The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/01100/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On January 29, 2015	**On February 3, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MOHINDER KAUR
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Shiliday (Home Office Presenting Officer)
For the Respondent: Mr Balroop, Counsel, instructed by Malik Law Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.

2. The appellant is a citizen of India. The appellant entered the United Kingdom as a visitor on August 8, 2012. Her visa was valid until January 27, 2013. On December 28, 2012 she applied for leave to remain due to private life with her daughter and grandchildren along with her medical conditions. The respondent refused to vary her

leave to remain on December 12, 2013 and at the same time took a decision to remove her by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2002.

3. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on December 12, 2013 and the matter came before Judge of the First-tier Tribunal Raymond (hereinafter referred to as the "FtTJ") on September 15, 2014 and in a decision promulgated on October 24, 2014 he allowed the appeal under both the Immigration Rules (paragraph 276ADE(vi)) and article 8 ECHR.

4. The respondent lodged grounds of appeal on October 29, 2014. She submitted the FtTJ erred by allowing the appellant's appeal under both heads.

5. Judge of the First-tier Tribunal Lever granted permission to appeal on December 17, 2014 stating there was an arguable error in law based on the fact the FtTJ failed to resolve differences between the evidence on the VAF forms and the evidence given at the hearing. He also found it arguable the FtTJ failed to give any consideration to the public interest as required by Section 117B of the 2002 Act (as inserted by Section 19 of the Immigration Act 2014).

6. The appellant was in attendance in court and was represented as set out above.

ERROR OF LAW SUBMISSIONS

7. Mr Shiliday adopted the grounds of appeal and submitted there were in fact five grounds of appeal and he then set out those grounds as follows:

   a. Ground One. The FtTJ erred in his approach to paragraph 276ADE HC 395. The appellant was not covered by subsections (iii) to (v) of paragraph 276ADE and therefore had to come within subsection (vi). This meant she had to demonstrate she had no ties including social, cultural or family. Bearing in mind the appellant had lived all her life in India save when she visited the United Kingdom she was unable to meet this requirement. The Tribunal in Ogundimu (article 8-new rules) Nigeria [2013] UKUT 60 defined ties as meaning

      > "The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin."

      The evidence before the Tribunal was she had worked in India until she retired in 1998 and had lived there with her husband albeit they were now estranged. The facts of Ogundimu, relied on by the FtTJ in paragraph [34] were wholly distinguishable from the facts of this appeal. The FtTJ erred in allowing the appeal under the Immigration Rules.

   b. Ground two is paragraphs [2] and [3] of the grounds of appeal. The decisions of Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) and R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) make it clear that any application must be considered under the rules. The FtTJ failed to consider the position under the

relevant Rule and decided the appeal on article 8 grounds and with no regard to whether the Immigration Rules could be met. In paragraph [34] the FtTJ allowed the appeal having regard to the principle in Chikwamba v SSHD [2008] UKHL 40. The facts of that case are wholly distinguishable from the facts of this appeal. Whilst there was no Rule that covered applications by dependant relatives in country there were entry clearance provisions and the FtTJ failed to consider this Rule. The grounds of appeal do not spell this out but Gulshan and Nagre say go to the Rules and if don't meet then consider whether there are any exceptional circumstances that would make removal unjustifiably harsh.

c. Ground Three. The FtTJ erred because he failed to consider the appeal under the Rules and consequently his finding that there were exceptional circumstances that would make removal unjustifiably harsh cannot stand.

d. Ground Four. The appellant is an adult dependant and following the decision of Kugathas v SSHD [2003] EWCA Civ 31 something more than normal emotional ties is necessary. In this appeal the appellant had until recently been living on her own in India. Although there was evidence before the FtTJ this did not go beyond the normal emotional ties.

e. Ground Five. There was a woeful consideration of Section 117B of the 2002 Act in paragraph [35] of the determination. There was no account taken of the fact the appellant would be reliant on the public purse because she had already needed medical attention and would continue to do so in the future. There was no evidence the appellant could speak English and it followed she would be unable to integrate into society. It was in the public interest to remove her.

Mr Shiliday concluded by submitting the FtTJ erred.

8. Mr Balroop opposed the grounds of appeal and responded as follows:

a. Ground One- When considering ties the FtTJ was not merely concerned with social ties. The Tribunal made clear in Ogundimu that "consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances". The Court made clear in Nagre that paragraph 276ADE does not cover every possible case. The FtTJ properly considered the application under the Rules and reached a conclusion that was open to him in paragraph [34] of his determination. His finding is not manifestly perverse. The respondent's submissions are a mere disagreement.

b. Ground Two. The respondent was arguing Chikwamba but this was not raised in grounds. The FtTJ found at paragraph [34] of his determination that there was no "in country" facility to make entry clearance from within the United Kingdom. The FtTJ cannot be faulted for considering outside the Rules.

c. Ground Three. The FtTJ made assessment in paragraph [34] that her health circumstances amount to compelling circumstances. The FtTJ was entitled to find that removal would be unjustifiably harsh.

d. Ground Four. The decision of Kugathas is about dependency. The FtTJ found the appellant to be a particularly vulnerable woman who suffered from serious

diabetes and was now supervised by her daughter. That is dependency. In Ghising (family life-adults-Ghurka policy) [2012] UKUT 00160 the Tribunal stated at paragraph [56] and [62]-

> "56. We accepted the Appellant's submission that the judgments in Kugathas had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts.
>
> 62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive…."

e. The court in Gurung and Ors [2013] EWCA Civ 8 preserved this finding stating at paragraph [46]-

> "We think that the cases are of some assistance to decision-makers and tribunals who have to decide these issues. Paras 50 to 62 of the determination of the UT in *Ghising* contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at para 62 that "the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive". The correctness of the UT's review has not been doubted before us. We endorse it. We doubt whether any useful purpose is served by further general elaboration".

f. Ground Five-Appellant is over 65 so does not need to speak English. The respondent says look at sponsors but that cannot be right as sponsors are going to care for her. With the exception of potential recourse to public funds it is submitted the public interest in removal is outweighed by the above factors.

9. Mr Shiliday maintained that ground 2 of his appeal did not stray beyond what was argued in the grounds of appeal but even if it did permission should be given to amend the ground, as there was no prejudice to the appellant who had ably addressed the issue. Although there was no direct in-country route for settlement as a dependant relative it was arguable that the FtTJ should have considered the equivalent entry clearance requirements and failed to do so. If he had he would have noted that the appellant could not satisfy E-ECDR 3.2 as there was a reliance on public funds.

10. I reserved my decision having indicated that if there was an error I would be able to remake the decision or decisions without recourse to further evidence or submissions.

ERROR OF LAW ASSESSMENT

11. The appeal that came before the FtTJ involved an application by a seventy-five year mother. She had a history of visiting her daughter and her family British family in 2005, 2006, 2009 and 2012. Her last entrance was on August 8, 2012 when she came on a family visit visa. Whilst in the United Kingdom she submitted an application to remain on the basis of family life on December 28, 2012. The respondent refused her application but her appeal was allowed on private life grounds under the Immigration Rules and family life grounds under article 8 ECHR.

12. The respondent appealed that decision and as can be seen from the court documents permission to appeal was given. A variety of grounds have been raised before me and in considering those grounds I have had regard to the FtTJ's determination, the representatives' submissions and the evidence submitted.

13. The FtTJ allowed the appeal under paragraph 276ADE finding in paragraph [34] that her appeal succeeded because:

    a. The appellant's only daughter is settled in the United Kingdom.

    b. Her daughter is the sole resource for a dignified end to her life as an increasingly physically restricted elderly person without the lucidity that she would have had before she retired as a head teacher.

    c. Her diabetes needs to be carefully and conscientiously monitored.

    d. The constant requirement of quality care and attention from her daughter and extended family makes "remote and abstract her ties to India"

14. Mr Shiliday submitted that the FtTJ erred in his approach to this issue whereas Mr Balroop reminded me that a "rounded assessment" was required and the FtTJ's finding was not manifestly perverse.

15. Both parties referred me to the decision of Ogundimu (Article 8-new Rules) Nigeria [2013] UKUT 60 (IAC) in which the Tribunal said -

> "123. The natural and ordinary meaning of the words 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
>
> … Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances."

16. In the recent decision of Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC) the Tribunal emphasised what a Tribunal should consider when considering "ties" and stated as follows:

> "15. … the FtT was required to consider in the form of a rounded assessment whether the claimant's familial ties could result in support to him in the event of his return to the DRC. In our view the Strasbourg jurisprudence understands assessment of this matter to require the decision-maker to take into account both subjective and objective considerations and also to consider what lies within the choice of a claimant to achieve.
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> 16. In this case the FtT appears to have approached the matter of family ties, as a purely subjective one, reasoning that because the two witnesses said there would be no effective family ties in the DRC that must be the case objectively. That was at odds with Strasbourg jurisprudence, which requires

> not only that assessment of ties has an objective as well as a subjective dimension but also that such assessment must consider, as a relevant consideration, whether ties that are dormant can be revived. Thus, in Balogun v UK app. no. 60266/09 [2012] ECHR 614 at [51] the Court noted that whilst it accepted that the tie between a Nigerian applicant and his mother in Nigeria was "not a strong familial tie", nevertheless "it is one that could be pursued and strengthened by the applicant if he chose". That assessment was not undertaken by the FtT."

17. The issue for me is to consider whether the FtTJ erred in his approach. The FtTJ accepted after hearing oral evidence:

    a. The appellant's husband lived in India but they were no longer living together and had not been for perhaps fifteen or sixteen years.

    b. The FtTJ was satisfied that she had no other family in India and her daughter and son-in-law supported her financially from the United Kingdom. Her siblings have all died except for one who lives in Canada.

    c. The appellant had become reliant in India on a man who had a car to help her but she was required to pay him to take her where she needed to go.

    d. She lived in a private property consisting of two to three rooms.

    e. She received a pension in her bank account.

    f. Her health was deteriorating.

18. The FtTJ considered the application under paragraph 276ADE HC 395. In order to succeed the FtTJ had to be satisfied the appellant satisfied sub-sections (i), (ii) and (vi). There was no suggestion the appellant did not meet subsections (i) or (ii) and the only issue was whether the appellant satisfied subsection (vi). In order to meet this section the appellant had to demonstrate "subject to sub- paragraph (2) *(she was)* aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family)".

19. The FtTJ considered all of the evidence and concluded she satisfied the requirement of subsection (vi). Applying both a subjective and objective test I am satisfied the FtTJ was entitled to make the finding he did. He carefully considered the inconsistencies in the evidence relating to whether she was with her husband and whether she had more than one child. Having found in the appellant's favour he then considered whether the appellant had any ties to India apart from the obvious fact that she had lived there all her life and had a place to stay.

20. It may well be that a different judge could have reached a different conclusion but it would be perverse to suggest that the conclusion he reached was not open to him.

21. In the circumstances I find the FtTJ was entitled to allow the appeal under paragraph 276ADE HC 395 and I therefore dismiss the respondent's appeal.

22. I briefly turn to the other ground of appeals. These relate to the FtTJ's approach on article 8 ECHR. I reject Mr Shiliday's submission that the FtTJ should not have considered the case outside of the Rules. The FtTJ acknowledged that the FtTJ could

not consider an in-country application for settlement as an adult dependant as that application must be made out of country. He had regard to the appellant's medical condition and in paragraph [34] found her health was a compelling circumstance.

23. In paragraph [34] of his determination the FtTJ considered the issues and had regard to article 8 principles and case law. Mr Balroop's legal arguments on adult dependency carry weight. Section 117B of the 2002 Act was considered by the FtTJ and contrary to Mr Shiliday's submissions I find the FtTJ reached conclusions open to him.

24. I therefore also dismiss the respondent's appeal under article 8 ECHR.

Decision

25. The decision of the First-tier Tribunal did not disclose an error in law.

26. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier and I see no reason to amend that order.

Signed: Dated: **February 3, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the original fee award.

Signed: Dated: **February 3, 2015**

Deputy Upper Tribunal Judge Alis