Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/20802/2013
OA/04668/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2015	**On 27 January 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

V V
[ANONYMITY ORDER MADE]

Appellant

and

THE ENTRY CLEARANCE OFFICER
CHENNAI, INDIA

Respondent

Representation:
For the appellant: Mr Peter Jorro, Counsel instructed by Roelens solicitors
For the respondent: Mr Paul Duffey, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the respondent's refusal on two occasions to grant her entry clearance to settle with her son and his family in the United Kingdom, on two separate occasions. She is an Indian citizen and is now 78 years old.

Background

2. The appellant wishes to join her son and daughter-in-law in the United Kingdom. She was married for 44 years, living with her husband in Coimbatore for all that time. Before his death, she was a sociable and happy soul, gentle by nature, innocent and occasionally child-like, who took great comfort from her marriage and her husband's company.

3. In 2005, their only son, who had come to the United Kingdom some years earlier to study, married and settled in the United Kingdom. The wedding was in India, but his home is here. The sponsor and his wife now have two sons, one born in 2006 and one in 2012.

4. In May 2012, the appellant visited the United Kingdom to see her son and his children. In November 2012, her husband died, and the appellant discovered his body. She was badly affected. She is now described as withdrawn, pessimistic, heavily depressed and completely changed, having lost all interest in life and things around her. Her niece in India has been helping look after the appellant, but she has her own domestic problems, with a seriously disabled daughter and an alcoholic husband. She says that she cannot continue to assist her aunt.

5. The sponsor has visited India to try to help his mother, on a number of occasions, but her progress was very slow. He is the appellant's only child and her siblings in India are all elderly, with difficulties of their own. He has paid his father's funeral costs and significant additional costs arising out of these applications, legal expenses, travel to India, loans his father had taken out for home improvement and so on. The sponsor and his wife have recently bought a house in the United Kingdom and the loans may have been to assist them, but now his father is dead, he has had to pay them back himself.

6. Her doctor in India referred the appellant to a consultant psychiatrist, Dr Selvaraj at the Vazhikatti Mental Health Centre. The monthly cost of the medical care she now needs is about £450 a month, and in addition, she needs help with daily personal care and emotional support. At present, the sponsor's wife's parents were receiving the funds he sent (about £300-£500 a month) and paying her medical bills. There was equity in the appellant's home in India of about £90,000 which could be realised if she joined her son in the United Kingdom.

7. The sponsor did not consider that a paid carer could provide for the appellant's needs; she expected her only son to look after her. Nursing homes in India are only for those whose families have rejected them, which would increase her depression rather than alleviating it. As it was, the appellant had ceased to keep her home clean, lost her appetite, and her niece had to do all the cleaning and cooking and so on. She experiences psychomotor retardation, as a result of which she is effectively housebound, inherently linked to her depressive state. The appellant spends all day in her bedroom, emerging for just 10-15 minutes a day to pray.

First-tier Tribunal decision

8. The First-tier Tribunal Judge, in a long and carefully reasoned decision, accepted the evidence as to the appellant's severe depression, lasting for at least 2 years and likely continuing, after her husband's death. He accepted that the witnesses were honest and well meaning, and that 'there is clearly a dependence between the appellant and her son, exacerbated enormously by the death of her husband in 2012'.

9. He considered that the appellant's circumstances could not be brought within the Rules, having regard to Appendix FM EC-DR.

10. Nor did he consider the circumstances to be such that the respondent should consider exercising her *Nagre* discretion outside the Rules and he dismissed the appeal.

Permission to appeal

11. The appellant sought permission to appeal. Permission to appeal was granted by Upper Tribunal Judge Rintoul on the basis that it was arguable that the First-tier Tribunal had not correctly applied the provision of E-ECDR 2.5 and the 'required level of care'. Upper Tribunal Judge Rintoul considered that there was less merit in the appellant's argument that there were compelling circumstances outside the Rules for which a grant of entry clearance should be made on Article 8 grounds.

Rule 24 Reply

12. The respondent in her reply argued that the Judge's interpretation of the meaning of 'care' in the Rules was open to him. The Reply sets out the relevant Rule, then continues thus:

> "5. It is the preliminary view of the respondent that the Judge was entitled to conclude that the need the support for everyday tasks was not applicable to the concept of emotional support or recovery. The conclusions of the Judge at paragraph 73 are open to him following his careful analysis of the rule.
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> 6. It is clear that the requirements of the rule are limited to the concept of assistance with everyday tasks. The rule is not intended to go further than this."

13. That was the basis on which the appeal came before me.

Upper Tribunal hearing

14. At the hearing, I had the benefit of a skeleton argument and oral submissions from Mr Jorro, and also submissions from Mr Duffey for the respondent Entry Clearance Officer.

15. In his skeleton argument, Mr Jorro argued that the 'required level of care' must be taken to include both the specific nature of the illness and the cultural context of the society in which such care is needed. In the appellant's case, that should be taken to include the emotional and practical support which could only be provided by the

sponsor, his wife and children, and the cultural expectations that such care would be provided to a widow by her only son. The appellant contends that in concentrating on 'functional care' rather than the extended definition contended for by the appellant, the First-tier Tribunal erred in law.

16. The skeleton argument then sets out the medical evidence at some length, emphasising the opinion of the appellant's doctors that her son's care is required for her wellbeing (see [11] in the skeleton). The appellant rejects the respondent's contention that the First-tier Tribunal's interpretation was open to it, and argues that the appeal should be allowed on this basis alone.

17. Turning to the *Nagre/SS (Congo)* point, the appellant contends that the Rules are not Article 8 complaint and that the question is one of *Razgar* proportionality. It is not reasonable to expect the sponsor and his British citizen wife and children to go to live in India to care for his mother there. The appellant will not be a burden on the United Kingdom taxpayer and accordingly, failure to allow the appeal outside the Rules is also an error of law.

18. In his oral submissions, Mr Jorro accepted that there was no authority on the interpretation of this particular rule. He sought leave to rely on the unreported decision of Upper Tribunal Judge Grubb in *Timiro Nour Osman* [2013] UKAITUR OA.18244.2012, in which the interpretation of E-ECDR 2.5 is considered at [30]-[33]

> "30. No definition of "long-term personal care to perform everyday tasks" is contained within the Immigration Rules. The reference to "personal care" is to be distinguished from "medical" or "nursing" care and would appear to mean that the care that has to be provided is "personal" rather than, for example, support provided by mechanical aids or medication. The need is for "personal" care, in other words, care provided by another person. The "personal care" must be required "long-term" rather than on a temporary or transitional basis. And, further, the provision of care must be necessary in order that an individual may perform "everyday tasks".
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> 31. The relevant IDI (dated 13 December 2012) at para 2.2.1 gives by way of example of "everyday tasks" that an individual is incapable of "washing, dressing and cooking". Those are obviously aspects of an individual's life properly described as "everyday tasks" but that phrase has a wider meaning which would include, for example, the management of an individual's bodily functions, difficulties with mobility and communication. Other activities of daily living will also be included within the phrase "everyday tasks".
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> 32. Thirdly, E-ECDR 2.5 requires an individual to establish that the "required level of care in the country where they are living" cannot be obtained even with the practical and financial help of the sponsor because either it is not available or there is no person in that country who could reasonably provide it or it is not affordable. Consequently, if the sponsor can provide a relative with the finances which will deliver the "required level of care" in the relative's own country then the requirements of the Rule will not be met unless the "long-term personal care" is not available and no one in the individual's country can reasonably provide it.
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> 33. This latter requirement undoubtedly imposes a significant burden of proof upon an individual to show that the required level of care is not available and no one can

> reasonably provide it in the individual's country. An example where that latter requirement might well be satisfied would be where the "required level of care" needed requires a particular type of carer, for example a close family member, none of whom live in the individual's country. The evidence would have to establish, in such a case, the need for a particular type of carer such as a family member and not simply that the individual required personal care from someone. In many circumstances, the "required level of care" to perform such everyday tasks as cooking, washing, and to assist mobility are likely to be capable of being performed not just by family members who do not live in that individual's country. But, it is equally possible to contemplate, having regard to cultural factors, that needed "personal care" involving intimate or bodily contact may require a gender-specific carer from the individual's family. What is the "required level of care" and who may appropriately provide it will depend upon the circumstances and the evidence in any given case."

19. In the *Nour Osman* case, the decision of the First-tier Tribunal was set aside and remade, on similar facts to those of this appeal, in the appellant's favour. In relation to the second ground, Mr Jorro's arguments mirrored those in his skeleton argument and do not need further expansion here.

20. For the respondent, Mr Duffey relied on the Secretary of State's IDI "Family members under Appendix FM of the Rules: Adult Dependent Relatives":

> "2.2.2 Unable to receive the required level of care in the country where they are living
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> The Entry Clearance Officer needs to establish that the applicant has no access to the required level of care in the country where they are living, even with the practical and financial help of the sponsor in the United Kingdom. This could be because it is not available and there is no person in that country who can reasonably provide it, or because it is not affordable. The evidence required to establish this is set out below. If the required level of care is available or affordable, the application should be refused.
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> 2.2.3 No person in the country who can reasonably provide care
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> The Entry Clearance Officer should consider whether there is anyone in the country where the applicant is living who can reasonably provide the required level of care. This can be a close family member: son, daughter, brother, sister, parent, grandchild, grandparent, or another person who can provide care e.g. a home-help, housekeeper, nurse, carer, or care or nursing home. If an applicant has more than one close relative in the country where they are living, those relatives may be able to pool resources to provide the required care. The Entry Clearance Officer should bear in mind any relevant cultural factors, such as in countries where women are unlikely to be able to provide support. "

21. At 2.2.5, example scenarios are given, which include a 70-year old person living alone in India, who is becoming frail and forgetful and whose daughter sends money for her mother to pay someone to do her cleaning; and an 85-year old living in Afghanistan, who has poor eyesight, has had a series of falls, and a hip replacement, but whose only son sends money to enable his father to pay a carer to visit and help

him wash and dress and cook for him. Neither of these examples is said to meet the criteria, because the required level of care can be arranged in the country of origin by paying someone to provide it.

22. At 2.3.3, the evidence expected is set out:

> "2.3.3 Evidence that the applicant is unable, even with the practical and financial help of the sponsor in the United Kingdom, to obtain the required level of care in the country where they are living:
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> Evidence that the required level of care:
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> (a) Is not, or is no longer, available in the country where the applicant is living. This evidence should be from a central or local health authority, a local authority, or a doctor or other health professional. If the required care has been provided through a private arrangement, the applicant must provide details of that arrangement and why it is no longer available.
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> (b) Is not, or is no longer, affordable in the country where the applicant lives. If payment was made for arranging this care, the Entry Clearance Officer should ask to see records, and an explanation of why this payment cannot continue. If financial support has been provided by the sponsor or other close family in the United Kingdom, the Entry Clearance Officer should ask for an explanation of why this cannot continue or is no longer sufficient to enable the required level of care to be provided."

23. Mr Duffey observed that the First-tier Tribunal had not made an express finding that *Kugathas* dependency existed in this case. As to compelling circumstances outside the Rules, it was difficult to establish that here since the Rules covered all of the matters relied upon for the exercise of the respondent's discretion outside the Rules. At present, day-to-day care was being provided and although the appellant would undoubtedly prefer her family to care for her, that was not the test.

24. In reply, Mr Jorro argued that the meaning of 'required level of care' was a matter of law not fact and that the appeal was on all fours with the decision of Upper Tribunal Judge Grubb in *Nour Osman*. It was not open to the Home Office to limit the scope of the Rules in her guidance as she had sought to do. He asked me to consider giving guidance on the interpretation of E-ECDR and to find that there was indeed family life between the appellant and her son, such that Article 8 was applicable and the proportionality test should be applied.

Discussion

25. The decision of the First-tier Tribunal turns on the provisions of paragraph E-ECRD 2.5 of the Immigration Rules HC 395 (as amended):

> "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."

The issue in this appeal is the meaning of 'the required level of care in the country where they are living'.

26. I have considered the submissions and the First-tier Tribunal decision, which is carefully reasoned and has full regard to the narrowness of the new Rule and the difficulties in its interpretation. It is clear that the Judge was aware that the effect of the decision was harsh, and that he reached the conclusion he did reluctantly, after very careful reflection on all of the evidence and arguments before him.

27. It is right that, like the appellant in *Nour Ahmed,* this appellant and her medical advisers consider that it would be preferable for her to live in the United Kingdom with her son. That decision is unreported and is not binding upon me. I recall that at paragraph 33, the Upper Tribunal in *Nour Ahmed* held that 'What is the "required level of care" and who may appropriately provide it will depend upon the circumstances and the evidence in any given case'. Contrary to Mr Jorro's submissions, the 'required level of care' is a question of fact, on the evidence before the fact-finding Tribunal.

28. In this appeal, the evidence before the First-tier Tribunal was that the appellant's care is being paid for by the sponsor, and her niece is doing her cooking and cleaning and so forth, while her son's parents-in-law receive money her son sends, and pay her medical bills. There was no evidence to show whether a paid carer could be found, or how much that would cost: that possibility had not yet been considered.

29. I am not persuaded that the First-tier Tribunal Judge erred in law. It was open to the First-tier Tribunal Judge to make findings of fact and then to apply the natural meaning of the Rule, and conclude that the 'required level of care' was available.

30. I therefore uphold the decision of the First-tier Tribunal and decline to reopen this decision.

DECISION

31. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.

The decision of the First-tier Tribunal shall stand.

Date: 25 January 2016 Signed Judith AJC Gleeson
Upper Tribunal Judge Gleeson