IAC-AH-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/24432/2018**
HU/24433/2018

THE IMMIGRATION ACTS

Heard at Field House (Remote) **Decision & Reasons Promulgated**
On: 11 May 2021 **On 28 May 2021**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

CML
MW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr L Youssefian, counsel instructed by House of Immigration Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal against the decisions of an Entry Clearance Officer dated 20 November 2018 to refuse the appellants entry to the United Kingdom on human rights grounds.

Anonymity

2. An anonymity direction is made owing to the appellants' both being particularly vulnerable.

Background

3. The appellants, who are father and son, applied for entry clearance to the United Kingdom on 9 September 2018 in order to settle with the sponsor, MA, who is the son of the first appellant and brother of the second. They made their applications under paragraph E-EC-DR.1.1 of Appendix FM. The first appellant, who was aged 82 at the time of the application, referred to his medical conditions which were hypertensive heart disease, peripheral neuropathy and osteoarthritis. The second appellant, who was aged 37 at the time of the application, raised his conditions of cerebral palsy and epilepsy

4. In refusing the first appellant's application, the respondent did not accept that he required long term personal care to perform everyday tasks owing to an absence of evidence both of his medical conditions or his inability to undertake various aspects of self-care. The ECO did not accept that there were any exceptional circumstances or compassionate factors that warranted a grant of entry outside the Rules.

5. In relation to the second appellant's application, the respondent acknowledged that medical records had been provided which stated that the appellant had mental and physical disabilities and that he required full-time care and assistance with activities of daily living. The application was refused because the second appellant had a full-time paid carer, (Z) and the appellant's siblings had declared that they were able to help him financially. Consequently, the ECO was not satisfied that he was unable to obtain the required level of care in his country of origin. Again, it was decided that there were no exceptional circumstances or compassionate factors.

6. An entry clearance manager (ECM) reviewed the decisions on 15 February 2019. It was noted that no further evidence had been provided in relation to either appellant. Consequently, the original decisions were maintained.

The decision of the First-tier Tribunal

7. The appeals were heard on 17 September 2019 by First-tier Tribunal Judge French and dismissed.

8. That decision was set aside in its entirety by Upper Tribunal Judge Kekic in a decision promulgated on 9 July 2020. Directions were made for the resumed hearing of the appeal to be held remotely, subject to representations from the parties.

Procedural matters

9. On 14 October 2020, directions were issued from Upper Tribunal Judge C N Lane which stated that the resumed hearing would be held remotely on the first available date.

10. The above-mentioned directions stated that any application to adduce new evidence was to be made to the judge presiding at the resumed hearing, that if fresh skeleton arguments were to be relied on these should be filed and served no later than 5 days prior to the resumed hearing and that no later than 7 days prior to the hearing, the appellant should serve an agreed consolidated paginated bundle of documents.

11. A transfer order was made on 13 April 2021 to enable any Judge of the Upper Tribunal to complete the hearing. This matter was listed for a hearing on 11 May 2021.

The hearing

12. I heard oral evidence from three of the appellants' relatives. Each was a son of the first appellant and elder brother of the second appellant. Witness MS gave evidence remotely from Pakistan in English and witnesses MA and AR gave their evidence remotely from the United Kingdom, via an Urdu interpreter. Mr Tufan had no objection to the evidence of MS being given from Pakistan. Thereafter I heard succinct submissions from both representatives. A note of the evidence and submissions made is set out in my note of the hearing which has been taken into consideration along with the documentary evidence before me.

13. At the end of the hearing, I reserved my decision.

Decision on error of law

14. While this is a human rights' appeal it was common ground that if the appellants were able to meet the requirements of the Immigration Rules for entry as Adult Dependent Relatives they would succeed on this basis. The sole matter at issue was whether the appellants could satisfy the following requirement of the Rules:

> *E-ECDR.2.5. 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*

15. Guidance on the correct approach to the Adult Dependent Relative Rules was also given by Sales LJ in *Britcits* [2017] EWCA Civ 368 at [59]:

> *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 the 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.*

16. It suffices to state that Mr Tufan argued that E-ECDR.2.5 (a) was not met and Mr Youssefian argued that it was. Mr Tufan relied on his colleague's skeleton argument, arguing that there was care available in Pakistan and the objection of the sponsors was to the standard of care available. There was no reasoned criticism by Mr Tufan of the reliability of the medical evidence adduced nor the credibility of the accounts given by the witnesses.

17. I found the witnesses to be truthful. Indeed, I hear no submission to the contrary. MS, in particular, provided an account rich in detail and consistency as to the arrangements made for the appellants' care and the difficulties in caring for the second appellant in particular.

18. The present position of the appellants is as follows. The first appellant continues to suffer from the same medical conditions as previously, is now aged 85 and is unable to undertake day to day tasks which include bathing, dressing, and feeding himself. He is also a wheelchair user and unable to provide care for the second appellant. Evidence is available for these propositions in the report of Dr Shafique dated 5 May 2019.

19. The second appellant remains profoundly disabled, uses a wheelchair and it is accepted by the respondent that he requires full-time care. Indeed, the detailed medical report of Dr Bajwa sets out the extent of the second appellant's physical and mental disabilities and care needs. Also mentioned is the negative effect upon the second appellant's mental state caused by the death of his mother in 2016. The said report explains that the second appellant has limited communication and was only able to converse with his immediate family and former carer, Z, who had been with the family for 15 years at the time of the application. The evidence before me was that Z left the employ of the family in early 2020 owing to

the role being too demanding. The witness MS explained that owing to his mental disability, the second appellant asks the same questions repetitively and becomes agitated if not responded to. He also said that prior to the death of the second appellant's mother she would spend time with the second appellant and had the patience to respond to his repeated queries and calm him down. Dr Bajwa also confirms in his report that the second appellant becomes frustrated and angry when his siblings have to return to the UK and that he requires medication to manage his mental state. MS also referred to the second appellant's agitation when his needs are not met by his carers. The evidence before me was that the carers who had been engaged since Z left did not stay for long because they quickly become "fed up" with the job. There are particular issues with the carers not being able to communicate with the second appellant which adds to his frustration.

20. Owing to the inability to obtain carers, the appellants' relatives have been taking it in turns to care for them. After Z left, MA went to Pakistan from February 2020 and remained there until August 2020 in order to provide care for the appellants. He was joined by two of his sisters for part of that time. Thereafter, MA returned to Pakistan from November to December and from January 2021 until April 2021 to care for the appellants. MS travelled to Pakistan on 7 May 2021. I heard that the first appellant's nephew had been pressed to care for the appellants between August and November 2020 but that he had only been able to do so because his university had been closed owing to the pandemic.

21. I am satisfied that the appellants are unable to obtain the required level of care in Pakistan because it is unavailable. That the family in the UK have engaged three carers since Z's departure and have had to care for the appellants themselves for the majority of 2020 and 2021 demonstrates that adequate care is not available.

22. All the evidence before me points to the second appellant, in particular, requiring particular care due to his cerebral palsy and mental health issues. Consistent with Dr Bajwa's report, the psychological report of Dr Shea of 23 August 2019 states that the second appellant "*needs full time care for his daily personal needs as he is unable to do anything for himself. Mr Waqas has limited communication due to his mental and physical disability and he is only able to communicate with his immediate family*" I do not accept the respondent's argument that the care is simply not to the family's standards. The second appellant's limited communication skills means that those unfamiliar with him are unable to understand him which leads to him becoming agitated to the point he requires medicating. Any care provided by an employee who is unable to understand the second appellant cannot reasonably be considered adequate or available.

23. The appellants' relatives in the UK all have families of their own, businesses, jobs and homes. That they have felt obliged to abandon their lives in the UK for protracted periods of time strongly supports the

evidence that adequate care for the appellants is not available in Pakistan. The coronavirus pandemic poses further obstacles to the practicality of the appellants receiving the required care. Dr Shafique's letter of 20 August 2020 explains that due to the coronavirus pandemic and the first appellant's vulnerabilities it has been difficult for even doctors and nurses to visit their house.

24. In view of the foregoing, I am satisfied that both appellants require long-term personal care to perform daily tasks and the required care is not available. While the second appellant's needs are more complex than those of the first appellant, it is clearly vital that they remain together given the second appellant's vulnerability. Indeed, the mental state of the second appellant deteriorated since the death of his mother. Mr Tufan accepted that there was family life between the appellants and their relatives in the UK. It follows that their appeals can be allowed under Article 8 because they satisfy the requirements of the Rules.

25. In the alternative, even if the Rules were not met, this is a case where the appellants have established that they have a family life with their close relatives in this country and that those relatives would be adversely affected by the decision to exclude them, applying *Beoku-Betts* [2008] UKHL 39. The support network that is available to the appellants in the UK cannot be replicated in Pakistan. It is relevant that in Pakistan, it is a cultural expectation that the eldest son care for elderly parents. It is not a sustainable solution for the first appellant's sons to abandon their lives in the UK for months at a time to care for the appellants. There is no issue as to the ability of the family to adequately accommodate and maintain the appellant. Indeed, two of the first appellants sons have extended their properties to make them appropriate for the appellants owing to their disabilities. I have had regard to the section 117B issues but these do not tip the balance towards the respondent. I conclude that appellants exclusion from the UK in these circumstances would be unjustifiably harsh and unreasonable and would amount to a disproportionate interference with their Article 8 rights.

Notice of Decision

The appeal is allowed on human rights grounds.

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.

Signed: Date: 14 May 2021

Upper Tribunal Judge Kamara

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 circumstances at the time of the hearing before the Upper Tribunal were not those in place at the time of the decisions of the Entry Clearance Officer.

Signed: Date: 14 May 2021

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email