Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/01028/2014
OA/01031/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th September 2015	**On 22nd September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUNIDASA WICRAMASINGHA WARNABHARANA DISSANAYAKE
MRS SONDARANGALLAGE PADMA PUSHPARANI DISSANAYAKE
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr Lawrence Tarlow, Home Office Presenting Officer
For the Respondents: Ms S Pararajasingam

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of the First-tier Tribunal, Judge Lawrence, promulgated on 11th February 2015, allowing the appeal of the

Appellants against a refusal of their entry clearance applications as elderly dependent relatives of two of their children, a son and a daughter, now resident British citizens. Permission was granted on the basis that it was arguable that the judge had failed to give adequate reasons that the required level of care is not available in Sri Lanka or why the Appellants, who contend that they can afford to maintain their parents in the United Kingdom, even in the event of their requiring care in a care home here, could not afford to continue to care for their parents in Sri Lanka.

2. There is no cross appeal challenging the decision on other grounds.

3. There was no application to submit additional evidence.

4. The matter proceeded on submissions.

5. Mr Tarlow briefly elucidated the grounds as above.

6. Ms Pararajasingam reiterated the submissions set out in the Rule 24 response to the point that the judge had the evidence of the Appellants' medical conditions/ailments and the medical professional's recommendations, to the point that the Appellants needed to be close to their children, and receiving their care in the family environment. The Respondent's contention that an ability to meet the maintenance and accommodation requirements in the United Kingdom result necessarily in the Sponsors' ability to afford care, if needs be in a care home, in Sri Lanka.

My Consideration and Findings

7. The Respondent in this case did not dispute that the Appellants require long-term personal care to perform everyday tasks. The detail of that concession and the medical evidence upon which it is based is set out in the Entry Clearance Officer's decision letters, and reiterated at paragraph 8 of the judge's determination. In short Professor Dissanayake suffered a stroke in 2012 causing some brain damage leading to disability in the use of his limbs and evident in his gait. It is difficult for him to feed himself, dress himself or walk without assistance. He has osteoarthritis, hypertension and atrial fibrillation and memory difficulties. The second Appellant is his wife and she has suffered from cervical spondylosis since 1994 and diabetes and hypertension. Their conditions are chronic, debilitating and deteriorating and adversely impacted by old age.

8. The judge notes that the Appellants have engaged care workers. The judge asserts, "I need to be satisfied the Appellants are able to obtain the required level of care in the country where they are living or it is not available or there is no person in that country who can reasonably provide it." It is self evident that the rule is incorrectly set out and so the judge self misdirects.

9. The judge continues on to find that whilst medical and domestic care assistance is available, the risk of further strokes in connection with the first Appellant or of hypoglycaemic attacks in respect of the second Appellant require healthcare workers

to be able to recognise symptoms and attend to them, or call for medical assistance quickly, and concludes that he is not satisfied "that such expertise is available to the Appellants." In doing so the judge continues to incorrectly self direct in terms of the requirements of the rule.

10. The judge sets out at paragraph 11

> "11. The Appellants are individuals. They are elderly. They are infirmed. They have needs, fears and thoughts. They are aware that they are suffering from chronic medical conditions without prospect of cure. They have three children, two in the UK and one in Canada. They have no relatives in Sri Lanka who could care for them. On a human level, I note that the Appellants must feel severe mental and emotional trauma that they are not in the care of their loved ones, their children. This is not a determinant but a fact which carries weight."

11. Further at paragraph 12

> "12. It is possible of course to place the Appellants in care homes. However, that is not the answer. As I have indicated the Appellants are elderly and infirmed and needing care. They are in need of loving care from their children. They need to be living in a loving environment, which a care home will be unable to provide. …".

12. The judge then notes that the Sponsors indicated to the Respondent that they are unable to support the Appellants should they be placed in a care home, and continues to find that the Appellants' Sponsors are able to meet the financial and accommodation requirements "without inconvenience" in the United Kingdom. The appeals are allowed under the Immigration Rules. The judge relies on the case of R (Forrester) v SSHD [2008] EWHC 2307. That lends no assistance to the Appellants. It was an in-country relationship of marriage involving a child, a relationship which was established when the Appellant was in the United Kingdom lawfully, and an application refused only because the cheque submitted with the application had bounced. The case did not concern the Immigration Rules currently under consideration and preceded the implementation of these Rules by some considerable margin. Whilst it is right to say that a tick box mentality should never be adopted when the factual matrix of an application concerns relationships, the bold fact is that patterns of immigration result in difficult situations where families are separated across the globe and when as here parents become elderly and infirm. The necessary use of care homes for loved ones whether here or in Sri Lanka is frequently beset with emotional disturbance for all involved.

13. Reading the decision as a whole it is clear that the judge has concluded that the care available in Sri Lanka is not adequate because it is not provided in the loving environment of the family home of the Appellants' children. Although he notes that that is not a determinative factor, reading the decision in the round it is plain that it is

the absence of that environment which the judge finds enables these Appellants to satisfy the requirements of the Rules.

14. At page 69 of the Appellants' bundle there is a comparator in respect of the current care arrangements asserting that total expenses in Sri Lanka, including the care currently received, including food, utilities and so on, results in total expenses of 65,000 Sri Lankan rupees. The care in the United Kingdom is assessed, again including food, contributions towards a cleaner, medicine of £42.50 and doctor's visits of £62.50, as totalling £325 a month. At page 70 a full-time home nursing calculation provides total expenses of 140,000 Sri Lankan rupees and, through the provision of medical insurance at £375 a month a British cost of £700. In respect of a residential care home in Sri Lanka it is stated at page 71 that the total expenses in Sri Lanka would be 170,000 Sri Lankan rupees, as opposed to care home accommodation costing £700 a month in the UK, the additional costs factored in by the family which are asserted to make the position in Sri Lanka untenable are the travel costs associated with the visits of the children. The basis of the comparisons made in the bundle of evidence is not based on the rules.

15. The "yardstick" is the affordability of care, and whilst future provision is part of that assessment the relevant date of assessment is the date of decision.

16. The contested requirements are set out below:

17. *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.*

18. *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.

19. The reality is as stated by the Entry Clearance Manager, the provision of care in Sri Lanka is affordable particularly taking account of the assistance of relatives here, it is available, and in circumstances of old age as described here it cannot be said there is no person, whether by provision through a care home or care workers in Sri Lanka who can reasonably provide it. The fact that the sponsors are here and want to care for their parents, and their parents want them to provide it, does not mean that others cannot reasonably provide it. The burden is on the Appellants, the standard is the balance of probabilities, and, on the evidence they have not discharged it so as to show that even with the practical and financial help of the sponsors, they are unable to obtain the required level of care required in Sri Lanka.

20. For all the reasons above the judge's decision is vitiated by material legal error, flawed by incorrect self-direction, a failure to appreciate the appropriate standard

and burden, and the making of findings which are unsustainable on the evidence. I set aside the decision.

21. Directions had previously been given to the point that in the event that I found an error of law I would proceed to remake the decision on the evidence as it was before the first tier, and both representatives submitted that I should do so. For the reasons I have set out above, in remaking the decision I find that the rules are not met, and I dismiss the appeal.

Notice of Decision

22. For all the reasons set out above I set aside the decision and remake it dismissing the Appellants' appeal on Immigration Rules grounds.

23. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Davidge