IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08307/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th October 2015	**On 4th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR SUBRAMANIAM RAMAMOORTHY TUTICORIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs S M Iyer, Sponsor
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on 5th March 1943 and he made an application for entry clearance under Appendix FM Section E-ECDR on 28th April 2014. His application was refused by the Entry Clearance Officer on 4th June 2014.

2. In his refusal notice the Entry Clearance Officer considered the letters produced from the appellant's cardiologist and his GP with regard to the limitations of his medical ailments and noted that although his GP stated that he could not cook and clean by himself but his cardiologist made no

mention of such. The area the appellant lived in had a high pollution level but there was no corroborative evidence submitted to confirm that. There were several areas in India which would not contain the same pollution levels. The letter stated he should eat low sodium and reduced saturated fat meals but he had not stated he was unable to receive this food in his area. It was quite simple not to add salt and saturated fat to a meal as these are primarily added during the cooking process. Private chefs were available in all parts of India on a part-time or full-time basis and they could provide home-cooked meals to specification.

3. He had also stated he could not obtain cleaners to clean the house on a regular basis but live-in and live-out maids and home helpers were readily available in the majority of India. Furthermore the care he stated he required appeared to revolve around avoiding pollution and consuming low sodium and saturated fat meals.

4. A check on Google for nursing homes in Maharashtra state alone provided 1,500,000 hits. A check for medical nursing homes had 1,300,000. It was clear therefore that help for his ailments was available in India and that he had several family members in India who could potentially provide care for him. Care could be provided through the financial help from the sponsor which he was already using. The Entry Clearance Officer was not satisfied he was unable to obtain the required level of care in India and refused the application with reference to EC-DR.1.1.(d) of Appendix FM of the Immigration Rules E-ECDR.2.5.

5. The decision was reviewed by the Entry Clearance Manager, who stated there were no reports to confirm that the appellant had chronic obstructive pulmonary disease but he was aware that there was treatment available in India. It is a matter of personal choice that the appellant did not wish to make use of care homes and there was no provision for this in the Immigration Rules. There was no reason why a care home or a personal carer would not be able to provide the required level of care that the appellant needed. It was known that in India domestic help and private nurses were widely available and that the waiting time to see a consultant was far shorter than that in the UK.

6. There were two letters and no other evidence of the appellant's ongoing medical treatment or condition. The appellant was able to afford to go to private medical doctors in India and although he states he is unable to afford a private caterer for his meals it is not shown he is able to afford this service in the UK or that sponsors would be able to take care of him on a full-time basis.

7. Judge of the First-tier Tribunal Suffield-Thompson heard the appeal on 28th January 2015 and refused the appeal on 3rd February 2015. An application for permission to appeal setting out errors of law was first refused by First-tier Tribunal Judge Shimmin, who rejected the application because it was not received in time. A renewed application was made to the Upper Tribunal.

Application for Permission to Appeal

8. The application for permission to appeal stated first in accordance with the Immigration Rules of Appendix FM-SE that the appellant was incapable of cooking and cleaning as evidenced by a letter from his GP. The cardiologist, although he did not use those words, stated that the father was not geared to care of himself. Further evidence was attached.

9. Secondly, with regard to pollution an air quality report was published by the Maharashtra Pollution Control Board, which was a registered government body. The GP had mentioned pollution in his letter dated 2nd April 2014. A letter from a pulmonologist dated 25th February 2015 was attached.

10. Thirdly, procuring a healthy diet. The GP clearly stated in his letter dated 2nd April 2014 regarding the difficulties the father faces regarding getting people to cook food to suit his health. He stated that the appellant "depends on outside food suppliers for his daily meals. The meals provided by such caterers are quite high in saturated fats and salt. Unfortunately there is a lack of caterers or cooks that provide healthy meals in this area." It was submitted that Dr Deshpande was a registered medical practitioner and his father's GP for many years and made home visits. This was independent evidence to prove the lack of healthy food suppliers.

11. Fourthly, the appellant did have brothers and sisters in India but the appellant had provided letters written by them stating their inability to support him on a daily basis. These were presented to the First-tier Tribunal in July 2014. Further evidence from the cardiologist dated 20th February 2015 showed that old age homes were unsuitable for him as he needed cardiac rehabilitation.

12. Fifthly, with regard to obtaining financial help the financial aid provided by the sponsor had not been of use in finding care that would be appropriate for his medical needs and there was a lack of facilities where he lived and he could not move to a care home as his cardiologist advised against it in his later letter of 2015.

13. Sixthly, the presence of relatives. The letters written by them provided strong evidence that they were no longer in a position to care for him on a regular basis.

14. Seventhly, the compassionate grounds. The evidence provided proved that the application to settle in the UK was not based on compassionate grounds as the GP, cardiologist and pulmonologist clearly explained in their letters that the appellant was not in a position to exert in order to cook and clean.

15. Eighthly, the appellant met the criteria of the Rules.

16. Ninthly, in making care arrangements the evidence provided established that care homes would not provide a level of care required by the appellant.

17. Lastly, the evidence demonstrated that the appellant suffered from heart and lung disease, had suffered a heart attack and had later on had congestive heart failure and he suffered from COPD, which is a long-term condition. The doctors' letters clearly explained that the illness was debilitating and there was no cure and he was not able to care for himself. He clearly met the Rules.

18. Upper Tribunal Judge Pitt extended time and granted the application. She found that it was arguable that the evidence before the First-tier Tribunal was capable of indicating that the appellant did not have access to support from family members in India and that his particular combination of health conditions and the evidence on pollution which was not overtly considered by the First-tier Tribunal Judge meant that he could not be cared for in his home or in a care home contrary to the findings at 11 and 13.

19. It was also arguable that the combination of factors in this case, the appellant becoming a widower, followed by one of his daughters dying relatively young and after some years of being nursed with multiple sclerosis, his heart attack having occurred on the anniversary of her death, when considered against the background of his own serious ill health and lack of provision for his needs could amount to compelling circumstances outside the specific provisions of the Immigration Rules. Permission was granted.

20. A Rule 24 response was submitted opposing the appeal. The respondent asserted that the case was determined on the papers and the judge considered the evidence before him at the date of the hearing and reached wholly sustainable conclusions as to the circumstances. The appellant relied on two letters which were provided after the date of the hearing and which appeared to be solely addressed in support of the appellant's application. The judge had considered the evidence that was before him as limited by Section 85A of the 2002 Act to that existing at the date of decision and reached the conclusions that were open to him. The grounds were merely a disagreement with the findings. Article 8 was not a general dispensing power.

The Hearing

21. At the hearing Mrs Iyer attended and referred to the two letters which she supplied subsequent to the hearing which took place on 28th January 2015, that is to the letter from the cardiologist dated 20th February 2015 and the pulmonologist dated 25th February 2015. She stated that she accepted that they were not letters before the First-tier Tribunal but she submitted that much of the evidence presented was overlooked. There were letters from relatives and letters in relation to pollution but once

again these were letters which were subsequent to the decision and I explained that albeit that circumstances appertaining at the time of the decision can be taken into account, the relevant date for consideration of the evidence is at the date of decision of the Entry Clearance Officer.

22. Mrs Iyer submitted that the evidence of the appellant's GP and his cardiologist which dated from the beginning of 2014 had not been taken into account.

23. She submitted that there were some care homes and medical nursing homes in India as indicated by the Entry Clearance Officer in his decision but these, she stated, were not suitable and the psychological aspect was very important. Although the cardiologist had not stated things such that her father could not cook and clean the GP had made note of this.

24. Mr Melvin submitted that the sponsor was seeking to reargue the appeal and that the evidence as at the date of the decision was the key and the sponsor was seeking to rely on postdecision evidence and raising issues now that should have been raised before the First-tier Tribunal.

Conclusions

25. At the outset of my conclusions I set out the relevant Immigration Rule the components of which all must be fulfilled.

> "**Section E-ECDR: Eligibility for entry clearance as an adult dependent relative**
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> ...
>
> **Relationship requirements**
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> ...
>
> E-ECDR.2.3. The sponsor must at the date of application be -
>
> (a) aged 18 years or over; and
>
> (b)
>
> (i) a British Citizen in the UK; or
>
> (ii) present and settled in the UK; or
>
> (iii) in the UK with refugee leave or humanitarian protection.
>
> E-ECDR.2.4. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must as a result of age, illness or disability require **long-term personal care to perform everyday tasks**.
>
> E-ECDR.2.5. The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and

financial 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.

…

Appendix FM-SE: family members specified evidence

…

Adult dependent relatives

…

34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:

(a) Independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and

(b) This must be from a doctor or other health professional.

35. **Independent evidence** that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

(a) a central or local health authority;

(b) a local authority; or

(c) a doctor or other health professional.

…"

26. It is clear from Appendix FM-SE that the appellant must produce evidence as to the long-term personal care required and independent evidence as to whether that appellant can obtain the required level of care in the country they are living should be independent, and, from a central or local health authority, a local authority or a doctor or other health professional.

27. Further to **AS (Somalia) and another v Secretary of State for the Home Department [2009] UKHL 32** there was discussion of Section 85 of the 2002 Act and this specifically found that in relation to an appeal under Section 82(1) against the refusal of entry clearance, Section 85(4) should not apply and the Immigration Judge may only consider circumstances appertaining *at the time of the decision to refuse*. *This included a consideration of Article 8*. It was stated that where a change of circumstances was alleged by someone who is outside the jurisdiction the Entry Clearance Officer would be in the best position to evaluate the effect of this. The debate was whether the restriction imposed was proportionate but found that the language in section 85(5) was incapable

of being read down. I do not consider in this case that a restriction imposed by section 85(4) is disproportionate. There is no doubt that there has been a shifting of the medical evidence. This change in the evidence might well reflect the changing nature of the appellant's difficulties but the evidence must support an assessment at the relevant time which is the date of the Entry Clearance Officer's decision.

28. I can accept that there was information submitted in relation to the appellant's condition in his application form but the two letters that were submitted to support that application were limited to a letter from Dr Viswanathan dated 21st April 2014 and a further letter from the appellant's GP Dr Deshpande dated 21st April 2014.

29. It is this evidence which is the key evidence in relation to whether the appellant could meet the Immigration Rules and the judge quite rightly stated that although the GP stated that the appellant was unable to cook and clean by himself there was no mention that the consultant had stated this. Even if it were the case that the appellant were unable to cook and clean by himself the Entry Clearance Officer quite reasonably submitted, and this point was adopted by the judge, that live-in and live-out maids and home helpers were readily available in the majority of India. Further the Entry Clearance Officer clearly stated that the needs of the appellant revolved around avoiding pollution and consuming low sodium and saturated fat meals.

30. Under the Rules there is a requirement for independent evidence from a doctor or a health care professional which would include Dr Viswanathan and the GP in relation to the obtaining of care but neither the GP nor the consultant addressed the issue relating to whether there were nursing homes or medical nursing homes available in India and in other words

> 'applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care **in the country'**.

31. Although there was criticism that the judge had referred to the family being able to look after the appellant there were no effective submissions in relation to nursing homes or care homes in the two independent pieces of evidence from the GP or the consultant. That information was not produced until after the decision was promulgated. There is no material error of law in the judge's decision.

32. At paragraph 13 the judge states specifically: "I do find that it is possible for the sponsor to find the care that he needs by way of outside help or a care home. There are other close family members nearby who can also assist the appellant to remain in his own home." Albeit that the judge did not appear to take into account the family members who all for the purposes of the appeal rejected the possibility of being able to assist the appellant the judge relied on the statements of the Entry Clearance Officer to the effect that there were care homes in India. The medical evidence produced at the date of the decision addressed the practical health

implications of self care rather than the psychological issues and thus the need for the appellant to live with family. There was no indication in either the GP or the Consultant's evidence at the time that there was a psychological need for the appellant to obtain assistance which could only be derived from his family.

33. First and foremost, however, at paragraph 11 the judge stated that the appellant had not demonstrated that he needed long-term personal care as required under the Rules. It was accepted that he had had a heart attack but there was contrasting evidence from the consultant who did not say that the appellant was unable to cook, clean or take care of his personal hygiene. In relation to the high level of air pollution, although it was stated by the GP that "this has affected his lungs leading to chronic obstructive pulmonary disease", it did not state how his functional ability had been compromised.

34. There was little by way of medical information or evidence in relation to the psychological effects on the appellant and although Mrs Iyer attempted to introduce this into her evidence before the Upper Tribunal I am not persuaded that the judge did not adequately deal with this factor on the basis of the evidence before him.

35. At paragraph 12 he stated: "Losing his wife and daughter must have been devastating but again these are things that happen to many elderly people and are not sufficient grounds to show that he cannot continue to live independently or care for himself with some help."

36. The grounds for permission to appeal rested, save for the second ground of appeal, on the submission of later evidence which, as I have explained, is not permissible. The second ground of appeal makes mention that the GP referred to pollution but the evidence should be in relation to the lack of care in the country not just the area.

37. Much of the challenge was based on evidence which was produced subsequent to the decision and from 2015 and which could possibly form the basis of a further application. It does not demonstrate an error of law in the First-tier Tribunal Judge's decision. The appellant's sponsor was clear that the challenge was in relation to the Immigration Rules only and not on the basis of the European Convention on Human Rights and indeed this did not form part of the appeal.

Notice of Decision

I therefore find that there is no material error of law in the decision of the First-tier Tribunal and the decision shall stand.

No anonymity direction is made.

Signed Date 27th November 2015

Deputy Upper Tribunal Judge Rimington