



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

Appeal Number: OA/02906/2014

THE IMMIGRATION ACTS

Heard at : IAC Birmingham

**Determination
Promulgated**

On : 24 June 2015

On: 30 June 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SULDANO DAHIR ANSHUR

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr T Khan, instructed by Acharyas Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer (ECO). However, for the purposes of this decision, I shall refer to the ECO as the respondent and Mrs Anshur as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Somalia, born on 5 May 1945, residing in Uganda. She applied for entry clearance to the United Kingdom as an adult dependent relative under paragraph EC-DR.1.1 of Appendix FM of the

immigration rules. Her application was refused on 30 January 2014 on the grounds that, whilst the respondent was satisfied that she required long-term personal care and thus satisfied the requirements of paragraph E-ECDR.2.4, the evidence produced did not satisfy the respondent that she was unable to obtain the required level of care in Uganda so as to meet the requirements of paragraph E-ECDR.2.5.

3. The appellant appealed that decision and her appeal came before the First-tier Tribunal on 22 September 2014 and was allowed in a determination promulgated on 2 October 2014. First-tier Tribunal Judge Pacey heard oral evidence from the sponsor, the appellant's son, and considered documentary evidence from Mengo Hospital in Kampala and two medical reports from Mulago Hospital and Kusenyi Health Unit confirming that the care needed by the appellant was not available there. She also considered a letter from the appellant's neighbour who had been looking after the appellant, but who had since left Uganda for the USA as she had refugee status there. On the basis that the appellant was being provided with care by her neighbour at the date of the respondent's decision to refuse entry clearance, she found that the requirements of paragraph E-ECDR.2.5 had not been met and that the appeal therefore failed under the immigration rules. However, with respect to Article 8 she considered that matters at the date of hearing were relevant and, given that by that time the appellant's neighbour had left Uganda and the appellant was therefore without any care, she allowed the appeal on human rights grounds on the basis of her family life with the sponsor.

4. Permission to appeal to the Upper Tribunal was sought by the respondent, and granted, on the grounds of the judge's erroneous consideration of the appellant's circumstances at the date of the hearing rather than the date of the decision.

Appeal hearing and submissions

5. The appeal came before me on 24 June 2015. I heard submissions from both parties.

6. Mr Khan accepted that the case law was against him and that he had to accept there was an error of law on the basis upon which permission had been granted. However he submitted that the appeal could nevertheless be allowed on human rights grounds given that the appellant's circumstances were exceptional and compelling. Family life had been established with her son as there was a dependency going beyond normal ties between adults and it would be unduly harsh to refuse entry clearance.

7. Mr Mills submitted that there had to exist not only compelling features in the appellant's case, but compelling features not dealt with under the immigration rules, and that in this case everything had been considered under the rules.

8. Mr Khan reiterated his submissions in response.

Consideration and findings

9. It is not a matter of dispute that Judge Pacey erred in law by directing herself that she had to consider matters at the date of the hearing when considering Article 8. That was plainly not correct with respect to entry clearance cases and was contrary to the requirements in section 85(5) of the Nationality, Immigration and Asylum Act 2002. The position was confirmed by the House of Lords in AS (Somalia) & Anor v Secretary of State for the Home Department [2009] UKHL 32 where it was made clear that the correct approach, where there had been a change of circumstances since the date of decision, would be to make a fresh application for entry clearance. Indeed had the appellant made a fresh application when it became apparent that her neighbour was leaving Uganda, rather than going down the lengthier route of appealing the decision, she may well have been granted entry clearance by now, subject of course to the respondent being satisfied that the financial and other requirements of the rules could be met at that time.

10. It is argued on behalf of the appellant that her circumstances at the date of the decision were sufficiently exceptional and compelling that it was open to the Tribunal to exercise discretion and allow the appeal on Article 8 grounds on that basis. However I agree with Mr Mills that such a submission demonstrates a misapplication of the case law relevant to Article 8 outside the immigration rules, since the appellant has to establish not simply that her circumstances were compelling or exceptional, but that there existed compelling circumstances which had not been covered by the rules and which therefore existed above and beyond the rules outweighing any public interest considerations as identified in section 117 of the 2002 Act. That has been clarified most recently in the case of The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387 which addressed both entry clearance cases as well as applications for leave to remain within the United Kingdom.

11. With regard to the appellant's particular case, the question of her ill-health and long-term care needs were all matters addressed within the rules and there is nothing in the evidence to demonstrate circumstances existing beyond that, at the time of the respondent's decision, so as to justify a grant of leave outside the rules. Article 8 cannot simply be used to circumvent the requirements of the rules and it remains open to the appellant to make a fresh application for entry clearance to join her son in the United Kingdom. She will, of course, have to satisfy the respondent that she is able to meet all the requirements of the rules including the evidential and financial requirements, at that time.

12. For those reasons I find that the judge erred in law and that her decision has to be set aside and the appeal dismissed under the immigration rules and on Article 8 grounds.

DECISION

13. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and to that extent the appeal made by the ECO is allowed. I re-make the decision and substitute a decision dismissing Mrs Anshur's appeal on all grounds.

Signed

Upper Tribunal Judge Kebede