



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15504/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7th January 2020

Decision & Reasons Promulgated
On 20th January 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

GRACE ADUKE FAPOJUWO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms M Onipede, the Sponsor
For the Respondent: Ms Jones, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Abebrese, promulgated on 17th July 2019, dismissing the decision, dated 30th May 2018, to refuse entry clearance to the appellant in respect of a human rights claim made by her on 27th February 2018.

Background

2. The appellant is a national of Nigeria, born on 14th April 1941. She was 78 years old at the date of the judge's decision. She sought entry clearance to settle in the UK with Ms Onipede, her daughter (the sponsor), who is present and settled in this country.
3. In her settlement application the appellant claimed that she needed to join the sponsor because she was unable to wash, dress or prepare food without assistance. She suffered from cataracts and had mobility problems stemming from arthritis and a problem with her kneecaps. The appellant received £70 a month from the sponsor and a further £50 a month from her other four children, all of whom were resident in the United Kingdom. The appellant also received a state and retirement pension.
4. The appellant was divorced from her husband. Although she had a 67-year-old sister in Nigeria the sister lived in another state and the appellant rarely saw her. The appellant relied on the goodwill of her neighbours for assistance, but this was said to be unreliable. The sponsor indicated at the appeal hearing before the First-tier Tribunal that the appellant previously employed a maid who took advantage of her financially.
5. In refusing the entry clearance application the respondent was not satisfied as to the relationship between the appellant and her sponsor. Nor was the Entry Clearance Officer satisfied that the requirement of E-ECDR.2.4. of Appendix FM of the immigration rules were met. This requires the applicant to need long-term personal care to perform everyday tasks as a result of age, illness or disability. Nor was the respondent satisfied that the requirement of E-ECDR.2.5. were met. This requires that, even with the practical and financial support of the sponsor, the applicant is unable to obtain the required level of care in her own country, either because it is not available and there is no person in the country who can reasonably provide it, or because it is not affordable.
6. The application constituted a human rights claim within the terms of s.113 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and, as such, the refusal of the application gave the appellant a right of appeal pursuant to s.82 of the 2002 Act. The appellant exercised her right of appeal.

The judge's decision

7. At the appeal hearing the appellant was not legally represented, although the sponsor appeared on her behalf. In the section of his short decision entitled "Findings" the judge found that the sponsor gave credible evidence in respect of her relationship with the appellant. Then, at paragraph 12 the judge stated:-

“I also do not find the evidence of the appellant and sponsor credible in relation to [*sic*] physical condition of the appellant. The respondent at the time of the decision found that the appellant had not provided any medical evidence. I was provided with an updated medical report at the hearing which I have attached **no weight** to because it was not before the Entry Clearance Officer or the Entry Clearance Manager. I was not provided with a plausible reason why this evidence could not have been provided earlier.” **[judge’s emphasis]**

8. At paragraph 15 the judge noted that other some medical evidence, dating from July 2018, had earlier been provided, but this post-dated the decision of the Entry Clearance Officer. The judge referred to a review by an Entry Clearance Manager, although I have seen no evidence of such a review in the papers before me. The judge noted that the Entry Clearance Manager’s review was not provided to the sponsor.
9. The judge briefly considered the medical evidence dating from July 2018. This indicated that the appellant had a cataract operation on 11th July 2018, and reference was made to a knee operation. The judge stated, “The medical evidence does not make any reference to the extent of any care and assistance that may be required by the appellant”.
10. At paragraph 14 the judge noted that the appellant failed to provide documentary evidence that the care she required was not available in Nigeria. The judge considered the sponsor’s evidence that the appellant previously employed a maid who was dismissed because of her conduct. The maid had not been dismissed because she was unable to carry out the required duties and the judge concluded that it was possible to obtain the assistance of another maid who would not take advantage of the appellant. The sponsor’s evidence suggested to the judge that no further steps had been taken to employ another person. The judge found that the required level of care would be available in Nigeria and that the sponsor and the other siblings in this country could assist by supplementing the cost of care. The judge concluded that the appellant was unable to satisfy the requirements of the immigration rules and that the refusal was proportionate given that the appellant would continue to receive the required level of care in Nigeria.

The challenge to the judge’s decision

11. The grounds, settled by the sponsor herself, make various assertions. They contend that there was procedural irregularity because the respondent failed to comply with Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The grounds contend that the judge wrongly referred to a decision dated 26th June 2018 when the decision under challenge was dated 30th May 2018. They contend that the judge failed to adequately consider the evidence relating to the appellant’s former husband and her sister, and that the sponsor was cut off by the judge during her evidence when describing the difficulties the appellant faced in Nigeria. The grounds further contend that the judge failed to adequately consider the

medical evidence dating from July 2018, including a report from the Faleti Medical Centre indicating that the appellant had impaired mobility due to severe osteo-arthritic changes in her knee and cataract operations and confirming that the knee and eye conditions were a major cause of impairment to the appellant's mobility and self-care. The grounds finally contend that the judge entirely failed to consider further medical evidence dating from May 2019 and improperly drew an adverse inference from the earlier omission of this evidence on the basis that no plausible explanation was provided in circumstances where the sponsor was not asked to give an explanation.

12. In granting permission to the Upper Tribunal, Upper Tribunal Judge Sheridan stated:-

“At paragraph 12 the judge stated that no weight was being attached to an undated medical report because it was not before the Entry Clearance Officer or Entry Clearance Manager. It is arguable that this is inconsistent with Section 85(4) of the Nationality, Immigration and Asylum Act 2002 which provides that matters arising after the date of decision may be considered. See **HH (conditional appeal decisions) Somalia [2017] UKUT 00490 (IAC)**.”

13. The sponsor focused her submissions by reference to the judge's failure to consider the new medical evidence. By disregarding the new evidence the sponsor was denied the opportunity of showing how the health of her mother had further declined, how the appellant could do even less than she could before, and consequently that the required level of care was now such that there was no-one who could provide it in Nigeria. The respondent did not oppose the appellant's application for permission to appeal and “invited the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant's updated medical evidence would have made a material difference to the outcome.” In her oral submissions Ms Jones submitted that the further medical evidence, properly considered, could not have materially altered the judge's conclusions because it still did not show the extent to which the appellant required care in order to perform everyday tasks and there was still no evidence that the appropriate level of care was unavailable or was too expensive.

Discussion

14. There is no merit in the grounds dependent on a breach of Rule 23 of the 2014 Procedure Rules. Although the respondent may have failed to provide a statement as to why he or she opposed the appeal, this would necessarily have been apparent from the arguments advanced by the Presenting Officer at the First-tier Tribunal hearing. A copy of the appellant's application form was provided to the First-tier Tribunal and there is nothing to indicate that the sponsor was not offered an opportunity to consider the application form or the evidence that accompanied the application. In any event, a failure to comply with a direction of the Procedure Rules

does not of itself render void the proceedings or any step taken in the proceedings (see Rule 6 of the 2014 Procedure Rules).

15. I acknowledge that the judge made a mistake in referring to the decision under challenge as being made on 26 June 2018, but this mistake is not material to the substance of the judge's decision. There is little merit in the contention that the judge failed to adequately consider the appellant's relationship with her ex-husband as the judge did not rely on the ex-husband in his decision, and the judge was entitled to note that, although the sister lived in another state, the appellant still had family in Nigeria. I do however find that the judge erred in law by failing to consider the most recent medical evidence.
16. Headnote (2) of **HH (Somalia)** reads, "Even in entry clearance cases, Section 85(4) allows post decision evidence provided it does not constitute a new matter".
17. At paragraph 20 of **HH** the Upper Tribunal stated:-

"It is no longer the case that the Tribunal, in deciding an appeal of this kind, is confined to the evidential situation as it was at the date of the refusal of entry clearance. Section 85(4) provides that it is possible for the Tribunal to consider evidence arising at a later time, providing that it does not constitute a new matter as defined by Section 85(6)".
18. There was no suggestion in the present appeal that the further evidence constituted a new matter. Although **HH** was not concerned with Appendix FM the principles of equal applicability, I have considered Appendix FM-SE, particularly paragraph 'D' of FM-SE and paragraphs 33 to 37. Paragraph 'D' indicates that, in deciding an application in respect of which specified documents must be provided, the Entry Clearance Officer or Secretary of State will consider documents provided with an application and will only consider documents provided after the application if certain requirements are met, none of which are relevant in this case.
19. Paragraphs 33 to 37 of Appendix FM-SE describe the evidence that must be provided to prove a family relationship and that, as a result of age, illness or disability, the appellant requires long-term personal care. The paragraphs also set out the independent evidence that is required to demonstrate that the required level of care is not available even with the practical and financial support of the sponsor.
20. For the purposes of determining whether the Immigration Rules are met the requirements in respect of documentation that could be considered by an ECO are time specific. There is however no such time restriction for a judge when considering the human rights claim outside the Immigration Rules (see **HH** and **Hesham Ali [2016] UKSC 60**). The immigration rules relating to entry clearance as an adult dependent relative are not a complete code in respect of Article 8 and it is always incumbent on a judge to consider a human rights claim having regard to all relevant evidence.

21. The respondent takes the position that even if the judge erred in law by failing to consider the most recent medical evidence, this error was not material such that it requires the decision to be set aside. There was no independent evidence before the judge that the required level of care for the appellant would not be available in Nigeria, and the judge was properly entitled to find that the financial misdeeds of one maid did not mean that all other maids would take advantage of the appellant. Nor was there particular evidence of any particular emotional needs or bonds sufficient to establish a relationship beyond those normally found between elderly parents and their adult children, although there did appear to have been material financial dependence.
22. The unconsidered medical evidence itself consisted of a letter from the Medical Director of the Faleti Medical Centre and radiologist reports indicating that the appellant suffered from stage 2 congestive heart failure, cardiomegaly (which relates to an abnormal enlargement of the heart), hepatic congestion with bilateral interstitial thickenings (which I understand is a condition affecting the lungs), and bilateral pleural effusion and degenerative spinal changes. This evidence did not expressly state that, as a result of her illness or disability or age, the appellant required long-term personal care to perform everyday tasks. But because the judge did not consider any of this evidence, he did not think to question the sponsor in respect of it. In circumstances where an appellant is not legally represented a judge may need to take on a more inquisitive role in obtaining and assessing relevant evidence. There is no indication that the judge asked the sponsor about the consequences of her mother's heart condition, or the bilateral interstitial thickenings, or the degenerative spinal changes, either in respect of how it affected the appellant's ability to perform everyday tasks, or in respect of the level of care that she now required in light of this further medical evidence (which suggested a further decline in her wellbeing). Had the judge not mistakenly excluded this evidence from his consideration, then the sponsor may have been able to give materially relevant evidence. As the sponsor said in the error of law hearing, by failing to consider the new evidence the appellant was denied the opportunity to show how her health had since declined and that there was no-one who could provide the required level of care. Although the requirements of the immigration rules in respect of the type and timing of evidence in support of an application by an adult dependent family member may not have been met, it remained possible, had the judge lawfully considered the new evidence and made appropriate enquiries from the sponsor as to the consequence of the new evidence - both on the appellant's ability to carry out everyday tasks and the availability of the required level of support, that a different conclusion may have been reached.
23. I am consequently satisfied, albeit by a narrow margin, that the error of law identified above is material and that the decision is unsafe and must be set aside.

24. Given the need for further extensive factual findings I have decided remit the matter for a de novo hearing to enable any further new medical evidence and evidence of the availability of the appropriate level of care to be provided.

Decision

The First-tier Tribunal's decision contains an error on a point of law and is set aside.

The decision is remitted back to the First-tier Tribunal to be determined at a fresh hearing before a judge other than Judge of the First-tier Tribunal Abebrese.

D. Blum

16 February 2020

Signed

Date

Upper Tribunal Judge Blum