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

Appeal Number: OA/20426/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 28 September 2015**

**Decision and Reasons
Promulgated
On 9 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

DHULHANNISA SHASHATH BASHA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER, CHENNAI

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India, born on 23 February 1940. She has appealed with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal Caswell, promulgated on 26 November 2014, dismissing her appeal against a decision of the respondent, made on 21 August 2013, refusing to issue her entry clearance to enable her to join her adult daughter, Ms Fathimunnisa Nazeer Ahamed (“the

sponsor”), in the UK.

2. The respondent refused the application by reference to the Immigration Rules for adult dependents relatives, found in Appendix FM¹. The appellant is a widow and lives alone in India. She suffers from a number of health problems. The respondent was not satisfied that she required, due to age, illness or disability, long term personal care to perform everyday tasks. (E-ECDR.2.4). Nor had she shown that care could not be provided in India by employing help (E-ECDR.2.5). The appellants submitted grounds of appeal arguing the rules were met.
3. The appellant was represented by a solicitor at the hearing. The judge heard evidence from the sponsor and her husband and considered the documentary evidence, including two letters from the doctor treating the appellant in India, Dr P Rammohan. These were dated 7 August 2013 and 25 October 2014 respectively. The judge directed herself to consider the circumstances appertaining at the date of decision and held as follows. At the date of application the appellant was suffering from hypertension and dyslipidemia, both controlled by medication, and her heart and kidneys were functioning normally. She was also suffering from depression and had “withdrawal symptoms”. The judge accepted also that appellant also had osteoporosis and pain in her knee. She was getting forgetful. By the date of hearing the appellant’s physical condition was deteriorating and her emotional stress was more concerning. She was being treated for depression and was showing acute symptoms of dementia. The appellant had had the services of a maid since 2009.
4. The judge found it had not been shown that the appellant required long term personal care to perform everyday tasks as at the date of decision. Furthermore, even if such care were required, the appellant had not shown it was not available in India. The maid washes the appellant's clothes, cooks and cleans the house but that was not personal care, as opposed to general household help.
5. Permission to appeal was granted by Upper Tribunal Judge Storey to argue the following points: (1) that the judge may have failed to take account of the actual nature of the care provided and whether this

¹ “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.”

amounted to personal care for the purposes of the rules; (2) that there may have been procedural unfairness in that the judge made findings in relation to matters which were not raised in the notice of decision, namely whether the financial requirements of the rules were met.

6. The respondent filed a response opposing the appeal. This argued the judge's findings were sustainable.
7. I heard submissions from the representatives as to whether the judge made a material error of law in her decision. I have recorded the submissions in full in my record of the proceedings and I only set out a summary here.
8. Mr Richardson accepted that the judge was entitled to look at the earlier medical letter and that she had to disregard post-decision deterioration. However, he argued the rule, which referred to the need for long term care, was necessarily forward-looking. He noted the judge had fully set out the evidence but argued she had not given adequate reasons for rejecting it.
9. Mr Richardson also relied on the fact the Upper Tribunal had not refused permission to appeal any of the grounds seeking permission to appeal and he therefore argued that the judge's decision on article 8 was also erroneous. The judge had wrongly applied a test of exceptional circumstances, which was only applicable in precarious family life cases (see *SS (Congo)* [2015] EWCA Civ 387). Whilst the judge had made a proportionality assessment in any case, this was inevitably tainted by her perception that there was a test of exceptionality. In conducting that assessment the judge had failed to consider whether family life could be continued in India. Finally, he argued the judge had made comments about the question of whether the financial requirements of the rules were met, without these having been in issue. This must have affected her proportionality assessment.
10. Mr Melvin relied on the rule 24 response. He likened the challenge to the judge's findings as mere disagreement with the decision. The judge had made reasoned findings based on the evidence. The judge had also made an adequate assessment of article 8. The judge had not made findings about the financial requirements.
11. I reserved my decision as to whether the judge made a material error of law such that her decision has to be set aside.
12. I find the judge made a careful assessment of the available evidence and, in particular, was careful to limit her findings to the circumstances appertaining at the date of decision. She was right to rely primarily on the first medical letter. The fact the rule refers to the need for long term care does not alter the fact that the focus of enquiry is the date of decision. The applicant must show she has personal care needs which, as at the date of decision, are likely to endure. It does not mean judges

must build in to their assessment recognition that the applicant's condition will deteriorate. The rule is plainly intended to rule out reliance on short term disablement, such as might occur after an accident or surgery.

13. That said, I agree the judge erred by apparently limiting the scope of personal care so as to exclude help with washing, dressing and cooking. The judge appears to have accepted the appellant received help with such matters from a maid. They are precisely the examples given of personal care in the IDIs. I find the judge erred by finding the appellant had failed to show she required personal care. Additionally, I agree with Mr Richardson that the judge failed to give any reasons for rejecting the evidence that she recorded in paragraphs 3 and 4 of her decision. It would have been open to the judge to make a negative finding on this point and she does refer to the absence of any confirmation from the doctor that the appellant needed "physical support". However, no reasons are given for finding the sponsor's evidence about her mother's care needs was not accurate.
14. That said, any such error would not have been material because the contemporaneous medical evidence, that is the first medical letter, did not confirm the appellant could not perform everyday tasks, as required by paragraph 34 of Appendix FM-SE. The mandatory requirement for specified evidence was not met.
15. Moreover, I do not agree with Mr Richardson that the judge's findings with respect to the availability of the required level of care in India were unreasoned and therefore erroneous. The personal care required by the appellant was of a kind which could be provided by a maid, as opposed to a trained nurse. The judge heard evidence that such care was provided by a nurse, albeit she could be unreliable. The judge took careful note of the evidence on this point at paragraphs 16 to 19. The reasons Mr Richardson suggested were absent from the judge's consideration are found at paragraphs 21 and 22. The judge reasoned that, if the current provision was not adequate, it was reasonable to expect to see the sponsor taking steps to meet the shortfall, which had not been done. The appellant had been receiving care from the same maid for five years and was therefore more likely than not to be satisfied. The judge was entitled to come to this conclusion on the evidence.
16. Even if I were wrong about that, the error would not be material because the requirements of paragraph 35 of Appendix FM-SE, that the evidence of the unavailability of the required level of care should come from a professional source, were not met in any event. The contemporaneous medical evidence was silent on the point. The application did not meet the mandatory evidential requirements of the rules and the appeal was therefore bound to be dismissed.
17. The judge's decision on article 8 was that there were no arguably good

grounds for saying there were compelling circumstances which were not fully recognised under the rules (see paragraph 24). Mr Richardson argued there was a misdirection of law because the judge had been seeking exceptional circumstances where none were required. I assume he derived that view from the sentence in paragraph 24 in which the judge says the appellant's position does not appear to be exceptional in any way. The argument would be that she had conflated the test of compelling circumstances with a higher one of exceptional circumstances.

18. In *SS (Congo)* the Court considered the correct threshold for engaging article 8 outside the rules. In general, compelling circumstances would need to be identified, which was lower than a test of exceptional circumstances. However, it was nonetheless a “fairly demanding test”, reflecting the reasonable relationship between the rules and the proper outcome of the application of article 8. In cases in which family life was begun under conditions of “known precariousness” (because family life could not be resumed in the UK unless and until the rules were met), it is appropriate to apply a similar test to exceptional circumstances (see paragraphs 37 and 67).
19. I see no misdirection of law in paragraph 24 of the judge’s decision. *SS (Congo)* had not been handed down when the judge made her decision, although the judgment can be viewed as revealing what the law always should have been. The judge clearly directed herself in terms of compelling circumstances and the following sentence does not necessarily mean she was applying too high a test. It is plain that, having failed to show she met the very demanding test contained in Appendix FM, it was difficult for the appellant to demonstrate there were compelling circumstances not covered by the correct application of the rules. The sponsor had chosen to live in the UK far from the appellant and therefore the family life between them could only resume if the entry clearance rules were met. If there had been deterioration in the appellant’s health and therefore an increase in her care needs since the decision, she had the option of re-applying for entry clearance and providing up to date evidence. The judge directed herself correctly and was entitled to reach the conclusion that there was no requirement to consider article 8 outside the rules. That was her primary finding. Any errors in the assessment of article 8 outside the rules could not therefore be material to the outcome of the appeal.
20. As far as the judge’s comments in paragraph 29 on the financial requirements are concerned, there is a danger that the judge could be perceived as making adverse findings on points not raised by the respondent without giving the appellant the opportunity to present evidence in rebuttal. However, in my judgment, the judge did enough in paragraph 30 to make it clear she was not influenced by the matters she noted in relation to finances when making her decision.
21. The decision of the First-tier Tribunal does not contain a material error

of law and shall stand. The appellant's appeal is dismissed.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeal shall stand.

Signed

Date 29 September 2015

**Judge Froom,
Sitting as a Deputy Judge of the Upper
Tribunal**