Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08704/2014
IA/08733/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st August 2017	**On 21st August 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

AT (FIRST APPELLANT)
EX (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B Hawkin, instructed by Paul John & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is a remitted hearing of the Appellants' appeals against the decisions of the Secretary of State dated 28th January 2014 to refuse their applications for indefinite leave to remain in the United Kingdom as adult dependent relatives outside the Immigration Rules.

2. The first Appellant, AT, was born on [ ] 1936, and the second Appellant, EX, was born on [ ] 1982. AT is the grandmother of EX and they are both citizens of India. The Sponsor, AX, is the daughter of AT and the mother of EX. She and her husband, XS, are both British citizens and have been living and working in the UK for some time.

3. On 20th August 2012 the Appellants were issued with a family visit visa valid until 20th February 2013. They entered the UK on 2nd November 2012 and were granted leave to enter until 20th February 2013. On 18th February 2013 the Appellants made an application for indefinite leave to remain in the UK as adult dependent relatives outside the Immigration Rules. The basis of this application was EX's personal circumstances. She is mentally disabled, blind and requiring constant care from her family. AT cared for EX in India . However, AT was at the time of application almost 77 years old and in need of care herself. There were no family members in India who could care for them.

4. This matter has a complicated procedural history, which is fully set out in the Appellants' skeleton argument. For the purposes of this appeal, the Court of Appeal remitted the matter to the Upper Tribunal for the following reasons. Neither the Appellants nor the Respondent furnished the Upper Tribunal Judge with any or any substantial and up-to-date evidence as to the availability and cost in India of specialist care of the type required by EX in particular. The Appellants submitted that such care would not be available or affordable. The Respondent submitted that the Appellants would be able to access suitable residential care together. The Upper Tribunal Judge was justified in observing that he was being invited to address this issue in something of an evidential vacuum.

5. The parties before the Court of Appeal agreed that a proper assessment of Article 8 proportionality required consideration of objective and up-to-date evidence of the availability and cost of appropriate care in India and the ability of the Appellants to avail themselves of such care in the event of their return. Any assertion by either party as to the likelihood of the Appellants' care needs being adequately met in India should be supported by evidence. The parties considered that it would be inappropriate to return an Appellant such as EX whose care needs are clearly extensive and for whom the consequences of being unable to access adequate care are potentially severe without an assessment of the type described above being undertaken. It was agreed that the appropriate forum to undertake the evidential assessment was the Upper Tribunal and the matter was remitted for prompt disposal.

6. Accordingly, the issue before me is whether the Appellants, even with the practical and financial help of the Sponsor, are able to obtain the required level of care India. The appeal is on Article 8 grounds since neither of the Appellants can satisfy E-ECDR.1.1. of the Immigration Rules because they did not have entry clearance as adult dependent relatives. They came to the UK as visitors.

7. The relevant Immigration Rule in assessing the issue before me is at E-ECDR.2.5. which states:-

> "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".

8. Deputy Upper Tribunal Judge Norton-Taylor made the following findings which have not been challenged and are preserved. EX has significant cognitive impairments and functional limitations arising from her conditions of global development delay and blindness. She has very significant care needs as a direct result of her conditions, including washing, dressing, accessing the toilet, taking adequate nutrition and moving around both in and outdoors. Her ability to care for herself will never materially improve. EX requires 24-hour care involving both intimate and non-intimate aspects. She requires emotional support and assistance to be able to go out and socially interact with others. The care required could not be provided by a man, whether he was a relative or not.

9. In relation to AT, the judge made the following findings. She suffers from foot pain, lethargy, microalbuminuria, hypertension and type II diabetes. AT had been able to provide the necessary care for EX whilst they were living in India. However, there had been a genuine change in circumstances since the Appellants arrived in the UK. AT was getting frailer and this had led to an inability to provide care for EX. The change in AT's health and overall ability to provide significant care for EX had materially reduced. AT could not now provide by herself the overall required level of care for EX. The Appellants had a particularly strong bond and it would be contrary to the interests of EX, in particular, for her to be separated from AT. There were no relatives in India who would have in the past provided, or would be likely in the future to provide assistance to the Appellants, although there were two sons who may be able to offer some financial support.

The Sponsor's evidence

10. AX relied on her witness statement, which she signed and dated at court, and the documents in the Appellants' bundle. She said that she provided care for her daughter which involved getting her up out of bed, taking her to the toilet, dressing, feeding her and taking her out. She had to provide all the necessary care for her daughter because she was completely blind and could not talk. It was often difficult to understand what she was saying.

11. The Sponsor worked as a nanny for three to five days a week. Her employers were understanding of her home situation and she was given leave when she needed it. There was a carer coming to her home for three hours twice a week to look after both Appellants. AT could no longer look after EX because she was suffering from giddiness and could not now hold or support EX.

12. The Sponsor had obtained a letter from the local council in Kerala and from the parish priest and these appeared at pages 14 and 15 of the Appellants' bundle. The Sponsor confirmed that there were no relatives in India, although her son lived in Malta and there was a letter from him at page 10 of the bundle. EX would suffer great distress if separated from the Sponsor because she had been living in the UK for almost five years. EX did not like being alone and preferred to be with someone. AT also stated that she wished to stay with the Sponsor until she died.

13. In cross-examination, the Sponsor confirmed that there was a carer who came twice a week for three hours. This had been arranged by a social worker through an agency. Social Services were paying for that care and it had been arranged by the Sponsor's GP. The care was for EX, although the carer would take both Appellants out and sit and talk to them. The GP had not arranged any specific care for AT. The carer was able to communicate because she spoke the same language as the Appellants.

14. Mr Melvin stated that the Home Office were of the view that home care could be provided for £75 per month in India. The Sponsor stated that there was no one near their house in Kerala who could provide care for EX and she could not live elsewhere. She was a girl and she would not know what was happening to her or be able to tell anyone if she was not cared for properly. The Sponsor needed to look after EX and keep her safe. Previously, the Sponsor's mother and father, when he was alive, had looked after EX.

15. The Sponsor had obtained indefinite leave to remain in 2012 and thereafter had invited her family to visit. She still had a house in Kerala, but nobody was living there. The Appellants could not return to the house and have live-in assistance because there was no-one who was willing to look after them and there was nobody who was able to look after EX. The Sponsor confirmed that there was nobody in her home area who was willing or capable of looking after EX. There may well be somebody in the city, but she did not have a home there and it was too expensive to live there.

16. EX was not taking very much medication and was having some investigation by ultrasound. Before she came to the UK she was not on any medication, although she had had three operations on her eyes. Before she lost her sight EX was walking nicely. The Sponsor had written to the church and local council and asked for assistance. Both the councillor and the parish priest knew the family. When the Appellants were living in India the Sponsor would visit them once a year.

17. I asked the Sponsor if she had tried to find someone to look after her daughter in India and she replied: "No-one will come. They want their own life and you cannot believe all the people."

18. In re-examination the Sponsor stated that her house was a long way from the city and it would take three to five hours to get there by bus. It took five hours by car to get to her house from the airport.

19. The Sponsor's husband relied on his witness statement dated 31st July 2017 as evidence-in-chief. He was not cross-examined.

Submissions

20. Mr Melvin submitted that the appeal was on a very narrow point of the availability of care in India. He relied on the Country of Information Response [COIR], which he had submitted with a skeleton argument on 31st July 2017. He submitted that there were adequate in-home care facilities available and there was also residential care, although it was more expensive. In-home care would cost £75 per month. The Appellants were currently receiving Social Services care for three hours twice a week and this was at the taxpayers' expense. There was nothing in the evidence which showed that the Appellants required a trained professional to care for them. Their medical needs were limited. They required assistance with day-to-day care. EX was not on any medication and had been receiving all her medical treatment and care in India before coming to the UK. The Appellants had a property available to them in India. The Sponsor had not made extensive enquiries in the local area as to the availability of assistance and Mr Melvin did not accept her assertion that nobody would come to look after EX. The Sponsor had made no enquiries of available help in her local area.

21. Mr Melvin submitted that, in the absence of evidence disputing that submitted by the Respondent, care was available in India at a relatively inexpensive cost and which could be paid for by the family in the UK. Mr Melvin submitted that I should place little weight on the two pieces of local evidence from persons known to the family who were providing assistance to the family in their application to remain in the UK. The letters were not indicative of the availability of nursing care in the local area. Mr Melvin referred to an article in the Appellants' bundle which stated that there were elder care specialists for the cost of Rs12,000 to Rs14,000 per month. The Appellants were not unfit to travel. They had travelled to the UK in late 2012 after making applications for entry clearance as visitors. There was adequate care available so they would be unable to satisfy the entry clearance rules. There were no compelling and compassionate circumstances to warrant a grant of leave outside the Immigration Rules.

22. On the facts of this appeal, the Appellants had accommodation and care in their home country and the refusal of indefinite leave was a proportionate response. Mr Melvin relied on his written submissions. The information request clearly showed that 24 hour in-home nursing care by a trained nursing assistant was available in India at a reasonable cost. There was also evidence that care was available by non-medically trained domestic workers in India and there were a wide range of residential care options in the private sector. The Appellants could obtain medical treatment and care in India and that care was affordable. The public interest in immigration control and the protection of public services, which are currently under enormous pressure in the UK, was not outweighed by the circumstances of the Appellants' case.

23. Mr Hawkin submitted that this was a sad case and the procedural history was set out in his skeleton argument. He submitted that Article 8 was engaged and the first issue before me was the level of care required by EX. She required long-term personal care to perform everyday tasks. Mr Hawkin relied on the unreported case of Osman v Entry Clearance Officer (OA/18244/2012). There were no other reported decisions on long-term personal care. The Tribunal found, on the facts of that case, that a person would not be able to provide the required level of care, to meet the appellant's needs to perform everyday tasks, which could only be fully provided by a close family member. Mr Hawkin submitted that the situation was the same in this case.

24. The medical evidence and the judge's preserved findings showed that EX's care and her emotional needs could not be met outside the direct family circle. Because of the nature of her afflictions and her low ability to communicate, she had only ever lived with her mother or grandmother, it would be very difficult for any other individual to deal with EX. The problems she had were fundamental and broad ranging in nature. There were also cultural issues. EX's care needs could only be met within the family. Although a carer did come twice a week for three hours, the times of her visits were limited and her duties were to take both Appellants out for a walk and to chat to them. There was limited input by such a carer and her role was a long way from providing other care that the Sponsor provided. The Sponsor provided for all the EX's needs and her communication was such that the only individuals who can understand and care for her are within the close family circle.

25. Mr Hawkin referred to the COIR and noted that it was undated and the costs of care were likely to have increased. This was not strong evidence to deal with the complicated facts and needs of this case. The Sponsor's evidence was that their home in Kerala was three to five hours by bus to the city and to her knowledge there was no-one in the area who would take on a live-in care role of this kind, caring for an 81 year old woman and a 34 year old woman with complex needs. The Sponsor had also provided evidence from a local councillor and the parish priest which stated that there were not enough facilities to look after EX. There were no special schools or rehabilitation centres. This was evidence on which I could place weight because the

Sponsor had not put words in the mouths of the authors of the letters and the provenance of the letters was not challenged.

26. There were also quotes from background material in the skeleton argument, which showed that women with disabilities were not treated kindly. This supported the Sponsor's evidence that there was no one in the local area to provide the kind of care necessary. The evidence in the background material was that there was discrimination against persons with disabilities in employment, education and access to healthcare, which was more pervasive in rural areas. Despite legislation that all public buildings and transport be accessible to persons with disabilities, there was limited accessibility. Women and girls with psychological or intellectual disabilities in India continue to be locked up in overcrowded and unsanitary state mental hospitals and residential institutions without their consent due to stigma and the absence of adequate community based support and mental health services.

27. The evidence in the US State Department Report for India 2016 supported the Sponsor's evidence that EX would be open to abuse, neglect or ill treatment in a residential home and also by a carer in the family home. EX could not communicate what had happened to her if she was abused. She was a very vulnerable female and disabled individual. The background material showed that there is not the level of care that EX requires in India. Mr Hawkin also submitted that the Home Office guidance was highly material to any interpretation of the Immigration Rules and the Appellants' case was very similar to one of the scenarios set out in that guidance. Mr Hawkin relied on Paposhvili v Belgium (App no. 41738/10) and argued that there was an Article 3 dimension to the case and therefore the case had to be looked at carefully.

28. Mr Hawkin submitted that the Deputy Upper Tribunal judge's conclusion that the Sponsor and her husband could leave the UK to care for the Appellants was flawed because they were both UK citizens who were working as a kitchen porter and domestic worker. It would not be feasible for them to move back to India because they would not be able to provide for both Appellants. This was not an issue in the appeal given the remittal by the Court of Appeal. EX needed care by close family members and as British citizens the Sponsor and her husband were not required to leave the UK.

29. In response, Mr Melvin submitted that there was no record of abuse of EX and Paposhvili was not relevant. There was no reason why British citizens could not relocate to India.

Discussion and Conclusions

30. I rely on the preserved findings of Deputy Upper Tribunal Judge Norton-Taylor set out at paragraphs 9 and 10 of this decision. AT is now 81 years old and is no longer able to care for EX. She has a particularly strong bond with EX and it would be

detrimental to the health and well being of EX is she was separated from AT. I must therefore look at the situation on the basis that the Appellants remain together.

31. EX is now 34 years old. She has very significant care needs as a direct result of her conditions. That care is currently being provided for by her mother, the Sponsor. EX also suffers from some menstrual difficulties which were under investigation and were being dealt with by the Sponsor. EX's care needs are very complex and demanding. They are of an extremely intimate nature. She has difficulty in communicating and has only ever lived with her mother and grandmother. AT is no longer able to provide physical care for her needs since AT can no longer support her or lift her, and that role has been taken over by the Sponsor since the Appellants came to the UK. This change in circumstances, since the Appellant's came to the UK as visitors, was not an issue in this appeal.

32. I find that looking at all the evidence before me, the level of care required by EX is of a highly intimate and personal nature and is one that can only be provided for by a close family member such as her grandmother when she was able to, and now her mother. It is not appropriate for EX to be cared for by somebody other than a family member. She is blind, she is referred to as mute, but the Sponsor stated she could communicate, although it is difficult for her to be understood. It would not be appropriate for another person to take over her 24-hour care given that a close family member has always provided it.

33. I accept Mr Melvin's submission that in-home care is available in India and I appreciate that the Sponsor receives help from a carer organised by a social worker. The carer comes and takes out both Appellants and talks to them for three hours twice a week. However, the main responsibility for dressing, bathing, feeding and dealing with all EX's needs is the Sponsor, her mother. The carer's role is limited in that respect. I also find that since EX needs 24 hour care and she has to remain with her grandmother, it would not be appropriate, and indeed would be impossible to find residential care for both of the Appellants if they were returned to India. EX's needs could not be met in a care home for the elderly.

34. There is a risk that EX, as a vulnerable adult, will suffer neglect or ill treatment because she would be unable to express herself. There was also evidence in the background material of the stigma and isolation faced by those with psychological or intellectual disabilities and the absence of adequate community based support and mental health services. EX certainly could not be returned to India to residential care, either alone or with her grandmother, on the evidence before me. The two require totally separate caring needs. The matter could only be catered for by in-home care, which although available, is not appropriate because the care needs of EX can only be provided by a close female family member.

35. Accordingly, I find that the Appellants have shown that they would be unable, even with practical and financial help of the Sponsor, to obtain the required level of care in India because there is no person in India who can reasonably provide it. There were

no family members, with whom EX has lived, to provide that care and therefore the issue of whether it is affordable is not relevant.

36. In assessing Article 8, I find that both Appellants have a level of dependency on the Sponsor, such that it amounts to family life. Whilst they were living independently in India prior to coming to the UK, it is clear from the previous undisturbed findings of the Deputy Upper Tribunal judge that there has been a change in circumstances since their arrival in the UK. The Appellants have been living with the Sponsor for almost five years and have become dependent on her. I am satisfied that they have established family life in the UK and their removal and the refusal of leave to remain would amount to an interference.

37. Such an interference would be in accordance with the law given that neither Appellant can satisfy the requirements of the Immigration Rules because neither had valid entry clearance as dependent relatives when they came to the UK. However, in assessing proportionality it is relevant that they are able to satisfy the substantive requirements of the Immigration Rules and fail only on this technicality. I weigh this into the balance in assessing proportionality.

38. In favour of the public interest there is the fact that both the Appellants came to the UK as visitors. They have remained in the UK after their visit visa expired for about four years. Their medical conditions mean that they will be reliant on the National Health Service and they require the assistance of a social worker and an agency carer. These matters are all being paid for by the state and therefore their presence in the UK affects the economic wellbeing of the country.

39. However, such matters are outweighed by the compelling circumstances in this case, namely the very complex special needs of EX and the fact that she can no longer be properly cared for by AT. They came to the UK as visitors, but circumstances have since changed. They have not sought to deceive Immigration Officials or failed to comply with the Immigration Rules. Their application for indefinite leave to remain was made before their visit visa expired and the only reason an application would fail under the Rules was because it was not for the reason for which they entered. That reason has been answered by the change in circumstances.

40. Accordingly, taking into account all the matters, I find on balance that the public interest in maintaining immigration control and the interests of the economic wellbeing of the country are outweighed by the Article 8 rights to family and private life of both Appellants. EX cannot be separated from AT. EX has complex needs which amount to compelling circumstances. It would be disproportionate for AT to return to India on her own because it would affect the health and wellbeing of EX. There were no family members to support AT were she to return. Although I accept that in-home care or residential care may well be available for AT, the fact is that she cannot be returned because she provides a level of care and emotional support to EX by being present in the home in the UK while the Sponsor is at work. I find that it would breach EX's Article 8 rights if AT returned to India.

41. Accordingly, taking into account all the material before me, I find that the refusal of indefinite leave amounts to a disproportionate interference with the Appellants' rights to family and private life and breaches Article 8. I allow the Appellants' appeals on Article 8 grounds.

Notice of Decision

Appeal allowed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

J Frances

Signed Date: 17th August 2017

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The Appellants failed to submit sufficient evidence at the appeal before Deputy Upper Tribunal Judge Norton-Taylor.

J Frances

Signed Date: 17th August 2017

Upper Tribunal Judge Frances.