



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

Appeal Numbers: OA/09109/2013
OA/09112/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 24th July 2014**

**Determination Promulgated
On 05th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

**MR ISHTIAQ AHMED (FIRST APPELLANT)
MRS MEHRUN NISA (SECOND APPELLANT)**

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Ms E Daykin - Counsel

For the Respondent: Mr Avery - Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. These are appeals by Mr Ishtiaq Ahmed and Mrs Mehrun Nisa, citizens of Pakistan, husband and wife, born 1st July 1945 and 1st January 1950 respectively. They appeal against the determination of First-tier Tribunal Judge Moore issued on 17th April 2014 dismissing under the Immigration Rules and on human rights grounds their appeals against the decision of the Respondent made on 12th March 2013 to refuse entry

clearance as adult dependent relatives under Appendix FM of the Immigration Rules. The Rule applied in this case was EC-DR1.1.

2. On 10th June 2014 a Judge of the First-tier Tribunal granted permission to appeal. She said:

“2. There is force in the argument in the second part of the grounds that the Judge erred in law in his assessment of Article 8 ECHR. The Judge does not make clear findings as to whether or not family life exists between the Appellants and Sponsor but it appears that he considered it did given the way the second part of paragraph 37 determination describes family life continuing. There is certainly material which could indicate that there is family life between the Appellants and their children in the UK. It is arguable that the Judge did not give adequate reasons for his conclusion that family life was not engaged given the matters referred to at paragraph 9 of the grounds. I observe that it may well be that the reason the Judge appears to have confined his analysis of Article 8 ECHR in the main terms of the Rules was the effect of the case of Gulshan (although the Judge does not refer to the case specifically) but again given the matters referred to at paragraph 9 of the grounds it is arguable that the Judge did not give adequate reasons for any implicit conclusion that there were not even arguably good grounds for granting leave outside the Rules.

3. The ground relating to the Immigration Rules is thinner. Whilst it appears from the end of paragraph 36 determination that the Judge reached his finding under the Immigration Rules on the basis of the nursing care that the Appellants were receiving in Pakistan, there appears to have been no evidence provided which met the requirements of the Immigration Rules that the required level of care was not available in Pakistan.

4. For the avoidance of doubt all grounds may be argued.”

3. The grounds submitting that an erroneous conclusion under the Immigration Rules was reached allege that the Judge failed to take into account that the professional nursing staff are only present two hours of the day and that there has always been one of the Appellants’ children present since the last resident son left Pakistan in November 2012. They take it in turns to take time off work to care for their parents temporarily. It is submitted that the reality of the evidence was that the Appellants’ father needs 24 hour care and the other 22 hours of physical assistance is provided by whichever son is there at the time. It is submitted that the finding of the Judge that the Appellants had failed to show that they were unable, even with the practical and financial help of the Sponsor, to obtain the required level of care because it is not available and there is no person in Pakistan who can reasonably provide it or it is not affordable is materially flawed.

4. At the hearing before me Ms Daykin submitted that it is clear from the evidence that was given at the hearing before Judge Moore that only two hours of help is given by

the nurse and that the rest of the care is provided by the family. The Judge did not factor the constant care of the Appellants' sons into his assessment. Oral evidence to this effect was given. She conceded that perhaps the requirements of FM-SE have not been met but these factors are relevant to Article 8.

5. The position of Mr Avery was that the Appellants cannot meet the requirements of the Rules. No evidence was provided of the amount of care required or that it is not available.
6. In response Ms Daykin asked me to consider the Respondent's IDI in the bundle at page 301 in particular paragraph 9(g). She submitted that this appeal should have been properly considered outwith the Rules.
7. In his determination Judge Moore set out the relevant law and the position of the Respondent. The position of the Respondent was that it was feasible for at least one of the children to return to Pakistan at different times to satisfy the cultural/religious needs of both Appellants in relation to the professional care provided.
8. Judge Moore said at paragraph 25 that a letter from Dr Asad Usman dated 25th October 2012 confirmed that the First Appellant is a diabetic and hypertension patient and that fourteen years earlier he had suffered a stroke. He was unable to do his daily routine and totally dependent upon his wife. Dr Usman also said that both Appellants were totally dependent on their sons but Judge Moore said that he would presume that such a statement simply follows information provided to Dr Usman by either of the Appellants. He also did not find it consistent for Dr Usman to say that whilst both Appellants were dependent upon their sons, the First Appellant was totally dependent on his wife. This statement appeared to him to suggest that the First Appellant was coping as a result of being dependent upon his wife. There was a further letter from Dr Asim Hameed dated 8th November 2012 in respect of the Second Appellant confirming her to suffer from diabetes, lower back pain, degenerative disease, osteoporosis and osteoarthritis of both knees. The doctor said that she was a high risk patient for fracture and had been under his treatment for the last four years and needed "special attention at home and while moving". The difficulty in her movement was due to her osteoarthritis. The Judge accepted that she would have difficulty carrying out some of the daily tasks for which her husband needed assistance. He noted that the nursing care provided included the supervision of an exercise regime as well as assisting the First Appellant with cleaning, bathing and other hygiene issues. There is a maid to assist the Second Appellant with cooking. Judge Moore went on to consider the submission of Ms Daykin that even if such nursing staff and similar carers could provide 24 hour a day care provision this would be inadequate, since it does not take into account the emotional support provided by the children to their parents, bearing in mind the cultural, religious and gender issues relating to Pakistan. She noted that what is required in order to meet the requirements of the Rules is as set out in paragraph E-ECDR2.4 and 2.5 of the Rules -

“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.

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.”

9. Judge Moore found that the provisions of the Rules were not met. It is clear from the papers before me that there was no information or evidence before the Judge to justify a grant of entry clearance under the Rules and that the documentation required under Appendix FM-SE was not before him either. There was no reliable evidence before the Judge that the Appellants require 24 hour care. There was no evidence that the Second Appellant is unable to provide any care to her husband or to what extent the gaps in the care required are not being met.
10. The issue of culture, religion and gender relied upon by Ms Daykin is dealt with at paragraphs 32 and 33 of the determination. Judge Moore took into account the guidance in the IDI which states that decision makers should bear in mind “any relevant cultural factors, such as in countries where women are unlikely to provide support”. He considered the evidence of the Sponsor that he has concerns about the fact that his father is nursed by female nursing staff but concluded that whilst it would undoubtedly be preferable for family members to assist in the provision of the required care it is not a prerequisite of the Rules that any such family member has to provide such care and it cannot be the case that simply because for cultural reasons a particular male individual would have a preference for a male nurse to provide care, an appeal should be allowed. He considered evidence of the Sponsor that he had done research in Pakistan and could find no care home providing the necessary care and support and said he found this surprising.
11. In all the circumstances and in particular the fact that no documentary evidence of the required level of care was provided I find that there is no material error of law in the findings of Judge Moore under the Immigration Rules.
12. I turn now to Article 8 ECHR. What is submitted is that the Judge failed to make adequate findings as to whether or not there is family life between the Appellants and their family. It had been submitted by Ms Daykin that the level of dependency between the Sponsor and his parents amounted to family life and any interference with that would be disproportionate. Judge Moore took into account that on the evidence before him the Sponsor in the UK had the ability and means to support his parents in Pakistan and would continue to do so. He went on to say:

“In the circumstances I am not satisfied that the decision of the Respondent would be an interference with the exercise of either Appellant’s right to respect for their family life and therefore would not engage Article 8. I am satisfied that family life would continue for the foreseeable future in the same way that it has at least since November 2012 when the last remaining child left Pakistan.”

13. It may be the case that the Judge did not make an absolutely clear finding on the existence of family life but I do not think there is any doubt that he did find that family life existed. The issue then is the level of dependency. He had found that the Rules were not met. He had found that it had not been established that the Appellants required 24 hour care or that such care was not available in Pakistan. He had found that there was no justification for a requirement that such care be provided by a family member though he did take account of cultural mores and of the submissions made by the Sponsor on the need for family involvement and emotional support. He accepted that family members were going to Pakistan to assist with care but that the requirements of the Rules could not be met. It seems to me that in these circumstances and in the absence of any established compelling circumstances having been established, he was justified in finding that any interference with the family life between the Appellants and the Sponsor did not engage Article 8.

DECISION

I find that there is no material error of law in the determination of the First-tier Tribunal and that that decision shall stand.

Signed

Date: 1st August 2014

N A Baird
Deputy Upper Tribunal Judge Baird