Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/23094/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 November 2017	**On 24 November 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS SHARANJEET KAUR KOCHAR

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R Drabble QC, Counsel instructed by Fast Track Immigration Services
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Monson promulgated on 20 March 2017 ("the Decision") dismissing her appeal against the decision of an Entry Clearance Officer ("ECO") dated 16 September 2016 refusing her entry clearance as an adult dependent relative of her son, Charandeep Singh, ("the Sponsor") who is settled in the UK.

2. The Appellant appealed a previous refusal in 2015. That culminated in a decision of First-tier Tribunal Judges Church and Kamara promulgated on 4 September 2015 allowing her appeal. Their decision was upheld by Upper Tribunal Judge Kopieczek on 15 April 2016.

3. However, when the matter came back to the ECO for decision, the application was again refused because of a deemed change of circumstances. That change of circumstances arose from the Sponsor divorcing his first wife who is a British citizen and remarrying a second wife who, until recently, lived in India with her child (and then also with the Sponsor's child from his first marriage). I note however the Sponsor's evidence that the breakdown of his first marriage in fact occurred quite shortly after the First-tier Tribunal hearing and that UTJ Kopieczek was made aware of this at the hearing before him.

4. The ECO's decision was upheld by the Entry Clearance Manager ("ECM") by letter dated 6 October 2016 following a complaint made by the Appellant's advisers on 5 October 2016. There is also a decision by the ECM made on 11 January 2017 following a review of the ECO's decision. I will need to say a little more about that when dealing with the Appellant's grounds.

5. By the Decision, Judge Monson dismissed the Appellant's appeal, concluding that the Respondent's decision was not disproportionate. Although the appeal to this Tribunal turns mainly on matters of procedure rather than the substance of the Decision, I will refer to the Decision in a little more detail in the discussion which follows.

6. The Appellant raises three grounds. Ground one concerns a breach of procedural fairness in taking points against the Appellant when these had not properly been put either by the Respondent or the Judge. Ground two concerns the Judge's refusal of a request to adjourn the hearing before him and failing to record the second basis on which the adjournment was sought. The third is said to be an error in the consideration of Article 8 and proportionality.

7. Permission was granted by Upper Tribunal Judge McWilliam on 14 September 2017 in the following terms so far as relevant:-

> "It is arguable that there is unfairness for the reasons articulated at grounds 1 and 2. I grant permission on all grounds."

8. The matter came before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

9. I indicated at the conclusion of the hearing that I found an error of law in the Decision, based on grounds one and two. I therefore indicated that I would set aside the Decision. I re-made the decision allowing the Appellant's appeal. I indicated that I would provide my reasons in writing which I now turn to do.

Error of law: reasons

10. As I indicated at the hearing, I was unpersuaded by ground three. That appeared to me to focus on the position of the Sponsor's second wife and the two children

and not on the Appellant. I had some difficulty in following the logic of this ground. I do not find any error of law on this account.

11. It is though appropriate to deal at this point with an issue which I raised at the start of the hearing as to whether this is an appeal which falls under the section 82 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") prior to amendment by the Immigration Act 2014 or after those amendments.

12. The original application for entry clearance was made as long ago as 1 August 2013. Following the allowed appeal, the case was referred back to the ECO for a new decision. That decision was made on 13 September 2016 but, since there was no intervening second application for entry clearance that was a decision on an application pending as at 6 April 2015.

13. The Appellant's advisers initially appeared disposed to the view that this is an appeal which proceeds under the pre-amendment provisions. Mr Wilding submitted however that the transitional provisions do not apply since the application includes also a human rights claim. Having considered this issue further, Mr Drabble agreed with that submission.

14. The impact of this is first as to the basis on which an appeal can be allowed or dismissed and second as to whether I am able to consider the position as at date of hearing (as Judge Monson himself did) or whether I am constrained by the pre-amendment provision in section 85A of the 2002 Act to consider only the circumstances as they existed at the date of the Respondent's decision. That is of particular importance in this case because, since the Respondent's decision, the Sponsor's second wife has been granted entry clearance and has arrived in the UK. That has relevance to the substance of the appeal, particularly in light of the findings of the original First-tier Tribunal which I will come to when dealing with the re-making of the decision.

15. The main focus of the submissions related to ground one. Both that and ground two focus on procedural issues. However, the substance of the Respondent's decision has relevance to those procedural issues and I therefore set that out as follows (so far as relevant):-

> "The applicant must provide evidence that they can be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds. If the applicant's sponsor is a British Citizen or settled in the UK, the applicant must provide an undertaking signed by the sponsor confirming that the applicant will have no recourse to public funds and that the sponsor will be responsible for their maintenance, accommodation and care, for a period of 5 years from the date the applicant enters the UK if they are granted indefinite leave to enter. Information held at this office demonstrates that this requirement is not met. I am satisfied that had the judge been made aware of this at your appeal he would not have allowed the appeal. I therefore refuse your application under paragraph E-ECDR.3.1 and E.ECDR.3.2 of Appendix FM of the Immigration Rules.
>
> I have taken account of the Judge's findings regarding your rights under Article 8. However, as the circumstances under which he made this ruling have significantly changed then I am satisfied that this no longer applies.

> I have therefore refused your application because I am not satisfied on the balance of probabilities that you meet all the requirements of the relevant paragraph of the United Kingdom Immigration Rules."

16. The Appellant's position is that the reasons for that decision are lacking and the decision is therefore not understood. As Judge Monson himself recorded at [28] of the Decision, the undertaking given by the Sponsor dated 11 July 2013 remained in place. The Judge accepted at [30] that the Sponsor had given an undertaking in the terms required by E-ECDR.3.2.

17. Mr Drabble also directed my attention to the statement of Mr Wells (the Appellant's legal adviser) relating to the ECM's response to the complaint made about the ECO's decision. That reply is recorded at [12] of Mr Wells' statement as follows (so far as relevant):-

> "Additional information has been presented following your clients appeal, which is subject to non-disclosure. In light of this information a decision has been taken to re-refuse your clients application….There is nothing further we can add at this stage and any further correspondence points will need to be addressed by an Immigration Judge at appeal, where all factors pertaining to this case will be assessed in the round."

18. Unfortunately, that did not and could not happen as envisaged as the Respondent was unrepresented at the hearing. The Appellant was therefore left completely in the dark as to the information which could not be disclosed. Mr Wells surmises in his statement that this information may have come from the Sponsor's first wife. However, no such information was disclosed at the hearing before me. The ECO/ECM's position therefore remains unclear (as it was at the time of the hearing before Judge Monson).

19. With that introduction, I turn to the procedural unfairness which is relied upon. In order to explain grounds one and two, it is appropriate to set out what is said by Counsel who appeared before Judge Monson (Mr O'Callaghan) and Mr Wells. Mr Callaghan's "evidence" comes in the form of an e-mail written immediately after the hearing as follows:-

> "FTT (IAC) – Taylor House
> 6 March 2017
> Coram: JFFT Monson
> HOPO: -----
> No Presenting Officer attended.
> The JFFT informed me that the ECO had served a bundle including a ECM decision, but no copy was provided to the Appellant.
> There appear to have been two different decisions, dated some 3 months apart, though we have only received 1.
> The ECO has provided no detail as to the 'information' that concerned him/her. I informed the JFFT that it is not appropriate that the Appellant seek to address 20 different issues that may or may not be in the ECO's mind. The Appellant's position is clear – he does not know the case he is to answer beyond generalities.
> If the information concerned separation of husband and wife, the decision refers to evidence now available that if before the Judge would have had an impact on the

decision. The separation was an issue known to the UT, which did not consider it sufficient to overturn the FTT decision.
?
There was a discussion as to whether the issue of personal care was at the heart of the refusal, with the Sponsor being employed and not able to provide 24 hours care. I observed that he was capable and willing to provide intimate care – evidence could be called on the issue.
I requested an adjournment so as to i) identify whether two decisions have been issued and ii) secure instructions as to issue of care.
The Judge refused the application for an adjournment as there were two issues before him as there was no evidence from ECO i) allow the appeal outright or ii) remit the matter back to the ECO. They were the two options addressed in the submissions."

20. Mr O'Callaghan's record of what occurred is supported by the statement of Mr Wells who also attended the hearing. His statement is supported by a statement of truth. It is not however contemporaneous with the hearing. The statement reads (so far as relevant) as follows:-

"[18] At the appeal hearing the ECO was unrepresented. First Tier Tribunal Judge Monson raised an issue concerning the appearance of a second decision by the ECO predating the decision which was the subject of the appeal by 3 months. This decision had not been provided to us and we were not shown a copy. The Judge confirmed that he had received a bundle from the ECO. Again, we were not shown a copy although no complaint is made about this point since we were confident that we had the relevant documents, with the exception of this second decision.

[19] Mr O'Callaghan argued that the ECO had provided no detail as to the information that concerned them and that it was inappropriate for the Appellant to seek to address twenty different issues which may or may not be in the ECO's mind. He maintained that the Appellant's case was that they did not know the case to be answered beyond the generalities postulated in the decision to refuse.

[20] He further pointed out that if the decision concerned the separation of the sponsor and his wife, the decision refers to evidence now available that if it had been before the Judge would have made an impact on the decision. He pointed out that the separation of the sponsor and his wife had been made known to the Upper Tribunal and the Upper Tribunal had not considered it sufficient to overturn the First Tier Tribunal Decision.

[21] First Tier Tribunal Judge Monson then referred Mr O'Callaghan to the second to last paragraph of the sponsor's witness statement where he speculates that the new information could be a letter from his ex-wife and asked if that was a 'guess' to which Mr O'Callaghan agreed saying that we simply did not know for certain what the issue was that had led to the second refusal.

[22] First Tier Tribunal Judge Monson then raised the issue of personal care of the appellant saying that he could not see how such care could be provided now that the sponsor's wife was no longer available and how the 24 hour care could be provided.

[23] Mr O'Callaghan responded that evidence could be called on the issue and then requested an adjournment on two grounds. Firstly he argued that we needed to identify why the decision we had appealed was different in content and dated three months after the decision the Judge possessed on his file. The second issue was that the Judge was now raising the issue of personal care and instructions needed to be taken so that evidence could be adduced on this point.

> [24] The Judge refused an adjournment. He said that there were two issues before him as there was no evidence from the ECO. He could either allow the appeal outright or remit the matter to the ECO and invited submissions on either course of action.
> [25] In light of that indication the sponsor was not called to give evidence. Notwithstanding the Judge's indication, First Tier Tribunal Judge Monson dismissed the appeal on the 20th March 2017."

21. Although the contemporaneous note of what occurred at the hearing is unsupported by a statement of truth and the version included in a formal signed statement is not contemporaneous, the two versions are entirely consistent with each other. Indeed, both versions are not inconsistent with what is said at [23] of the Decision save that the Judge has not noted that the submission that the appeal should be allowed outright arose because of what he had said and that he overlooked that Counsel for the Appellant also indicated that he wanted an adjournment to take instructions on the personal care issue and that evidence could be called on that issue if necessary.

22. Mr Wilding obviously could not assist as to what occurred as there was no Presenting Officer at the hearing. I have not been able to find Judge Monson's record of the proceedings on file and he was not asked to comment on what it is said occurred. As I posited at the hearing, it may be that the Judge thought that this was an "old style" appeal which might have permitted him to find that that the ECO's decision was not in accordance with the law or the Immigration Rules and to remit for further reasons to be given. He may have subsequently realised that this was not an option under the amended appeal provisions. However, as Mr Drabble submitted and I accept, if that were the position, the Judge should have invited further written or oral submissions on what course he should take in the alternative. It may be that there was some misunderstanding of what the Judge said about allowing the appeal; it might be that the Judge intended that he should be able to dispose of the appeal by either allowing it or dismissing it outright or to remit it in the alternative. However, if that intention were made clear, it is unlikely that both of those present at the hearing would have misunderstood that intention in the same way. I am for that reason prepared to accept that the e mail written by Mr O'Callaghan and the statement of Mr Wells are a true reflection of what occurred.

23. Turning then to the impact of what occurred, I note first that the second decision spoken of in the e-mail/statement is one dated 11 January 2017. It is in the form of a review by the ECM of the ECO's decision. It says no more than that the ECO's decision is in accordance with the law and rules and that the ECM was not prepared to exercise discretion. In relation to Article 8, it notes only that given the change in circumstances there is no breach. For that reason, I can well see why the Judge refused the adjournment on that basis. That decision says no more than already said by the ECO. It provides no additional reasons.

24. The second basis for the adjournment request is however the more important and needs to be considered alongside the lack of evidence from the Sponsor and what

it is claimed that the Judge said about the possible outcomes (which I have accepted he did in fact say or was understood to have said). Mr Wilding submitted that there is no procedural unfairness in relation to the Sponsor not being called to give evidence. The Appellant was legally represented and it was a matter for the legal representatives how the case was presented. As an abstract proposition, I have no difficulty in accepting that. However, in this case, that occurred in the context of the Judge having indicated that he would either allow the appeal (as Mr O'Callaghan submitted he should do) or remit to the ECO for a further decision.

25. That lack of evidence then led to what Mr Drabble submitted is at the heart of the error of law namely the Judge's reasoning for dismissing the appeal at [32] and [33] of the Decision. The Judge there said this:-

> "[32] There has been a significant change of circumstances since the previous hearing before the First-tier Tribunal. At the time of the previous hearing, the plan was for the sponsor's first wife (who had status here) to look after the appellant in the family home while the sponsor was out at work. But now there is nobody to look after the appellant while the sponsor is out at work. Tiranjit Kaur is willing to perform this role, but her ability to do so is contingent upon her applying for, and being granted, entry clearance – together with her son by a previous relationship.
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> [33] Mr O'Callaghan submitted that the appellant could look after his mother on his own until his second wife joined him here, with the two children. This is not a realistic proposition, and it is not shown to be affordable. It is not realistic because it involves the sponsor leaving his mother alone while he is out at work. Moreover, the appellant requires help with "*intimiate tasks*": see paragraph [29] of the decision of the Upper Tribunal. As Sikh faith and culture places a great deal of importance on personal dignity, it is not credible that the appellant would tolerate having assistance with intimate tasks being given by her son, rather than by a daughter-in-law."

26. I was initially unpersuaded that the Judge was not entitled to reach the conclusions he did for the reasons given, in particular, the focus of the earlier appeal on the need for the Sponsor's first wife to be present to care for the Appellant whilst the Sponsor is at work and the point made that he could not afford care in India (and it might be expected that care in the UK would be more costly).

27. I was however persuaded by Mr Drabble's submissions that the reasoning does indeed involve errors. Firstly, as Mr Drabble points out, in the previous appeal it was accepted by the Tribunal that the Sponsor and his first wife took it in turns to travel to India to care for the Appellant. There was no suggestion that the Appellant was not willing to allow her son to deal with her personal care. Second, Mr Drabble drew my attention to the Sponsor's recent witness statement where he explained that, if the Appellant had come to the UK before his second wife was permitted to do so, then his cousin and his cousin's wife would have helped with his mother's care. Of course, that statement was not before Judge Monson. Neither does any submission appear to have been made to him that by saving the £300 that the Sponsor currently sends to India for the Appellant's care, he could afford to pay for care in the UK.

28. That though brings me on to the rather more important point which is that the reason that some of this evidence was not before the Judge is that the points were not put to the Sponsor or those representing the Appellant. Again, I accept Mr Wilding's submission that it is not necessarily procedurally unfair for points not to be put to a witness where a decision is taken not to call evidence from that witness. That though ignores the reason why the Sponsor was not called to give evidence which is because the Appellant's representatives had understood that they did not need to call evidence because the Judge intended either to allow the appeal outright or to remit to the ECO (had the Judge had the power to do so).

29. The way in which procedural unfairness is argued in the Appellant's skeleton argument is as follows:-
    a) It was manifestly unfair for the ECO to give the limited reasons he did; Judge Monson himself accepted at [35] of the Decision that inadequate reasons were given.
    b) As a result of the inadequate reasons, the Appellant was not aware of the case against her and her advisers' preparation of her case was thereby prejudiced. It is said that the Tribunal should have adjourned with a direction for the Respondent to provide more details of the nature of the evidence relied upon or to disclose the evidence.
    c) That unfairness was compounded by the Judge's indication that in light of the lack of evidence, his two options were to either allow the appeal outright or remit to the ECO. As a result, this deprived the advisers of the opportunity of considering whether the Sponsor should be called to give evidence once the adjournment was refused.

30. I am persuaded that the Appellant has made out a case of procedural unfairness particularly based on (c) above. If the Appellant's advisers had understood the Judge to indicate that he might dismiss the appeal outright once the adjournment had been refused, it is undoubtedly the case that they would have called the Sponsor to give evidence about how he intended to provide care for the Appellant in the absence of his wife and what alternative arrangements could be put in place in the interim if his second wife had not by then arrived. The Appellant was therefore deprived of the opportunity to present her case as she would have wished if the Judge had not given the indication which he did (or at least the indication which both advisers understood him to give).

31. I therefore find an error of law to be made out on grounds one and two. The error is clearly material as it has deprived the Appellant of the opportunity fairly to present her case. For that reason, I set aside the Decision of Judge Monson.

Re-making of decision on appeal: reasons

32. As I indicated at [13] above, both representatives agree that this is an appeal which proceeds under the amended section 82 of the 2002 Act. Accordingly, the issue for me is whether the Respondent's decision breaches the Appellant's human rights.

33. I do not need to go into any detailed analysis in light of the decision made in the previous appeal. In that decision, FTTJs Church and Kamara accepted that the Appellant meets the adult dependent relative requirements of the Immigration Rules. Their reasoning is based on the following findings. They accepted that the medical, shopping, housework and cooking requirements could be met in India. However, they went on to say that there "is no person in India who could reasonably provide the personal care element of the Appellant's requirements at any price. This is because of the 'humiliation' the Appellant would feel at having intimate tasks such as washing, bathing and dressing carried out by a stranger when, according to her Sikh culture, she should be cared for by her only son's family." Having found that the Appellant met the requirements of Appendix FM, they also allowed the human rights appeal because the Respondent's decision "would cause very significant disruption to the life of the Sponsor, his wife and their son" and that the circumstances were compelling and the interference unjustified.

34. Whilst it is right to point out that at the date of the hearing before Judge Monson and his Decision, there had indeed been a change of circumstances in the sense that not only was the Sponsor divorced from his first wife but his second wife remained living in India and was therefore able to care for the Appellant there (at least until she was granted entry clearance). As I have noted, however, I now need to consider the issues as at date of the hearing before me.

35. The Sponsor's second wife was issued with a spouse visa on 27 June 2017. Although she has travelled back to India and returned to the UK on two occasions since, and the Appellant has at other times been supported by the Sponsor's mother-in-law, the situation in the UK has now reverted to the situation as it was at the date of the first appeal, save that the care which was to be provided by the Sponsor's first wife at that time will now be provided by the Sponsor's second wife (at least whilst the Sponsor is working and unable to do so himself).
36. There is nothing before me to suggest that the Appellant's medical condition has changed or improved. There is nothing to suggest that the necessary care arrangements are any different to those present at the time of the previous appeal decision. There is therefore no person in India who can reasonably provide the care. The financial requirements are met. Although the ECO put in issue the undertaking, Judge Monson accepted on the evidence (and I accept also on the evidence now before me from the Sponsor) that the necessary undertaking for the purposes of E-ECDR.3.2 has been provided. It follows that the Appellant meets the Rules for entry as an adult dependent relative.

37. As this is an appeal under the amended provisions of the 2002 Act, I cannot however allow the appeal on the basis that the Respondent's decision is not in accordance with the Rules. I can only (in the circumstances here) allow the appeal on human rights grounds. It is clearly relevant that the Appellant meets the Rules. As the original Tribunal found, to refuse the Appellant entry will cause

very significant disruption to the family life of the Sponsor, his wife and child. It is for the Respondent to justify the interference and to show that refusal of entry is proportionate. The public interest does not require the Appellant to be refused entry because she is able to satisfy the requirements under the Rules. For that reason, I allow the appeal.

DECISION

I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Monson promulgated on 20 March 2017 is set aside.

I re-make the decision and I allow the appeal on human rights grounds on the basis that the Respondent's decision refusing the Appellant entry clearance breaches her Article 8 ECHR rights.

Signed Dated: 23 November 2017

Upper Tribunal Judge Smith