



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/14894/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 21st February and 18th July 2019

**Promulgated
On 2nd August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**KMSK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bundock of Counsel, instructed by Rahman & Company
For the Respondent: Mr Avery and Mr Tufan, Home Office Presenting Officers.

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Graves made following a hearing at Hatton Cross on 16th October 2018.

Background

2. The appellant is a citizen of India born on 15th August 1969. She applied to come to the UK to join her sister as a dependent relative and it was the refusal of this claim which led to the appeal before the Immigration Judge.

3. The judge accepted that the evidence which he had been given from the appellant's sister, the sponsor and her husband was credible and he said that he found them to be consistent and reliable witnesses. They had opportunities to exaggerate or embellish the evidence but did not do so.
4. The appellant is disabled, her disability having a physical component and a learning disability. Until April 2017 she lived with her mother who has since died. She now lives alone in a house owned by the sponsor and receives help from a person in a neighbouring village who comes to her on a daily basis.
5. The judge dismissed the appeal, saying that it may well be the case that the appellant's needs were greater than the medical evidence suggested but he could not make a finding based on speculation. He was not satisfied that she could meet the requirements of the Immigration Rules.
6. So far as Article 8 outside the Rules was concerned, had there been compelling and cogent evidence to establish that the nature or quality of the appellant's care needs, including that any emotional or psychological component could only really be met by her sister and that the impact upon the appellant of continued separation from her sister and her current circumstances had a significantly detrimental impact upon her mental health and wellbeing, then those matters may have outweighed the public interest in the maintenance of immigration control. However, that evidence was not before him and he dismissed the appeal.
7. The appellant sought permission to appeal on the grounds that the judge had failed to take important evidence into account, in particular the sponsor's handwritten witness statement handed up at the hearing which made it clear that the appellant's physical disability did make it very difficult for her to perform personal tasks including brushing her hair and doing her teeth. The judge did not engage with the evidence in the statement that the appellant had very intense emotional needs since she felt and thought as a child and not an adult.
8. There was also medical evidence before him in the form of disability certificates issued by the government of Maharashtra state and a certificate from a private doctor which the judge appeared to doubt, without reason. He said at paragraph 30 "I do accept that the appellant requires some help with cooking if indeed she has a learning disability" and at paragraph 37 "Her learning disability, if it can be called that."
9. Finally, he did not take into account the fact that the appellant's mother had died less than six months before the refusal decision. She had lived with her mother her entire life and her mental health had been deteriorating since then.
10. Although Mr Avery defended the determination and submitted that the oral evidence before the judge did not indicate that the appellant had any real difficulty with the present arrangements, I am persuaded that in an otherwise thoughtful and detailed determination the judge did not engage

with relevant evidence before him, in particular the sponsor's witness statement. The witness statement makes it clear that the appellant does have difficulties in performing personal tasks, such as combing her hair and doing her teeth. The sponsor's evidence has been accepted as credible in all respects. In failing to take into account material evidence the judge erred in law such that the decision needs to be remade.

11. Mr Bundock told me that the appellant wishes for the matter to be retained in the Upper Tribunal principally due to the lengthy delays in the First-tier Tribunal in listing. Accordingly, this matter will come before me at the next available date.

Decision

12. The judge erred in law and his decision is set aside.

Resumed Hearing

13. Ms Hure gave brief oral evidence and adopted the two witness statements which she had prepared for earlier hearings. She also confirmed that the reports which had been prepared for the Tribunal from a consultant clinical neuropsychologist Dr Halari which recorded the conversations she had had with her were true and accurate.
14. She said that she spoke to her sister two or three times a day and also had video WhatsApp calls with her every other day when the person who looked after her was able to help her to use a smartphone. Whilst the lady had not said that she was unwilling to continue to look after her sister the sponsor herself felt that she was worried about continuing to do so. She kept asking about the progress of this appeal.
15. So far as the practical support which the appellant needs she said that she could not run her own bath, could not wash her hair, could wash the front of her body but not the back and could not comb or brush her hair or her teeth. She could not wash her own clothes or iron them or do her own shopping.
16. Ms Hure said that she had been in the UK since 1991 and whilst her parents were alive she used to go back to India every two or three years but now since they have died she goes more regularly every one to one and a half years. Her sister was only 49 and she could live a long time. It was a lifelong commitment because of the extent of her disabilities. The appellant lives five hours from Mumbai in a small village. She said that she could not adjust to a care home in Mumbai and if she came to the UK she could be looked after by her family which she needs to make her feel comfortable.

Submissions

17. Mr Tufan did not seek to argue that the appellant did not require long-term personal care to perform everyday tasks. In his submission the situation as it presently was could continue because currently help was available

and was reasonably provided. If not she could go to a care home in Mumbai.

18. He questioned the conclusions in the report from the consultant psychologist and noted that there were a number of positive findings in her report about the appellant's abilities, namely that her memory was adequate and that she was educated to fifth grade level.
19. He queried how the psychologist had reached some of her conclusions, in particular why it would be extremely detrimental for her to remain in India when this situation has persisted for her whole life. Whilst he had no doubt that the sponsor had her best interests in mind and could give her good quality care, he considered that there was no reason why the present situation could not continue. There were a very significant number of disabled people in India and nothing to suggest that this particular case was outside the broad range of entry clearance cases where less weight should be given to family life.
20. Mr Bundock relied on his skeleton argument and submitted that the crux of this case was the emotional and psychological requirements of the appellant which could not be met by someone outside the family. There was a very strong bond between the sisters. He relied heavily on the report from Dr Halari who was a very experienced consultant at the Maudsley Hospital with an impressive CV built over years of experience. She had interviewed the appellant for three quarters of an hour to an hour on a video link and her conclusions should be given great weight.
21. In his submission the appellant met the requirements of the substantive Rule and therefore it would not be proportionate to deny her entry clearance. Alternatively if it was found that she did not meet the requirements of the Rule refusal would still be disproportionate.

Findings and Conclusions

22. At an earlier stage in these proceedings the respondent appeared to be arguing that the appellant did not meet the requirements of paragraph E-ECDR.2.4, namely that she was not a person who required long-term personal care to perform everyday tasks but Mr Tufan very sensibly did not challenge the sponsor's evidence and accepted that the appellant did indeed require that care. As he said the crux of the issue is whether the appellant is able to obtain the required level of care in India.
23. Paragraph E- EC DR 2.5 states 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 it is not available and there is no person in that country who can reasonably provide it.
24. The appellant has lived all of her life in India, born there on 15th August 1969. She has cerebral palsy which results in significant intellectual and physical disability. She was cared for in India by her parents but her father died in 2004 and her mother died in April 2017. Two months after her mother's death she applied for entry clearance as the adult dependent

relative of her British citizen sister. It is accepted that there are no other relatives in India who are able to care for her.

25. At present the appellant is being cared for by a family friend who gives her the practical care which she needs.
26. It was accepted by the original judge that there is family life between the appellant and her sister, a finding which has not been challenged by the Secretary of State.
27. At paragraph 37 the judge said
“I find that the fact the appellant has family life with her sister to the standard in Kugathas v SSHD [2003] EWCA Civ 31. This is because on the particular facts of this case I find there is a relationship of emotional and financial interdependency that goes beyond the normal ties of adult siblings. That is because the appellant is financially dependent upon her sister in this country and additionally while her main relationship of emotional dependency is likely to have been with her mother since her mother’s death she is now more isolated and more emotionally dependent upon her sister. Her learning disability if it can be called that is likely only to make her more vulnerable and therefore more dependent on her sister”.
28. Article 8 is therefore engaged.
29. The issue is whether the refusal of entry clearance is proportionate in all the circumstances of this case.
30. The main evidence, aside from the sponsor’s oral and written evidence comes from Dr Rozmin Halari who has an appointment as a senior lecturer at King’s College London and worked as a consultant chartered clinical neuropsychologist both in the NHS and in the independent private sector. She is also a consultant clinical neuropsychologist at the Maudsley specialising in assessing and treating psychiatric and neuropsychological and development disorders, inter alia autism spectrum disorders, including Asperger’s disorder and dementia. She works with children, adolescents and adults. She conducted an interview with the appellant through a video WhatsApp call on 10th July 2019.
31. So far as her intellectual ability is concerned Dr Halari said that it was difficult to understand K’s speech as it was slurred and she was salivating constantly. She became very emotional and tearful and her speech was not easily comprehensible, not being able to provide any meaningful conversation or dialogue in response to questions. She was not orientated to date, time or place and could not perform subtraction of 7 from 100 serially. Dr Halari noted that there was significant cognitive impairment with a score of 8 demonstrating significant impairment in verbal comprehension, articulation, retention and recall of information. She also suffered from moderate anxiety and moderate depression.
32. Dr Halari noted that K’s mother died two years ago which had a negative emotional impact on her. She had been very close to her mother and

relied on her for companionship, practical and emotional support and found it very difficult to cope and function on a day-to-day basis without her. Since her mother's death she has been reliant on a lady from the village to attend to her needs and to cook for her although the lady was not able to care for K in the long-term. Her overall presentation seemed to be deteriorating and she required emotional and practical support. Since her mother's death she has been socially isolated, withdrawn and feeling low in her mood experiencing fear and anxiety when she is alone at night and during the monsoon season.

33. Dr Halari suggested that if K continued to live a life without significant support she would be at risk of further mental and physical deterioration. Her depressive symptomatology was likely to fluctuate depending on where she was staying. She was much happier and in a better mental state when she was in the company of her sister but she continues to worry about what her life would be like if she remained in India alone and these thoughts and emotions seem to be maintaining her levels of depression, anxiety and poor physical health.

34. At paragraph 62 Dr Halari wrote

“In my professional opinion and based on my clinical experience K would not be able to carry out day-to-day tasks for example if she was in a care home or if she had in a live-in carer she would not be in any way physically, mentally or cognitively well enough to be able to care for herself or to perform everyday tasks. K is a vulnerable lady who would require the practical and emotional support from her sister whom she heavily relies on. More importantly her positive mental state and her stable physical health is dependent on her being around her family. K does not have any other family support in India”.

35. At paragraph 67 Dr Halari said that K was extremely scared of strangers, not trusting them or feeling comfortable with the idea of a care home. She was likely to experience significant anxiety, confusion and panic.

36. At paragraph 69 she said

“In my clinical opinion K is an extremely vulnerable individual who is not only dependent on her family emotionally but also physically, cognitively and practically. Her sister makes the relevant decisions for her in relation to her health and wellbeing. She would significantly deteriorate in her mental and physical health if she were to live alone or even with a live-in carer or in a home. Her happiness and wellbeing is strongly attached to the time she spends with her family who reside in the UK. She is likely to struggle to trust strangers and this will cause her to become isolated socially and emotionally”.

37. And finally at paragraph 71

“If K were to remain in India it is highly likely to place her at risk of further mental cognitive and physical deterioration if she had to live on her own without her family. This for her will signify further loss,

loneliness and an inability to cope on her own. Her poor physical and mental health difficulties mean that she requires constant supervision and emotional as well as practical support and an absence of this can place K at risk of significant physical and emotional harm”.

38. I was referred to the case of R (Britcits v SSHD) [2017] EWCA Civ 368 which concerned the issue of whether the adult dependant Rule was ultra vires as being a rule which was impossible to satisfy. The Court of Appeal found that it was not ultra vires.

39. At paragraph 59 Sir Terence Etherton MR said

“Second as is apparent from the Rules and the guidance the focus is on whether the care required by the ADR applicant can be reasonably provided and to the required level in their home country. As Mr Sheldon confirmed in his oral submissions the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is of course to be objectively assessed”.

40. And at paragraph 76 he said

“In particular rejection on the basis of the availability of adequate care in the ADR’s home country turns upon whether the care which is available is reasonable for the ADR to receive and of the level required for that applicant. Contrary to the submissions of the claimant those considerations are capable with appropriate evidence of embracing the psychological and emotional needs of elderly parents”.

41. Although the sponsor has been in the UK for almost 30 years the appellant was cared for by her mother until April 2017 when she died and it was only following her death that the present application was made. It is now accepted by the respondent that the appellant has very significant disabilities and meets the requirements of the Rule E/ECDR2.4, namely that she requires long-term personal care to perform everyday tasks.

42. The respondent argues that she could go to a care home in Mumbai.

43. However I conclude that in this particular case that would not amount to a required level of care for Ms K. She has always lived in her village, being cared for by her parents. Her physical needs are very high. Whilst it is possible to conclude that her physical needs could be met by staff in a care home, her emotional and psychological needs could not. The sponsor is her only relative. It is quite clear from Dr Halari’s report that she is a very vulnerable woman whose closest relationship is with her sister in the UK. There is no basis upon which to challenge Dr Halari’s expertise.

44. The sponsor has significant contact with her sister on a daily basis and there is no reason whatsoever to doubt Dr Halari's conclusions that she provides the psychological and emotional support that the appellant needs and this could not reasonably be provided by placing her in an institution.
45. Mr Tufan submitted that there is no reason why the present situation could not continue. However the sponsor's evidence has not been challenged at any stage in these proceedings. She did not seek to embellish what she had said before which was that a lady in the village had been employed to provide her sister with practical support since her mother died, but this was not a long-term arrangement and the carer herself was becoming anxious about how long she would be expected to help the appellant. In any event she is not meeting the appellant's emotional and psychological needs.
46. The temporary care arrangements suffice for the practical day-to-day care but is not a substitute for emotional and family support which it can only come from her sister.
47. This application for entry clearance was prompted by the death of the appellant's mother. She has been looked after by a family member almost all her life. I conclude that her emotional and psychological needs cannot be met by anyone else other than the sponsor. The appellant is a particularly vulnerable individual with no family in India. If she did not meet the requirements of E/ECDR2.5 it is difficult to see who would.
48. Accordingly, to refuse her entry clearance as a significant interference with the family life which she enjoys with her sister and since the appellant meets the substantive requirements of the Rules, refusal of entry clearance is disproportionate. There are no other issues in this appeal. The sponsor and her husband are able to fully accommodate and provide for the appellant.

Decision

49. The original judge erred in law. Her decision has been set aside. It is remade as follows. The appellant's appeal is allowed.

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

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

Deborah Taylor

Signed

Date 24 July 2019

Deputy Upper Tribunal Judge Taylor