



IAC-FH-CK-V1

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

Appeal Number: OA/13013/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25th February 2016**

**Decision &
Promulgated
On 29th March 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

and

MRS CUIYUN SU

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr A Jafar, Counsel instructed by The Chancery
Partnership, London

DECISION AND REASONS

1. Mrs Cuiyun Su is a citizen of the People's Republic of China. Her date of birth is recorded as 10th October 1940. Sometime in July 2014 she made application for entry clearance to the United Kingdom on the basis that as a result of her age, illness or disability she required long-term personal care to perform everyday tasks, having regard to E-ECDR.2.4.

2. On 18th September 2014 a decision was made to refuse that application and Mrs Su appealed. Her appeal was heard on 26th August 2015 by Judge of the First-tier Tribunal Nicholls sitting at Taylor House. The issues before the judge narrowed so that the only consideration was whether, having regard to rule E-ECDR.2.5. of the Immigration Rules, the Respondent was unable to obtain the required level of care in China because it was not available. The issue of whether or not it was affordable was conceded in the First-tier Tribunal. In fact the Rule, read as a whole, requires the Appellant to show that she is unable, even with the practical and financial help of the Sponsor, to obtain the required level of care in the country (China) either because that care is not available or because it is not affordable. As I said, the issues somewhat narrowed.
3. Judge Nicholls clearly found the Sponsor, the Respondent's daughter, to be very impressive in the evidence that was given and indeed says so in terms at paragraph 17. He had regard to the medical evidence such as it was but also to the evidence given by the Sponsor and came to the view that there was a long-term need for Mrs Su to have emotional care which could not be provided in China but could only be provided by her daughter, the Sponsor, in the United Kingdom.
4. Not content with that finding, by Notice dated 17th September 2015 the Entry Clearance Officer made application for permission to appeal to the Upper Tribunal. The grounds focused entirely on the interpretation by the judge of Rule E-ECDR.2.5. and it was submitted that:

"The fact that the [Respondent] and Sponsor may not want her to access that care cannot lead to a finding that it is not available. The First-tier Tribunal Judge itself [sic] records the Sponsor's evidence at paragraph 17 that residential care is available and accessible to the [Respondent]."

It is submitted that a choice not to go into a care home that is evidently available does not equate to a finding that personal care is not available in China. The fact that an Appellant does not wish to be cared for by strangers cannot lead to a finding that care is unavailable. The Respondent submits that a person in the United Kingdom requiring hospital or residential care will inevitably be cared for by strangers."

5. On 7th January 2016 Judge of the First-tier Tribunal Hollingworth granted permission thus the matter comes before me.
6. Mr Clarke for the Secretary of State made a valiant attempt to widen the grounds to include the contention that the finding made by the judge was not open to him given the requirements, that is to say the evidential requirements, of Appendix FM-SE at paragraphs 33 to 35. Mr Clarke, however, both fairly and properly accepted that it really was not appropriate, or open to him, on the morning of the hearing, to seek to widen the grounds and so the issue for me to resolve in this appeal is

whether it was open to the judge to make the finding made within the context of paragraph E-ECDR.2.5.

7. I return to the grounds in which it is submitted that a choice not to go into a care home that is evidently available does not equate to a finding that personal care is not available in China. The judge did not find, in my judgment, that the fact that the Respondent did not want to be cared for by strangers led to a finding that care was unavailable. There was rather more to it than that. It was the nature of the care which the judge found was not available. It is not in issue that Mrs Su has a number of medical issues but those were dealt with in the medical evidence which is referred to in the decision. She has diabetes, hypertension, arthritis and heart disease as well as difficulty with day-to-day tasks.
8. Evidence was led that Mrs Su was very unhappy about the prospect of being cared for by somebody she did not know or trust. That formed part of the concerns of the Respondent, and indeed the Sponsor, but what informed the decision which the judge made was that the Respondent was lonely and isolated albeit that in using the term “depressed” or “depression” it was not being used in the clinical sense but rather a lay sense.
9. At paragraph 18 the Sponsor is recorded as having argued that her mother’s requirements including tackling her feelings of *depression* and isolation were such that no amount of care coming into the home or residential care would be met and that she, that is to say the Sponsor, was the only person who could provide for the Respondent’s needs of intimate and personal care.
10. I have to ask myself whether the finding was one that was open to the judge and whether the finding was perverse, irrational or made in circumstances in which there was no sufficient evidence (bearing in mind that the requirements of FM-SE do not fall to be considered in the context of the appeal before me).
11. I come to the view that whilst it may have been a generous decision, it was one that was open to the judge. The judge made plain at paragraph 19 that there was nobody in China, in his view, who could provide the filial care for the Respondent which the Sponsor can provide. Mr Clarke submitted that filial care was not sufficient within the context of the Rule under consideration but of course the Decision and Reasons have to be read as a whole, as one piece, and when one does that, one sees that it is the mental state reasonably inferred from the physical conditions taken together with the specific evidence of the Sponsor that entitled the judge, in my view, to come to the conclusion that he did.
12. In those circumstances the appeal to the Upper Tribunal is dismissed and for the avoidance of doubt the decision of the First-tier Tribunal is affirmed.

13. The grounds of the Entry Clearance Officer do not suggest that consideration should have been given to the wider application of Article 8. There is no cross-appeal. In those circumstances I do not deal with that possibility.

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The Decision of the First-tier Tribunal is affirmed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Zucker