



**Upper Tribunal  
(Immigration and Asylum Chamber) Appeal Numbers: OA/02345/2014**

**OA/02347/2014**

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On: 20 April 2015**

**Decision and Reasons  
Promulgated  
On 30 April 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**MR LALJIBHI FULABHAI RABARI  
MRS SAKARBEN LALJIBHAI RABARI  
(NO ANONYMITY DIRECTION MADE)**

**Appellants**

**and**

**ENTRY CLEARANCE OFFICER**

**Respondent**

**Representation**

**For the Appellants: Mr P Bonavero, counsel (instructed by  
Turbervilles Solicitors)**

**For the Respondent: Ms A Holmes, Senior Home Office Presenting  
Officer**

**DETERMINATION AND REASONS**

- 1.** The appellants are husband and wife. They are nationals of India. They appealed against the respondent's decision dated 25 January 2014 to refuse to grant them entry clearance to join their son, "the sponsor", who is a British citizen.
- 2.** In the determination promulgated on 5 December 2014, the First-tier Tribunal Judge dismissed their appeals under the Immigration Rules and pursuant to Article 8 of the Human Rights Convention.

3. On 9 February 2015, First-tier Tribunal Judge Colyer granted the appellants permission to appeal to the Upper Tribunal stating that it is arguable that the Judge misdirected himself in various ways including the finding that the appellants had failed to show that they required long term personal care to perform every day tasks. It was also arguable that the Judge failed to give proper reasons for not following the doctor's assessment of the physical capabilities of each appellant.
4. Mr Rabari is 75 years old and his wife is 72. They live together in a rural village in Gujarat. Their sponsor is their only son.
5. It was contended before the first-tier Tribunal that the appellants are both in poor health.
6. Mr Bonavero, who also represented the appellants before the First-tier Tribunal, contended that in the light of the evidence disclosed, the Judge could not properly have reached the conclusion that the appellants do not require long term personal care to perform every day tasks. The Judge noted that the appellants provided medical reports from a single doctor, Dr Thakar. He had been their family doctor since 2005. The Judge stated that ".....it would be assumed therefore that he did have some knowledge about the appellants." The letters dated October 2014 set out in more detail the medical conditions of each appellant. The Judge stated that he has taken those into account [10].
7. The Judge went on to find at paragraph 13 that it was impossible to accept that a qualified medical doctor would describe his practice as "a Poola Nursing Home" unless it actually was a nursing home. That evidence cast doubt over the whole of the claim that there is no private care available to the appellants in the locality. He considered that the claims that appear in their statements are embellishments and are not accurate.
8. The Judge went on to state [14] that this casts doubt over the whole of the claim as regards the availability of carers and why they could not go into a residential home.
9. Mr Bonavero submitted that in fact the sponsor had been asked about this during the hearing and he explained that it was not a nursing home in the sense understood in the UK. It did not provide residential care. This was consistent with the fact that Dr Thakar had been caring for the appellants despite the fact that they are plainly *not* residents of a nursing home. Accordingly, the Judge appears to have discounted the sponsor's explanation without giving good reasons for doing so.
10. Mr Bonavero referred to the letters produced in respect of each appellant from Dr Thakar, Appellants' bundle p. 43. The letter is headed "Medicare". The words "Poola Nursing Home" appear in the heading. Underneath that, the names of the two doctors, Dr Vijay C. Thaker and Dr

Smita V. Thaker, are set out. They are respectively described as physician and cardiologist, and obstetrician and gynaecological specialist.

- 11.** Accordingly, the fact that the letter refers to Poola Nursing Home is not in any way determinative that it is in fact a nursing home in the conventional sense. The fact that the doctors referred to are specialists in areas not apparently related to a nursing home militates against the finding that it was not a residential home providing full time care to patients.
- 12.** Apart from this having been explained to the Judge during evidence, each letter relied on and produced refers in detail to the individual problems of each appellant, noting that the appellants have been patients under his treatment as outdoor patients from December 2005 and December 2013 respectively.
- 13.** The Judge has, as a result of 'this dubious finding', found that it casts doubt over the whole of the claim. Accordingly, Mr Bonavero submitted that this has affected the Judge's approach to the credibility of the claim as a whole.
- 14.** He pointed out that the Judge also referred to the fact that the appellants have hired a number of carers in the past, although they have been unreliable. This therefore is an indication that carers are available in the local area. He also found that it was understandable that they may well be suspicious of different carers because of their past experiences. One carer was caught stealing from them and was dismissed on the spot.
- 15.** Mr Bonavero submitted that the Judge failed to have regard to paragraph E-ECDR.2.5(a) of the rules which requires that the applicant 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 it is not available and there is no person in that country who can reasonably provide it.
- 16.** Mr Bonavero also submitted that the Judge found that the Entry Clearance Manager had made a fair observation concerning the opinions of Dr Thaker and how his conclusions were reached. That seemed to be based at least in part on what he was told by the appellants. He submitted that it is unclear how or why such a conclusion was reached. Every doctor relies at least initially on what the patient tells him. In any event, that appeared to contradict what the Judge had already found at paragraph 10, namely that it would be assumed that Dr Thaker did have some knowledge of the appellants. That is because he had been a family doctor since 2005.
- 17.** Mr Bonavero referred to the detailed letters dated 31 October 2014 relating to each appellant from Dr Thaker at pages 43-44 respectively. He also referred to the letters relating to each appellant dated 10 November 2014 at page 43. There were also numerous reports produced relating to

the history and findings in respect of each appellant. There are letters dated December 2013 noting the second appellant's suffering from osteoarthritis in her knee, hypertension and chest pains, requiring attention by a close relative for her well being. There are other reports pre-dating the dates of application in which the individual treatment and findings by the doctor in respect of each appellant are given.

- 18.** Accordingly Mr Bonavero submitted that the undisputed evidence before the First-tier Tribunal was that Dr Thaker had been their doctor for many years.
- 19.** The evidence also disclosed that there were severe mobility problems, including ordinary day to day tasks such as cooking and the like. This is clearly set out by the doctor at page 43. Even 'light activities' such as walking by the first appellant could not be performed. He cannot perform normal day to day tasks. Mr Rabari has high blood pressure. He also suffers from difficulties in breathing as a result of long term damage to his lungs. He is increasingly breathless, even when not doing anything particularly active. He frequently has chest infections and needs an inhaler.
- 20.** These conditions affect his mobility. He is often unwell and bedridden. His health has deteriorated a great deal according to Dr Thaker's report.
- 21.** With regard to the second appellant, she suffers osteoarthritis in her knees. This results in discomfort and the loss of movement. Her chest pains should be taken seriously. She needs someone to look after her 24 hours a day. There is no care home facility around the area where they are living. There is great difficulty in finding a good, reliable personal carer.
- 22.** Her condition has also affected her mobility in that she is often very ill and can barely walk. She can no longer perform normal day to day tasks. Her health has also deteriorated a great deal.
- 23.** Mr Bonavero also complained about the finding [19] that the appellants "..... have been able to survive adequately in their own country with the financial health (sic) of the sponsor".
- 24.** That reasoning placed an impossibly high threshold for success in such appeals. The appellants have survived despite the lack of necessary care. It is not the case however that they should be required to wait until they were on the threshold of death before an appeal of this nature could succeed. By definition, in appeals such as these, the dependent relative has managed to survive despite the lack of care required for their needs.
- 25.** Moreover, although the Judge found that the appellants have been able to pay for their care in the past, that ignored the evidence of the 'Sarpanch' (Head) of their village, who confirmed in a statement that they have had great difficulties finding a responsible carer and that one had

been caught stealing from them. That has resulted in their fear of letting a stranger into the home.

- 26.** The Rule merely requires the applicant to demonstrate that the care which they require is not available and there is no person in that country who can *reasonably* provide it.
- 27.** In the circumstances, having regard to their experiences, it would not be reasonable, he contended, to require the appellants to employ another carer in similar circumstances. Nor had the Judge considered whether, even if home care is available, it would be reasonable for the appellants to make use of it.
- 28.** He submitted that in the circumstances, there are no findings which can be preserved as the Judge has made findings which have not been supported by the evidence. There have been misdirections in law rendering his decision unsustainable.
- 29.** On behalf of the respondent, Ms Holmes relied on the Rule 24 submission. The grounds are essentially a disagreement with the findings of the Judge. He took all the evidence into consideration and did not accept that the true position of the appellants was accurately represented.
- 30.** Moreover, his comments at paragraph 10 about Dr Thaker are only initial observations. He has given a full analysis of that evidence at paragraph 18.
- 31.** She submitted that E-ECDR.2.5 is stringent. With regard to the findings of the Judge at paragraph 13 relating to the Poola Nursing Home, she submitted that the Judge had been entitled to find that it was a nursing home. Moreover, he found that that evidence cast doubt over the claim that there is no private care available to the appellants in the locality.
- 32.** The findings at paragraph 19 as to whether the evidence shows that they require long term personal care to perform every day tasks were appropriate and open to him. They are able to travel independently to visit their doctors and to make trips to obtain food and other items as found.
- 33.** There is an apparent conflict between those findings and what is contained in Dr Thaker's letters at pages 43 and 44. Although they may be helpful on the face of it, they do not identify what the day to day tasks are.
- 34.** It is not clear from the letters how bad the conditions are for the appellants as they still survive. There was a lack of detail to assess that issue. The Judge was entitled to have doubts about their situation.

- 35.** There was also conflicting evidence between that provided by the Teacher of a primary school, Ms Jarjibhai Horabhai Rabari in the statement in support of their appeals, bundle p. 46. It is asserted by her that the appellants have hired carers who have stolen from them in the past and have been unreliable and untrustworthy. The appellants only referred to the theft by a carer and did not state that all of them were dishonest and untrustworthy – the first appellant's witness statement at paragraph 9.
- 36.** In reply, Mr Bonavero submitted that it was not only a small part of the claim that the Judge found to be affected by the Poola Nursing Home issue [13] but the Judge went on to find that this cast doubt over the whole of the claim as regards the availability of carers as to why they could not go into a residential home.
- 37.** There was no conflicting evidence before the Judge.

### **Assessment**

- 38.** The appellants were at the date of the appeal before the First-tier Tribunal, 75 and 72 years old respectively. They lived in a rural village.
- 39.** The evidence produced showed that both are in poor health. Mr Rabari suffers from hypertension, chronic obstructive pulmonary disease and gastroesophageal reflux disease. Mrs Rabari suffers from osteoarthritis, hypertension and chest pain. There was also reference to their loneliness and isolation leading them to developing depression and anxiety.
- 40.** Both appellants have restrictions relating to their mobility and in particular the first appellant has difficulties moving about. The result is that they are not able to perform ordinary tasks relating to their personal hygiene apart from being unable to cook for themselves or to clean the house.
- 41.** The respondent has accepted that the suitability and financial arrangements were made out.
- 42.** With regard to the eligibility requirements at E-ECDR.2.4 and 2.5, the appellants must as a result of age, illness or disability, require long term personal care to perform every day tasks. Moreover, they must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care where they are living because it is not available and there is no person in that country who can reasonably provide it.
- 43.** The Judge found that it was significant that the appellants' doctor's address is "Poola Nursing Home." That had been referred to during the

sponsor's oral evidence. He explained that it was not a nursing home in the sense understood in the UK as it did not provide residential care.

- 44.** Further, as already referred to above, the identification of the specialities of the two doctors in the letterhead is inconsistent with the assertion that this is a residential nursing home as opposed to the address of the hospital where the doctors practice.
- 45.** The Judge's findings with regard to the Nursing home at paragraphs 13 and 14, which I have set out above, did result in the subsequent finding that the claims that appear in the appellants' statements are embellishments and not accurate. It cast doubt over the whole of the claim regarding the availability of carers. The actual finding by the Judge was that the documents produced by the appellants themselves demonstrated that there is a nursing home in the local area [13]. That constituted a material misdirection in the circumstances.
- 46.** The Judge's findings that the appellants do not require long term personal care to perform every day tasks are also problematic. The question is not whether, as stated by the Judge, the appellants have been able to survive adequately in their own country with the financial help of the sponsor [19], but whether they had shown that the care which they require is not available and there is no person in the country who can reasonably provide it.
- 47.** I accept the submission in this respect that the Judge's approach and reasoning required too high a threshold for success.
- 48.** Given the fact that the appellants have had carers who have been dishonest and stolen from them in the past, causing them distress, the question is whether it would be reasonable to require them to employ another carer in similar circumstances. Nor has it been considered whether, even if such home care was available, it would be reasonable in the circumstances for the appellants to be required to make use of it.
- 49.** The Judge concluded without an appropriate consideration of the evidence produced that they had not shown that they required long term personal care to perform every day tasks. The evidence in that respect was set out in their respective witness statements and confirmed by their sponsor, as well as Dr Thaker who identified their medical problems, stating that they are unable to take care of themselves or one another. Finally, there were members of the village who also described their predicament, which was not properly taken into account.
- 50.** I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. In the circumstances, I set aside the determination.
- 51.** Both parties accepted that if I reached that conclusion, the decision would have to be remade, without preserving any facts.

- 52.** I have considered Mr Bonavero's submission that this is an appropriate case to be remitted to the First-tier Tribunal for such a decision. I have had regard to the Senior President's Practice Statement relating to the issue of remitting to the First-tier Tribunal.
- 53.** I am satisfied that the extent of judicial finding which is necessary in order for the decision to be made will be extensive. The appellants are entitled to have their case considered on the basis of all the evidence presented. It will have to therefore be a complete re-hearing with no findings preserved. I have also had regard to the overriding objective and conclude that it would be just and fair to remit the case.
- 54.** In the circumstances, I direct that the appeal be remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made.
- 55.** The necessary administrative arrangements will need to take place.

### **Notice of Decision**

Having found that the decision of the First-tier Tribunal involved the making of material errors of law, it is set aside. The appeal is remitted to Taylor House for a fresh decision to be made.

No anonymity direction is made.

Signed

Dated 28/4/2015

Deputy Upper Tribunal Judge Mailer