Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11697/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2018	**On 14 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NN RAHMATHUNNISA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr D Balroop, Counsel instructed by Malik Law Chambers

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal. In order to avoid confusion I shall refer to the Secretary of State as such throughout and to Mrs Rahmathunnisa as the claimant.

2. The claimant is a citizen of India, born on 2 March 1935. The claimant entered the United Kingdom on 8 November 2015 on a visit visa which was valid from 12 August 2015 until 12 February 2016. She re-entered the United Kingdom on 10 January 2016 on the same visit visa. On 21 January 2016 she applied for leave to remain in the United Kingdom on the basis that it would breach Article 8 of the European Convention on Human rights (on the basis of her right to enjoy private life) to return her to India.

The claimant, in her application for leave to remain in the United Kingdom, asked for consideration under the private life provisions and additionally that she required 24 hour current supervision as a result of her ill-health and fragility. The Secretary of State refused the claimant's application on 20 April 2016. The Secretary of State did not accept that there would be very significant obstacles to the claimant's integration into India as she had lived there all her life, that the claimant had not submitted any evidence to show that she would be unable to have the same level of care that she had previously received whilst in India if she returned there. The Secretary of State also considered whether there were exceptional circumstances warranting a grant of leave under Article 8 outside the Immigration Rules but reiterated that the claimant had had 24 hour care and supervision in India and had not submitted any evidence that this could not be reinstated were she to return.

The appeal to the First-tier Tribunal

3. The claimant appealed against the respondent's decision to the First-tier Tribunal. In a decision promulgated on 25 October 2017 First-tier Tribunal Judge J H H Cooper allowed the claimant's appeal. The judge found that the claimant would meet the requirements of paragraph E-ECDR.2.5 of Appendix FM if she were making an application for entry clearance from India. The judge found that the claimant could not meet the requirements of Appendix FM of the Immigration Rules. This was accepted. The judge considered there were exceptional circumstances justifying a grant of leave under Article 8 on grounds outside the Immigration Rules. The judge found that to return the claimant to India solely for the purpose of making an entry clearance application would impose very great strains on her health and concluded that it would be a disproportionate interference with the claimant's and sponsor's right to enjoy family life together.

4. The Secretary of State applied for permission to appeal against the First-tier Tribunal's decision. On 19 December 2017 First-tier Tribunal Judge Chohan granted the Secretary of State permission to appeal.

The hearing before the Upper Tribunal

Submissions

5. The grounds of appeal set out that the judge erred in failing to give adequate reasons for the decision. The judge has not considered the need to have any objective medical evidence to confirm the assertion that the claimant requires a high level of personal care as a result of her medical issues. The judge has failed entirely to make any findings on the claimant's medical conditions, appearing content simply to rely on video footage of the claimant. Although the sponsor is medically qualified, the judge has overlooked that his evidence is provided in a subjective context. His evidence is clearly biased and his credentials and CV have not been scrutinised in the usual way an expert providing a medical report would be. The judge has not regarded any objectively procured evidence concerning the claimant's medical condition or the level of care she

requires. The sponsor asserts that the claimant's current care arrangements are not as good as what he could provide but no evidence of this is provided and the judge does not appear to have considered this assertion any further. The claimant has not provided any evidence as to why her current care arrangements cannot continue in India or any objective evidence to support the assertion that appropriate medical care cannot be sought in India.

6. The judge found that if the claimant were applying for entry clearance from outside the UK she would qualify at the time of the hearing, the inference being that her appeal should otherwise succeed as per **Chikwamba (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2008] UKHL 40**. The judge is misdirected in this finding having assumed that the only reason to refuse the case is as the result of the claimant being in the UK already. However, the judge has not adequately considered her claim to require the full-time care of her sponsor and has therefore misdirected himself without a proper assessment of the core issues. The judge has entirely failed to adequately consider Section 117B and the need for effective immigration control. The claimant is likely to be a considerable burden on the NHS and may not be able to successfully integrate into British society. **EB (Philippines) [2014] EWCA Civ 874** is relied upon, the UK cannot be expected to provide medical care to the world. The judge has erred in his approach to the required balancing act, the judge has not considered all relevant factors in the round.

7. In oral submissions Ms Everett submitted that there were no findings regarding the medical evidence. The claimant had medical problems prior to entry into the United Kingdom. The claimant indicated that it was her intention to return to India in her application for a visit visa. Many of the medical conditions referred to were conditions that occurred whilst the claimant was in India. It is not clear how her condition is said to have deteriorated significantly whilst in the United Kingdom. The judge has not considered any objective evidence with regard to the medical care that is available in India and has simply accepted what the sponsor has said at face value. The judge was required to make specific findings on the medical care available to the claimant in India in order to make a finding that she met the requirements for entry clearance. There is an absence of reasons on critical issues throughout the decision.

8. Mr Balroop referred to paragraph 28 of the First-tier Tribunal's decision where the judge recites the requirements that must be met for entry clearance. There was no need for the judge to go any further other than to be satisfied that the claimant needs long-term care. The findings were open to the judge, in particular that there were no suitable carers. He referred to paragraph 26 where the judge set out that the claimant's situation had deteriorated since arriving in the UK. There was a difference in the claimant's health between what was happening before she left India and after she arrived in the UK. The Tribunal was entitled to take into account the subjective evidence of the sponsor because this was based on experience. He accepted that Section 117B had not been considered by

the judge but that even if that were an error of law it is not material when looking at the findings overall. The claimant would be exempt from the English speaking requirement. The claimant would be financially independent, given the sponsor's level of income and family life existed prior to the claimant coming to the UK as a result of the dependence on the sponsor. There would be no burden on the NHS as evidence of private health cover insurance had been submitted.

9. In reply Ms Everett submitted that at paragraph 30 it is not clear that there is evidence that shows that the Rules are satisfied and, whilst the judge was entitled to find the sponsor credible, there was a substantial amount of care including hospital submissions over a lengthy period whilst the claimant was living in India. There is no indication as to why the judge accepted that there are only domestic carers available in India. She submitted it is simply not sufficient to accept a submission by a relative that is not supported by any substantive objective evidence or based on enquiries that have been undertaken as to the care that would be available and answers to those enquiries to prove that care would not be available. She submitted that the Secretary of State is unable to ascertain from this decision why the judge made the findings that she did.

Discussion

10. The judge set out at paragraphs 24 onwards:

> "24. It is clear, for the reasons acknowledged in the grounds of appeal, that the Appellant cannot meet the requirements of Appendix FM... in that the Appellant entered the United Kingdom on a visitor's visa and applied from within the country, rather than applying for entry clearance from India.
>
> 25. The Sponsor is a practising GP, earning a substantial income and owning significant assets both here and in India. I found him a convincing and credible witness, who gave his evidence in a measured and (so far, perhaps, as it is possible for a son to do in relation to his own ailing mother) objective manner.
>
> ...
>
> 27. Had she been in a position to make such an application from India, I am satisfied from the evidence that she would have met all the requirements of Section E-ECDR of Appendix FM. I consider in particular paragraphs E-ECDR 2.4 and 2.5.
>
> 28. E-ECDR.2.4 requires that the applicant ...'must as a result of age, illness or disability require long-term personal care to perform everyday tasks'. On the Sponsor's evidence, following the death of the Appellant's husband in 2007, she was on her own with carers for some 9 years, latterly requiring 24 hour care for several years. The evidence is that currently she lives with the Sponsor and his wife, and when they are out at work is looked after by full-time carers. The medical and psychiatric reports submitted to the Respondent with the application are consistent with this description, and I have no doubt that the

requirements of paragraph E-ECDR.2.4 would be met, were she making an entry clearance application from India today.

29. Paragraph E-ECDR.2.5 requires (so far as is material to this application):

> '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
>
> (a) it is not available and there is no person in that country who can reasonably provide it; or
>
> (b) it is not affordable'.

30. There is no suggestion on the part of the Sponsor that care would not be affordable in India – indeed he has been paying for it for some years already, but he is emphatic that his mother's needs are now such that no suitable carers can be found. He describes those that used to provide the service as essentially being domestic workers, rather than professionally trained carers, pointing out that the system is not the same in India as in the United Kingdom. He acknowledged in oral evidence that the Appellant has a nephew, but explained that he was married with his own children, and could not realistically provide the intensive level of care that the Appellant now requires.

31. During the course of the hearing, with my permission, the Sponsor showed video footage on his tablet computer of his mother, which I describe in my record of proceedings as follows:

> 'One section shows a large lady struggling to get out of bed and use a wheeled walker to make her way slowly across the room. Clearly a difficult process.
>
> Second section shows her being addressed by Sponsor (off camera) who asks her a series of simple questions such as her date of birth, where she lived in India, where she was now etc, to all of which she appeared to make little response'.

32. Considering all the evidence, I accept that the Appellant would meet the requirements of paragraph E-ECDR.2.5 of Appendix FM were she making an application for entry clearance from India today.

33. Because the Appellant cannot meet all the requirements of the Immigration Rules, the issue then becomes whether there are exceptional circumstances justifying a grant of leave under Article 8 on grounds outside the Immigration Rules.

34. Considering the *Razgar* questions, I am satisfied that the Appellant and the Sponsor do enjoy family life together, in that there are 'further elements of dependency, involving more than the normal emotional ties' (per *Kugathas*) between them. Removal of the Appellant to India would amount to an interference with their enjoyment of that family life of sufficient gravity as to engage Article 8.

35. There is no question but that the Respondent's decision was taken lawfully, in pursuit of the legitimate aim of maintaining effective immigration control. The issue is therefore whether removing the Appellant would be a proportionate step in pursuit of that aim.

36. That raises the *Chikwamba* issue – namely whether, I having found that the Appellant would be more likely than not to succeed on an application for entry clearance as an adult dependent relative if it were made from India, it is proportionate in all circumstances to require her to return there solely for the purposes of making that application.

37. I am satisfied that if the Appellant had to return to India, the Sponsor would have to accompany her. Evidence has been produced to show that he is a busy GP in a practice with some 12,500 registered patients. I take judicial notice of the fact, supported by the Guardian article at AB 102, that there is a shortage of GPs in the NHS, such that removing the Sponsor from the United Kingdom, even for the period that it would take for the Appellant to make an entry clearance application, is a factor weighing against that step having to be taken.

38. I am satisfied also that to require this frail and elderly lady, who is suffering from a degree of dementia, to return to India solely for the purpose of making an entry clearance application would impose very great strains on her health.

39. In the cast majority of cases it is important for effective immigration control that individuals must not be seen to 'jump the queue' by entering the United Kingdom, albeit lawfully, for an ostensibly temporary purpose and then making an application to remain from within the country. However, I conclude that in this particular case it would be a disproportionate interference in the Appellant's and the Sponsor's right to enjoy family life together in her declining years to require her to return to India to make an entry clearance application which would be highly likely to succeed."

11. There does not appear to be a specific finding by the judge that the level of care required by the claimant is unavailable in India. It might be inferred from paragraphs 30 to 32 that the judge in accepting the sponsor's evidence that no suitable carers can now be found, that the judge considered that the required level of care required is not available in India. The judge does not appear to have engaged in any critical way with the evidence of the sponsor. In this particular case the claimant was receiving 24 hour care in India before she came to the United Kingdom. The sponsor described the carers as essentially being domestic workers rather than professionally trained carers. No evidence was adduced that professionally trained carers are not available in India or that residential care is not available to meet the claimant's needs. It might be the case that such care is not available. However without any objective evidence in support of that claim the judge's finding is insufficiently reasoned. There was no evidence for example of the sponsor undertaking enquiries in India about residential care homes or about obtaining the services of professionally trained carers. Whilst the judge is entitled to accept the evidence of a witness the requirement of paragraph E-ECDR.2.5 places a burden on an applicant to prove that the required level of care is not

available and there is no person in that country who can reasonably provide it. To simply accept the unsupported evidence which consisted of unsubstantiated assertions about the level of care in India is insufficient to support a finding that the requirement of the Immigration Rules would be met.

12. A finding that the claimant would meet the requirements of the Immigration Rules if an entry clearance application was met would not be sufficient to allow the appeal. The judge therefore correctly considered whether there were exceptional circumstances justifying a grant of leave under Article 8 on grounds outside the Immigration Rules (the judge was not imposing a threshold test of exceptionality). The judge commenced by considering whether the first questions as set out in **Razgar** were answered affirmatively, finding that they were, and decided that the issue then was whether the respondent's decision would be a proportionate step in pursuit of the legitimate aim of maintaining effective immigration control. The judge moved straight to the **Chikwamba** issue described as whether or not it would be proportionate in all the circumstances to require the claimant to return to India solely for the purpose of making that entry clearance application. In addressing proportionality solely on that basis the judge has missed out the important balancing exercise. The judge has failed to consider Section 117B of the Immigration and Asylum Act 2002. A judge must have regard to the provisions of Section 117B when considering Article 8 outside of the Immigration Rules. This is an error of law.

13. Is that a material error of law? With regard to the **Chikwamba** issue, the judge noted that the sponsor would have to accompany the claimant to India. However, in evidence, it is clear that the sponsor has a sister in Belgium with whom the claimant has stayed and been cared for, and also the claimant's wife who currently, together with the sponsor, cares for the claimant. The judge noted that there is a shortage of GPs in the NHS so removing the sponsor, even for that period, is a factor weighing against that step having to be taken. It is not clear that any of these factors were considered during the hearing and there does not appear to be any evidence with regard to these factors in the bundle. I note that the sponsor will not be in the United Kingdom between 21 February and 6 April this year. It is therefore not at all clear that had he been asked these questions during the hearing that he would have given evidence that he was unable to accompany the claimant to India if an entry clearance application were required to be made. I do accept that the judge was entitled to conclude that the state of the claimant's health at the date of the hearing in October 2017 was such that to have to return to India for the purpose of making an entry clearance application would impose very great strains on her health.

14. The difficulty with the **Chikwamba** approach in this case is that it is predicated upon a finding that the claimant would be more likely than not to succeed on the application for entry clearance. The Tribunal erred in reaching the conclusions on the likelihood of success in entry clearance by failing to adopt a critical and reasoned approach to the test required

relying simply on the unsupported assertions of the sponsor. If the claimant was not likely to succeed or if there was not sufficient evidence to reach a conclusion on that matter then **Chikwamba** would not be relevant and an appropriate balancing in the proportionality exercise would be required to be undertaken under Article 8.

15. The proportionality exercise undertaken by the judge cannot be considered to be adequate and therefore there was an error of law. It was a material error of law not to consider Article 117.

16. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

17. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

18. I remit the case to the First-tier Tribunal for the case to be re-heard at Taylor House before any judge other than Judge H H Cooper pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed on the next available date.

19. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The appeal of the Secretary of State against the decision of the First-tier Tribunal is allowed. The case is remitted to the First-tier Tribunal at Taylor House before any judge other than Judge H H Cooper

Signed P M Ramshaw Date 12 March 2018

Deputy Upper Tribunal Judge Ramshaw