Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22410/2018

THE IMMIGRATION ACTS

Heard at Cardiff CJC	**Decision & Reasons Promulgated**
On 27 February 2020	**On 17 March 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR SEWA SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: M A Rehman, Counsel, instructed by Lawfare Solicitors
For the respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are a written record of the oral reasons given for my decision at the hearing.

Introduction

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Dorrington, (the 'FtT'), promulgated on 5 June 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 5 October 2018 of his application for entry clearance for settlement, to join his son and sponsor, as the adult

dependent relative (the 74-year old widower father) of the sponsor. The respondent had maintained her initial refusal of entry clearance in an entry clearance manager ('ECM') review decision dated 8 February 2019.

3. The scope of the issues is in dispute. The appellant says that the respondent's refusal was solely on the basis that the appellant failed to meet the requirement of section E-ECDR.2.5(b) of the Immigration Rules, i.e. the appellant was unable, even with the financial help of the sponsor, to obtain the required level of care in India, where the appellant is resident, because such care is "not affordable." The appellant refers to the documents submitted with his application for entry clearance, which refer to the sponsor's limited financial means even to pay for the existing level of care, let alone the increased level of care said to be necessary because the appellant has Alzheimer's disease.

4. The respondent's refusal decision referred to sub-sections E-ECDR-2.1 to .2.5 more generally, but then specifically referred to the lack of evidence said to support the sponsor's assertion that he was no longer able to afford the increased cost of care. In the ECM's decision, the respondent further referred to the sponsor being able to afford the level of care (although whether this is the existing or increased level of care is unclear) and the sponsor's savings in excess of £3,000.

The FtT's decision

5. The FtT accepted the deterioration in the appellant's health ([38]) would necessitate an increase in nursing costs from the 8 hours each day to 24 hour/ 7 day week provision, but the FtT did not accept that alternative healthcare providers would not be willing to provide the appellant's care more cheaply, in the absence of evidence of searches by the sponsor about the availability of providers and the lack of alternative quotes. The current provider might be very expensive, and the quote was for in-home support, as opposed to residential care-home support, which might be far cheaper. The FtT essentially concluded that the appellant had not demonstrated that cheaper providers could be found, as opposed to focussing on the unaffordability of his current provider.

6. The FtT concluded that the appellant's failure to meet E-ECDR-2.1 to .2.5 in turn impacted on the proportionality assessment, for the purposes of GEN.3.2, as well as a free-standing article 8 assessment, and rejected the appellant's appeal.

The grounds of appeal and grant of permission

7. The appellant lodged grounds of appeal which are essentially that the FtT went beyond the scope the respondent's refusal and the ECM's decision, in considering E-E-ECDR.2.5(a), as opposed to sub-paragraph (b), namely the FtT considered whether the required level of care was not available; as opposed to it being available, but not affordable. The respondent had not raised the issue of comparability of costs of alternative providers, so that the FtT had erred in making findings which had not been the basis for refusal – see: IO (Points in Issue) Nigeria [2004] UKIAT 00179. The FtT further failed to carry out adequately an article 8 assessment.

8. First-tier Tribunal Judge P Hollingworth granted permission on 2 September 2019, regarding it as arguable that the FtT had decided the appeal for reasons not relied on in the original refusals of entry clearance, and there had arguably been a failure to carry out adequately an article 8 assessment.

The Law

9. Section E-ECDR provides:

Section EC-DR: Entry clearance as an adult dependent relative

EC-DR.1.1. 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.

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.2.5. 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

(b) it is not affordable.

10. The case of IO (Points in Issue) Nigeria [2004] UKIAT 00179 includes the following guidance at [13]:

> *"13. The Tribunal is well aware the entry clearance officers often work under great pressure. Nevertheless each applicant is entitled to a proper decision. We set out below a summary of the approach that we say should be taken when considering visitor applications and appeals:*
>
> *a) If entry clearance officers are not satisfied that an applicant has met the requirements of a particular clause of rule 41 they must say so*

clearly and identify the rule unequivocally, preferably both by its number and a direct quotation from it.

b) *Applicants are entitled to assume that their ability to satisfy the particular requirements of the rules is not in issue unless the Entry Clearance Officers unequivocally puts it in issue.*

c) *Adjudicators hearing appeals must decide the case for themselves on the totality of the evidence but must not decide that a requirement of the rules is not satisfied unless the Entry Clearance Officer clearly said that it was not satisfied OR the Adjudicator has given the appellant express notice that the Adjudicator is not satisfied that an appellant can satisfy the particular requirements of a clause of rule 41.*

d) *The injustice to the appellant inherent in any delay caused by an adjudicator putting in issue the appellant's ability to satisfy the requirements of part of the rule that the entry clearance officer did not put in issue will usually be greater than the injustice caused by the Adjudicator assuming that the entry clearance officer had good reason for not expressly saying that the requirements of a particular clause were not met."*

The hearing before me

The appellant's submissions

11. First of all, Mr Rehman referred to a decision of the Upper Tribunal Das Gupta (error of law – proportionality – correct approach) [2016] UKUT 00028 (IAC) and in particular paragraph [20] which suggests that the availability of residential care homes in India was more limited than the FtT had concluded. In any event, the FtT's conclusions at paragraph [54] were speculative and there had been no evidence before the FtT as to the availability of residential care homes. Indeed, this went to the core of the appeal, as in essence, the appellant had come to the FtT hearing unprepared for a discussion about the availability of alternative providers, or more widely, care homes in India and having done so the FtT effectively then speculated on their availability, which appeared on the face of it to contradict the evidence that had been before the Upper Tribunal in the case of Das Gupta, although as Mr Rehman accepted, it was not a country guidance authority on the availability of healthcare in India. In reality the whole issue of affordability had been dealt with by the FtT in the paragraphs leading up to paragraph [47], with an analysis of the limited savings that the sponsor had at [49], which the FtT accepted was for emergencies. Where the FtT had gone outside the scope of the refusal of entry clearance was in his consideration of alternative providers at paragraphs [55] and [59]. The sponsor could not be criticised for not having brought documents on alternative healthcare provision, as the FtT sought to criticise him, when he was unaware that this would be an issue. It was also unsurprising that in his oral evidence, the sponsor had not been able to give precise detail of the enquiries he had made about alternative providers.

The respondent's submissions

12. Mr Howells made the point that the Presenting Officer had raised the issues about the affordability of alternative providers to the sponsor at the FtT hearing although he accepted that the issues had not been raised explicitly in the refusal of entry clearance or in the ECM review decision. In the circumstances, the fact that the sponsor had had the opportunity to comment on the alternative scenario of finding a cheaper care home, did not therefore amount to an error of law.

Discussion and conclusions on error of law

13. I accept the force of Mr Rehman's submissions, in particular by reference to the authority of IO (Points in Issue) Nigeria to which I have already referred, that the FtT erred in considering an issue not raised in the refusal or ECM review decisions. As [13(a)] indicates, if an Entry Clearance Officer is not satisfied that an applicant has met the requirements of a particular clause, they must say so clearly and identify the Rule unequivocally, preferably by both its number and a direct quotation from it. Paragraph 13(b) confirms that applicants are entitled to assume that their ability to satisfy the particular requirements of the Rules is not in issue unless the respondent unequivocally puts it in issue. The respondent did not unequivocally put the matter of alternative providers in issue, merely referring instead to the availability of funds to pay the existing level of fees from the current provider and the availability of savings. The FtT did not uphold that analysis and conclusion and instead considered and reached his decision on the separate issue of alternative providers. I conclude that by considering that issue, for which the sponsor and the appellant were unprepared, and which had never been challenged by the respondent, the FtT erred in law, such that his decision is unsafe and cannot stand.

Disposal

14. Given the narrowness of the factual and legal issues which needed to be remade, I regarded it as appropriate and in accordance paragraph 7.2 of the Senior President's Practice Statement that the Upper Tribunal remade the decision on the appellant's appeal, which I did so and gave an oral decision on the day of the hearing, the written reasons for which are set out below.

The remaking decision

Remaking disposal

15. Both representatives agreed with me two propositions, in remaking the appeal. First, the sole basis on which the appellant's application for entry clearance had been refused was because it was said that he had failed to meet the requirement of section E-ECDR.2.5(b) namely because of the affordability of healthcare rather than the lack of availability. Second, if I were to conclude that the appellant met the requirements

of section E-ECDR.2.5(b) that would be determinative of an article 8 assessment, because refusal of entry clearance would be disproportionate.

16. The sole basis of the respondent's refusal of entry clearance was because the respondent was not satisfied that the appellant, with the support of the sponsor, could not afford the cost of healthcare. The sponsor had provided with the appellant's application the healthcare costs of daily care for 8 hours each day; the slim margin by which he was just about able to afford those costs, which he had been able to afford, despite an increase in his mortgage payments, through careful budgeting, with savings of £3,000 retained for emergencies. The sponsor gave undisputed oral evidence at [38] about the increase in those costs from 10,000 Indian rupees each month (just over £100), which together with the appellant's rent, necessitated monthly financial support of £200, to 40,000 Indian rupees, or more than £400 each month, with accommodation costs in addition. He had only £39.53 remaining each month on the basis of his lower contributions, which he had set out clearly in a budget sheet that he had sent to the respondent prior to her decisions. The content of that budget sheet was undisputed, and the only query raised by the FtT had been why the appellant's monthly mortgage payments had increased from £516 to £765. However, even on the basis of monthly mortgage repayments at the date of the application of the lower amount, £516, that still only left £39.53 remaining, clearly not enough to meet the additional £300 monthly expense, as a result of 24-hour care. On the basis that the respondent has never raised the issue of cheaper, alternative care providers as the basis for refusal, and it is clear that the applicant, with the assistance of the sponsor, is unable to afford the costs of his care with his current provider, I concluded that the appellant does meet the requirements of E-ECDR.2.5(b).

17. On an article 8 analysis, both representatives have conceded that if the appellant were to meet the Immigration Rules, that the refusal of entry clearance would be disproportionate. I conclude that the respondent's refusal of entry clearance, in the circumstances and on the evidence available to me, is in breach of the appellant's rights under article 8.

Notice of decision

Remaking

18. I therefore remake the appellant's appeal by allowing his appeal.

Signed J Keith Date: 5 March 2020

Upper Tribunal Judge Keith

TO THE RESPONDENT - FEE AWARD

The appeal has succeeded, so I order that the respondent reimburses the appellant's fee of £140.

Signed J Keith Date: 5 March 2020

Upper Tribunal Judge Keith