IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14479/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th March 2016	**On 14th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS AMARBAI KANJI NARAN HALAI
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:
For the Appellant: Mr E. Waheed, Solicitor
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 15th May 1945. She appeals against a decision of Judge of the First-tier Tribunal James sitting at Birmingham on 11th August 2015 who dismissed the Appellant's appeal against a decision of the Respondent dated 15th August 2014. That decision was to refuse the Appellant entry clearance to the United Kingdom as an adult dependant relative pursuant to Section E-ECDR.2 of

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Appendix FM of the Immigration Rules. The Appellant wished to join her daughter Ms Kirtiben Kirankumar Patel ("the Sponsor").

2. Section E-ECDR sets out the requirements for eligibility for entry clearance as an adult dependent relative. The applicant must be (inter alia) the parent of a person who is in the United Kingdom. E-ECDR.2.4 provides that the applicant must as a result of age, illness or disability require long term personal care to perform everyday tasks. E-ECDR.2.5 provides 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 either it is not available and there is no person in that country who can reasonably provide it or it is not affordable. The burden of proof of establishing this rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities.

3. The Appellant's case was that she was living on her own in Kenya following the death of her husband who had been shot and killed during a robbery in April 2014. The Appellant had no family living in Kenya. Her daughter Ms Halai had been caring for the Appellant in Kenya but needed to return to the United Kingdom. The Appellant was unable to look after herself because she could not speak, read or write English and she needed somebody to give her the correct medication.

4. The Respondent refused the application stating that if there was a requirement for long term medical care it should be demonstrated by evidence from a doctor that the Appellant's physical or mental condition meant that she could not perform everyday tasks. The Appellant had not met that requirement. The Appellant was obliged to provide evidence that even with the practical and financial help of the Sponsor in the UK she was unable to obtain the required level of care in Kenya. A letter had been produced to the Respondent from the Eldoret Hospital in Kenya stating that the Appellant had high blood pressure and had been receiving counselling for the loss of her husband. That letter did not state that the Appellant was unable to look after herself or that care was unavailable for her. The Appellant was in sufficient funds to hire an individual to look after her if necessary. The application was refused under Section EC-DR.1.1(d).

5. The Appellant appealed that decision stating that she was suffering from a mental disorder following the circumstances of her husband's death. Her condition was so debilitating that her functional abilities were severely impaired. There was a close family relationship which meant that the family visited and cared for her but this could not continue indefinitely as her daughter had responsibilities in the United Kingdom. Hired help was not an option in view of the Appellant's fragile mental state. The decision breached Article 8.

The Decision At First Instance

6. At paragraphs 25 to 30 of his determination the Judge set out his findings and conclusions. He had no doubt that the Appellant had suffered a dreadful experience when she witnessed the killing of her husband but in order to succeed under the Rules the Appellant had to demonstrate that she required long term care to perform everyday tasks. The evidence appeared to show that the Appellant was able to perform everyday tasks. The Appellant might not have always eaten breakfast but family members contacted the Appellant every day and sometimes more than once per day and this ensured that the Appellant was eating properly and had taken her medication. The Appellant was able to maintain her medication regime without the need for these telephone calls. Living alone was increasing the Appellant's sadness and loneliness which in turn increased the risk of deterioration in her condition and being suicidal but there was no assessment of that risk to establish whether it was approximate or remote. If there was a deterioration the Appellant could make another application. There was no medical or psychiatric evidence to support the assertion that the Appellant would be unable to accept a non-family member into her house. Any care that the Appellant might require (if she was unable to undertake everyday tasks) could be provided in Kenya.

7. At paragraph 30 the Judge dealt with Article 8 writing:

> "Finally the Appellant has submitted that there are compelling and compassionate reasons for granting her leave to enter the UK outside the Rules. I have no doubt that the Appellant has suffered an awful experience but I am not satisfied on the evidence before me that there is a basis to grant leave to enter the United Kingdom outside the Rules".

He dismissed the appeal.

The Onward Appeal

8. The Appellant appealed against this decision arguing that the Judge had failed to make a finding under Article 8. This disruption to the family life of the Appellant's family in the United Kingdom was significant and disproportionate to any legitimate aim. Compelling circumstances existed. There was no specialised psychotherapist dealing with the trauma suffered by the Appellant. At paragraph 13 the grounds stated "The Judge errs when stating that there is no evidence to show appropriate care was not available to the Appellant in Kenya". I pause to note here that the grounds appear to have taken the Judge's remarks out of context. At paragraph 29 the Judge was referring to the Appellant's ability to perform everyday tasks saying in effect that if she could not undertake such tasks any care she required could be provided in Kenya. The Judge was not referring there specifically to psychotherapy. Further the grounds argued that it was the evidence of the Sponsor that there were days that the Appellant did not eat properly. That I would note at this stage appears to be a mere disagreement with the Judge's findings at paragraph 26 of the determination. Further it was argued that on the basis of the Judge's

findings the Appellant did satisfy the provisions of Appendix FM of the Immigration Rules she could not perform day-to-day tasks.

9. The application for permission to appeal came on the papers before First-tier Tribunal Judge Nicholson on 2nd February 2016. In granting permission to appeal he wrote:

> "Since the Rules regulating entry of dependent relatives are not necessarily a complete code it is arguable that in simply stating in one sentence that there was no basis to grant leave outside the UK the Judge failed properly to consider Article 8 outside of the Rules. Permission is granted on this ground".

10. The Judge did not refuse permission on the remaining grounds which addressed the provisions of the Immigration Rules but commented that it was difficult to see how the letter from the Eldoret Hospital showed that the Appellant could not receive the care required. Although that letter stated that there was no specialist psychotherapist in the hospital dealing with trauma the letter also confirmed that the Appellant was currently undergoing supportive psychotherapy from a psychiatrist. The letter indicated that she simply needed to continue with her medication and psychotherapy.

11. The Respondent replied to the grant of permission by letter dated 5th February 2016. The Respondent accepted that the Judge's reference to compelling reasons in paragraph 30 was brief but that was not a material error of law. The family members returned to Kenya to care for the Appellant out of choice. The burden was on the Appellant to provide the required evidence to satisfy Immigration Rules for entry clearance as an adult dependent relative. It was open to the Judge to find that the Appellant was still able to perform everyday tasks. The Appellant had not presented evidence which showed she could be granted entry clearance outside the Rules.

The Hearing Before Me

12. At the hearing before me the Appellant's solicitor submitted that the main point in the appeal was the brief treatment of Article 8 outside the Rules. There was a lack of reasoning in the Judge's decision. The Appellant's problems had been described in the evidence put to the Judge and that the family could not travel to Kenya anymore to look after the Appellant. Article 8 should have been considered in more detail. The Appellant was dependent on the Sponsor and her daughters. The whole family was affected by the situation. There was a strain on the Sponsor and her sisters. It was difficult to see what the Judge made of the evidence on that particular point. The Judge had not considered the compelling circumstances of the case. The First-tier should have considered family life as a whole.

13. In reply the Presenting Officer submitted that the Immigration Rules set out a high test. The Judge had considered the requirements of the Rules and dismissed the appeal on that basis. For the test to be applied in leave to enter cases one had to look at **SS (Congo)** (cited by the Judge). Article 8 was also a high test in leave to enter cases. The Judge concluded that there were no compelling factors in this case.

14. Finally in reply the Appellant's solicitor stated that the First-tier had not taken into account the effect on the family. The proper course was to find an error of law and to remit the matter back to the First-tier to be decided again for a proper assessment of Article 8. One could not simply look at the Appellant in isolation.

Findings

15. To succeed within the Rules as an adult dependent relative the Appellant had to prove that she needed help with ordinary everyday tasks. The Judge for the detailed reasons he gave found that the Appellant could not establish that and he dismissed the appeal under the Rules. Although the grounds of onward appeal sought to argue with the Judge's conclusions on this point, those arguments were in truth nothing more than a disagreement with the result. Whilst permission was not refused on those grounds, it was clear even from the grant of permission to appeal that there were severe difficulties for the Appellant to make out a case under the Rules.

16. At the hearing before me there was little if any argument that the Judge was wrong in law to dismiss the appeal under the Rules. The appeal instead concentrated on whether the Judge had adequately dealt with the Article 8 claim outside the Rules. As Judge Nicholson pointed out the relevant section of Appendix FM in this case is not a complete code and in appropriate cases an appeal can be allowed outside the Immigration Rules where an Appellant, as here, has not demonstrated that she can bring herself within the Rules.

17. There are however a number of difficulties for the Appellant in this case in showing that she should succeed outside the Rules. The first is that she has to show some compelling circumstances to succeed. It is clear from reading the determination as a whole as opposed to isolating paragraph 30 that the Judge did not consider that there were compelling circumstances because this Appellant could look after herself. The Judge was entitled to take the view that the Rules in this case provided fully for Article 8 considerations. Since the Appellant could not identify any compelling circumstances there was no reason for the Judge to proceed to consider the matter outside the Rules in view of his finding that compelling circumstances did not exist. What the Appellant would have to show was that the gap between her situation and the requirements of the Rules was such that the appeal should be allowed outside the Rules. It was evident

from the Judge's findings particularly that the Appellant did not need help with everyday tasks but that as and when she did need help such help could be provided that there was no significant gap in this case. Whilst the Judge's treatment of Article 8 was brief as the Respondent herself acknowledged, the facts as found by the Judge were such that no compelling reasons could be established.

18. The second argument the Appellant makes under Article 8 is that not only is there a disproportionate impact on the Appellant's private and family life but there is also a disproportionate impact on the lives of her daughters who are in touch with the Appellant and who visit her from time-to-time. It is argued that the Judge did not deal with that aspect at all.

19. There are two difficulties with this second argument. The first is that at paragraph 23 the Judge records the submission made to him that "The continued travelling of family members to Kenya is not a reasonable option". He was aware of the case being put to him. The Judge's response to that submission at paragraph 29 was that an outside person could be called in to assist the Appellant with day-to-day living. The Judge specifically rejected the argument that the Appellant would be unable to accept such a person. That being so it is to the grant of permission a matter of choice for the Appellant's relatives to provide the care they do for the Appellant as the Respondent pointed out in her reply. Whether there are or are not difficulties for them in providing such care is irrelevant. The Judge's clear finding was that outside help could be provided to the Appellant. Thus whether the Appellant's family continue with their arrangements or desist is a matter for them but is not a matter which engages Article 8.

20. Such difficulties as the Appellant's daughters experience in the present care arrangements could be alleviated by arranging for an outside party to take over the care of the Appellant as the Judge found. If the Judge had found that it was impossible for anyone else to care for the Appellant then the issue may have had to have been considered by the Judge in more detail. Since that was not his finding it is difficult to see why the Judge should have gone on to consider something which was irrelevant to the case. I do not find there was any error of law in the Judge's decision and I dismiss the Appellant's onward appeal.

Notice Of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 7th day of April 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 7th day of April 2016

…….
Deputy Upper Tribunal Judge Woodcraft