



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/10867/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 17 June 2014

Determination promulgated  
On 5 August 2014

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Entry Clearance Officer,  
Islamabad

**Appellant**

and

Hamida Amirullah  
(Anonymity direction not made)

**Respondent**

**Representation**

For the Appellant:

Mr. P. Duffy, Home Office Presenting Officer.

For the Respondent:

Ms. A. Pease of Counsel instructed by Lawrence & Co.

**DETERMINATION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Metzger promulgated on 31 March 2014 allowing Ms. Amirullah's appeal against the decision dated 8 April 2013 to refuse her entry clearance as an adult dependent relative of her son Mr Gulyaar Jaseem, a British citizen ('the sponsor').
2. Although before me the Entry Clearance Officer is the appellant and Ms Amirullah the respondent, for the sake of consistency with the

proceedings before the First-tier Tribunal I shall hereafter refer to Ms Amirullah as the Appellant and the Entry Clearance Officer as the Respondent.

### **Background**

3. The Appellant is a national of Afghanistan born on 15 March 1940. On 15 February 2013 she applied for entry clearance to join the sponsor in the UK. The application was made at the same time as an application by the sponsor's wife, Ms Rahima Jaseem. Ms Jaseem was, at the time of the applications living with, and caring for, the Appellant. Ms Jaseem's application was successful and she consequently joined the sponsor in the UK.
4. The Appellant's application was refused for reasons set out in a Notice of Immigration Decision dated 8 April 2013 with reference to paragraphs EC-DR.1.1(d) and E-ECDR.2.4 of Appendix FM of the Immigration Rules.
5. The Appellant appealed to the IAC. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination.
6. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Saffer on 12 May 2014.

### **Consideration**

7. As noted above, at the time of her application the Appellant was living with her daughter-in-law – the sponsor's wife, Ms Rahim Jaseem. It is said that Ms Jaseem undertook the role of a carer for the Appellant: see Ms Jaseem's witness statement dated 24 March 2014. Applications were made for entry clearance for both the Appellant (as an adult dependent relative), and Ms Jaseem (as a spouse). Ms Jaseem was successful in her application, and subsequently made arrangements to travel to the UK; however, prior to her departure, she spent time explaining to a neighbour the day-to-day care requirements of the Appellant – see witness statement of Mr Naseem Shiragha at paragraph 6 (Appellant's bundle before the First-tier Tribunal, page 18).
8. The First-tier Tribunal Judge set out the supporting evidence, both oral and documentary at paragraphs 3–13 of the determination. This included references to supporting medical evidence, the sponsor's written and oral testimony, further supporting witness statements from the sponsor's wife and sponsor's brother. The Judge appropriately directed himself as to the burden and standard of proof (paragraph 14), and made reference to, and paraphrased, the requirements of paragraphs E-ECDR.2 .4 and 2.5. The Judge then drew all these matters together in a short summation and conclusion at paragraph 16.

9. In particular the Judge found that the Appellant *“requires long-term personal care to perform everyday tasks, including bathing, being fed, taking medication and general assistance with very basic tasks”*; *“She has a diagnosable serious long-term medical condition and the medical evidence establishes she requires assistance”*; and *“I do not consider it reasonable to assume that a neighbour should continue to provide it, and that there is no person in Afghanistan to be able to reasonably provide it”*.
10. The Respondent challenges the conclusions of the Judge. The grounds in support of the application for permission to appeal seek to make two similar points:
  - (i) In respect of personal care, there was no evidence as to why the Appellant could not continue to be cared for by a neighbour with financial support from the sponsor, beyond an unsupported assertion that it was unreasonable to continue the arrangement.
  - (ii) The finding that it would be unreasonable to expect the neighbour to continue caring for the Appellant was a speculative one contingent upon future events, and as such was a circumstance post-dating the Respondent’s decision, which was inadmissible pursuant to section 85A of the Nationality, Immigration and Asylum Act 2002.
11. Further to the sequence of events outlined above, at the date of the Respondent’s decision it was in fact the Appellant’s daughter-in-law, who was looking after her: the neighbour had only become involved in her care at the time the daughter-in-law was preparing to leave to join her husband, the sponsor, in the UK. Mr Duffy acknowledged that the second ground of challenge was erroneously premised.
12. In any event, in my judgement, in determining that it was not reasonable to assume a neighbour should provide care the Judge was not looking forward to a potential breakdown of such an arrangement, but was characterising the arrangement itself as one that was not reasonable.
13. Whilst in the ordinary course of events it may be reasonable to expect a degree of ‘neighbourliness’ from a neighbour, this is very different from expecting a neighbour to undertake a serious care commitment, even with the provision of some financial support. The care requirements of the Appellant were described as demanding: *“The neighbour comes early in the morning to give her medicine, breakfast and to get her ready for prayer. She comes for one or two hours then returns at lunchtime and gives her dinner as well as her medicine on each occasion”* (Determination at paragraph 9). It was pointed out in the witness statement of Mr Shiragha that the neighbour *“has her own three*

*daughters that she looks after too, which is difficult for her to balance, and naturally she places more priority on her own family” (witness statement at paragraph 7).*

14. The undertaking of long-term care for an elderly person with a chronic underlying diagnosis, and with no specific prognosis of improvement, would not ordinarily be something that it would be reasonable to expect a neighbour to undertake. In my judgement that is the conclusion reached by the First-tier Tribunal Judge. It is an eminently sustainable evaluation based on the facts.
15. The fact that such a state of affairs might theoretically be continued does not render it reasonable.
16. Thus, in my judgement, a proper reading and understanding of the basis of the First-tier Tribunal Judge’s decision provides a complete answer to the bases of challenge in respect of both grounds pleaded in the application for permission to appeal.
17. Accordingly, I reject the challenge brought by the Respondent as pleaded in the grounds submitted in support of the application for permission to appeal.
18. However, Mr Duffy raised a different point at the hearing in respect of the evidential requirements of Appendix FM-SE: he suggested that these requirements had been overlooked by the First-tier Tribunal Judge, in particular paragraphs 34 and 35.
19. Ms Pease observed that no such point had apparently been raised by the Respondent before the First-tier Tribunal Judge, and further no such point had been raised in the grounds to the Upper Tribunal. Mr Duffy sought to argue that the evidential requirements were essentially encompassed in the grounds as pleaded. I do not agree with him in this regard: the grounds of challenge are very specific and relate to the Judge’s evaluation of the reasonableness of a personal care arrangement involving a neighbour and do not challenge the underlying premise of the requirement for personal care, or seek to suggest that such personal care was available other than via the private arrangement with the neighbour.
20. In the circumstances I explored with the representatives the relevant Rules and the available evidence with a view to determining whether or not to permit the Respondent to raise this issue at this late stage.
21. The following matters are particularly germane in my judgement:
  - (i) Ms Pease indicated that she was instructed that documents specifying the unavailability of care had been submitted with the

application, but had been returned as not required. In circumstances where the issue had not been raised until the hearing before the Upper Tribunal she was not in a position to provide supporting evidence of this claim, or copies of the documents said to have been submitted. It was to be noted, however, that there was a letter in the appeal bundle at page 7 from a medical practitioner confirming a diagnosis of pancreatitis and indicating that the Appellant required continuous care and prolonged treatment. This, it was suggested went some way to meeting the evidential requirements of paragraph 34 of Appendix FM-SE.

(ii) As regards the evidential requirements of Appendix FM-SE, it is to be noted that there is a distinction between different paragraphs as to evidence that “*must*” be provided in a certain form (e.g. see paragraph 27), and evidence that “*should*” be provided in a particular specified form (as is the case in respect of paragraphs 34 and 35). It seems to me that this distinction denotes a degree of flexibility: a ‘must’ requirement is more onerous than a ‘should’ requirement; whilst failure to comply with the former will lead inevitably to a refusal, the failure to comply with the latter will not inevitably result in refusal.

(iii) The application herein was made in February 2013. The Appellant was at that time, just shy of her 73<sup>rd</sup> birthday and unwell. It is now almost a year and a half later, and there is no suggestion that the Appellant’s health will have improved.

22. Were it the case that the requirements of Appendix FM-SE were of a more mandatory nature in this regard I might have taken a different view. However, in circumstances where there was a degree of flexibility as to the method of proving that the requirements of the Rules were met, and in circumstances where the Respondent had not hitherto taken this point, and where the First-tier Tribunal Judge clearly had little hesitation in concluding in the Appellant’s favour, on balance, I considered that it was too late to permit the Respondent to raise this new ground of challenge.
23. In all such circumstances I find no error of law in the decision of the First-tier Tribunal Judge. Accordingly, the decision under the Immigration Rules is to stand.

### **Decision**

24. The decision of the First-tier Tribunal Judge contained no error of law and stands.
25. The appeal of Ms Amirullah remains allowed.

**Deputy Judge of the Upper Tribunal I. A. Lewis      31 July 2014**