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

Appeal Numbers: OA/06586/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 August 2015**

**Determination Promulgated
On 8 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**N A
(ANONYMITY ORDER MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Baruah, Counsel.

For the respondent: Mr Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1.** This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Majid (“the FTTJ”) promulgated on 17 February 2015, in which he allowed the Appellant’s appeal against the refusal of her application for entry clearance as an elderly dependent relative under the Immigration Rules and Article 8 of the European Convention on Human Rights.

2. For ease of reference and continuity, throughout this decision I maintain the descriptions of the parties as Appellant and Respondent, as set out in the FTTJ's decision, although it is the Respondent who pursues this appeal.
3. No anonymity direction was made in the First-tier Tribunal but, given the references in this decision to the Appellant's personal circumstances, including her health, an anonymity order is appropriate.

Background

4. The Appellant is the mother of the sponsor who is British. The Appellant's application was refused by the Respondent because she had not provided evidence, as specified in Appendix FM-SE of the Immigration Rules, to demonstrate her medical condition or that the care she required was not available in the country where she was living. The Respondent's position was that the Appellant could obtain the treatment she required in her own country and that her sister would be returning to Pakistan from Canada and could assist her; nor had the Appellant demonstrated that she required, due to her age, illness or disability, long-term personal care to perform everyday tasks. The application was refused under paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules, by reference to paragraphs E-ECDR.2.4 and E-ECDR.2.5.
5. For the hearing before the FTTJ the Appellant produced a report by Dr Moeen, an independent expert, on the availability of care for the Appellant in Pakistan. No medical report on the Appellant's health was provided.
6. The FTTJ allowed the appeal on the grounds that the decision was in breach of the Immigration Rules and on human rights grounds (his paragraph 21). The Respondent was granted permission to appeal to this Tribunal

Submissions

7. Mr Wilding relied on the grounds which can be summarised as follows:
 - a. the FTTJ had failed to take the Immigration Rules properly into account, particularly E-ECDR.2.4, E-ECDR.2.5 and FM-SE, the absence of specified evidence or the requirements of EC-ECDR.2.4 which was a preliminary hurdle before consideration of EC-ECDR.2.5.
 - b. the approach to Article 8 was flawed because the FTTJ had failed to take into account Appendix FM when considering proportionality, had failed to take into account the public interest factors both within and outside s117B of the 2002 Act, had failed to conduct a balanced assessment when considering proportionality and had failed to provide adequate reasons to demonstrate that family life was engaged.
8. Ms Baruah accepted that the Appellant was in some difficulties insofar as the application of FM-SE and the Article 8 analysis was concerned; she was not however instructed to make any concessions. She accepted that

medical evidence on the Appellant's condition was not before the FTTJ albeit he had the report of Dr Moeen. She did not formally oppose the submissions of Mr Wilding but gave me some background to the effect that the Appellant's circumstances were distressing; the sponsor's concern was that the Respondent should reconsider the application and particularly the updated medical evidence with a view to granting entry clearance. That said, she accepted that this Tribunal had no discretion in that regard and recognised that the issue before me was limited to whether or not there had been a material error of law and any subsequent steps. She submitted that the FTTJ had conducted a balancing exercise with regard to Article 8, having accepted the evidence of the sponsor and her husband.

Discussion

9. The Appellant did not provide the Respondent or the FTTJ with a medical report to demonstrate she fulfilled the criteria in paragraph E-ECDR.2.4. This failure was a breach of Appendix FM-SE, paragraph 34, which required her to provide "evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of: (a) independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and (b) this must be from a doctor or other medical professional." The FTTJ failed to address the requirements of FM-SE in his decision and this omission is a material error of law.
10. Insofar as the FTTJ's consideration of the Appellant's human rights is concerned, I find that he has failed to follow the stepped guidance in **Razgar v SSHD [2004] UKHL 27**. He has failed to identify the consequences of the interference with the Appellant's right to respect for her family and/or private life and whether those consequences were of such gravity as potentially to engage Article 8. It is relevant here that the Appellant and her daughter and son-in-law live in different countries and have done so for many years. He has also conducted his assessment on the basis that the interference with the Appellant's protected rights is in accordance with the law, whereas that is not the case. This undermines his assessment to such a degree that it is not sustainable. In any event, his assessment of proportionality is fundamentally flawed, based as it is on the premise that the Respondent's decision was in breach of the Immigration Rules, whereas the opposite is the case. Whilst the FTTJ's failure to refer to the public interest factors listed in s117B of the 2002 Act is not, without more, an error of law (**Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)**), his failure to undertake any assessment of the parties' competing interests is a material error. For all these reasons, there are material errors of law in the FTTJ's decision in relation to Article 8.
11. As a result, none of the FTTJ's findings are sustainable. I set aside the decision of the FTTJ and remake it dismissing the appeal on the grounds that the Appellant, having failed to provide the medical evidence required

under paragraph 35 of FM-SE, had not demonstrated she fulfilled the criteria in that paragraph or E-ECDR.2.4 or E-ECDR.2.5.

- 12.** As regards Article 8, I have noted the evidence before the FTTJ. The Appellant lived in Pakistan at the date of decision whilst her sponsor and her sponsor's husband, who are both British, lived in the UK. The Appellant was in poor health and financially dependent on her sponsor and her son-in-law in the UK. Their family life consisted of their living in different households, in different countries, albeit with financial support. The burden of proving that Article 8 is engaged rests with the Appellant. Given her personal circumstances and that the decision merely maintains the status quo, I am unable to find that she has demonstrated that the interference with her own and her family's protected rights is such as to engage Article 8, even given the low threshold for such engagement.

Decision

- 13.** The making of the decision of the First-tier Tribunal did involve errors of law, as set out above.
- 14.** I set aside the decision.
- 15.** I re-make the decision in the appeal by dismissing it under the Immigration Rules and on human rights grounds.

Signed
Deputy Upper Tribunal Judge A M Black

Date 7 September 2015

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.

Fee Award

The FTTJ made a fee award. I set that award aside: the Appellant is not entitled to a fee award, the appeal having been dismissed.

Signed
Deputy Upper Tribunal Judge A M Black

Date 7 September 2015