



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

Appeal Number: OA/16009/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 25 September 2014**

**Determination
Promulgated
On 9 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MRS ZEINAB ABDELAZIZ HASSAN TAHOUN

Appellant

and

ENTRY CLEARANCE OFFICER - CAIRO

Respondent

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Respondent: Unrepresented

DETERMINATION AND REASONS

1. The respondent, whom I shall refer to as the appellant as she was before the First-tier Tribunal, is a citizen of Egypt and her date of birth is 28 January 1941.
2. The appellant made an application for entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules. Her

application was refused by the ECO in a decision of 6 August 2013. The reasons for the refusal are as follows:

- (i) Documents that the appellant submitted do not relate to her current personal circumstances and there is no evidence detailing her current health or other reasons why she should be granted a visa to live in the UK as a dependent relative.
 - (ii) The appellant provided no evidence of her financial situation and did not demonstrate that she has been in any way previously dependent on a UK relative.
 - (iii) There is no evidence of a change in the appellant's circumstances resulting in the need for care from the sponsor.
 - (iv) There is no evidence to show that the appellant is unable with the practical and financial help of her sponsor to obtain the level of care that she requires in Egypt.
 - (v) The appellant has not established that she is the mother of the UK sponsor.
3. The decision was maintained by the Entry Clearance Manager in a decision of 27 November 2013. It was noted by the Entry Clearance Manager that documents sent with the appeal showed that the appellant is currently resident with a sister of a similar age in Egypt and that her sister's daughter is also resident there.
 4. The appellant appealed against the decision of the Entry Clearance Officer and her appeal was allowed by Judge of the First-tier Tribunal Lucas in a decision that was promulgated on 10 June 2014 following a hearing at Taylor House on 20 May 2014. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal TRP Hollingworth in a decision of 7 August 2014.

The Decision of the First-tier Tribunal

5. The Judge of the First-tier Tribunal heard evidence from the sponsor, the appellant's son Dr Khaled Mohamed Ali Alfakh. The sponsor's evidence was that the appellant had moved in with her sister in Cairo however they are both elderly and frail. His cousin the appellant's sister's daughter wants her mother to live with her and this would mean that the appellant would remain living on her own. She is frail and depressed.
6. The evidence relating to the appellant was that in the respondent's bundle (the letters referred to above). In addition the sponsor attended the hearing. In the grounds of appeal that were before the FtT it is asserted that the appellant's niece, Nashwa Kamel is unable to look after the appellant and the appellant's sister (Mrs Kamel's mother) and she wishes

to take her mother to live with her. There is no room in her house for the appellant and there are no other relatives who will be able to stay with the appellant. Dr Alfakh is the eldest son and a consultant cardiologist in London. It is stated that the appellant does not need 24 hour care and her needs could be met by the sponsor's wife who only works part-time. In addition any limited outside help would be affordable.

7. In addition to the oral evidence of the sponsor the Judge had before him a letter of 3 September 2013 from Dr Ahmed El Khateeb which indicates that the appellant had muscular skeletal problems and she is unsafe on her own and can only walk about 50 metres with a walking aid. There is a second letter of 1 September 2013 from Dr Nagui Gamil a consultant psychiatrist. He indicates that he last saw the appellant in April 2013 when she complained of anxiety and depression and that she used to live alone which had "a remarkable negative effect on her". The appellant was prescribed medication and it was recommended that she not live alone. There was a third letter from Dr Ahmed El Khateeb of 8 November 2013 which states that the appellant has severe osteoporosis and chronic lower back pain and as a result she is in need of continual help and assistance. There was also a letter from the appellant's niece Nashwa Kamel.

8. The Judge went on to make the following findings:

“15. The Tribunal found the sponsor in this case to be an entirely credible witness. He is a professional medical practitioner and quite clearly had sufficient resources available properly to accommodate and maintain the appellant. There is no question that she can be accommodated and maintained without any recourse to public funds.

16. It is quite clear that the appellant is now frail and elderly. She is living in precarious circumstances in Cairo with another elderly sister. The correct and appropriate place for her is to be with her own son and his family within the UK. The fact that the sponsor has explored the possibility of having to relocate his entire family until within the UK to seek to care for the appellant, demonstrates the level of care and attention that he is prepared to give her.

17. In the view of the Tribunal, it is simply not proportionate to expect or require the sponsor to relocate to Egypt when the appellant could enter the UK without any additional recourse to public funds.

18. The Tribunal therefore proposes to allow this appeal within the Immigration Rules. It is quite clear that the appellant is elderly, frail and in need of long-term personal care to perform everyday

tasks. All of these facts can be discharged in the care of her son in the UK without any recourse to public funds.

19. The appeal is therefore allowed and the Entry Clearance Officer is directed to grant entry clearance to this appellant.”

The Grounds Seeking Leave to Appeal

9. The grounds seeking leave to appeal argue that the Judge made a material misdirection of law. He failed to engage with the requirements of the Immigration Rules contained in paragraph E-ECDR.2.5. of Appendix FM. It is necessary for the appellant to establish that no person in Egypt can reasonably provide her with care if she wishes to avail herself under the Rules.
10. Ms Holmes expanded on the grounds of appeal in oral submissions and the sponsor who attended the hearing before me submitted that in his view the Rules should be interpreted in a flexible manner and that the Judge did not make an error of law.

The Immigration Rules

11. Paragraph E-ECDR contains the requirements to be met for entry clearance as an adult dependent relative and the relevant part of E-ECDR are as follows:

“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.”

Error of Law

12. The Judge made a material error of law. The Judge did not engage with the requirements of the Immigration Rules as they stand in paragraph E-ECDR. He found that the appellant was in “need of long-term personal care to perform everyday tasks” and it appears therefore that he made a finding in relation to E-ECDR.2.4. (this is not challenged by the Secretary of State in the grounds of appeal). However, the Judge should have gone on to consider E-ECDR.2.5 and he did not do so. It is clear that on the evidence at the date of the decision there was a person (either the appellant’s niece or assistance that could be paid for by the sponsor) who could reasonably provide the level of care required by the appellant in Egypt.
13. The requirements of the Immigration Rules are stringent and do not allow for flexibility. It was not open to the Judge to allow the appeal on the basis of the evidence before him. In these circumstances I set aside the decision of the First-tier Tribunal to allow the appeal under the Immigration Rules pursuant to section 12(2)(a). There was no need to go behind the primary findings of the FtT; however, for the reason stated above the Judge materially erred. I remake the decision pursuant to Section 12(2)(b)(ii) and dismissed the appeal under the Rules.

Article 8

14. The First-tier Tribunal Judge did not consider the appeal under Article 8 of the ECHR given that he allowed the appeal under the Immigration Rules.
15. In **MM and SSHD [2014] EWCA Civ 985**, at paragraph 135, the Court of Appeal stated as follows:

“Where the relevant group of IRs, upon their proper construction, provide a ‘complete code’ for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of ‘foreign criminals’, then the balancing exercise and the way the various factors are to be taken into account in an individual cases must be done in accordance with that code, although references to ‘exceptional circumstances’ in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a ‘complete code’ then the proportionality test will be more at large, albeit guided by the **Huang** tests and UK and Strasbourg case law.”

16. The issue is at this stage whether or not there is a further Article 8 claim that should be determined by the Tribunal. In my view on the facts in this case there is no need for an assessment outside the Rules as they are, on the facts in this case, Article 8 compliant. In any event, if I am wrong in that I would have to go on to consider whether or not family life is

engaged for the purposes of Article 8(1) of the 1950 Convention on Human Rights.

17. The sponsor has lived in the UK since 1986. There is no evidence of significant dependency, financial or otherwise, between the appellant and the sponsor at the date of the decision. Having considered the relevant case law in relation to adult dependent relatives specifically paragraphs 50 to 62 of **Ghising (family life - adults - Ghurkha policy) Nepal [2012] UKUT 160 (IAC)**. It is clear that although family life may continue between parent and child even after the child has attained majority, in this case there is no evidence of further elements of dependency involving more than the normal emotional ties. In these circumstances the relationship between the appellant and the sponsor is not sufficient for the applicability of Article 8(2) and the appeal is dismissed under Article 8.

Signed Joanna McWilliam

Date 7 October 2014

Deputy Upper Tribunal Judge McWilliam