



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

Appeal Number: OA/08223/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 April 2015**

**Decision and Reasons Promulgated
On 20 April 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer - Chennai

Appellant

and

**Sitharamaiah Vaddiraju
[No anonymity direction made]**

Claimant

Representation:

For the claimant:

The sponsor Mr V N S N Vaddiraju

For the appellant:

Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer against the decision of First-tier Tribunal Judge Asjad promulgated 19.1.15, allowing under both the Immigration Rules and article 8 ECHR, the claimant's appeal against the decision of the Entry Clearance Officer to refuse him entry clearance to the United Kingdom as an adult dependent relative under section E-ECDR of Appendix FM of the Immigration Rules. The Judge heard the appeal on 8.1.15.
2. First-tier Tribunal Judge Holmes granted permission to appeal on 2.3.15.
3. Thus the matter came before me on 17.4.15 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below I find that there was such error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Asjad should be set aside and remade.
5. The first test under E-ECDR 2.4 is that the claimant must demonstrate that as a result of age, illness or disability, he requires long-term personal care to perform everyday tasks.
6. Judge Asjad allowed the appeal, finding that because of the claimant's age he requires long-term help from another person with cooking. At §22 of the decision the was satisfied on the balance of probabilities that this had been proved. However, the judge failed to consider the specified evidence requirements under Appendix FM-SE and I find, for the reasons set out that the claimant failed to provide the necessary evidence.
7. At §22 of the decision Judge Asjad also answered the test in E-ECDR 2.5 in the claimant's favour, the test being that the claimant must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in India, because it is not available and there is no person in that country who can reasonably provide it. Again, the judge failed to consider the specified evidence requirements.
8. If the judge was satisfied that the Immigration Rules were met there was no purpose in going on to consider article 8 ECHR, and the appeal did not need to be additionally allowed on that basis. However, no error of law arises from considering article 8, though for the reasons set out I find that the conclusion was flawed and cannot stand.
9. The grounds rightly complain that Judge Asjad's approach to the requirements of section E-ECDR was misconceived and flawed for failure to consider that the claimant has family in India, including adult grandchildren, cousins and in-laws to whom he could turn for support. Additionally, he could relocate to a home closer to his daughters, so that they could support him and provide his meals. The fact that there may be cultural reasons why his daughters (incorrectly described as sisters in §14 of the decision) were unwilling to provide assistance does not meet the test that there is no person in India who can reasonably provide the necessary care. Further, as Judge Holmes noted in granting permission, it is absurd to suggest that amongst the vast population of India there was no one suitably qualified to provide the required level of care. The sponsor's evidence was that the claimant relied on the services of a maid, who cooked and cleaned for him, but it was said that this was erratic and on the days the maid does not come he has to ask someone else to get him something to eat. The claimant's statement to the Entry Clearance Officer was that the maid came for 3 hours on a daily basis. At §18 the judge concluded that a maid could not reasonably provide the required level of care, suggesting that the claimant and the sponsor had demonstrated that this was not a viable option. At §19 the judge found that for the majority of the time the required help is not available. The sponsor said that it was difficult to get a maid in a rural area, but no consideration had

apparently been made to relocating the claimant to somewhere he could access the necessary level of support. I find that the judge's assessment of the evidence was inadequate and he failed to address the real issues in the case.

10. Further, the First-tier Tribunal Judge failed to have regard to paragraphs 33-37 of Appendix FM-SE as to the specified evidence required to demonstrate that the claimant meets both limbs of E-ECDR 2.4 and 2.5.
11. Evidence that the claimant requires long-term personal care as a result of age, illness or disability, should take the form of independent medical evidence that his physical or mental condition means that he cannot perform everyday tasks; and this must be from a doctor or other health professional. At §10 the judge referred to a letter from Dr AVG Reddy, dated 18.4.14, which recommends "physical and moral support to get on with his day to day activities," following bilateral total knee replacement surgery. Whilst the notes also say that his appetite was poor, it is also noted that this improved gradually with treatment. None of this evidence constitutes independent medical evidence that he cannot perform everyday tasks because of age, illness or disability. In the circumstances, the claimant failed to meet the first test of 2.4, regardless of the judge's views as to the limited evidence of Dr Reddy and the oral evidence of the sponsor.
12. By paragraph 35 of FM-SE, there also has to be independent evidence that the claimant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in India, and that this evidence must be from a central or local health authority; a local authority; or a doctor or other health professional. No such evidence was before the First-tier Tribunal and in the circumstances, the claimant's application was doomed to failure and the appeal could not succeed on immigration grounds, regardless of what I find was a flawed assessment of the available evidence as to the use of a maid having been tried and tested.
13. Further, paragraph 36 provides that if the claimant's required care has previously been provided through a private arrangement, the claimant must provide details of that arrangement and why it is no longer available. Paragraph 37 also requires that if financial support has been provided by the sponsor or other close family in the UK, the claimant must provide an explanation as to why this cannot continue or is no longer sufficient to enable the required level of care.
14. The grounds complain that there was no evidence as to what efforts had been made to secure alternative reliable domestic assistance. It cannot be the case that only one unreliable maid is available, even if the claimant is in a rural community. The sponsor asserts that he can finance care in the UK for 20-25 hours a week from their comfortable income; thus he can provide more than one maid and even live in help. There has been no credible explanation why such finances could not be deployed in providing additional care for the claimant, or helping him move to somewhere where such care is more readily available. It makes no sense at all to move the claimant all the way to the UK just because there is an erratic maid in his rural community. I find that obvious questions were left unanswered in the evidence adduced on behalf of the claimant. For example, how many sources had been

contacted; how many maids employed previously; what has been done to address the concerns about the erratic level of care. The Entry Clearance Officer noted that general, domestic and even specialised domestic care is available at affordable cost in India, especially if funded by someone abroad. The claimant also has friends and neighbours who apparently assisted him to travel to Chennai to make his application. The claimant failed to demonstrate that he could not, with the sponsor's financial assistance, pay for further assistance to include the cooking or provision of meals. Further, as stated, it was also open to the claimant to relocate to somewhere where he could access such assistance. It is absurd to suggest that it is reasonable in these circumstances to expect the UK to shoulder at public expense the burden of the claimant's care when he could, for example, relocate to be near his daughters or other family members, or a larger town or city where domestic help may be more readily available. As the Entry Clearance Manager review suggested, the claimant has failed to demonstrate that this application is one of necessity rather than choice and convenience. In that regard I note the grounds of appeal state that it is the claimant's last wish of his life to spend his remaining life with the sponsor. In his remarks to the Tribunal the sponsor urged on me the moral responsibility he had for his father the claimant and his concern about the level of care available to him.

15. None of the above considerations were properly addressed in the decision, rendering the decision of the First-tier Tribunal flawed, irrational, and in error of law.
16. The article 8 assessment is also flawed for want of adequate reasoning, setting out in just 6 lines the judge's conclusion that the claimant has family life with his son in the UK, although they have lived apart by choice for many years. In such circumstances, if any family life exists between them, it cannot to render the refusal decision a sufficiently grave interference so as to engage article 8 at all.
17. Even if article 8 was engaged, there was no consideration of the public interest and in particular section 117B that immigration control is in the public interest, or the absence of evidence that the claimant speaks English, or whether he would be financially independent or a burden on the state, at least in respect of health care and treatment in the UK.
18. The decision of the Entry Clearance Officer merely maintained the status quo. There is no positive duty on the Entry Clearance Officer to admit the claimant if he does not meet the Rules. The decision of the First-tier Tribunal makes no proportionality assessment and takes no account of the public interest in maintaining immigration control, the likely cost to the public purse, or of the opportunity for the claimant to make a further application, ensuring that the evidence meets the requirements of the Rules. Article 8 is not a short cut to compliance with the Rules. On the basis of the judge's assessment of article 8, every relative of every settled person in the UK would be entitled to entry on the same grounds, just because they are related to each other.
19. In the circumstances, the decision was in error of law, cannot stand and must be set aside and remade.
20. In remaking the decision I take account of those matters set out above. I find for the same reasons set out that the claimant has failed to demonstrate by specified

evidence that he meets either 2.4 or 2.5 of E-ECDR. I find it a strange proposition that just because a maid is erratic in attendance at the claimant's home to cook his meals, the claimant should be uprooted from India to come and live with the sponsor in the UK. The claimant has failed to demonstrate that even if he does require long-term personal care because of his age, that such care is not available elsewhere. For obvious reasons the threshold test under E-ECDR is very high, requiring independent evidence, but providing protect for those with provable need of support to carry out everyday tasks and where that level of support cannot be provided in their own country. The frustrations with the erratic maid or the sponsor's understandable care and concern for his father in his old age do not meet the strict requirements.

21. In relation to the article 8 claim, whilst I accept that there is a family relationship between father and son, it is a situation of long-standing whereby the sponsor has chosen to remain in the UK far away from his father. That family life is not such as to engage the protection of article 8 outside the FM and section E-ECDR Rules. The decision of the Entry Clearance Officer does not amount to such grave interference with the claimant's rights. Even if article 8 ECHR is engaged, taking into account the public interest considerations set out above from section 117B and bearing in mind that there is a route for entry for those who meet the strict requirements, and in respect of which the claimant has failed to prove, it remaining open to him to make a further application addressing those strict requirements, the balances come firmly down in favour of the Entry Clearance Officer's decision. It was not disproportionate.

Conclusions:

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on all grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the 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).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed

Deputy Upper Tribunal Judge Pickup