IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/05619/2014
OA/05620/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 July 2015	**On 20 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR HARI KRISHNA RANJIT
MRS TEJ KUMARI RANJIT
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Z Malik, Counsel, instructed by Malik Law Chambers

DECISION AND REASONS

The Appellants

1. The application for permission to appeal was made by the Secretary of State on behalf of the Entry Clearance Officer but nonetheless I shall refer to the parties as

they were described before the First Tier Tribunal, that is Mr and Mrs Ranjit as the appellants and the Entry Clearance Officer as the respondent.

2. The appellants are citizens of Nepal born on 3 March 1945 and 2 April 1954. They appealed against the decisions of the Entry Clearance Officer dated 24 March 2014 which refused them entry clearance to the United Kingdom as the adult dependent relatives of their son Mr Charanjibi Ranjit and his wife, and their son Mr Suraj Kumar Ranjit and his wife, who lived in the United Kingdom, with reference to paragraphs EC-DR.1.1 of Appendix FM of the Immigration Rules HC 395.

3. The Entry Clearance Officer in his refusal stated :

> "You and your wife (NED/3526472) have applied to join your sons in the United Kingdom. I note that you stated that you live in a property that is owned by you. You said that you are supported financially by your sons and daughter in law in the United Kingdom. I am aware that you have been visiting the United Kingdom as a visitor on regular basils since 2009 staying between five and six months on each visits. You have also stated that your children visit you and your wife in Nepal on a frequent basis.
>
> You have stated that you are hypertensive and hyperuricemic, have osteoarthritis and suffer with depression. You said that you are not able to care for yourself on a daily basis due to age and due to the above medical conditions. You add that your care is currently provided by your wife. You said that you wife has her own health issues and cannot continue to look after you. You claim that whilst you can obtain medical help from a doctor in Nepal you require day to day mental and emotional support from your family members. You add that the care you require is not affordable in Nepal yet you have stated that your UK sponsors can continue to pay for your arrangements in Nepal.
>
> In making my decision I note your recent travel to the United Kingdom. I am aware that domestic help is readily available in Nepal and at a relatively low cost when compared to similar provisions the United Kingdom. I am also aware that your medical conditions are being cared for by in Nepal by medical professionals as an outpatient. You have confirmed in Annex 1 that your UK sponsor or another close relative can pay for your care arrangements in Nepal. I am satisfied that the financial support that you currently receive from your sponsor will continue and that any care if required could be provided through financial help from them. You and your wife are continuing to support and care for one another given each other's declaration within Appendix 1 and are receiving medical treatment for your medical condition. I am therefore not satisfied that you are unable to obtain the required level of care in India.
>
> I therefore refuse your application under paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules (E-ECDR.2.5)."

4. Following an appeal hearing on 5 January 2015 Judge of the First-tier Tribunal Blake allowed the appeal both under the Immigration Rules and under Article 8.

5. The Secretary of State made an application for permission to appeal on the grounds that the judge although identifying that he was only entitled to consider circumstances appertaining at the time of decision and identified **DR (ECO – post-decision evidence) Morocco [2005] UKAIT 00038**, he nonetheless proceeded to incorporate evidence post-dating the decision which is 24 March 2014. Secondly, it

was submitted that the judge had made a perverse or irrational finding on a matter or matters material to the outcome.

6. On the one hand the judge noted that the appellants were still receiving personal care from the sponsor's friend in November 2014 [Paragraphs 73 and 74] and at [80] the judge recorded "*The sponsor stated that he had paid for helpers and he sent some £500 per month to the appellants and sometimes more"* but on the other hand the judge stated that he found the background evidence supplied by the appellants supported the claim that there were few care homes for the elderly available in Nepal". It was submitted that it was irrational for the judge to have subsequently find at [134] that

> "I found on the fact that they were unable, even with the practical and financial help of their sponsors, to obtain the required level of care in Nepal where they were living. I found this on the facts. I found that such care as they needed was not available where they were living and there were no known persons in Nepal who could reasonably be expected to provide it."

7. And again at paragraph 135 the judge reasoned *"I accepted the sponsor's evidence that such assistance as was available was not obtainable at any price*".

8. The judge appeared to exclude his earlier finding as to the carer at the date of decision or the few care homes referred to in the objective evidence.

9. The third ground was that the judge failed to give reasons or adequate reasons for findings on Article 8 of the ECHR. However it was submitted that the judge relied on the findings made in relation to the same facts upon which he found the appellant succeeded under the Immigration Rules and which were challenged.

10. It was submitted that the judge also erred at paragraph 146, in failing to provide adequate reasons as to why he considered the appellant's circumstances to be disproportionate to the public interest.

11. First-tier Tribunal Judge Davidge granted permission to appeal stating

> "The respondent applies to appeal on the basis that the judge has wrongly taken into account post-decision evidence in these out of country appeals.
>
> I find there is some merit in the grounds which set out in detail at paragraphs 5, 6 and 7 the post-decision evidence to the point that the judge's conclusions are arguably perverse/irrational."

12. At the hearing Mr Malik relied on **Sakhar [2014]EWCA Civ 195** particularly paragraph 16. In essence Mr Malik was submitting that an unqualified grant of permission was limited to the points identified in the points in the application. The reasons for granting made no real reference to the perversity challenge.

Conclusions

13. Although it is good practice in effect to identify each of the grounds which is granted, the grant of permission does make reference both to the post-decision evidence and to the judge's arguably perverse/irrational findings.

14. It is clear to me on a reading of the decision that the findings are enmeshed with references to post-decision evidence.

15. **DR (Morocco)** states at paragraph 27.

> "We take a different view when it comes to evidence about whether evidence of the coming to pass of an event which had been the subject of disputed predictability or likelihood is admissible. Evidence that it had not happened equally would be inadmissible. The usual issue is whether the particular matter or circumstance is likely at the date of decision; e.g. obtaining employment. The subsequent obtaining of the predicted job is a matter arising afterwards and evidence about it is excluded. It is akin to evidence being inadmissible to show that an intention has changed. The fact that the new matter or circumstance eg the job may have been predicted or reasonably foreseeable does not avoid it being a matter arising after the event, nor is it a circumstance appertaining at the time of decision."

16. The judge stated that he relied on the letters from Dr Lumeshwo Acharya, Dr Bhola Shrestha, Dr Robin Basnet and Dr Dambar Shah and that although he asserted that their reports "built on those placed before the ECO in March 2014 upon which the application was based", in essence the judge had taken into account new matters and further appeared to ignore his own findings in respect of the personal care for the appellants from the friend, which did in fact continue after the date of decision. It is clear that there were medical conditions relevant to the appellants as at the date of decision of the Entry Clearance Officer but the fact is that there were subsequent diagnoses and conclusions drawn from evidence which post-dated the decision by nine months.

17. It was stated that the deterioration post-decision was foreseeable in March 2014 but this directly contradicts what was stated in **DR (Morocco)**. As stated at paragraph 27 of **DR (Morocco)** the fact that a new matter or circumstance may have been predicted or reasonably foreseeable does not avoid it being a matter arising after the event, nor it is a circumstance appertaining at the time of the decision.

18. I accept Mr Malik's arguments that not all new evidence is inadmissible and that the judge is using the past tense at paragraph 134 but the fact is that his focus was on matters and diagnoses which had arisen afterwards and that his findings are based on the doctors' reports made after the decision. The report of Dr Acharya at page 194 was dated 4 December 2014 and the letter of Dr Bhola Shrestha at page 195 was dated 9 December 2014.

19. When comparing the reports with the medical evidence placed before the Entry Clearance Officer there is a marked difference in the evidence. The report from Dr Basnet before the Entry Clearance Officer referred to a lack of emotional and mental support for the first appellant from his family members and does refer to depression but the report of 4th December 2014 referred to Mr Ranjit having dementia and that 'in the last two months he has reported that he has reported increase in the problems'.

20. The sum of the medical evidence in relation to Mrs Ranjit before the ECO was that she had chronic mechanical back pain, was hypertensive and hyperuricemic and was taking medication prescribed by Bir Hospital. Care and support from the family was advised. She also received Chiropractic treatment. By the 9th December 2014 there was a statement from a Dr Shrestha to the effect that 'she needs to be assisted with her day to day work. Mrs Ranjit is strongly instructed not to perform hard house hold work as this will damage her spine. She requires long term personal care'. Apart from the difficulties with this report this ostensibly is very differing evidence from that given to the Entry Clearance Officer.

21. The threshold for perversity is always high but, putting that on one side, the difficulty with this decision is that the judge, although citing **DR (Morocco),** took into account evidence which post-dated the decision to support one of his concluding findings follows [134]:

> "I found on the facts that they were unable, even with the practical and financial help of their sponsors, to obtain the required level of care in Nepal where they were living. I found this on the facts. I found that such care as they needed was not available where they were living and there was no known person in Nepal who could reasonably be expected to provide it."

22. The judge also ignored evidence which was before him with regards the assistance of the friend until November 2014.

23. I therefore find an error of law and set aside those findings and conclusions which are relevant to post-decision evidence. I preserve the sections in relation to the recording of the evidence given and in particular paragraphs 73 and 74.

24. As Mr Malik stated, there was no challenge to the credibility of the first sponsor, Mr Chiranjibi. It was accepted that he and his brother were close to their ageing parents.

25. For the purposes of the Immigration Rules

> "E-ECDR1.1(d)
>
> The requirements to be met for entry clearance as an adult dependent relative are that -
>
> "(a) the applicant must be outside the UK;
>
> (b) the applicant must have made a valid application for entry clearance as an adult dependent relative;
>
> (c) the applicant must not fall for refusal under any of the grounds in Section S-EC: suitability for entry clearance; and
>
> (d) the applicant must meet all of the requirements of Section E-ECDR: eligibility for entry clearance as an adult dependent relative."
>
> E-ECDR 1.1

> To meet the eligibility requirements for entry clearance as an adult dependent relative all of the requirements in paragraphs E-ECDR 2.1 to 3.2 must be met.
>
> …
>
> E-ECDR 2.4
>
> The applicant or, if the applicant and their partner are the sponsor's partner or grandparents, the applicant's partner, must as a result of age illness or disability require long-term personal care to perform everyday tasks
>
> 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 were 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."

26. The appellants must show that they are in need of long term *personal* care which is not available in Nepal. The relevant date for my decision is 24th March 2014.

27. The evidence within the application forms showed that the appellants had returned to Sri Lanka in late 2013 immediately prior to the application for entry clearance on 26 February 2014. Clearly at this point the appellants were able to travel. Up to that point it would appear from the application form that they had travelled every year, that is from 2009 to 2013. There was no indication on the application form that they had travelled with escorts. The first appellant in his application form stated that he was hypertensive, hyperuricemic, had osteoarthritis and depression and that "due to that my health condition is deteriorating day by day". He confirmed that he was under regular medication due to the medical conditions and "these are less likely to be elimination but expecting not to deteriorated" (sic).

28. He added that "*Currently only my wife is looking after me. However she herself suffers from various health issues due to it is getting difficulty to get care day by day*". At paragraph 1.13 of Annex 1 attached to the VAF application he stated: "I can obtain medical help from doctor in Nepal. However I am lacking day-to-day and emotional and mental support from my family members instantly."

29. When asked at 1.16 whether his UK sponsor or another close relative could put in care arrangements in a country where he was living, he replied "yes" on the form and qualified it with "*However as there are no one to help us on daily work such as cleaning, washing, cooking. I required physical and mental support from sons and daughter in laws.*"

30. At this point there was no mention of dementia.

31. In relation to the wife, who was 54 years old she stated that she was hypertensive, hyperuricemic, a cardiac patient and also added that her condition was deteriorating day by day.

32. She added at 1.12 that her husband

> "Looks after me whenever required as he is already 69 years old and have other health issue. He cannot provide proper care I required in addition. Both my sons are settled in the UK with their family and have no other close relative in Nepal".

33. She also stated at paragraph 1.6 that her sponsors could pay for care arrangements in the country but as there was no one to help her and her husband on a daily basis with cleaning, washing, dressing up and that they needed physical and mental support from their sons and daughters-in-law. This to my mind places an emphasis on domestic tasks rather than personal care. At the date of the decision the first appellant was 69 years old and the second appellant 60 years old.

34. From the evidence taken at paragraph 68 it was clear that the first appellant's health had deteriorated over two years but I do not accept from the descriptions above that the medical conditions of either of the appellants at the date of decision were such that the appellants required long-term *personal* care to perform everyday tasks and therefore that they would 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 was not available and there was not persona in the country who could reasonably provide it , under E-ECDR 2.5.

35. At the date of the decision there was simply not the evidence to demonstrate that at the date of the decision even with the practical and financial help of the sponsor that either of the appellants were unable to obtain the required level of care in Nepal. I conclude this from the medical evidence supplied as to the degree of their medical conditions and the description of care needed, the appellant's own statements in their visa applications and the evidence of the sponsor regarding the help given.

36. The evidence that was taken at paragraphs 73 and 74 that there *was* a friend who had been able to give help and assistance to his parents until November 2014. At paragraph 74 he stated that he had been advised that this could no longer continue to help but this was well after the decision taken by the Entry Clearance Officer.

37. No mention of this was made in the application form and it is to the testament of the sponsor that he was candid in describing this help but it is clear that the appellants did receive both financial support and assistance from the friend in Nepal until at least November 2014, some nine months after the decision.

38. The appellants described their needs in their application forms and referred to the need for daily help with domestic tasks. Together with the assistance from the friend and the financial remittances from the family it cannot be the case that daily assistance could not be found for these needs.

39. The sponsors claim was that the particular care needed the oversight and emotional care of the family but I am not persuaded that this is made out. I turn to the medical evidence which was in existence at the date of decision and that is a letter from Dr Robin Basnet dated 16 February 2014 which states that the first appellant was undergoing regular treatment from the hospital in Nepal and he was taking medications for osteoarthritis of the knee and that he had had hernia surgery four years previously.

40. The doctor then stated

> "Being his doctor I have witnessed that Mr Hari Krishnar Ranjit lacks emotional and mental support from his family members especially because of physical absence of both his sons and daughters-in-law which has caused depression in him. I would like to emphasise that family care and support would help him improve his present medical conditions."

41. I accept there was reference to medical conditions and depression but the severity was not discussed and there was no mention in this letter that he required long term personal care. I note the witness statement from the first appellant dated 29th December 2014 gave a detailed account of his condition, trips to the United Kingdom and situation in Nepal which was rather at odds with his diagnosis of dementia. I accept however that this may have been drafted on his behalf.

42. Clearly until the date of decision the appellants were able to attend medical appointments and receive medical care.

43. Similarly the letter dated 3 March 2014 from Dr Dambar Shah in relation to the second appellant stated:

> "Being her doctor I have witnessed that Mrs Tej Kumari Ranjit is lacking family care and support in the absence of his both sons and daughter-in-law.
>
> I would like to emphasise that having family care and support would help her to improve her present medical condition."

44. It is clear that this was the medical evidence that was submitted to show the medical conditions of the appellants as at the date of the decision.

45. A letter from the friend Mr Shrestha dated 10 December 2014 identifies that he had responsibility of care for the appellants for two years. He stated: "Now the couple is alone without any help or a care taker except me. I am sorry that I will be unable to take care of them because I have to travel abroad frequently due to my household affairs."

46. I am not persuaded on the medical evidence and the evidence preserved within the decision of Judge Blake that the appellants did require long term personal care in order to meet their medical needs. Clearly they had the emotional support of each other, the oversight and assistance of a family friend which continued long after the date of the decision and the financial resources from the family in the United Kingdom.

47. Although it was suggested by the sponsors that there were limited care homes for the elderly in Nepal, the evidence from the doctors which referred to their improvement and their treatment and their conditions did not suggest the requirement of a care home as at March 2014. I do not accept that the medical evidence indicated that a residential care home was needed for either of the appellants. Although the sponsors stated that such homes were culturally unacceptable it is clear from the evidence of the sponsor that they do exist in Nepal. It was alleged that the standards in such homes was unacceptable but no comprehensive evidence of poor standards or the level of care was placed before me and it is for the appellant to prove his case.

48. Finally, the appellants are husband and wife and although elderly, as at the date of decision, they had the emotional support of each other and the care of a friend. The parents were also being funded with practical and financial help as at the relevant date.

49. I find the appellants cannot succeed under the Immigration Rules.

50. I do not find there were factors which were not considered by the Entry Clearance Officer to demand considering outside the Immigration Rules but even if I am wrong about that because of the cultural background of the family and the need for the positive affirmation by states of Article 8 rights, I do not accept that there is a family life between the appellants and their sponsors in this instance, **AA v The United Kingdom [2011] ECHR 1345**. The appellants had, to the date of decision, led an independent and private life together, in a different country. The first sponsor came to the United Kingdom in 1999 and the second sponsor came in 2000. The appellants are married and so too are their sons.

51. Even if that were incorrect and family life were engaged, applying **R (Razgar) v SSHD [2004] UKHL 27,** the decision was in accordance with the law and necessary for the protection of rights and freedoms of others through the maintenance of immigration control. The starting point must be the Immigration Rules which sets out the position of the Secretary of State. As to proportionality the appellants have each other to turn to for support and as at the date of decision, the personal assistance and care of a family friend and the financial assistance of the sponsors in this country which could continue. I have considered the interests of the family in the United Kingdom, **Beoku-Betts (FC) (Appellant) v SSHD [2008] UKHL 39,** and I note that the sponsors have difficulty in visiting but as at that date they are able to keep in contact with their parents via modern methods and indeed the parents had visited them themselves. I must also engage Section 117B of the Nationality Immigration and Asylum Act 2002 and there was no indication that this couple could speak English and this is a factor which I take into account when balancing the rights of the individual against the public interest. Although there was an indication that private health care had been enlisted when the appellants were in the United Kingdom, I am not persuaded that they would not be a burden on the NHS system when in the United Kingdom. At the date of decision I conclude that it would be reasonable to expect the appellants and sponsors and their family to continue conduct family life as has been done hitherto. That said, if their medical conditions

are now such that they meet the Immigration Rules it is open to them to make a fresh application.

52. Following **Huang v SSHD [2007] UKHL 11**, and taking full account of all considerations, I did not consider that any family or private life of the claimant was prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.

53. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and dismiss the appeals.

Order

Appeals dismissed.

Signed Date 14th August 2015

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 14th August

Deputy Upper Tribunal Judge Rimington