



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03417/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 11 August 2020

Decision & Reasons Promulgated
On 24 August 2020

Before

UPPER TRIBUNAL JUDGE PITT

Between

VIYALAMMAH VELUPPILLAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms U Miszkiel, Counsel instructed by SM Solicitors Ltd
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision issued on 23 October 2019 of First-tier Tribunal Judge M A Khan, refusing a human rights appeal against the refusal of entry clearance.
2. The error of law hearing was conducted via Skype with Mr Tufan appearing on video for the Secretary of State and Ms Miszkiel making her submissions by telephone via the Skype system. No difficulties were raised concerning the case being heard in this manner.
3. The appellant is a citizen of Sri Lanka born on 6 July 1945.

4. The background is that the appellant made an application for entry clearance on 11 May 2018 to join her adult children in the UK. Her application was refused on 18 December 2018. The Entry Clearance Officer did not accept that the appellant had shown that she was related as claimed to the sponsors in the UK. Further, it was not accepted that she had care needs that could not be addressed in Sri Lanka. An Entry Clearance Officer Review upheld the decision on 25 April 2019.
5. The appeal came before First-tier Tribunal Judge M A Khan on 8 October 2019. Judge Khan accepted that the appellant was related as claimed to the main sponsor and his brothers in the UK. The judge did not accept that the appellant was in need of long term personal care or that this care was unavailable to her in Sri Lanka. Paragraphs E-ECDR.2.4 and 2.5 of the Immigration Rules were not found to be met, therefore.
6. In the proceedings before the First-tier Tribunal, the main sponsor, the appellant's son, gave oral evidence, as did his wife and another brother. In addition to their oral evidence and witness statements the appellant relied on medical evidence setting out her difficulties. This material was provided in a bundle comprising 209 pages.
7. A letter dated 30 April 2018 at page 206 of the bundle stated that the Base Hospital Medical Superintendent had formed the opinion that the appellant was suffering from hypertension, arthritis and dementia. She was seen regularly for dementia and hypertension and her physical and mental condition was gradually deteriorating. She had difficulty visiting the clinic and taking medicine regularly. She was living alone with the help of a caretaker but "due to the dementia she does not trust caretaker and neglect medications and clinic appointment".
8. A letter dated 10 April 2018 on page 207 of the bundle set out that the view of the Divisional Secretary of the Local Area Secretariat was that there were no care homes in the area in which the appellant lives.
9. A letter on page 55 of the bundle dated 17 September 2019 from the Mental Health Unit of the Local District General Hospital stated that the appellant was being cared for by the team and was suffering from a depressive illness and dementia. She was stated to be "disturbed and unclear" and the condition was stated to be "deteriorating". The letter also confirmed that she lived alone with the help of a carer.
10. The appellant also relied on a letter at page 209 of the bundle dated 30 April 2018 from the appellant's carer, Ms Thankamma. This letter stated that although she had been caring for the appellant this situation was not sustainable as the appellant did "not really trust me because of her illness" and was "not eating properly and not taking medication, so she is getting worst (sic) health condition". The carer also indicated that she had caring responsibilities for her own mother and could no longer care for the appellant.
11. On page 70 to 71 of the bundle there was a further letter from the carer dated 15 September 2019. This letter stated that the sponsor's mother-in-law could no longer assist the appellant due to her own frailty and the injury to her hand. The letter also

set out that there had been visits from the authorities enquiring about the sponsor and his brothers who had been recognised as refugees from Sri Lanka. The carer indicated that this frightened her and made her even more reluctant to assist the appellant. The carer confirmed that she was in great difficulty offering care any longer for the appellant who was becoming more unwell and that she could not continue to assist her. The letter confirmed in the final sentence on page 71 that it had “been read back to me in Tamil” and fully understood by Ms Thankamma.

12. The appellant also relied on a letter dated 15 September 2019 from Mrs Nadarasa, the sponsor’s mother-in-law. This letter confirmed that Mrs Nadarasa’s daughter was married to the sponsor and that the sponsor’s mother, the appellant, had health problems. The letter refers to her being unable to care for herself, having a carer during the day and to Mrs Nadarasa sometime staying with her at night. Mrs Nadarasa states that could no longer assist the appellant due to her own age and frailty, in addition to an accident in which she had seriously injured her hand. The same letter also indicated that the appellant did not trust the carer and therefore refused to take medication from her, being more willing to accept medication from the sponsor when he visited. The letter indicated that it had been read to Mrs Nadarasa in Tamil.
13. This summary of this evidence shows it was the appellant’s case before the First-tier Tribunal that she had long term care needs which could not be addressed in Sri Lanka as her current carer could no longer assist for a number of reasons and that there were no care homes in the area. There was the additional issue of one aspect of her dementia preventing her from trusting others easily, leading to her refusing medication which she needed when offered it even by her long-term carer.
14. The First-tier Tribunal did not find that the letters from Ms Thankamma and Mrs Nadarasa were reliable. On the contrary, the judge found that they were a “fabrication”. In paragraphs 20 to 31 of the decision of the First-tier Tribunal the judge sets out his summary of the cross-examination that took place concerning these letters. Paragraph 23 reads as follows (verbatim):

“It was put to the sponsor that the letter from the carer dated 15/09/2019, from the language used in it, does not appear to have been written in Sri Lanka? The sponsor said that the caretaker got hold of someone to write the letter in English. It was again put to the sponsor that the language used in the letter indicates that it was written in the UK and not in Sri Lanka? The sponsor stated that he received the letter in an envelope from Sri Lanka. It was put to the sponsor that the letter at page 68 by his mother-in-law is again written by someone in the UK and signed by his mother-in-law? He said that is not correct, these letters drafted in Sri Lanka and he received them from there. He said that when he went to Sri Lanka, the carer asked him to release her from the caring duties for his mother but he asked her to put it in writing, which she did. The carer knew about his mother’s application for entry clearance to the UK. He said that he returned to the UK on 15/09/2019 and the same carer is still looking after his mother, on humanitarian basis”.
15. The judge went on as follows in paragraph 25:

"I put it to the sponsor that it was ironic that he left Sri Lanka on 15/09/2019 and the two letters, one by his mother-in-law and the other by the carer are also dated 15/09/2019 and yet both letters were sent by post to him? He said that he left Sri Lanka on 15/09/2019 (vague and evasive). I put to the sponsor that he had these two letters drafted in the UK, took them to Sri Lanka and got them signed by his mother-in-law and the carer, what did he have to say about it? He said that he himself would not be able to write such letters. I repeated the question, and the sponsor said that these were genuine letters and so are all other documents".

16. In paragraph 28 of the decision the judge records the evidence of the sponsor's wife. The second half of this paragraph states as follows:

"It was put to the witness that just few weeks before the appeal hearing, both her mother and the carer decide to write their letters, why? She said that she did not know about it, her husband was in Sri Lanka at the time. She said that her husband was looking for an alternative carer; he may have asked her mother and the carer to write these letters".

17. The judge's conclusions on this evidence was as follows in paragraphs 36 to 41 (again verbatim):

"36. The appellant's sponsor was in attendance at the hearing, he adopted his written witness statement and the bundle of documents and gave oral evidence. He was cross-examined. I found the sponsor as someone who would say anything and make up evidence in support of his mother's appeal. The two letters at pages 68, by his mother-in-law and page 70 signed at 71 from the carer. I find that these two letters have been manufactured, few weeks prior to this hearing and are purely self-serving.

37. I find that all the witnesses, including the sponsor over exaggerated the appellant's conditions and ailments. The Mental Health Unit is again putting emphasis on the appellant joining her family for social support but does not mention the appellant's current arrangements. She has a carer who is with her from 6.30 a.m. until 9.00 p.m. There is no mention by anyone as to why a permanent in-house carer could not be employed for the appellant in Sri Lanka.

38. I have had sight of the two personal health record books, one starts from 14/12/2016, where the record shows that the appellant is suffering from lack of sleep and poor appetite. These issues are repeated many times over and these records do not give the medical situation as described by the witnesses in their evidence before me.

39. I do not find it credible or consistent that the sponsor travels to Sri Lanka on 06/09/2019, returning on 15/09/2019. He make little or no attempt to recruit a replacement care taker for his mother, there little or no evidence of his attempts, this is despite the current carer telling him that she no longer act his mother's carer. He leaves Sri Lanka on 15/09/2019 and on the same day his mother in law and the carer draft in precise English language letters to say that the appellant should join her family in the UK as she can no longer be cared for by them, by the mother-in-law because she injured her hand in a grinder 11 moths earlier and the carer who is afraid to travel in and out of the are where the appellant lives. I find

that this whole evidence has been fabricated few weeks prior to the hearing; this is in order to assist the appellant with her appeal.

40. In light of the fabrication, I put little weight on the rest of the documentary evidence before the Tribunal. I find that the sponsor in this case has set about making up evidence in support of the appellant's case.
 41. The reality is the appellant who is now 75 years of age made an application to join her family in the United Kingdom. In Sri Lanka she lives in her own accommodation, cared for by a carer since about 2017 from 6.00 a.m. until about 9.00 p.m. in the evening. She spends the night on her own and there is no suggestion that she has any problems during the night or anyone is called out to assist her in any way. As to the appellant's movements around the house, the evidence of the two brothers was inconsistent; the sponsor said that his mother could not move at all on her own and the second brother said that she could move about by herself.
 42. I do however; accept on the evidence before me that the appellant and the sponsor are related as claimed. I do not however accept that the appellant is in need of long term personal care to preform daily tasks as claimed".
18. The appellant brings her first ground of challenge against the manner in which the judge questioned the sponsor and his wife about the letters from Sri Lanka from the carer and Mrs Nadarasa and the conclusions he reached having questioned them about that evidence.
 19. It is the appellant's case that it was the judge who "put" the propositions to the sponsor and his wife concerning the dates and contents of the letters from Sri Lanka during cross-examination and that, in doing so, he descended into the arena and showed bias. He did not ask open questions about the letters but repeatedly put his own highly adverse view of these documents to the witnesses, not a view that had been expressed by the respondent either in the refusal letter, ECO Review or at the hearing.
 20. With the grounds of appeal the appellant provided a witness statement dated 18 November 2019 from the instructing solicitor, Ms Tham, who had attended the hearing. In that witness statement she maintains that the matters "put" to the witnesses set out in paragraphs 23 and 25 of the determination were all raised by the judge. In paragraph 10 of her witness statement Ms Tham maintains:

"I recall that our Counsel objected to the FtTJ's questions in cross-examination and after cross-examination when he had put the further matters to the Sponsor as set out at paragraph 25. Our Counsel submitted that the FtTJ had descended into the arena and that there was an appearance of bias. Our Counsel asked for the FtTJ to make a note of her objections in the Record of Proceedings. I do recall the FtTJ raised his voice to our Counsel and did not allow her to make an application to recuse himself, instead he shouted at her to start with the re-examination".
 21. I was also provided with a document provided by the Home Office Presenting Officer (HOPO) who appeared at the hearing. This document was prepared the day after the hearing and is a summary of the HOPO's view of the case. The note is silent

on the issue of the judge putting propositions to the sponsor and his wife and on the appellant's Counsel attempting to request that the judge should record her concern that he had descended into the arena and displayed bias.

22. I was also provided with a memorandum dated 6 July 2020 prepared by the Presiding Resident Judge at Field House which contained the comments of First-tier Tribunal Judge Khan on the allegations made in the grounds of appeal. He comments:
- “1. It is said that the appellant did not have a fair hearing because I descended into the arena and asked questions of the sponsor and other witnesses during cross-examination, I did ask the sponsor and two other witnesses questions on issues about which I had serious concerns. I gave all witnesses the opportunity to address the issues of my concern.
 2. All of the evidence during the proceedings was taken down contemporaneously, which is noted in the decision (paragraphs 18 to 33).
 3. I had serious concerns about written evidence (letters from Sri Lanka), I gave all witnesses to address these concerns, they failed to provide clear evidence as to the authors of these letters, hence my findings that the evidence had been manufactured for the benefit of the appellant and were self-serving”.
23. When considering this ground I have referred to the authorities on the question of judicial bias which are helpfully summarised in paragraphs 15 and 16 of the case of Sivapatham (Appearance of Bias) [2017] UKUT 00293 (IAC). I note from the case law that the hypothetical observer test here is not of a general civilian but someone with reasonable legal knowledge who would assess the whole of the hearing and decision and not just individual aspects. As the Tribunal indicated in Sivapatham “the hypothetical reasonable observer is endowed with greater and fuller attributes than his jurisprudential predecessor, the innocent bystander”. I also take full account of the guidance of the Court of Appeal, as referred to in Sivapatham, in particular the case of Singh v SSHD [2016] EWCA Civ 492. The Court of Appeal in Singh confirmed that the proceedings as a whole must be considered and also that it can be a positive and necessary aspect of litigation for a judge to put forward a preliminary view or express a presumption robustly in order to progress litigation and litigate material issues.
24. It is my conclusion that the material here show that the challenge of an appearance of bias is made out, that is, that the hypothetical reasonable observer with a reasonable knowledge of the case, having informed himself of what “bias” means in this context, would conclude that there was a real possibility here that the judge was biased.
25. The materials indicate that it was the judge who questioned the sponsor and his wife as set out in paragraphs 23, 25 and 28. In the memorandum dated 6 July 2020 the judge accepts he put those questions and he also recorded this in paragraph 25. The appellant's legal adviser states that he did so in her witness statement.
26. It is unarguably legitimate for a judge to put concerns he has about the evidence to the parties. It is legitimate for a judge to do so robustly. However, the manner in

which the highly adverse propositions that were put to the sponsor (repeatedly) and to his wife are capable, in my view, of suggesting that the judge had already made up his mind about the letters having been fabricated. This was not, as considered in Sivapatham [2017] UKUT 293 (IAC), the expression of a provisional view on the part of the judge. The judge's concerns were not put by way of a proposition on which the witnesses were asked to explain or comment on. The proposition, essentially that the letters were fabricated by the sponsor, was "put" to him by way of leading questions. The repeated questioning on the point after the sponsor had given his explanation adds to the likelihood of a fair-minded and informed observer concluding that the judge had taken against the witness as someone who had fabricated evidence and that nothing the sponsor said could alter this. Further, the judge's intervention occurred during cross-examination by the HOPO, not at the beginning of the hearing so the witnesses could deal with it in chief and not after all of their evidence had been heard and the judge remaining with unaddressed concerns. Further, the proposition that the letters were fabrications prepared by the sponsor before he went to Sri Lanka was a very serious one, well beyond the respondent's case that they attracted little weight. The fact that there is no reference in the decision or memorandum to the exchange between the judge and the appellant's representative in which she requested that he record her concerns about an appearance of bias serves to compound, and not to reduce, the concern which necessarily results.

27. In addition, there was other evidence from a number of other sources in Sri Lanka, as summarised above, stating that the appellant was in poor and deteriorating health, needed care, did not trust her carer and so refused to accept medication from her or attend medical appointments with her. In paragraph 40 of the decision, the First-tier Tribunal relying only on the conclusion that the letters from the carer and the mother-in-law in Sri Lanka were deliberately fabricated, conducted no further assessment of the other evidence from Sri Lanka, stating only that "I put little weight on the rest of the documentary evidence before the Tribunal". The fixed and adverse view on the letters from the carer and Mrs Nadarasa being fabricated is shown to have coloured the judge's approach to other evidence, was not limited to those parts of the evidence, therefore, adding to my view that a fair-minded and informed observer of the proceedings as a whole would consider that there was an appearance of bias.
28. For these reasons I find that the decision of the First-tier Tribunal discloses a procedural error such that it must be set aside to be re-made. Following the Senior President's Practice Direction this is a case which calls for the decision to be re-made *de novo* as a result of the procedural error and it is therefore remitted to the First-tier Tribunal to be re-made.

Notice of Decision

The decision of the First-tier Tribunal discloses error of law and is set aside and is remitted to the First-tier Tribunal to be re-made.

Signed: *S Pitt*



Date: 18 August 2020

Upper Tribunal Judge Pitt