Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04581/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2015	**On 12 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS BANI MITRA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K. Reid of Counsel
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 15 July 1936. She appealed against a decision of the Respondent dated 19 December 2013 to refuse to vary leave to remain for a purpose outside the Immigration Rules and to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Walters sitting at

Taylor House on 24 September 2014. The Respondent appeals with leave against that decision and the matter therefore comes before me in the first place to decide whether there is an error of law in the first instance decision. For the reasons which I set out below I have found that there is and have proceeded to remake the decision in this appeal. I therefore continue to refer to the parties as they were known at first instance for the sake of convenience.

2. The Appellant entered the United Kingdom as a visitor on 11 January 2012, returning to India on 8 December 2012. She re-entered the United Kingdom as a visitor on 26 December 2012 and made her current application for indefinite leave to remain outside the Immigration Rules on 12 June 2013.

3. The Appellant's application was based on the fact that her husband had passed away on 6 November 2012 while she was visiting the United Kingdom. She and her son, Dr Mitra ("the Sponsor") had returned to India on 8 December 2012 to finalise the formalities. Her son had accompanied the Appellant because she, the Appellant, was unable to look after herself physically and financially.

The Appellant's Case

4. The Appellant had a number of medical conditions. In 1972 she had been diagnosed with follicular non-Hodgkin lymphoma which was subsequently treated with radiotherapy. In 1995 she was found to have a large mass involving kidney which was also a non-Hodgkin lymphoma. She had been treated with six cycles of CHOP and a CT scan at the end of treatment showing that she had a complete remission but had scarring to her remaining kidney. In 2001 she had developed a further lymphadenopathy but further chemotherapy had achieved a complete remission. In 2009 she developed further lymph nodes in her neck and chest. In 2012 and 2013 she had severe breathlessness from mitral valve disease which had improved on diuretics. She had chronic renal failure and was on diuretic medication for raised blood pressure. Apart from her oncological problems she had other medical problems resulting in multiple organ failure which needed specialist cardiology and renal specialist input. She was socially, emotionally and financially dependent on her son the Sponsor. She was physically unfit and needed someone to help her. She was unable to go to the shops to buy food for herself. In India when she could not walk to the shops she had to go to bed hungry. She was unable to clean and maintain her home in India. The Sponsor was her only child.

5. The Sponsor said that he employed a housekeeper who looked after his mother. He accepted he could employ people in India to look after his mother but she would not receive the same quality of care. The housekeeper cooked for the Appellant and washed her clothes. In India the Appellant had lived in a house with her husband, the Sponsor's father, where they had one domestic servant. Some treatment had taken place in India.

6. The Sponsor was concerned about his mother's fitness to fly when they both went back on 8 December 2012. He had had considerable communication with Emirates Airways about her and they would only permit her to fly if he accompanied her.

The Decision at First Instance

7. The Judge found that the Appellant could not succeed under paragraph 276ADE of the Immigration Rules because she clearly had social and cultural ties with India having lived there for 76 out of her 77 years. The Appellant's medical condition did not meet the high threshold required for Article 3. Whilst the Appellant had a family life in the United Kingdom with the Sponsor and his wife and children there was no more than normal emotional dependence between the Appellant and Sponsor. The Sponsor had provided for the Appellant financially while she was in India and continued to do so while she was in the UK. The removal of the Appellant would amount to an interference with the Appellant's right to respect for private and family life under Article 8. It would, however, be in accordance with immigration law.

8. The Judge carefully considered the relevant provisions in Appendix FM of the Immigration Rules in relation to entry clearance as an adult dependent relative. The Appellant satisfied the requirements in Section E-ECDR.2.4 in that the Appellant "as a result of age, illness or disability requires long-term personal care to perform everyday tasks". However, the Judge found that the Appellant could not go on to meet the requirements of Section E-ECDR.2.5 which provides that the Appellant "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."

9. The Judge found that the Appellant would be able to obtain the required level of care in India if the Sponsor employed a paid carer or carers and it was not in dispute that the Sponsor could afford to do this. No adult dependent relative could succeed in an application for entry clearance where a paid carer could be employed in their country of origin and the Sponsor could afford to pay for it. Paid care by a stranger defeated an application for entry clearance as long as it was affordable. Such an application would have to be made from abroad, not in country. However much one sympathised with the Appellant and the Sponsor it would be proportionate to the legitimate public end being pursued to remove the Appellant.

10. Nevertheless the Judge was concerned about one point and that was the state of the medical evidence as to whether the Appellant was fit to fly. Emirates Airways had only accepted the Appellant as fit to fly in December 2012 because she was accompanied by the Sponsor. He could not be compelled to accompany the Appellant if she were to be removed from the United Kingdom. As there was no-one who would be able to accompany the Appellant it would be a breach of her physical and moral integrity to remove her unless and until the Respondent established that the Appellant was fit to fly. The Judge allowed the appeal on human rights grounds, albeit dismissing it under the Immigration Rules. He made no fee award, finding that "the Respondent succeeded substantially on the merits".

The Onward Appeal

11. The Respondent appealed against that decision, arguing that the Judge's decision to allow the appeal was misguided. It was unclear what medical evidence had satisfied the First-tier that there was "no doubt that [the Appellant] is not fit to fly". The evidence from Emirates Airways stated that they would only accept the Appellant on board if she was accompanied by her son the Sponsor but this was not independent medical evidence of the Appellant's fitness or unfitness to fly. The burden was on the Appellant to show that she was unfit to fly. In any event the Respondent would not remove the Appellant until such time as she was deemed fit to fly where it was previously evidenced that she was unable to do so. It was not open to the Judge to allow the appeal under Article 8.

12. The application for permission to appeal came on the papers before First-tier Tribunal Judge Foudy on 9 December 2014. In granting permission to appeal the Judge wrote that an arguable error of law was disclosed by the Respondent's application.

The Hearing before Me

13. The matter thus came before me in the first place to decide whether there was a material error of law in the Judge's decision such that it fell to be set aside and remade. If not the decision would stand. Although the case was called on for hearing in the mid-afternoon there was no attendance by either the Appellant or the Sponsor. The Appellant was represented at the hearing before me by Counsel but there was no reasonable explanation given for the absence of either the Appellant or Sponsor. In the absence of such a reasonable explanation I decided that the matter would proceed. There was no objection to this course by Counsel or any application for an adjournment.

14. In brief oral submissions the Presenting Officer reiterated the arguments contained in the grounds of onward appeal that there was no justification for the Judge's conclusion that the Appellant was unfit to fly. In any event, if a decision was taken to remove the Appellant the Respondent could make whatever arrangements were needed at that time to facilitate removal.

15. In reply Counsel accepted that she was in a difficult position in the light of the non-attendance of the Appellant and the Sponsor. However, there was medical evidence of the Appellant's condition. The hearing at first instance had been difficult and the Judge had made observations about the inability to communicate with the Appellant due to her hearing difficulties. The Judge had considered that the removal of the Appellant to India was proportionate under Article 8 but had then considered it to be impossible in practice. The practical problems involved in removing the Appellant should have affected the Judge's proportionality considerations. He should have gone into the proportionality consideration in a more pragmatic way.

16. It was argued that the removal directions could remain in place until such time as the Appellant was assessed as fit to fly. Counsel made two observations on that. The

first was that better medical evidence would be required. The Appellant suffered from a permanent condition which would not improve. The second was that Section 47 had been applied by the Respondent because the Appellant was here unlawfully but the reason why she had become an overstayer was because she was not fit to leave the United Kingdom due to her illnesses.

The Error of Law Stage

17. The first issue I have to decide is whether there was an error of law. The Judge had decided that it was a proportionate interference with the Appellant's private and family life in this country to require her to leave the United Kingdom. She could not succeed under the Immigration Rules for the reasons given by the Judge and the Judge evidently did not consider that there was any reason why the appeal should be allowed outside the Rules save that there was the issue of the Appellant's fitness to fly. Although the Judge found that there were more than the normal emotional ties between the Appellant and her son the Sponsor because of the Appellant's dependence on the Sponsor, the Judge also considered that the Sponsor could make arrangements for the Appellant in India so that she did not need to be in the United Kingdom. The only reason why she should remain in the United Kingdom was because of the practical problem in physically removing her.

18. In doing so the Judge erred since that was not a relevant part of the proportionality test. What the Judge had to do if he was to allow the appeal under Article 8 was to establish whether there were compelling and compassionate circumstances such that the appeal should succeed outside the Rules (see **Gulshan**). The Judge had accepted that Article 8 was engaged. The only compelling or compassionate circumstance he considered to be relevant was the issue of fitness to fly. It was not a question of the Appellant's medical condition or what arrangements needed to be made for her.

19. The issue was thus a very narrow one. Was it sufficient to allow an appeal under Article 8 on the basis that there would be practical difficulties in removing the Appellant? It is difficult to see how the arrangements which the Respondent might make for removal could be a matter for arbitration by the Tribunal. It is well established that in the case of the removal of a minor to their country of origin the Respondent should make some form of enquiry as to what reception arrangements there will be upon return. That would not apply in this case even given the Appellant's medical condition because the Judge was satisfied that appropriate arrangements could be made for the Appellant once she returned to India.

20. Similarly where there is a risk of self-harm by a person being removed it is well established that the Respondent should make arrangements to ensure that no such self-harm can occur when being removed. That does not apply in this case either since the Respondent would not remove the Appellant unless she was fit to fly.

21. In fact it had not been established that the Appellant was unfit to fly. The evidence if anything pointed to the fact that she was fit to fly because she had flown both back to India in December 2012 and returned to the United Kingdom. The Respondent's criticism of the Judge was that he had misinterpreted the Sponsor's evidence (that the

Appellant could only fly if accompanied by the Sponsor) to mean that she was not fit to fly at all. That was an error although, since the issue of whether she was fit to fly or not was not relevant to the outcome of the proceedings, it was not of itself a material error. The important point was that the Judge had embarked on a line of reasoning which was not properly open to him. I therefore found there to be an error of law such that the decision of the First-tier fell to be set aside and remade.

The Substantive Re-hearing

22. I have indicated there was no further evidence to be given in this case because of the non-attendance of the Appellant and the Sponsor. Counsel for the Appellant properly drew the Tribunal's attention to the state of health of the Appellant but this does not in my view affect the issue of whether there were compelling and compassionate circumstances such that the appeal should be allowed outside the Rules. The Judge at first instance did not find that to be the case and neither do I. The Appellant could not meet the Immigration Rules, she was here unlawfully, she had shown that she was able to fly to and from India, arrangements could be made for her care in India. The weight to be given to the fact that she could not meet the Immigration Rules was such that the Judge was quite right when conducting the proportionality exercise to find that the appeal could not succeed either within or outside the Immigration Rules.

23. The error the Judge made was a narrow one and setting that part of the determination aside (but not the remainder of the Judge's findings and conclusions) leads me to the view that as Article 8 was engaged in this case it was not a disproportionate interference with Article 8 rights to dismiss the Appellant's appeal against the Respondent's decisions. It was not argued that the Appellant could meet the Immigration Rules. Any private life she had established here had been established while her status was either precarious or unlawful. As such little weight was to be afforded to it in assessing the proportionality of any interference with it. Her family life with her son did not for the reasons given by the Judge go beyond normal emotional ties. Any interference with that family life would thus be proportionate to the legitimate aim being pursued.

24. Having set aside the decision at first instance I remake it by dismissing the Appellant's appeal against the Respondent's decisions to refuse to vary leave and to remove her.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the Appellant's appeal against the Respondent's decisions in this case.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The Judge made no fee award in this case and I preserve that decision. I too make no fee award as I have dismissed the Appellant's appeal.

Signed this 11th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft