Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02015/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th October 2017	**On 6th October 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

F N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Kotas , Senior Presenting Officer
For the Respondent: The sponsor on behalf of the Respondent

DECISION AND REASONS

1. The Entry Clearance Officer appeals, with permission, against the decision of the First-tier Tribunal (Judge Howard) who, in a determination promulgated on the 20th May 2017 allowed the appeal of the Respondent on human rights grounds. Whilst the Appellant in these proceedings is the Entry Clearance Officer, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

2. Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity as a result of her medical circumstances. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The Appellant is a citizen of Nigeria. She made an application for entry clearance as a dependent relative under Appendix FM of the Immigration Rules. The Appellant had sought entry clearance as an elderly adult dependent relative as the widowed mother of the Sponsor. The applicant's husband died in 2005. In the application form and accompanying material, evidence was provided as to her current circumstances in Nigeria which had required her to, in essence, to spend large periods of time in the United Kingdom where she could be looked after by daughters all of whom are British citizens living in the United Kingdom. It was asserted that her health needs were such as a result of her age that she required long-term care which was not available to her in Nigeria.

4. The application was refused in a decision made on 15th June 2015. The reasons given for refusing the application can be summarised as follows. The Entry Clearance Officer (hereinafter referred to as the "ECO") considered the application under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules. The ECO found that the suitability entry clearance requirements were met and also that the financial requirements were met (see decision). Under this section EC-DR1.1 (d) the ECO made reference to a letter from the sponsor stating that the Appellant had been visiting them in the UK virtually every year since her husband died in 2005 and that she stayed in the UK for about five months on each visit. He also made reference to the letter stating that she was lonely in Nigeria and that she did not "have anyone to look after" but during an interview she stated that the Appellant looked after herself that she did not required day to day care.

5. The ECO went on to state that in order to meet the rules for adult dependent relatives, the Appellant has to be able to demonstrate that due to either age, illness or disability, that you require long-term personal care to perform everyday tasks and that she had not demonstrated this. The decision letter made reference to her passport demonstrating travel as recently as December 2014 and as she had a visit visa (issued in 2012 five years) this indicated she was able to travel alone and the Appellant provided no details or evidence to show that she was unable to take care of herself. He refused the application under paragraph E-ECDR 2.4. As to paragraph E-ECDR 2.5 it was stated that the Appellant had not submitted any evidence or details regarding what care she may need or why she was unable to get the care in Nigeria. Thus the application was refused.

6. The Appellant's appeal against the Respondent's decision to refuse entry clearance came before the First-tier Tribunal (Judge Howard) on the 11th May 2017. It is common ground that as a result of the new appeal provisions that the only right of

appeal against that decision was on human rights grounds. In a determination promulgated on 20th May 2017, Judge Howard allowed the appeal on human rights grounds, having considered that issue in the light of the Appellant's compliance with the Immigration Rule in question.

7. The Respondent appealed against that decision and permission was granted by the First-tier Tribunal (Judge McGinty on the 26th July 2007.

8. Thus the appeal came before the Upper Tribunal. The ECO was represented by Mr Kotas, Senior Presenting Officer. On behalf of the Appellant, her two daughters, who were her sponsors, appeared at the Tribunal. As the decision of Judge Howard demonstrates, the Appellant had no legal representation at the hearing but he heard evidence from both of her daughters who advanced the appeal on her behalf. They had provided a document dated 22 August 2017 which was intended to stand as a Rule 24 response. Mr Kotas confirmed that he had seen that document.

9. I intend to deal with the grounds in the light of the submissions made by Mr Kotas. In respect of the first ground, in which it was asserted that the evidence did not show elements of dependency, Mr Kotas did not seek to advance that ground in the light of the factual assessment made by the judge. In any event, permission was not granted on the ground (see paragraph 5 of the grant of permission).

10. In dealing with the other grounds, Mr Kotas referred the Tribunal to the judges assessment at paragraph 23 of the decision whereby the judge found that the Appellant had met the adult dependent relative rules and that if it was correct, those rules are the Respondents view of the public interest and in those circumstances it would not be necessary to consider section 117 considerations any further.

11. As to the remaining grounds, he submitted that they were a "reasons challenge" as to whether the judge had given adequate reasons for reaching his decision. In this respect he conceded that the reasons would have to be so unclear that anyone reading the determination would not know why the decision had been reached and given the findings of fact made in this appeal, that he would have difficulty in advancing paragraphs 5-6 of the written grounds to demonstrate that the judge had not given adequate reasons. He highlighted at paragraph 19 that the judge heard accepted the evidence of the sponsor and found that she had not sought to exaggerate the evidence before the Tribunal. Thus he accepted that the judge had given adequate reasons to demonstrate that the Appellant required long-term personal care to perform everyday tasks.

12. As to paragraph 7 where it was stated that the judge had not "outlined why it would be unreasonable for the Appellant to relocate to a town or city" he submitted that the judge had given reasons at paragraphs 21 and 22 and that the grounds were essentially a disagreement with those findings.

13. In the light of those submissions it was not necessary to call upon the sponsors to provide any further submissions than those in their rule 24 response.

14. Furthermore in the light of those submissions which were made fairly and properly by Mr Kotas, and in the context of the decision of the judge, I find that there is no error of law in the determination. It is plain from reading the determination that he found the evidence of the Appellant's daughters to be wholly credible and as he observed at [19] when giving details and evidence of their mother's health needs that "she did not seek to exaggerate the situation "and that the oral evidence given was consistent with the written evidence in the doctor's letter and in the witness statement of Appellant's sponsor. That was an assessment open to the judge to make having had the opportunity to hear the oral evidence that the subject of cross-examination. In this context I remind myself of the importance of oral evidence**.**

15. In the well-known case of Piglowska v Piglowski [1999] UKHL 27, Lord Hoffmann said this:

> "... the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. ..."

Then there is a quotation from his own decision in Biogen Inc v Medeva Ltd [1997] RPC 1:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

16. In the light of the evidence which he accepted, the judge found that the Appellant could meet the rules (see paragraph 23) and as the appeal was limited to human rights grounds, he considered Article 8 against the background of compliance with those rules.

17. What Mr Kotas submitted is that the written grounds mount a "reasons challenge" against the judges assessment in this respect which he candidly concedes was essentially a disagreement with the judge's findings and therefore is not an error of law. He is right in this regard. Looking at the rules, the judge made a number of findings on the evidence as to the issue of compliance with E-ECDR 2.4 which required the applicant, as a result of age, illness or disability to require long-term

personal care to perform everyday tasks. As he conceded, the judge did give adequate and sustainable reasons at paragraph 20 onwards. He expressly referred to "all that I have heard and I have seen I am satisfied that as a result of age, illness and disability the Appellant does require long-term personal care to perform everyday tasks." It is not necessary for the judge to set out every aspect of the evidence that he had regard to and in this case the judge found the Appellant's daughters to be entirely credible and importantly, found that they were not seeking to exaggerate their mother's situation regarding her health needs (see paragraph 19). He also had the benefit of two reports from Dr O. Those reports lent support to the sponsor's account of their mother's health needs and in particular her age and how it affected her. It referred to her sciatica, her inability to walk, limited movement with constant pain. A further letter referred to heart failure and rheumatoid arthritis. The evidence of her daughter was to the effect that she was unable to carry out activities such as cooking, struggling bathing and dressing and referred to her severe pain (see witness statement paragraph 6). She was describing the witness statement as vulnerable and living alone. The judge also made reference at [17] as to requiring health basic needs such as being lowered onto lifted off the toilet. Therefore the judge did give adequate reasons this respect.

18. As to paragraph 5, the grounds assert that the judge failed to give adequate reasons as to why she could not reasonably be expected to remain in Nigeria and with financial assistance. At paragraph 6 it was asserted that the judge had not outlined why would be unreasonable to relocate to a large town.

19. As set out earlier, Mr Kotas conceded that the judge did give adequate reasons did not seek to advance those grounds any further. I agree with him. The judge expressly found that the required level of care was not available and also that there was no one who could reasonably provide it, even with financial help. The judge accepted the evidence that there was no provision in the village available. The judge made reference at [16] to the evidence relating to a visit made where her daughter was attending to all daily washing cooking and feeding needs and at [17] recent evidence as to the level of care required. The recitation in the determination suggests that in cross-examination she was questioned about whether she could pay for a maid to carry out care (see paragraph [16]) but the evidence before the judge was that whilst they existed, they were not up to the task. The judge accepted that in the light of her care needs, she needed carers and not a maid (see [17] and [21]). At paragraph 21 he made reference to the attempts made to provide and pay for the level of care necessary with maids and the judge found "the family have tried maids. They have been unsuccessful for a number of reasons, but as already stated, the Appellant needs a carer not a maid." This refers to the evidence given by the Appellant's daughter, as set out in the 24 response, but that home care and assistance was attempted but was not successful and caused distress, anxiety and left neglected rather than cared for and that housekeepers were taking advantage of her vulnerability. He also found that due to the remoteness of a home such professionals were not readily available (see

paragraph [21]). Therefore, the judge did give reasons for reaching that conclusion.

20. As to paragraph 7, whilst it is asserted that the judge had not outlined why it would be unreasonable for her to relocate to a larger town, the judge gave such reasons at paragraphs 21 – 22 as Mr Kotas conceded. The judge gave consideration to whether or not it was reasonable for her to relocate to a large urban centre but found that it would not be so reasonable as it would remove her from her home and community where she had resided since 1977 (see paragraph 22), he found that such a course would require her to live alone in a new home cut off from the community visits daughter. Therefore contrary to the written grounds, the judge did give reasons as to why he found it unreasonable to expect to relocate.

21. The last issue relates to the section 117 public interest considerations. However the judge, as set out above gave adequate and sustainable reasons for reaching the conclusion that the Appellant had met the rules. As such the rules are the Secretary of State's view of where the public interest lies and if the Appellant, as in this case, can meet the rules, it is a very weighty consideration in any proportionality balance as those factors may necessarily outweigh the public interest. Whilst the grounds make reference to the judge failing to properly take into account all the section 117 considerations, his findings in this regard are set out at [27]. There is no express reference to the Appellant's ability to speak English but it is implicit in his finding at paragraph 27 that she had worked in the UK in the past. The evidence before the judge was that she had trained and worked in the UK as a nurse for periods of time and as the 24 response set out, this had been outlined the judge that she had undergone such training and spoke English. English is a language spoken in Nigeria also. Furthermore as to financial independence (S117B (3)), the Entry Clearance Officer had accepted that she met the financial requirements and the judge also found that her daughter had the financial means to look after her (see paragraph [27] and the evidence in the bundle relating to financial resources). The only aspect I can see which may have some relevance is the economic well-being of the UK in terms of provision by the NHS for any medical problems she may have. However, the judge found that she had not used those facilities whilst in the UK and that the daughters had sufficient resources. Nonetheless, in the light of the judge's findings, which were adequately reasoned, that she met the rules, this was of such weight in the proportionality balance that it has not been demonstrated that this would have outweighed the facts found in favour of the Appellant as the judge observed at [27]. It may well be that this was not the only outcome possible on the facts in this particular case but this was, ultimately, a fact based assessment for the judge to make. In Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045 Carnwath LJ (as he then was) said this:

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is

> indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist Tribunal should be respected."

For those reasons I am satisfied that the decision of the First-tier Tribunal, even if it could be characterised as a generous one, did not make an error of law as Mr Kotas has fairly set out. Thus the appeal of the ECO shall be dismissed and the decision shall stand.

Decision:

The decision of the First-tier Tribunal does not disclose the making of an error of law; the decision of the FTT allowing the appeal shall stand.

Signed Date: 5/10/2017

Upper Tribunal Judge Reeds