Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49484/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 July 2014	**On 11 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS NIRMALJIT KAUR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel, instructed by Charles Simmons Immigration Services
For the Respondent: Mr P Nath, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision by the respondent to refuse her application for leave to remain in the United Kingdom on family life grounds outside the Rules. The First-tier Tribunal did not make

an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of India, whose date of birth is 4 June 1958. She entered the United Kingdom on 15 May 2013 with valid entry clearance as a visitor. Her visit visa ran from 17 April 2013 until 17 October 2013. On 4 October 2013 Charles Simmons Immigration Solicitors submitted an application for leave to remain on her behalf. In a covering letter, they said that the appellant wished to extend her current leave for a further period based on her compassionate circumstances and rights afforded under Article 8. She was a dependant of her son, Mr Harpreet Singh, and her daughter-in-law. Prior to coming to the UK she was living with her husband who died on 28 March 2013. She was dependent on her son and daughter-in-law for her daily activities, and there was no immediate family she could turn to on her return to India.

3. The appellant was suffering from osteoarthritis. She was in constant pain and had several health problems, particularly with both her knee joints. She continued to have medical treatment for this whilst in India. She also suffered from blood pressure problems. Due to her illness she had reduced mobility and was unable to look after herself and carry out her daily activities. She was in the process of obtaining all her medical records to substantiate this.

4. In an accompanying witness statement, Mr Singh said that he and his wife had been supporting his parents financially. His father had provided physical and emotional support to his mother whilst he was alive. Following the death of his father, his mother had been residing in India alone. She had no other family members in India she could turn to and she had been unable to take care of herself. He and his wife had sponsored his mother to come to the UK on a visit visa.

5. On 7 November 2013 the Secretary of State gave her reasons for refusing the application. Her policy was to consider granting leave outside the Rules where particularly compelling circumstances existed. Grants of such leave were rare, and were given only for genuinely compassionate reasons. The appellant had not made an application as an “adult dependent relative” and as such she could not be considered under these Rules. In any case, any such application would fail on the basis that entry clearance as an adult dependent relative was a mandatory requirement for a further in country grant of such. The family life she claimed to enjoy with her adult children and grandchildren therefore did not constitute family life in the application which she had made. Her relationships with her settled family in the UK could continue through other communication methods from abroad. In view of the above, the Secretary of State was not satisfied that her circumstances were such that discretion should be exercised outside the Rules.

The Hearing before, and the Decision of, the First-tier Tribunal

6. The appellant's appeal came before Judge R L Walker sitting in the First-tier Tribunal at Hatton Cross on 24 March 2014. Mr Sharma of Counsel appeared on behalf of the appellant, and Mr Peter of Counsel appeared on behalf of the respondent. The judge received oral evidence from the appellant, her son and her daughter-in-law. In his subsequent determination, he summarised the appellant's case at paragraph 12. She could not reside alone in India because of her deteriorating health. She had no help or support available in India. She had been cared for by her son and daughter-in-law since her husband's death. They helped her with her daily activities, including cooking, feeding, cleaning and keeping herself hygienically clean. Her son and daughter-in-law had the financial wherewithal and the accommodation to look after her.

7. The judge's findings of fact and credibility are set out in paragraph 17 onwards. Mr Peter had produced at the hearing a copy of the appellant's VAF. This showed that an application for the visit visa was made online on 28 March 2013, which was the same day that the appellant's husband died. The evidence of the appellant was that originally both she and her husband were applying for visit visas, but following his death the application was changed to cover herself only. Nonetheless, the VAF referred to her husband as being alive. It also referred to her being supported by her husband, and being financially dependent on him and that her husband received rental income from land of 40,000 rupees per annum.

8. The judge observed that neither she nor her son were able to explain why her husband's details were still in the VAF, notwithstanding the fact that he had passed away. The appellant physically attended some days later in order to submit her [signed] application and to comply with the biometric requirements, but this misinformation was not corrected. Also, the appellant's son was in India at the time, and was assisting her. His evidence was he did not go with her on the appointment to confirm the application. If the son did not go with her, then this had some bearing on a separate aspect of the appeal, which was the appellant's claim that she needed constant care and attention, and could do little for herself.

9. The judge went on to find in paragraph 19 that the incorrect information being submitted in the VAF amounted to deception. Whether the appellant herself was aware of this is not known, but certainly those helping and advising her would have been fully aware.

10. At paragraph 20, the judge addressed the evidence of the appellant's various health problems. He found that the various reports did not include any clear diagnoses or prognoses and he found that little evidential weight could be replaced upon the reports from India, other than showing that medical help and services were available to the appellant in India.

11. At paragraph 21, the judge held that the evidence today showed the appellant had a home in India, where she had the services of a maid who had worked in the household for several years. In addition she and her

late husband had land which was let in order to produce an income. He found that the appellant would therefore be in a comfortable position in India with her home, staff, income and savings.

12. At paragraph 22, the judge found that the level of care that the appellant claimed to need had been exaggerated. Her witness statement went as far as saying that she needed help in keeping herself hygienically clean. But her son's evidence was she had been able to shower herself. As far as her mobility was concerned, the judge observed her walk into court unaided and to move seats unaided. The appellant was not old. She might well be overweight and with some health problems, but so far as her care and medical needs were concerned, these were just as available to her in India as they would be in the UK. The appellant stated that her last family member, her brother, had died in December 2013. She did not however make any reference to her brother's family, and in particular to his children who would be her nephew and niece.

13. In view of the matters referred to above, and the fact the appellant was unable to confirm that she had a return airline ticket when she arrived in the UK, the judge found that it had been her intention on entry, and no doubt that of her son, that she would remain here. He could understand her wishing to be with her son and his family, but nonetheless she had attempted to circumvent the Immigration Rules with what could only be described as deception.

14. At paragraph 26, he held that Article 8 could not be engaged as any interference was going to be limited and certainly not of such gravity to enable such engagement. At paragraph 28 he said he carried out a careful balancing exercise and had taken into account all relevant circumstances, and he found that in all the circumstances the respondent's decision was a proportionate one. He concluded at paragraph 29:

> The appellant has whatever she needs in India apart from her declared wish to live with her son…The difficulties that the appellant is going to experience on returning to India are surmountable and not exceptional in any way.

The Application for Permission to Appeal

15. The appellant's solicitors settled her application for permission to appeal to the Upper Tribunal. They argued that there were three errors of law in the determination. Firstly, the learned judge had made fundamental errors of fact. Secondly, the consideration under the Rules was improper; and thirdly the consideration of her Article 8 rights was inadequate. With regard to the latter, it was submitted that he set too high a threshold for whether Article 8 had been engaged. There was no requirement to show insurmountable obstacles. The error in the judge's approach was compounded by the fact that the judge had failed to consider the remaining three steps in the **Razgar** test.

The Grant of Permission to Appeal

16. On 13 May 2014 First-tier Tribunal Judge P J G White granted permission to appeal for the following reasons:

> 2. Having had regard to grounds for permission to appeal in the determination, I am satisfied that in reaching her decision the judge arguably made the following errors of law:-
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> (a) Whilst the judge at paragraph 25 of the determination refers to **Gulshan**, it is arguable the judge's approach to the issue of human rights does not accord with the approach set out in **Gulshan**, in particular the judge has not engaged with Appendix FM and paragraph 276ADE of the Immigration Rules.
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> (b) The judge at paragraph 26 states that 'Article 8 cannot be engaged as any interference is going to be limited and certainly not of such gravity to enable this'. It is unclear whether the judge is stating that Article 8 is not engaged in relation to the appellant's private life, or family life, or both.
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> (c) It is unclear why the judge having stated in paragraph 26 that 'Article 8 cannot be engaged' has considered it necessary to consider the proportionality of the interference in paragraph 27 onwards.

The Hearing in the Upper Tribunal

17. At the hearing before me, Mr Sharma submitted that the judge had erred in failing to consider Appendix FM and Rule 276ADE, but that his error in this regard was not material. He sought to develop ground 1. He submitted that it had been irrational of the judge to make a finding of deception against the appellant. At best, there had been a negligent failure to disclose the change in the appellant's domestic circumstances. Mr Sharma took issue with the finding that the level of care she claimed to need had been exaggerated, as the judge had seen the appellant using a walking stick to move around. It had not been put to the appellant that she had extended family members remaining in India. Furthermore, it was not a **Kugathas** dependency relationship between the appellant and her extended family members in India, and therefore she could not be treated as enjoying family life with such extended family members for the purposes of Article 8.

18. In summary, the judge had failed to give proper weight to factors in the appellant's favour, and had given undue weight to factors which counted against her, so as to come to an irrational and perverse outcome. There had to be *mens rea*: the appellant had to have an intention to deceive.

19. In reply, Mr Nath submitted that the judge's finding of deception was entirely warranted on the evidence that was before him.

Discussion

20. The judge's approach to the Article 8 assessment does not disclose an error of law. If the judge had been minded to allow the Article 8 claim outside the Rules, it probably would have been necessary for him to follow a two stage approach, beginning with an analysis of the claim under Appendix FM and Rule 276ADE. But as he was not minded to allow the Article 8 claim outside the Rules, it was not necessary for the judge to conduct a two stage assessment.

21. The threshold for the engagement of private life rights is relatively low, but it was nonetheless open to the judge to find that the proposed interference with the appellant's private life rights was not of sufficient gravity as to engage Article 8. The same applies to the finding on family life. In so finding, the judge was reflecting the balance which is struck by the new Rules. Having found that questions 1 and 2 of the **Razgar** test should be answered against the appellant, it was not necessary for the judge to go on to consider the three remaining **Razgar** questions. But it was prudent for him to do so.

22. The appellant's real challenge is not to the architecture of the judge's Article 8 assessment, but to the judge's adverse findings of fact which underpin the conclusion that the appellant is not entitled to Article 8 relief.

23. It was not perverse of the judge to find that the appellant and her son had sought to circumvent the Immigration Rules by deception. Although not specifically referred to by the judge in his determination, the plain implication of the son's witness statement is that he had sponsored his mother's visit visa application in the full knowledge that she was now a widow and would henceforth be living alone in India. The timing of the online application and its contents, the fact that there was ample opportunity to correct the misrepresentations in the application before a signed copy was presented in person by the appellant, and the fact the son had not purchased a return ticket for his mother were all matters reasonably relied on by the judge as supporting the finding of deception. The son attempted to pin the blame on the agents who drafted the VAF, but this excuse does not stand up to scrutiny. For the evidence of the appellant was that originally both she and her husband were applying for visit visas, and it was only after his death that the application was changed to cover herself only. So when instructing the agents to change the application, the son would have informed the agents why the application needed to be changed, namely because the appellant's husband had died. Accordingly, as found by the judge, certainly those helping advising the appellant would have been fully aware that the appellant's VAF falsely represented that the husband was still alive.

24. At paragraph 20 of the determination, the judge noted that some of the medical reports gave the appellant a date of birth of 4 June 1960 as opposed to the date of birth given in the VAF of 4 July 1958. Mr Sharma submitted that it was procedurally unfair for the judge to make this observation, as it had not been put to the appellant in cross-examination. But while noting the discrepancy, the judge does not make much of it. He

does not draw an adverse inference about the appellant's credibility from this particular discrepancy. His main reason for attaching little evidential weight to the various medical reports from India is that they did not include any clear diagnoses or prognoses. Conversely, they showed that medical help and services were available to the appellant in India. This undermined the claim that the appellant needed to be looked after in the UK.

25. With regard to paragraph 22 of the determination, I consider that the judge has given adequate reasons for concluding that the level of care that the appellant claimed to need had been exaggerated. The fact that the appellant used a walking stick to walk into court does not detract from the broad thrust of the judge's reasoning.

26. With regard to paragraph 23, it is not apparently disputed that the appellant has extended family members living in India. The judge makes a specific finding that the appellant's brother, who died in December 2013, had a son and daughter living in India. This evidence could only have come from evidence tendered by or on behalf of the appellant, and therefore there was no procedural unfairness in the judge relying on this evidence. The judge was also not thereby suggesting that the appellant could move in with her nephew and niece. All the judge was indicating was that it was not true that the appellant had no family left in India.

27. In conclusion, the judge has given adequate and sustainable reasons for finding that the appellant does not qualify for Article 8 relief outside the Rules.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson