitable for the appellants taking into account their nursing care and medical care needs, their culture and language are not available in Mumbai or India as a whole.
28. Dr Dias also commented on the reasons for the respondent's refusal of entry clearance. With regard to the number of nursing homes which are said to be available he concluded that these are not suitable since they specifically refuse admission to people with dementia.
29. The evidence from Dr Dias is generally backed up by research evidence conducted by the sponsor and his wife and detailed in a letter with appendix dated 1 April 2013.
30. Mr Melvin relied on the Entry Clearance Officer's reasoned decision. He was based in Mumbai and had local knowledge. His internet search had

shown that there were 200 care homes in Maharashtra and it was not immediately apparent why these could not cater for the appellants.

31. The appellants also had a claim under Article 8. Mrs Rothwell took us to the cases of MF (Article 8 - new rules) Nigeria [2013] EWCA Civ 1192, Gulshan [2013] UKUT 00640 (IAC), Nagre [2013] EWHC 720 (Admin) and in particular to paragraph 26 and to MM (Lebanon) [2014] EWCA Civ 985 and in particular paragraphs 132 and 135. She submitted that the import of these decisions was that since there was no comprehensive code which purported to deal with those in the appellants' circumstances that the Article 8 consideration should be at large. She submitted that because of the medical evidence and the evidence of the sponsors the family life went beyond the normal emotional ties which would bind parents and adult children. The appellants were totally dependent on their daughters and on the sponsor in the United Kingdom. The Razgar test applied. To refuse entry would interfere with family life. She submitted that it was not necessary to show exceptionality. The sponsor was a nurse within the United Kingdom and she had her own part to play in her community in the UK (paragraphs 48 and 49 of her statement). Her husband had 15,000 patients in his practice. He paid his tax in the UK. They and their children were British citizens and it was unreasonable for them to relocate to Mumbai in order to look after the sponsor's parents. The appellants although Indian citizens had been many times to the United Kingdom and knew the country well. The legitimate aim that could be prayed in aid of not allowing the appeals could only be that of immigration control. There was no economic impact. The provision of care would be provided for by the sponsor and her husband out of their resources. She accepted that the provisions of Section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 would apply. She submitted that they both spoke English and they would not be a burden on the taxpayer. They met the public interest test. There was a balancing exercise. There was a significant effect on the two children of the sponsor when she went away to look after her parents. These were detailed at paragraph 38 of her statement. In particular the younger child Alana suffered from separation anxiety. Section 55 applied and should have regard for the welfare of the children.
32. Mr Melvin submitted that after the application of the new Rules the Tribunal was bound by Nagre. He said that this was a complete code for criminal cases and in other cases encompassing discretion. There was therefore no need for the Razgar test. He referred to Nagre at paragraph 35 and to MM (Lebanon) at paragraph 135. The comments in MM (Lebanon) were an obiter comment and they did not outweigh what the Court of Appeal had said in other matters. We should disregard paragraph 135.
33. If it was necessary to show exceptionality the grant of indefinite leave would entitle ageing parents to access the NHS and to have free drugs. There was therefore an economic impact on the United Kingdom. The new Act required the Tribunal to give great weight to the public interest and

this was not one which showed a great public interest. These were citizens of India who were cared for their sisters and that could continue. The decision of the ECO was proportionate and the case law and Section 55 did not apply on entry clearance.

Decision

34. EC-DR.2.5 requires the appellants to show that even with the practical and financial help of the sponsor they are unable to obtain the required level of care in the country where they are living because it is not available and there is no person in that country who can reasonably provide it. 35.

From the medical reports cited above it is apparent that both appellants have complex medical conditions. These require a high level personal, nursing and medical care. There is no doubt that specialist medical care is available for both of them in India; that is evidenced by the expertise of these doctors who have provided reports for the appellants. The issue is with the personal and nursing care.

35. The Immigration Directorate Instructions guidance on the application of the Rules for adult dependent relatives sets out the matters that must be addressed by applicants and sponsors. The appellants and sponsor meet the relationship requirements. Evidence has been provided, including the appropriate undertaking by the sponsor, that the appellants can be adequately maintained, accommodated and cared for in the UK without recourse to public funds. The appellants meet the suitability requirements. Paragraph 2.2.1 requires that as a result of age, illness or disability, the applicant must be incapable of performing everyday tasks for themselves e.g. washing, dressing and cooking. That condition is met.

36. Paragraph 2.2.2 of the guidance provides that the ECO establish that the applicant has no access to the required level of care in the country where they are living even with the practical and financial help of the sponsor in the UK. While there are nursing homes in Maharashtra the evidence is that they do not accept patients with dementia and they would probably be split up. That would be detrimental to their health. There are only six care homes in India specialising in the care of dementia patients. Those in the south of the country would pose language difficulties and would clearly be inappropriate. In any event the long waiting list for such homes is measured in years. Given the appellants' ages and the present need for personal and nursing care we accept that there are no suitable nursing homes. We also accept, for the reasons given by Dr Dias, that it would not be possible for the appellants to continue living on their own even with the assistance of maids and nursing staff, without the presence of a family member.

37. Paragraph 2.2.3 requires the ECO to consider whether there is anyone in the country where the applicant is living who can reasonably provide the required level of care. The guidance gives the example of close family members including a son or daughter who may provide that care or another person, such as a home help or a housekeeper, a nurse, carer or

care or nursing home. We accept that the appellants appear to be sufficiently well off that they could afford home help and even a level of nursing care at home. We have given careful consideration as to whether or not the evidence before us satisfies this requirement. On balance we have come to the view that there is nobody who can reasonably provide the level of care that the appellants clearly require. The appellants' medical conditions are complex and a range of care and assistance is required. Dr Dias's evidence was that the missing link was a family member who could be the coordinator of the various threads of care; the provision of care at home would be impossible without the presence of a family member. We note, too, the first appellant's resistance to assistance from anybody other than her daughters. The daughters themselves have felt it necessary to provide care by returning to India on rotation. There are no other family members in India who could provide such care. We are satisfied that this provision is met.

38. A number of example scenarios are given in the guidance at paragraph 2.2.5. None of these are directly in point but the example given at paragraph (g) appears to us to be not too dissimilar to the present situation. We were also shown a copy of a letter written by a Home Office Minister, Lord Taylor of Holbeach to Lord Avebury dated 24th July 2014. In the letter he answered a query from Lord Avebury about the operation of Appendix FM. Lord Taylor advised Lord Avebury that based on the applications that had been received two further scenarios had been identified. He sets these out in his letter. The second of those appears to us to be almost directly comparable to the appellants' circumstances.
39. Accordingly we are satisfied that the appellants have demonstrated that they are unable, even with the sponsor's financial and practical help, to obtain the required level of care in India.
40. Given our decision under the Rules it is not necessary for us to reach a view on the Article 8 claim.
41. The appeals are allowed.

LORD BOYD OF DUNCANSBY
Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber)
Date: **11 November 2014**