



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/09644/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2014

Determination Promulgated
On 15 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MRS SULTANA SAMDANI GHULAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pretzell, Counsel instructed by M & K Solicitors, Luton

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan whose date of birth is recorded as 22 December 1943. On or about 23 January 2013 she made application for entry clearance as an adult dependant relative, pursuant to Appendix FM to the Immigration Rules. The sponsor in the United Kingdom is Mr Atif Shaikh Iqbal whom the appellant claimed was her son.
2. On 2 April 2013 a decision was made to refuse the application. The respondent did not accept the parent/child relationship and in any event it was contended by the Secretary of State that the appellant could obtain the requisite care in her home country, with funds sent from the United Kingdom to provide for it. The appellant appealed and on 13 January 2014 her appeal was heard by Judge of the First-tier Tribunal Raymond sitting at Hatton Cross. He dismissed the appeal. He did not find that the relationship had been proved, principally because despite other

evidence, it was his view that DNA evidence would have settled the issue “unequivocally” and so that that ought to have been obtained and further because the appellant has a daughter living within reasonable proximity of the appellant it was not proved, in his judgment, that that daughter could not provide the care now sought.

3. Not content with that determination, by notice dated 15 April 2014, the appellant made application for permission to appeal to the Upper Tribunal. The grounds run to 20 paragraphs but in essence submit firstly that the judge applied too high a standard of proof in respect of the relationship and secondly had misdirected himself in determining whether the appellant’s daughter could provide the requisite care ignoring the respondent’s own guidance at Chapter 8 Section 6 Annex 5 which provides:

“No other close relatives to turn to – however, it should be noted that this will largely depend on their culture. For example, in the Indian subcontinent, married women are unlikely to be able to provide support.”

It was the appellant’s case that her daughter was not only married but had her own children to look after as well as her mother-in-law.

4. On 22 May 2013 Judge McDade granted permission thus the matter comes before me.
5. I am able to deal with the issues as to whether or not there were material errors of law in the determination of Judge Raymond relatively briefly because whilst Ms Isherwood did not formally concede the points, equally she had little to say.
6. At paragraph 11 of the determination Judge Raymond wrote:

“The burden of proof is upon the appellant to the civil standard of the balance of probabilities. I have taken into account the relevant rules, with the evidence set out in the record of proceedings and submissions. I do not accept that in the context where substantial remittances can be seen to have been sent by the sponsor to Pakistan, albeit not the appellant personally, an expenditure has been undertaken for the medical care of the appellant during 2013, that the burden of proof can be seen to have been discharged by reliance at the hearing upon documentary evidence submitted with the application on the claimed relationship, whereas a DNA test would have unequivocally settled the issue.”

7. The judge was clearly right to identify the standard of proof as the civil standard. In my judgment, however, he simply did not apply it. The approach taken by the judge was to say that although there was documentary evidence, he was not willing to accept it as either sufficient or satisfactory in circumstances in which there was a better way for the appellant to have proved her case. Following that logic through the judge found the appellant to have failed on balance of probabilities to have discharged the burden of proof. However, that approach was flawed. The reality of what the judge did was to say that where it is possible to prove a case to a higher standard then that should be done and good evidence will give way to that better evidence so that an appeal will fail where that better evidence is not obtained. One

has to ask rhetorically how much documentary evidence would the appellant have had to produce still to fail in her appeal, simply because she did not obtain DNA evidence? In the ordinary course of events people do not prove their relationships with DNA evidence. Of course it can be obtained but a parent, for example, in the United Kingdom claiming child support does not need to produce DNA evidence; documentary evidence will do provided it is sufficient and satisfactory.

8. As to the finding that the care could be found and provided for in Pakistan, Mr Pretzell provided a skeleton argument setting out that evidence which, in his submission, the judge appeared not to have taken into account, as to which I say rather more below, but very fairly Ms Isherwood conceded that the determination lacked sufficient reasoning given the evidence that was available. I agree. In the circumstances the determination of Judge Raymond needs to be set aside and remade.

The Remaking of the Decision - The appellant's case

9. Mr Pretzell took me through the appellant's bundle of documents relevant to the issue of the relationship of the appellant and the sponsor. At page 24 of the appellant's bundle there is a birth certificate. It bears the sponsor's name showing him to have been born in Saudi Arabia. The nationality of the sponsor's parents are shown as Pakistani and the appellant's name appears on the birth certificate as the sponsor's mother. Then at page 34 there is an extract of the appellant's passport with the sponsor's name listed under "children". Further at page 31 there is a document headed "Heirship Certificate" listing 3 heirs of the appellant's late husband. The document is dated 10 June 2013 and bears the names of the appellant and the sponsor. Still further at page 76 there is a copy of the sponsor's Pakistani identity card (the sponsor is also a British citizen). The reverse of that document which appears at page 77 gives the sponsor's address in the United Kingdom and also an address in Pakistan which corresponds with the Heirship Certificate to which I have already referred. Likewise, the appellant's identity card appears and whilst not translated, there is sufficient on that document in roman numerals to be corroborative of the address given to be the same as in the other documentation to which reference is being made.
10. That the appellant is now a widow is evidenced by the death certificate which appears at P136 which also gives the sponsor as the person "causing disposal of the body" and names the sponsor as the deceased's son with the medical services certificate of death which appears at page 137 giving that same address that has appeared in the other documentation.
11. The sponsor gave evidence before me. He adopted his witness statement which appears at pages 10 to 16 of the appellant's bundle and is dated 6 January 2014. His evidence was that he is a British citizen with the appellant being his mother currently requiring long time care being provided as best as possible by his sister and his mother's neighbours. The appellant's sister is married with 2 children. He is married with 2 children. It was in 1996 that the sponsor entered the United Kingdom

as a student but later married and acquired British citizenship. He has been supporting his parents since 2003. His father was a doctor but died on 13 September 2012. The sponsor continues to send money via intermediaries for the benefit of his mother. His mother lives alone and cannot manage her affairs. The appellant has a brother but he is elderly and unable to look after himself. The sponsor's sister in Pakistan visits their mother but she has the commitments of her own children, her husband and mother-in-law with the family income of the sponsor's sister in Pakistan, being relatively modest. The appellant's sister is doing what she can but it is becoming an intolerable burden with children to take to different schools and the various obligations which fall upon her.

12. The possibility of the appellant being placed in care has been examined but there are not adequate facilities. Such institutions provide only for the destitute. There is no regulation of such institutions in Pakistan and in any event even if such were available, there are cultural imperatives, contends the sponsor which requires him as the son to care for his mother.
13. The sponsor's evidence was further to the effect that his mother suffers from a number of conditions affecting her ability to care for herself including diabetes and imbalance which has resulted in a number of falls. Her health has more recently deteriorated and the care which the appellant's sister can provide is wholly inadequate given that the appellant requires "round the clock care."
14. As to his own ability to provide for his mother, the sponsor is employed with Luton Borough Council as a Senior Chartered Accountant with an income in excess of £40,000. His wife is not currently working but is training to be a barrister. They, that is to say the sponsor and his wife, own a 4 bedroom house so that there is adequate accommodation for the appellant should she arrive in the United Kingdom.
15. The situation in Pakistan is that the appellant's sister and family live in a 2 bedroom flat inhabited by the appellant's sister, husband, 2 children and the sponsor's sister's mother-in-law. The sponsor told me that his sister would visit their mother 2 or 3 times a week spending about 2 hours in the morning or the afternoon. As to home care, the sponsor said that they did try a maid but with no man in the house, the maid took advantage of the appellant, disappearing with various chattels. Even when the sponsor's father was alive there were a number of robberies so that the appellant, on the sponsor's case, was now left without adequate protection.
16. So far as money transfers are concerned, in answer to the issue raised by Judge Raymond to the effect that there was inconsistency in the documentation because the monies were not being sent directly to the appellant, the sponsor explained that the recipient was a very good friend of his, with whom he had lived when they were students. It would not be possible for money to be sent directly to the appellant because she would not be able to collect it and it would be unsafe for her as a woman to be carrying money.

17. The sponsor was cross-examined. He was asked what steps he had actually taken to establish whether there might be a care home available for his mother. He said that he had spoken to friends and his sister, as well as looking on the internet but could not find anything satisfactory. He did accept that there was a degree of facilities available and said that he had not approached any of the particular institutions himself but his sister had done so. The sponsor also explained that he had not seen his mother since his father died not because of an unwillingness to do so but because he had got caught up in this appeal process. It was suggested to the sponsor that there were a number of inconsistencies in his account. Firstly, the sponsor was taken to one of the medical reports which suggested that the appellant ate regularly whereas the sponsor was for saying that she did not eat properly. He could not provide an answer as to why the medical report said what it did. The sponsor's evidence was that sometimes his mother would simply eat food that had gone bad because his sister would leave food and might not be able to return the next day or so, so that his mother would then eat what was available. It was also pointed out to the sponsor that whereas his evidence was that his nephews and nieces in Pakistan were going to school and being taken there by his sister, his sister's own Affidavit spoke of tutoring. He explained that that tutoring was in addition to the schooling which those children received. It was because of the diabetes that his mother's mental functions were impaired. When asked how many times it was necessary for his mother to see a doctor, he said that he did not know but thought it was about twice per week. His mother previously had been a midwife.
18. At page 139 of the appellant's bundle there is an Affidavit from the appellant's daughter, Mrs Khan. She provides an address for her mother consistent with the other evidence and speaks of her mother suffering from long term diabetes, arthritis, high blood pressure and recurrent urinary infection. There have been a number of occasions also when her mother is said to have collapsed with, as at the time of the Affidavit being sworn, 26 December 2013, her mother having had a number of hospital admissions. Mrs Khan states that she is unable to look after her mother because of the other commitments to which reference has already been made and that in Pakistan it is not acceptable for parents to live with married daughters. Her obligation, that is to say Mrs Khan's obligation, is now to her mother-in-law. Her obligations are transferred to her husband's family. She, like the sponsor, says that attempts have been made to employ a maid or care worker but this simply has not worked out given the dishonesty of the people who have been employed.
19. From page 102 onwards there is medical evidence relating to the appellant. Dr Ashfaq wrote a letter dated 14 December 2013. He speaks of a history of recurrent urinary tract infections with last admission to hospital on 8 September 2013. There is also a history of diabetes and a history of multiple falls. She is described as getting insufficient rest and sleep though eating regularly but with knee joint pain and some loss of weight. She is on medication.
20. That the crime rate in Karachi is high is evidenced by various documents which have been placed within the appellant's bundle provided to provide support for the

appellant's contention that the appellant remains at risk as a woman without support.

The Respondent's case

21. Relying on the Reasons for Refusal Letter, Ms Isherwood for the Secretary of State submitted that there was no sufficient evidence that care had actively been sought in Pakistan. She suggested that the evidence was essentially made up of bare assertions contained in the Affidavit and the sponsor's evidence. Further whilst the sponsor understandably might want his mother to join him in the United Kingdom, it was not sufficient to say that the facilities in the United Kingdom would be better than Pakistan: that simply would not be the test. The evidence, Ms Isherwood submitted, was that they had tried one maid and no more and that that maid had stolen from them but asked Ms Isherwood rhetorically, "What other avenues have been tried?" Finally the evidence did not suggest, she submitted, that the appellant was "totally" incapable. The sponsor, she submitted, had exaggerated the evidence.
22. As to the issue of the relationship between the appellant and the sponsor, Ms Isherwood made no submissions.

Burden and standard of proof

23. The burden is upon the appellant in this case to satisfy me that on balance of probabilities, as at the date of decision, the requirements of the rule were made out. The issues were somewhat narrowed in this case. Ms Isherwood did not concede formally the relationship of the appellant and the sponsor but as I have said made no submissions on it. Also she accepted that this case turned on whether, if established that the appellant and sponsor were related as claimed, the required level of care in Pakistan was not available and there was no person in that country who could reasonably provide it. Reference therefore was made to E-ECDR2.5 (a).

My findings

24. I make findings of fact having regard to the totality of the evidence. The Immigration Directorate's Instructions which were provided are dated June 1998 and relate to the provisions of paragraph 317 of the Immigration Rules which is no longer applicable to cases such as this but in terms of the assessment of the particular issues in this appeal, it provides some helpful guidance. It states, "*if there is a relative in the applicant's own country who is **able** and **willing** to support [the applicant], then it would not be unreasonable to expect [the applicant] to turn to that relative for support, even if the sponsor in the United Kingdom is financially in a better position to do so.*"
25. The same directions go on to make the point that in the Indian subcontinent married women are unlikely to be able to provide support, though if there are several close relatives then the guidance suggests that there is no reason why that should not be obtained.

26. Ms Isherwood accepted that this case was case sensitive and she also accepted that the Affidavit of the appellant's sister, if accepted at face value without more, would in fact make out the appellant's case. It was simply Ms Isherwood's submission that the whole of the claim was being exaggerated without there being sufficient evidence to support what was being contended for.
27. I found the sponsor to be an honest and reliable witness. He gave his evidence in a straightforward manner and made appropriate concessions. He accepted that he had done no more in looking for care homes than look on the internet and rely on what his sister had had to say but he explained why he had not been to Pakistan, having got caught up in the appeal process. Whereas Ms Isherwood was for saying that the sponsor had exaggerated the claim, it was not suggested by him that his mother needed to visit the doctor on a daily basis, he reasonably said that it was from time to time that the difficulty was that she, the appellant, simply could not be left alone. As to the cultural imperatives, Ms Isherwood did not respond to that which is clearly set out in the grounds and which appears in the Immigration Directorate Instructions. It was Ms Isherwood's suggestion that the de facto position was that the appellant's daughter was providing that care and there was no reason for it to continue but I have to decide whether it is the required level of care given the wording in the rule. That is a finding of fact. Ms Isherwood agrees.
28. In my judgment the evidence overwhelmingly points in the appellant's favour. Firstly I have no hesitation whatsoever in finding as a fact that the sponsor and appellant are related as claimed. The documentary evidence all points in one direction.
29. What then is the required level of care? I find as a fact that what is required for this elderly and increasingly infirm appellant is round the clock care. This is a person who on the medical evidence speaks of the appellant having suffered numerous falls. Clearly she cannot reasonably be expected to live alone. There is the constant risk that she might fall. Were she, for example, to break a hip she could be left both in pain and at mortal risk. She cannot, I accept, manage her own affairs. The diabetes impairs her mental functioning. I also accept that it is not reasonable, using the words of the relevant provision, to expect the appellant's daughter to continue to provide the care which she does. Firstly, the care is not adequate in my judgment and secondly she has other obligations, recognised by the Immigration Directorate Instructions which Ms Isherwood did not suggest were inapplicable. It seems to me that the provision in the rules and now under consideration contemplated precisely this kind of case. I appreciate the submissions made by Ms Isherwood that perhaps more enquiries could have been made about what care might be available but in my judgment to ask more would be to fall into the same error as the judge in the First-tier namely to require a higher standard of proof than is necessary. Indeed, one might suggest that the appellant, through the sponsor, could have enquired of every single care facility in Karachi lest there be one that could provide the requisite level of care but that is not the test. The question for me is whether on balance of probabilities sufficient has being done for the appellant through the sponsor to discharge the burden which is upon her. I find as a fact that that has been done and

I find that the level of care cannot be provided save by the appellant coming to join her son in the United Kingdom by which I mean such care as is contemplated within the requirement of the rule.

Decision

The determination of the First-tier Tribunal contained material errors of law and is set aside. In remaking the determination of the First-tier Tribunal the appeal is allowed and I make a full fee award in the sum of £140.

Signed

Date

**Designated First Tier Tribunal Judge
(Sitting as a Deputy Judge of the Upper Tribunal)**