Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10837/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham **Determination Promulgated**
On 9 October 2014 **On 24 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

ENTRY CLEARANCE OFFICER
INDIA (CHENNAI)

Appellant

And

MRS PUSHPAMMA GOWRIKUTTY
ANONYMITY DIRECTION NOT MADE

Respondent

Representation:

For the Appellant: Mr S Kandola, Presenting Officer.
For the Respondent: Ms N Bustani, Counsel, instructed by Paul John & Co, Solicitors

DETERMINATION AND REASONS

Claim History

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing on 6 May 2014. However, for ease of reference, the Appellant and

© CROWN COPYRIGHT 2014

Respondent are hereinafter referred to as they were before the First-tier Tribunal. Therefore Mrs Gowrikutty is referred to as the Appellant and the Secretary of State is referred to as the Respondent.

2. The Appellant, a citizen of India, applied for leave to enter the United Kingdom as a dependent relative under Appendix FM of the Immigration Rules. Her application was refused and her appeal against refusal was allowed by First-tier Tribunal Judge Elliman under the Immigration Rules.

3. In the grounds of application, the Respondent submits that the Judge erred materially in law because:

    a. EC-DR.2.5 requires the Appellant to establish that she requires "long term care to perform everyday tasks" and that she "must be unable, even with the practical and financial support 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." The Judge had noted that "It was suggested that the sponsor could readily find care for his mother but there was no evidence to suggest that there are care facilities or carers available in the same way that they are in the United Kingdom." It is submitted that the Judge reversed the burden of proof by requiring the Respondent to provide evidence when the burden is on the Appellant; and

    b. The medical evidence provided confirmed that the Appellant suffered from "dysthymia, a disorder that is primarily due to lack of family and social support" and that "it would be beneficial if she could stay with her son and his family". However, simply because the condition is due to lack of family and social support does not mean that it family and/or social support is required to treat it. Furthermore, the Judge's finding that care was not available to her was inconsistent with the Country of Origin Information Report (COIR) for India dated March 2012, which confirmed that private care was available and affordable for the Appellant.

4. Permission to appeal was granted on the basis that the grounds were arguable.

5. A Rule 24 response was not submitted by the Appellant but Ms Bustani supplied a detailed skeleton argument on which she relied.

<u>The Hearing</u>

6. Relying on the grounds of application, Mr Kandola submitted that the burden of proof was on the Appellant but that the Judge did appear to reverse the burden of proof when he stated that there was no evidence to show that care would be available in India. The Appellant was in receipt of care as established by the evidence from the Amrita Institute of Medical Sciences. The fact that it would be beneficial for her to live with her son and his family was only one aspect of care; the absence of it would not mean

that she was bereft of all medical care. The Appellant's case was that she needed the care of her immediate family to counter loneliness but the care she in fact needs is for her mental health issues. It was not correct that no evidence was available that care would be available to the Appellant in India; COIR did not confirm that there were no mental health facilities. Medical care was available in certain areas and the Appellant had not provided any evidence to establish that treatment was not available.

7. Ms Bustani relied on her detailed skeleton argument which I will not repeat here but will refer to in my decision and reasons. I indicated to the parties at the hearing that I would be dismissing the appeal because I was not persuaded from the written and oral submissions that the Judge reversed the burden of proof and because she gave sufficient reasons for finding that the care required by the Appellant would not be available to her but that written reasons for my decision would follow.

Decision and reasons

8. There was no challenge to the Judge's findings of fact and these were set out at paragraph 5 of Ms Bustani's skeleton argument. I will not repeat them here but suffice to say that the Appellant was in poor health, was having falls due to dizziness (one of which resulted in dislocation of her shoulder which required hospitalisation in October 2012) and that her health was in fact was deteriorating. The Judge found that "the Appellant does, as a result of her age and illness (physical and mental) require long-term professional care to perform everyday tasks" [14]. This finding is not challenged.

9. The Judge was well aware that the legal threshold was high; she state that the Appellant "has the very difficult task of showing that even when the sponsor can provide practical care and financial help he could not obtain the required level of care in the country where his mother is living, either because it is not available and there is no person in that country who can reasonably provide it or because it is not affordable". This does not suggest that the Judge was not aware of where the burden was or that her reference at [16] to the Respondent's suggestion that care could readily be provided reversed the burden of proof. The Judge's remark that there "was no evidence to suggest that there are care facilities or carers available in the same way that they are in the United Kingdom" was simply a comparison in provision between the two countries on which the Judge did not rely for the purposes of his conclusions.

10. The Judge's conclusion is that the Appellant requires "round-the-clock care", a finding which is not challenged, and that "on balance" she is inclined to accept the Sponsor's evidence that there are few or no professional carers who can provide "round-the-clock care" in the Appellant's case because she had "very specific emotional and physical needs", again a finding that was not challenged and was based on the Sponsor's evidence that he had employed carers to take care of the Appellant but that they had been unable to stay with her "because of he emotional disturbance from which she suffers when in the company of a stranger." The Judge found that "…whatever care there is would be difficult

to provide when the (sponsor's) mother has a genuine illness that renders her emotionally 'disordered' and when she cannot trust or live with strangers." She found that "the Appellant suffers from a specific mental health problem that, I accept, genuinely requires the immediate care of her family so that such care cannot be provided by 'professional' carers." These findings were made in the context of the Judge finding that the Sponsor was a credible witness.

11. The Judge's reasons for allowing the appeal were therefore based on the particular facts of the Appellant's circumstances. Her findings were open to her on the evidence before him; they have not been challenged. She did not misdirect herself in law and she correctly applied the law to the facts. Read as a whole the determination discloses no material errors of law and the grounds are simply a disagreement with the findings of the Judge.

Decision

12. The determination of Judge Elliman contains no material errors of law and her decision therefore must stand.

13. The Respondent's appeal is dismissed.

14. There was no application for an anonymity order before the First-tier Tribunal or before us. In the circumstances of this case, I see no reason to direct anonymity.

Signed Date 23 October 2014

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT

In light of my decision, I have considered whether to make a fee award (Rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Respondent's appeal has been dismissed, Judge Elliman's fee award is confirmed.

Signed Dated 23 October 2014

M Robertson
Deputy Judge of the Upper Tribunal