Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03333/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 14 April 2015	**On 24 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

CAROLINE HEMLATA BARBOSA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Cooray, JCWI
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. At the end of the hearing I announced that I would allow the appellant's appeal because I am satisfied that the decision and reasons statement of First-tier Tribunal Judge Maxwell (promulgated on 18 July 2014) contains legal error that requires it to be set aside. I also announced that I would remake the decision and allow the appeal against the immigration decisions of 2 January 2014 refusing to vary the appellant's leave and to remove her by way of directions. Although I gave brief reasons at the end of the hearing, I indicated I would prepare a full statement, which was reserved.

2. The appellant was born on 22 July 1928 and is a citizen of India. She last arrived in the UK on 2 May 2013 as a visitor, holding entry clearance that acted as leave to enter for six months. Before that leave expired, on 25 October 2013, she applied to vary her leave outside the immigration rules on the basis of her health circumstances and at the same time made a human rights claim. The focus of her application was on the fact that she had been diagnosed with Alzheimer's disease and vascular dementia, meaning that it was not possible for her to care for herself. As she had been living alone in India and would return to a situation where care could not be provided, she sought to remain in the UK where her daughter and son-in-law could provide daily care. The medical evidence also identified a number of six other conditions for which the appellant received various medications.

3. The appellant acknowledged that she could not succeed under the adult dependent route of the immigration rules as that only permitted applications from people outside the UK. The Home Office agreed, pointing out that in addition to the adult dependant route, the appellant did not meet the requirements of paragraph 276ADE. The Home Office considered the application exceptionally and concluded that it was reasonable to expect the appellant to obtain suitable medical treatment in India and there was no evidence that she would be unable to travel to receive such treatment. Therefore she could return there. The Home Office also disputed that the appellant enjoyed family life within the meaning of article 8 ECHR with her adult children and grandchildren present and settled in the UK.

4. Judge Maxwell examined the evidence and made a number of findings which are unchallenged. At paragraph 17, he concluded that the medical evidence confirms that the appellant has dementia, and that "*…her condition is deteriorating and that she is increasingly unable to look after herself and requires a level of care commensurate with her present condition but this is likely to become greater as her dementia inevitably progresses.*" At paragraph 19, he found that this was a case there required direct consideration of article 8 ECHR. At paragraph 21, Judge Maxwell concluded that applying Kugathas v SSHD [2003] EWCA Civ 31, there is family life between the appellant, her sponsor (her daughter) and family. In the following paragraph, Judge Maxwell found that the consequences of the immigration decisions were of sufficient gravity to engage article 8(1). He also accepted that the decision was in accordance with the law and there was public interest in removing the appellant because of the importance of maintaining immigration control. He therefore went on to address whether the immigration decisions were proportionate in all the circumstances.

5. When considering whether the decisions were proportionate, Judge Maxwell did not accept that the appellant could not receive appropriate care in India. At paragraph 30 he stated, "*The sponsor and her husband have sufficient resources to fund the appellant's care in India without the necessity of the sponsor having to go and live there.*" At paragraph 30 he took into consideration the "*cost to the public purse if the appellant were allowed to remain.*" Although he accepted the sponsor and her husband genuinely intended to look after the appellant, he believed that they would have to resort to public funds "*sooner rather than later*" because of the nature and prognosis of the appellant's condition. Judge Maxwell believed it to be "*inevitable that the National Health Service*

will be called upon to cope with the appellant at some point and that point will be reached soon rather than later."

6. During the hearing I asked if either representative could show me the evidence from which Judge Maxwell had drawn these conclusions. They were unable to do so. The medical evidence did not indicate that the appellant would need medical care or residential care. The extensive reports all concluded she needed supervisory care, which was being provided by her daughter and son in law and which should continue. In light of the evidence, it was unclear on what basis Judge Maxwell had reached his conclusions that the appellant would need to resort to NHS treatment. In addition, it is well known that NHS treatment does not cover residential or supervisory care, which is the type of care the appellant would require. It is evident from the findings at paragraph 29 that Judge Maxwell was satisfied the sponsor was able to meet the costs of the appellant's care. Although he indicates there were sufficient resources available to provide care in India, the level of necessary expenditure is indicated in paragraph 30 to be at least £27,647 which is likely to go a long way to meeting any care costs arising in the UK. In any event, before me Mr Kandola acknowledged that the evidence of the resources available to the sponsor and her husband would be sufficient to provide care in the UK.

7. It is evident that Judge Maxwell relied heavily on his conclusions regarding the cost to the public purse when carrying out the necessary balancing act. Therefore, the fact that he had no basis other than speculation for those conclusions undermines his assessment because it is unsound for lack of reasons. It is for this reason that I set aside his decision because the proportionality assessment needs to be remade.

8. Before moving to that issue, I add that there are other difficulties with the balancing act carried out by Judge Maxwell. In paragraph 34 he concludes that any separation of the sponsor's family unit would be "*… as a result of voluntary actions of the sponsor and her husband. In any event, there is nothing to stop both the sponsor and her husband going to India to care for the appellant, the result of which would be their daughter would remain in their care.*" This conclusion does not follow from the other findings because it does not take into consideration what the sponsor and her family would have to give up in order to relocate to India. To suggest that it was simply a choice the family would have to make fails to have proper regard to whether it would be reasonable to expect the family to be divided or for British citizens to be expected to leave the country of their nationality in order to care for a relative who is and could be cared for in the UK. In addition, this conclusion fails to have regard to the best interests of the sponsor's nine year old daughter, assuming merely that she would be able to adapt to such a significant change of life. Again, the findings are undermined by the judge's speculation.

9. In remaking the decision, given the preserved findings, I only need to assess the proportionality of the immigration decisions. I remind myself that it is for the Secretary of State to establish that the level of interference that would arise from the immigration decisions is proportionate. The usual civil standard applies.

10. As I have indicated, the evidence is not disputed. The sponsor gave further evidence at the hearing to update that evidence; little had changed. An updated medical report was also submitted. There was no challenge to the sponsor's credibility or to any of the evidence.

11. Mr Kandola reminded me that the appellant admitted she could not meet the requirements of the immigration rules and, because this was a case where s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended) applied, weight had to be given to the public interest that lay in maintaining effective immigration control. Mr Kandola submitted that it was reasonable to expect the appellant to be cared for in India. The Dementia India Report was published in 2010 and was not up to date. Medical care was certainly available. As to maintaining family life, that could be achieved by regular visits.

12. There was no need for me to hear from Mr Cooray, the burden lying on the Secretary of State in relation to the issues I have to decide. Mr Kandola's submissions, which reflect the reasons for refusal, do not show that on the facts of this case it is proportionate to remove the appellant to India. My reasons are essentially those that I have already given above in finding an error of law. For clarity, I set them out below.

13. I reject Mr Kandola's argument that the Dementia India Report is out of date and therefore unreliable. It is the best evidence we have about the situation in India. It is limited to the issue of how people with dementia are cared for in India. It confirms that such care is usually provided by families and that there are no trained carers in India because of this cultural background. There is nothing to indicate that Indian society and culture has changed significantly since 2010. I mention that I accept the sponsor's evidence that the appellant has no living relatives in India to be truthful. Given the appellant's history of having been settled in the UK between 1994 and 2000 and given her age, it is more likely than not that her surviving family are her adult children in the UK.

14. The current situation is also described by the sponsor. She is a medical professional, being a general practitioner in the UK. She has investigated for herself what care could be provided in India and has concluded that apart from a day centre many miles away in Delhi there is nothing. The number of places available at the day centre is very limited and therefore there is no realistic prospect of the appellant accessing such care, even if she were able to travel to it.

15. The evidence clearly shows that the appellant requires 24 hour care. It has successfully been provided to the appellant by her sponsor since she arrived here, that is, for over a year. There is no reason to think that the sponsor would not continue with such arrangements or that she would be unable to meet the costs of any external care she buys in. There is no dispute that the sponsor and her husband have more than sufficient funds to ensure there would be no risk to the economic wellbeing of the UK should the appellant be allowed to remain.

16. It is wholly unrealistic to expect the sponsor and her family to relocate to India. They are all British citizens. The sponsor works as a general practitioner. Her husband is retired. Her daughter is at school. The level of disruption that they would incur in order to move to India to care for the appellant is unreasonable. I add that they would be left with no reasonable choice should the appellant be removed. The appellant is part of the family unit, and should she be removed the family would be faced with the choice of bearing severe disruption either by relocating as a unit or by separating. Although human rights law indicates that where there is a reasonable alternative, then an immigration decision will be proportionate, that is not the case here.

17. The evidence in this case also indicates that it would not be reasonable to expect the appellant to travel to India to make an application as an adult dependent relative. Her dementia would make such a journey extremely difficult. It is clear she could not make that journey on her own. Yet I am satisfied that the evidence shows that the requirements of the adult dependent relative route would be met, bearing in mind the specified evidence requirements of appendix FM-SE to the immigration rules, were the appellant in a position to make that journey and application.

18. For all these reasons, I am satisfied that in this case the appellant's personal circumstances outweigh the public interest in maintaining immigration controls. That means the immigration decisions are not proportionate and violate the UK's obligations.

Decision

The decision and reasons statement of Judge Maxwell contains an error on a point of law and is set aside.

I remake the decision and allow the appeal against the immigration decisions on human rights grounds.

Signed Date **23 April 2015**

John McCarthy
Deputy Judge of the Upper Tribunal