



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

Appeal Number: OA/07046/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 March 2015**

**Decision & Reasons Promulgated  
On 30 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**and**

**CWD (FRANCE)  
(ANONYMITY DIRECTION MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Mr D Clarke, Specialist Appeals Team  
For the Respondent/Claimant: MGF, Co-Sponsor

**DECISION AND REASONS**

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds outside the Rules against the decision to refuse her entry clearance to the United Kingdom as the adult dependent relative of a person present and settled here. The First-tier Tribunal did not make an anonymity direction, but as the claimant is a vulnerable adult I consider that she should be accorded anonymity for these proceedings in the Upper Tribunal. It is not however necessary that her sons should

be accorded anonymity, and so the anonymity direction is limited to publication of her name.

2. The claimant is a national of the USA, whose date of birth is 10 September 1929. She lived in the UK between 1951 and 1957 when married to a British national but returned to the USA after their divorce. From 1975 she took up residence in France with her second husband. In April 2014 her two British national sons in the UK sponsored an application by her to join them in the UK as an elderly dependent relative on compassionate grounds. These were summarised in paragraph 81 of the application form. MGF said that their mother lived alone in Paris, having been widowed in 2004. He and his brother found it impossible to manage her welfare as they both lived in the UK. She would be 85 years old this year. Her helper, who came in four nights a week, had recently been ill with cancer, and she would no longer be able to continue to help. His mother had no family in Paris and was totally alone during the day. They had found a residential care home near Sevenoaks which was near where PGF lived. Their mother was financially self-sufficient, receiving a trust income of approximately £85,000 per annum. This should be more than sufficient for her living and medical expenses. Letters from trustees could be produced as verification. They intended to take out medical insurance for her in the UK. Powers of attorney were being granted to the two sons.
3. The application was supported by a letter from Lavenders Care Home in West Malling, Kent, dated 17 April 2014. In this letter the registered manager of the care home said she had been recently approached by the family of CWD. She was living alone in Paris and although she had been having an element of help at home, she was struggling emotionally and physically to cope. The family felt that she would benefit from moving to England to be near them, and to have the extra care that they could provide in her declining years. She had been in contact with her doctor who wholeheartedly agreed that this would be best for her future care and wellbeing.
4. On 6 May 2014 an Entry Clearance Officer (post reference Paris\587555) gave his reasons for refusing the claimant's application. She had provided evidence of her son's birth certificate showing he was born in the USA, but there was no evidence of his current status in the UK. So he was not satisfied that he was either a British citizen or present and settled in the UK.
5. In order to qualify for entry clearance as an adult dependent relative, there had to be no person in her country of residence who could reasonably provide the same care. Whilst he acknowledged the importance of being close to family and having their support, he was satisfied there were adequate care home facilities in France. He noted that she was financially independent, and did not require financial support from either of her sons. So he was not satisfied that she was dependent on them and therefore refused her application under paragraph EC-DR.1.1(d) of Appendix FM of the Rules.

#### **The Hearing before, and the Decision of, the First-tier Tribunal**

6. The claimant's appeal came before Judge Youngerwood sitting at Taylor House on 12 November 2014. Both parties were legally represented. In his skeleton argument on

behalf of the claimant, Counsel cited inter alia the following well-known passage from **Huang and Kashmiri v SSHD [2007] UKHL 11** at paragraph [18]:

Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives...

7. He also cited **Singh v ECO [2004] EWCA Civ 1075** where the Court of Appeal emphasised at paragraphs [38] and [77] that Article 8 protected the potential for development of family life. He submitted that the appellant's physical and emotional needs were inseparable. She was in an extremely vulnerable condition, such that only close proximity to her family in the UK and tailored support from them, in conjunction with specialist carers, could accurately be described as adequate care. Her appeal did not hinge on whether there was a disparity per se between the quality of healthcare facilities in the UK as against those in France, but on her wider and urgent need to be cared for adequately, and the refusal of her application was disproportionate to the legitimate aim of immigration control.
8. Judge Youngerwood's findings were set out in his subsequent decision at paragraphs [17] onwards. The claimant met the requirements of E-ECDR.2.4, namely that as a result of age, illness or disability she required long-term personal care to perform everyday tasks. But the judge found that the appellant did not meet the requirements of E-ECDR.2.5, namely that she was unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where she was living, either because (a) it was not available and there was no person in that country who could reasonably provide it; or (b) it was not affordable. The judge found that the claimant could obtain the required level of care in France.
9. However, the judge found that the claimant succeeded in a private life claim outside the Rules. He directed himself that the ambit of private life under Article 8 was very wide, citing **Pretty v United Kingdom [2002] 35 EHRR 1** where at paragraph [61] the court held the expression covered "the physical and psychological integrity of a person."
10. The judge continued in paragraph [29]:

The reality of the [claimant's] situation, as I find, is that she would, as argued before me, be facing a traumatic scenario, in having to leave the apartment where she has lived for so many years and move from personal care, provided by a faithful, long-term carer, to care provided in a care home, however excellent that care home might be. It is clear that Article 8 can still be wider than the ambit provided for in the Immigration Rules, certainly where the Rules are not a complete code, and in this case, as I find, the [claimant's] condition is not satisfactorily met in the Rules, which emphasised the need for personal care in everyday tasks. Whilst I find that the care available to the [claimant] in France would meet those requirements of everyday care, emphasising the physical requirements of the claimant, and also finding that she would be able to communicate reasonably effectively with her carers, as of the present time, it is a significant fact, in my further view, that the [claimant] has stressed that she would, in terms, suffer by being in a French home, albeit able to communicate in

everyday French, for the simple reason that this would not be socially comfortable for her, given her Anglo-American background so that she is entitled to argue that, although her physical needs would be met, her social needs of companionship and communication with residents in her French care home, who obviously be entirely, or would be for the most part, be French, would not be met.”

11. The judge went on to consider Section 117B of the 2002 Act. He found that the claimant could clearly speak English, and was financially independent. So there was nothing in that section which weighed against the claimant in the balancing exercise.

### **The Application for Permission to Appeal to the Upper Tribunal**

12. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal on behalf of the Entry Clearance Officer. Ground 1 was that the judge had failed to consider the **Nagre** threshold of unjustifiably harsh consequences. Had the judge applied himself to this question, he would have been bound to conclude that it was not unjustifiably harsh, especially in the light of the sponsor’s evidence that the claimant had various French friends through her second husband, and that she had lived in France for almost 40 years. Ground 2 was that the judge failed to give adequate consideration to Section 117B. The judge had entirely ignored the requirement of sub-paragraph (1) of Section 117B. Ground 3 was that the judge had failed to consider the cases of **Nasim and Others** and **Patel**, both of which served to remind decision makers of the limited utility of Article 8 in private life cases which were far removed from the protection of an individual’s moral or physical integrity. On the facts found by the judge, the case revolved around a preference to live in the United Kingdom, rather than an interference with the physical or moral integrity of a claimant who had chosen not to reside in the UK since 1957.

### **The Grant of Permission to Appeal**

13. On 21 January 2015 First-tier Tribunal Judge Mark Davies granted permission to appeal for the following reasons:

The judge has made no reference as to whether an Entry Clearance Officer’s decision has unjustifiably harsh consequences to the [claimant]. He should have done so.

### **The Hearing in the Upper Tribunal**

14. At the hearing before me, MGF gave me an update on his mother’s situation. Her mental health had deteriorated, and they had had to move her to a nursing home which was an hour away from Paris. There was only one friend in Paris who visited her at the nursing home. This friend was a US citizen, who was frequently in the USA, and so was only able to visit occasionally. He confirmed that he and his brother had been registered as having a lasting power of attorney in respect of their mother’s financial affairs and also in respect of their mother’s health and welfare last year, as evidenced by a notice of registration dated 20 August 2014 at page 45 of the appellant’s bundle before the First-tier Tribunal. There was a great deal of emotional dependency. His mother was heavily emotionally dependent on both him and his brother. As they were not fluent French speakers, they had a problem understanding what her carers at the care home were saying when they telephoned. He agreed with

me that his mother was probably eligible for French citizenship (in which case she could freely enter the UK) but he understood that the process of obtaining registration would be cumbersome and protracted.

### Discussion

15. The error of law challenge mounted on behalf of the Entry Clearance Officer is that the judge did not ask himself all the right questions; and, if he had asked himself all the right questions, he would have been bound to find that the refusal of entry clearance was not unjustifiably harsh, and hence not disproportionate to the public interest in immigration control recognised in sub-paragraph (1) of Section 117B of the 2002 Act.
16. I am not persuaded that the judge failed to take into account any relevant public interest considerations. Although he did not specifically refer to sub-paragraph (1) of Section 117B, he clearly had the public interest in immigration control in mind when considering proportionality. He was entitled to attach great weight to the fact that the claimant spoke English and was financially independent, as these were positive factors listed in Section 117B which could be treated as reducing the public interest in the maintenance of effective immigration controls in the particular case under consideration. It was open to him to accept the evidence of the sons that all the needs of the claimant in the UK would be met privately, and she would not be a burden on the UK taxpayer, either directly or indirectly.
17. Although the judge did not make an express finding that the consequences of the proposed interference were unjustifiably harsh, such a finding is implied by his express findings. He found that the claimant was facing a traumatic scenario. He found that the claimant's social needs would not be met if excluded from the UK. His citation from **Pretty v United Kingdom** showed that, in his view, the effect of the refusal decision was to violate the claimant's moral and psychological integrity. The judge reasonably found that the claimant's condition was not satisfactorily met, or sufficiently recognised by, the Rules relating to the admission of elderly dependent relatives. The focus of these rules is entirely on the physical needs of an elderly dependent relative. They do not purport to take into account the person's psychological integrity or emotional needs.
18. Mr Clarke submits that the judge's conclusion is undermined by his earlier finding in paragraph [24] that there was not the necessary dependency for a finding that the decision interfered with family life.
19. However, the judge erred in law in making this finding, as it was inconsistent with the unchallenged evidence and his other findings. The judge held at the beginning of paragraph [24] that there was a close and loving relationship between the claimant and her sons and their respective families, who were naturally concerned about her declining health and present circumstances. The judge did not engage with the submission made by Counsel for the claimant that the effect of the refusal decision would be to prevent the deepening and enrichment of such family ties which would come about as a result of the claimant being in close proximity to one of her sons in Kent, and also to various grandchildren living in or near London, some of whom had made statements in support of her appeal. The judge also overlooked two key pieces

of evidence in finding that there was not **Kugathas** dependency. The first was that at the time of decision the two sons were seeking to obtain power of attorney over their mother's affairs: not only her financial affairs, but also her health and welfare. Secondly, in his witness statement before the First-tier Tribunal, MGF explained how his brother had asked JP Morgan, as trustees, to increase the annual distribution of the trust to their mother to 4%, although this had the potential of diminishing the capital which he and his brother would ultimately receive. So in monetary terms, he and his brother had indirectly been giving additional financial support to their mother in 2013 amounting to approximately 28,500 US dollars. In short, contrary to Judge Youngerwood's finding, there was a dependency relationship between the claimant and her two sons at the date of decision, and the facts of the case mirrored the paradigm case of **Huang**. The claimant had become heavily dependent on her family in the UK, and there had come a point in her life when separation from her family in the UK seriously inhibited her ability to live a full and fulfilling life.

20. In conclusion, while the reasoning of Judge Youngerwood was erroneous in the one respect discussed above, the error was not material. It was open to the judge to reach the conclusion that the circumstances of the claimant were such that the refusal of entry clearance was disproportionate.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly this decision stands. This appeal to the Upper Tribunal by the Entry Clearance Officer is dismissed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall identify her by name. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date **30 March 2015**

Deputy Upper Tribunal Judge Monson