Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10211/2014

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated**
on 14 October 2015	**on 19 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR SAHIDAR MIR MOHAMED HASAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

HASSAN THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Salam, Solicitor
For the respondent: Mr A Holmes, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondent is a citizen of Afghanistan born on 1 January 1949. However, for convenience, I refer below to Mr Mohamad as the appellant and to the Secretary of State as the respondent, which are the designations they had before the proceedings at the First-tier Tribunal.

2. The Secretary of State appeals with permission to the Upper Tribunal against the determination of First-tier Tribunal Judge Talbot promulgated on 5 May 2015, allowing the appellant's appeal pursuant to the

Immigration Rules as the dependent relative under Appendix FM paragraph EC DR. 1. 1. against the decision of the Secretary of State made on 17 July 2014, in which the Secretary of State refused the appellant's application for leave to enter the United Kingdom.

The First-tier Tribunal Judge's findings

3. First-tier Tribunal Judge Talbot gave the following reasons for allowing the appellant's appeal pursuant to the Immigration Rules.

   i. [19] The primary issue in this appeal is whether the appellant meets the criteria in Appendix FM E-ECDR 2.4. and E-ECDR.2.5. Sub paragraph 2.4 requires that the applicant "must as a result of age, illness or disability require long-term personal care to perform everyday tasks". Paragraph 2.5 states that the applicant "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.

   ii. [20] the most relevant evidence in support of the appellant's appeal is the appellant's own statement, the evidence of her daughter (oral and written), and the hospital medical report (summarised above). I was impressed with the evidence of the appellant's daughter and found her to be a credible and reliable witness. The sponsor is the person who has direct experience of caring for her mother during her frequent visits and is therefore in the best position to describe her caring needs on a daily basis. The hospital reports provides further corroboration from a medical standpoint for the problems described by the sponsor and by the appellant herself.

   iii. [21] with regard to paragraph 2.4, the question is "whether she requires long-term personal care to perform everyday tasks". The term "personal care" is not defined in the Immigration Rules, but commonly means care of an intimate nature such as in washing, toileting, dressing et cetera. The respondent's own internal guidance explains it in terms of the applicant being "incapable of performing everyday tasks for themselves e.g. washing, dressing and cooking". The evidence of the sponsor combined with the medical report clearly indicates that she needs help in tasks such as washing, dressing, toileting and taking prescribed medication, and cooking and getting around can be hazardous for her. These are activities that come within the ambit of personal care and this is clearly required on a long-term basis and given her age she is no doubt liable to deteriorate. I am therefore satisfied that paragraph 2.4 is met.

   iv. [22] I turn to 2.5. I am satisfied from the detailed evidence of the sponsor that her mother lives alone. I am also satisfied that there are no close relatives in the country available to help with care.

The immediate family are either deceased or abroad and the aunt who was previously able to provide at least emotional support and company for the appellant has died. The question is then whether the necessary caring could be provided by paid carers outside the family. There does not seem to be a specific issues with regard to affordability, as the sponsor has a reasonable level of income. The issue is that of availability of care. The sponsor (corroborated by the medical report) has credibly explained the absence of a proper carer's profession in Afghanistan. She has therefore attempted to resolve the matter by hiring a succession of mates. She has explained the difficulties that she has had in finding reliable and honest ladies to perform these duties. She has had some limited success in finding ladies to do duties such as shopping and housework but not the intimate personal care that her mother needs for example cleaning her after performing her toilet or night-time care. The use of maids has therefore not resolved the issue satisfactorily and it is for this reason and the resultant anxiety that the sponsor or her husband have had to make frequent visits to Afghanistan. On the evidence before me I am satisfied that the required level of care is in practice unavailable to the appellant despite attempts made by the sponsor over a period of time to try and resolve this problem.

v. [23] In reaching the determination, I have taken full account of the points raised by the respondent in her refusal letter and the ECM Review. One particular point mentioned, namely the fact that the appellant had recently travelled to the UAE, has been explained in the appellant's witness statement, namely that she travelled to the UAE with her son-in-law as a matter of necessity purely in order to lodge her entry clearance application. I am satisfied that the other points of concern have now been adequately addressed by the evidence submitted. I conclude that the appellant's case does meet the relevant criteria of Appendix FM.

Grounds of appeal

4. The respondent in her grounds of appeal state the following which I summarise. The Judge allowed the appeal under appendix FM as he was satisfied, based on the detailed oral evidence of the sponsor and the appellant's own evidence and a medical report that the Immigration Rules were met. It is submitted that the First-tier Tribunal Judge has failed to lawfully engage with section 12A (g), 33-37 of Appendix FM-SE, which details the evidence necessary to support an application under the adult dependent relative route of Appendix FM.

5. The Judge gives no reason for departing from the evidential requirements which were deemed a necessary prerequisite as set out in **SSHD v SS Congo [2015] EWCA Civ 387** at paragraph 51 which states "In our

judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.".

6. The court considered the requirements necessary because "the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them to assess the risk and put in place measures which are Judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts".

7. The respondent submits that, whilst there is a medical report from Dr Sayed of the hospital in Kabul, the medical report does not establish that necessary provision is unavailable across Afghanistan. It establishes that Dr Sayed hospital does not provide outreach services.

8. It was for the sponsor's evidence with satisfied the Judge as to the general lack of care available to the appellant but the respondent submits that such evidence is not independent, as is required by the Rules, and therefore does not assist the Tribunal in assessing E-ECDE. 2. 5. The respondent further submits that the evidence does not sufficiently establish an unavailability, or inadequacy, of care; it is open to the appellant to relocate to Kabul and employ maids/carers there.

The hearing

9. At the hearing I heard submissions as to whether there is a material error of law in the determination. Mr Holmes on behalf of the respondent submitted that the Judge made his findings based on the appellant's daughter's evidence that medical care is not available. This does not answer the question dependent evidence is required under the Rules. In respect of the appellant's travel to the UAE someone must have been looking after her.

10. Mr Salam on behalf of the appellant submitted that the letter from the hospital clearly states that care is not available. There are no care services in Afghanistan as it is an underdeveloped country. The appellant lives in a rented house in Herat. The Judge took all the evidence into account and has not made a material error of law.

Findings as to whether there is an error of law

11. The complaint made by the respondent is that the Judge did not take into account that the appellant had not met the evidential requirements of the Immigration Rules and that the oral evidence of the appellant and her

sponsor, even if they were found to be totally credible witnesses, could not remedy that lack.

12. The Judge should have been required to look for independent evidence that there was a lack of available paid care to meet the appellant's needs in Afghanistan. The Judge completely disregarded this requirement. This was fatal to the determination.

13. The Judge did not take into account that enforcement of the evidence rules ensures that everyone applying for leave to remain or leave to enter is treated equally and fairly in relation to the evidential requirements that must be satisfied in order to retain uniformity and equality throughout the system.

14. The Judge did not take into account the evidence that when the sponsor was in the United Kingdom, care must have been provided to the appellant by others in Afghanistan. Therefore the appellant must have someone in Afghanistan caring for her when the sponsor was not visiting her. The Judge found that the fact that the appellant went to the UAE, even if it was to make her application for entry clearance, suggested to the Judge that the appellant was not someone who was so ill and requiring of daily care that she was able travel to the UAE. This is a logical inference drawn from the facts. The Judge was entitled to find that the appellant's sponsor's evidence about the care that the appellant receives and needs is at odds with the appellant's ability to travel to Afghanistan.

15. I am satisfied that there is a material error in the determination of First-tier Tribunal Judge because the Judge did not take into account the case of **SS Congo** and relied solely on the evidence of the appellant and her sponsor without seeking independent evidence as required under the evidential part of the Immigration Rules.

16. Consequential to my finding that there is a material error of law, I set aside the determination of the first-tier Tribunal Judge preserving none of the findings.

17. Both parties agreed in such an event, the appeal ought to be sent back to the First tier- Tribunal so that findings of fact can be made. I agreed that this was the proper course of action to take in this appeal in accordance with section 7. 2 (b) (i) the Senior President's Practice Statement of 25 September 2012 as I was of the view that the appeal requires judicial fact-finding and should to be considered by the First-tier Tribunal.

18. The re-making of the decision on appeal will be undertaken by a First-tier Judge in the First-tier Tribunal other than by First-tier Tribunal Judge Talbot on a date to be notified.

Decision

19. The appeal by the Secretary of State is allowed and the determination of First-tier Tribunal Judge is set aside. The case is remitted to the First-tier Tribunal for re-determination.

Signed by

Mrs S Chana Date 15th day of November 2015
A Deputy Judge of the Upper Tribunal Judge