IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/01303/2015
OA/01305/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th February 2016	**On 21st March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THAMBIPILLAI SIVASUBRAMANIAM
PARAMESWARY SIVASUBRAMANIAM

Appellants

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellant: Mr Singer, Counsel, instructed Sreeharans Solicitors Southall
For the Respondent: Mr E Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants and each of them are citizens of Sri Lanka whose dates of birth are recorded as 23rd August 1943 and 11th January 1953 respectively. They are husband and wife. In September 2014, they made application for entry clearance to the United Kingdom a view to settlement as the adult dependent relatives of their son and sponsor, Mr Sivasoruban Sivasubramaniam, pursuant to Appendix FM of the Immigration Rules with. On 4th December 2014 decisions were made in each case to refuse the applications which refusals were upheld on 26th February 2015 after review by an Entry Clearance Manager.

2. The appellants appealed and on 6th July 2015 their appeals were heard by Judge of the First-tier Tribunal Gribble sitting at Birmingham. The focus of the appeal was upon E-ECDR.2.4 and 2.5 which provide as follows:

> *2.4. The applicant or, if the applicant and their partner are the sponsors' 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.*
>
> *2.5. The applicant or, if the applicant and their partner are the sponsors' 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 [Sri Lanka] because:*
>
> (a) *it is not available or there is no person in that country who can reasonably provide it; or*
>
> *(b) it was not affordable.*

3. Appendix FM-SE paragraphs 34 and 35 provide:

> *34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:*
>
> *(a) Independent medical evidence that the applicants physical or mental condition means that they cannot perform everyday tasks, and*
>
> *(b) This must be from a doctor or other health professional.*
>
> *35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:*
>
> *(a) a central or local health authority;*
>
> *(b) a local authority; or*

(c) a doctor or other health professional.

4. Judge Gribble considered the Appellants' witness statements, listened to the evidence of the Sponsor and his sister but came to the view that the Appellants had not proved their case. She formed the view that the Appellant's evidence was unreliable because of the use of certain phrases in their witness statements; she pointed to certain inconsistencies in the evidence and additionally found the medical evidence insufficient. However she did find having regard to paragraph 2.5(b) that such care has might have been required was not affordable. Having considered the matter under the immigration rules she then went on to consider the wider application of Article 8 ECHR but not satisfied with the evidence generally she dismissed the appeal on all grounds.

5. Not content with that decision by Notice dated 12th August 2015 the Appellants and each of them made application for permission to appeal to the Upper Tribunal. There were five grounds, which I summarise:

   (i) The judge erred in law by unfairly and wrongly ruling that the Appellant's medical professionals could not be said to be independent on the basis that the experts had been treating the appellants;

   (ii) Insufficient weight was given to the medical evidence;

   (iii) The approach taken by the judge to the witness statements of the appellants on the basis of the idiomatic language used was unfair;

   (iv) *abandoned*;

   (v) The judge erred in her approach to her consideration of the wider application of Article 8 by failing, in particular to find family life. (I observe that it was not suggested by the Secretary of State that the judge should not have gone on to consider the wider application of Article 8 in this case.

6. On 2 January 2016 Judge of the First-tier Tribunal Shimmin gave permission to appeal on all grounds although the focus of his grant was upon the approach taken by Judge Gribble to the independence or otherwise of the medical professionals.

Was there an error of law?

7. At paragraph 36 of her Decision and Reasons, Judge Gribble stated:

> *"The medical evidence filed with the application is from the Appellant's treating clinicians. This is clear from their letters whereby they refer to 'my patient'. They are not therefore providing 'independent' medical evidence as required by Appendix FM-SE and therefore on that basis alone, at the date of the decision, the requirements of the rules were not met."*

8. Clearly, [what] an expert should not be is a “hired gun”. An expert should not provide a report as if he or she is a second advocate. The expert must stand back and make his or her objective findings based upon what he or she is told and what he or she observes. However provided the expert does not simply accept without more what he or she is being told but exercises his or her judgment then there is no reason why an expert should not be regarded as independent. If authority were required for that proposition then I would refer to R (on the application of AM) v Secretary of State for the Home Department [2012] EWCA Civ 521. More particularly, what is required from an expert has long been established since the Ikarian Reefer [1993] 2 Lloyds Report 68 in which Creswell J set out the requirements at paragraph 20 of his judgment. He put them thus.

> *“The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> 1. *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
>
> 2. *An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise…An expert witness in the High Court should never assume the role of an advocate.*
>
> 3. *An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion…*
>
> 4. *An expert witness would make it clear what a particular question or issue falls outside his expertise.*
>
> 5. *If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one…*
>
> 6. *If after exchange of reports, an expert witness changes his view on a material matter…such a change of view should be communicated…to the other side without delay and when appropriate to the Court.*
>
> 7. *Where expert evidence refers to photographs, plans, calculations…these must be provided to the opposite party at the same time as the exchange of reports.”*

9. I observe in passing that in the case of Lord Arbinger –v- Aston (1873) 17 LREQ 358 374 the judge stated:

> *“Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very*

> *natural, and it is so effectual that we constantly see persons, instead of considering themselves witness rather consider themselves as the paid agents of those who employ them."*

10. It is against that observation and that sort of case that the guidance in the Ikerian Reefer was given but the important point is that nowhere in the guidance is there the suggestion that simply because an expert witness is treating an individual they cannot be independent. It is simply that there are occasions when the judge must exercise caution. The first ground is clearly made out but because Judge Gribble went on at paragraphs 37 and 43 of her Decision and Reasons to proceed on the alternative basis of the medics in fact having provided independent evidence, the issue of materiality arises and so I go on to consider the second ground.

11. In considering the second ground, and not withstanding the caution which I have acknowledged is to be exercised by a judge when examining the medical evidence of doctors reporting on their patients, there is the real risk of "confirmation bias" which must equally be guarded against. By this I mean that by having formed the view that the medics are not neutral the judge then, unconsciously, looks for the evidence that demonstrates the lack of independence. I am concerned that this appears to have occurred in this case and am reinforced in that view by the way the Judge then approached the Appellants own evidence, which takes me to the Third ground.

12. At paragraph 44 of her Decision and Reasons Judge Gribble said as follows:

> *"It is inevitable in appeals of this nature that I cannot hear directly from the appellants. However I do have statements from them. I comment that it is clear that they have been drafted by professional representatives and do not contain their own words or experiences. For example, the second appellant says her and her husband's safety is being 'incredibly compromised' and uses the phrase 'psychologically distressed which I find are odd and legalistic forms of words for an elderly woman who does not have English as a first language to use. Whilst this may be to an extent expected, I do treat the statements with some caution and in the absence of satisfactory independent evidence of the extent of their difficulties and why these create a difficulty with personal care I regret I cannot place much weight on their own views of their problems."*

13. I do not ignore the manner in which litigation generally is conducted. It is perfectly proper and not at all unusual for professional advisors to draft witness statements. Provided the witness statements have been drafted based upon the instructions that have been given and the witness then signs the witness statement adopting the evidence as their own, the fact that it has been drafted by someone else, all the more so if English is not their first language, should not mean that the witness statement should, as appears to have occurred here, be discounted without more.

14. In addition to those witness statements, Judge Gribble also had the original applications in which the appellants' cases were set out. Those applications were signed and so those they were as much evidence in the case as were the witness statements.

15. The difficulty that I have is that despite Mr Clarke's valiant efforts to persuade me otherwise, I find that it cannot be known what view the judge would have taken of the medical evidence if she had not been what appears to be so cynical about the evidence generally by taking into account improper considerations. The report of Dr Shehan Ladd with respect to the first appellant speaks of daily assistance needed for some of the activities which are undertaken and there is a report from Dr Murujanandan which speaks of the Second Appellant gradually losing memory with age related memory loss affecting her day-to-day activities such that she is unable to manage her activities on her own.

16. The evidence is to be looked as a piece even if the evidence is to be provided in the specified form as required by the Rules. In my judgement it was open to the judge to come to a different view on the medical evidence and it may be that she would have done had she not been concerned about the evidence of the appellants in the manner in which she describes her concerns at paragraph 44.

17. Mr Clarke sought to persuade me that the error was not material. He pointed to the judge's observations that there had been inconsistencies which at first he suggested had been inconsistencies in the evidence of the Sponsor but in fact that is clearly not correct because the example given at paragraph 46 relates to the Appellants. Whether these "inconsistencies" would have been thought to have been quite so significant had the judge taken a different view of the appellant's witness statements cannot be known and it is for that reason that I find the error material.

18. In the circumstances the decision of the First-tier Tribunal must be set aside. It is not necessary for me to consider in detail the final ground though necessarily, it too is made out.

Remake or remit?

19. I have to consider whether in the circumstances the decision can be remade but in my judgement it cannot be done without a proper consideration of the evidence in the First-tier Tribunal with a view being taken as to the extent of the inconsistencies, if any.

20. Both parties were content for the matter to be remitted to the First-tier Tribunal were I to find an error of law. Having regard to the Senior President's Practice Direction concerning these matters, I agree that this would be the proper course. Both parties agreed that the finding that the care could not be afforded should be preserved.

21. In the circumstances the matter will be remitted to Birmingham for a rehearing not before Judge of the First-tier Tribunal Gribble.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside to be remade in the First-tier Tribunal by a Judge other than Judge Gribble.

Signed **Date**

Deputy Upper Tribunal Judge Zucker