Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05428/2014

THE IMMIGRATION ACTS

Heard at Field House, Newport	**Decision and Reasons Promulgated**
On 22 July 2015	**On 18 August 2015**

Before

UPPER TRIBUNAL JUDGE MCWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LAYLA KHANAM
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr Kalam, Kalam Solicitors
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-Tier Tribunal. We find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. The Respondent in this appeal was the Appellant before the First tier Tribunal and for ease of reference we refer to her as the Appellant in this determination. She is a citizen of Bangladesh and was born on 7 May 1940. She appealed against the Respondent's decision dated 18 March 2014 refusing her entry clearance as a dependent relative. Her appeal was allowed by First-tier Tribunal Judge I Ross in a decision promulgated on 27 February 2015 ("the Decision"). The matter comes before the Upper Tribunal to determine whether the Decision involved the making of an error of law.

2. Permission to appeal was granted by First-tier Judge Garrett on the ground that it was arguable that it was not accepted by the Respondent that the Appellant required long term care as the Respondent indicated both in the decision and the ECM's review that it was in issue.

3. Mr Kalam said that he appeared in the hearing before the First-tier Tribunal and there was a concession by the Respondent that the requirements of paragraph E-ECDR.2.4 were met and that the Appellant required long-term personal care to perform everyday tasks. Mr Clarke said that he had no note of the concession but cross-examination focussed on paragraph E-ECDR.2.5 although this was not determinative.

4. Mr Clarke submitted that First-tier Judge Ross was not entitled to make a finding that the Appellant required long-term care. The doctor's letter post-dated the decision and was dated 13 January 2015 and consequently should not have been taken into account. He also relied on the requirements of paragraph 33 of Appendix FM-SE which required medical evidence from a doctor or health professional to show that an adult dependent relative met the substantive requirements of the Rules. The medical evidence did not address 'personal care'. With regard to paragraph E-ECDR.2.5, medical evidence had not been provided to show that the Appellant was unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in Bangladesh. Such evidence was required by paragraph 35 of FM-SE.

5. Mr Kalam submitted that permission to appeal was limited to Judge Ross's findings in respect of paragraph E-ECDR 2.4. Mr Clark replied that the grounds were not limited and there was silence on whether the other grounds were arguable. In any event it was a 'Robinson' obvious point.

6. Mr Kalam submitted that the medical letters did not post-date the decision. There had been medical letters submitted with the application and they were before the Entry Clearance Officer ("ECO"). They were dated 7 December 2013 and 26 June 2013. They satisfied the requirements as to specified evidence as they were from a doctor. In any event, the sponsor had been found credible in relation to his evidence as to the Appellant's inability to care for herself and Judge

Ross had accepted that it was difficult to secure care. It was open to the Judge to make his findings in respect of paragraph E-ECDR 2.5 and there was no error of law.

7. Mr Clarke submitted that it was a matter for us to determine whether the medical evidence was sufficient to meet the criteria of paragraph E-ECDR 2.4. It was said in the medical letter that she required an attendant but it was questionable that this was enough to show that she could not perform everyday tasks. First-tier Judge Ross did not consider whether there was anyone in Bangladesh who could reasonably provide care and did not take the requirements of paragraph 35 of FM-SE into account.

8. The parties agreed that if we found that there was an error of law we could go on to re-make the decision on the basis of the evidence before the First-tier Tribunal.

Error of Law

9. We deal first with the whether the Respondent is limited in the grounds she can pursue. Permission was not refused on any of the grounds and we find that consequently the Respondent is not limited to the ground identified in paragraph 2 of the grant of permission. In Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304(IAC) the Tribunal held that in deciding an application for permission to appeal the UT a judge should consider carefully the utility of granting permission only on limited grounds. In practice, such a limited grant is unlikely to be as helpful as a general grant, which identifies the ground or grounds that are considered by the judge to have the strongest prospect of success. Where the judge intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal.

10. We consider that it is clear from the decision granting permission to appeal that First-tier Judge Garrett intended a general grant in this case and identified the ground considered to have to strongest prospect of success. However, all grounds may be argued.

11. It is the Respondent's case, as set out in her grounds, that First-tier Judge Ross failed to take into account or resolve a conflict of fact on a material matter in respect of whether the Appellant required long-term personal care. At paragraph 6 of the Decision the Judge stated 'Nor is it disputed that the appellant's medical conditions result in the requirement for long term personal care'. The Respondent argues in the grounds that this was a matter in issue between the parties as the ECO and Entry Clearance Manager ("ECM") both refused the application on

the basis that they were not satisfied that the Appellant required long-term personal care to perform everyday tasks. It is clear from a perusal of the refusal of entry clearance and the ECM Appeal Review that this was a matter in issue.

12. It is the Appellant's case, as became apparent at the hearing, that the Respondent had conceded that the medical evidence relied on by the Appellant was considered by the Respondent's representative to satisfy the requirements of E-ECDR paragraph 2.4. First-tier Judge Ross does not record a concession in his Decision but proceeds at paragraph 6 on the basis that it is not disputed that the Appellant's medical conditions result in the requirement for long-term personal care. We consider that the likelihood is that the Respondent did make such a concession. Mr Kalam appeared at the hearing before the First-tier Tribunal and recalled that the concession was made. Further, we consider that the fact that cross-examination proceeded on the basis of paragraph 2.5 only is a strong indication that paragraph 2.4 was not in issue at the hearing.

13. In any event, First-tier Judge Ross then went on to make a finding at paragraph 7 of the Decision that 'given the age of the appellant and her medical conditions as set out in the reports, that she does require long-term personal care to perform everyday tasks'. We accept, having seen the medical evidence that was before First-tier Judge Ross, that it pre-dated the Respondent's decision and hence he did not err in taking it into account. There were two letters before him from North East Medical College Hospital and Bangabandhu Sheikh Mujib Medical University dated 7 December 2013 and 26 June 2013 respectively. The first letter states that 'all the physicians including myself are in the same opinion that at present her physical condition do not permit to live alone. She always needs one attendant in her day to day life'. The second letter gives the same opinion. The author of the first letter is a professor of surgery and the second a professor of hepatology.

14. We do not consider that First-tier Judge Ross erred in law if failing to identify the reports in his determination. The medical evidence was before him from a doctor as required by paragraph 33 of Appendix FM-SE and he was entitled to take it into account.

15. In considering the requirements of the Rule, 'personal care' should to be distinguished from 'medical' or 'nursing' care and therefore is to be provided by another person. The care needs to be long-term rather than transitory and it has to be in order to perform 'everyday tasks'.

16. Whilst the medical evidence does not overtly address the nature of the care required, we consider that the word 'attendant' is sufficient to demonstrate that the nature of the care required is personal rather than medical. There is no suggestion that the care required has to be provided by a medically qualified individual. Further, we find that it is proper to infer from the words used by the medical evidence that she

requires the attendant 'in her day to day life' that the care is required to perform everyday tasks. In view of the fact that she was 73 years old at the date of the Respondent's decision and that she suffered inter alia from senile osteoarthritis, uncontrolled diabetes mellitus, diabetic neuropathy and hypertension we find that it was not an error of law to find that the care required as likely to be long-term.

17. We therefore consider that in the light of the opinions of the medical professionals it was open to First-tier Judge Ross to find that the Appellant required long term personal care to perform everyday tasks. We do not find therefore that there was an error of law in relation to the Judge's findings under paragraph E-ECDR 2.4.

18. However, we do find that there was a material error of law in relation the First-tier Judge Ross's findings regarding paragraph E-ECDR.2.5 of the Immigration Rules. The Rules require 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 (a) it is not available and there is no person in that country who can reasonable provide it; or (b) it is not affordable. By virtue of paragraph 35 of Appendix FM-SE such evidence must be from a central or local health authority; a local authority or a doctor or other heath professional.

19. First-tier Judge Ross's findings in relation to this aspect of the Rule were recorded at paragraph 8 of the determination. He stated 'I accept the sponsor's evidence that it has been difficult to secure reliable carers to look after the appellant, and I accept the appellant's daughter's sworn evidence that she is not in a position to provide the level of care needed.' He further finds at paragraph 9 'I find that the level of care required by the appellant can only be reasonably provided by her children in the UK, rather than a new maid who may or may not be able to look after the appellant'.

20. The evidence required by paragraph 35 of Appendix FM-SE was not before him in relation to the applicant's ability to obtain the level of care required in Bangladesh. There was no evidence from a health authority, local authority or doctor or health professional. We find that in concluding that it had been difficult for the sponsor to find reliable carers the Judge applied the wrong test. He was required to making a finding whether the applicant was unable, due to its unavailability, to obtain the required level of care by reference to prescribed evidence. He did not do so. We conclude that he made a material error of law. We set aside the decision pursuant to section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

Conclusions

21. There was no further evidence produced by either party in accordance with the directions of the Tribunal and we proceeded to remake the

decision on the basis of the evidence before the First-tier Tribunal pursuant to section 12 (2) (b) (ii) of the 2007 Act.

22. It is apparent that the evidence required by paragraph 35 of Appendix FM-SE was not before the First-tier Tribunal in relation to the requirements of paragraph E-ECDR 2.5 and it is not before us.

23. The evidence in relation to the availability of care before the First-tier Tribunal consisted of a witness statement from the sponsor, Abu Bashir Mohammed Farhad, a letter from three of the Appellant's children in the UK and an affidavit from Shakira Ahmed, the Appellant's daughter who remains living in Bangladesh. According to the sponsor, the maid who currently looks after his mother is ill and elderly herself. The sponsor states that his sister, Shakira Ahmed who lives in Bangladesh is unable to provide any care as she is married with two children and has a husband who suffers from medical problems. The sponsor further states that it is extremely difficult to find reliable maids in Bangladesh to look after his mother and unfortunately, dedicated specialist health carers are not available in Bangladesh. He adds that even if they managed to find someone to care for their mother her safety and well-being would be put in jeopardy as there is no vetting process in place in Bangladesh with people in general being unreliable. He states that hospitals are unwilling to provide nurses at home.

24. The letter from the appellant's children asserts that it is difficult to find reliable carers and that specialist ones are not available. The affidavit from the appellant's daughter in Bangladesh states that her husband has heart disease and she has two children. She asserts that it is impossible for her to look after both her husband and her mother.

25. The Appellant's unsupported evidence does not establish that the level of care required is not available in Bangladesh. It establishes that it may be difficult to find reliable carers. There is no evidence to support the assertions made by the sponsor that if they were to find someone, the appellant's health would be put at risk. It may not be reasonable to expect the Appellant's daughter to provide care, but the Appellant has not established that the level of care from third parties (a carer, private nurse or a nursing home) would not be available. Further, the Appellant has had a maid in the past who has now herself become old and we consider that it is reasonable to conclude that another maid could be similarly employed. In terms of affordability, the Appellant is supported by her son's in the UK and the evidence does not establish that care is not affordable.

26. The requirement of reasonableness in our view concerns whether it is reasonable to expect a particular person to care for the Appellant for example because that person lives far away and has a family of his or her own to look after. Reasonableness does not refer to the general availability of care for example from a nurse or carer and whether is it reasonable to expect the Appellant to be cared for by a particular

person (rather than her carer of choice). It is obvious that the Appellant would prefer to be cared for by members of her family, but this is not a consideration under the rules. The Appellant has not demonstrated that the requirements of paragraph E-ECDR.2.5 are met and her appeal must be dismissed.

27. The Appellant asserted in her grounds of appeal before the First-tier Tribunal that the refusal of entry clearance is a breach of Article 8 ECHR. According to the grounds, all her children are British Citizens and settled in the UK. It is said in the grounds of appeal that she is living alone in her country and her daughter is unable to look after her. It is asserted that the Respondent's decision is disproportionate.

28. It does not appear to have been in dispute that the Appellant is dependent on the sponsor. However, the sponsor and Appellant did not live together and at the date of the Respondent's decision and there is no evidence to show that they did so in the recent past. Whilst the Appellant may, as the sponsor asserts in his witness statement, have visited the sponsor and her other children in the UK, we consider that the Appellant has not established on the evidence before us that more than the normal emotional ties between herself and her UK based children exist. We find that family life did not exist within the meaning of Article 8 ECHR at the date of the Respondent's decision.

Decision

29. The Respondent's appeal is allowed. The decision of the First-tier Tribunal allowing the appeal involved the making of a material error of law. We set aside the decision and remake it. We dismiss the appellant's appeal under the Immigration Rules and Article 8.

Signed

L Murray
Deputy Judge of the Upper Tribunal Dated 14 August 2015