Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12307/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 November 2017	**On 16 November 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS VIMIABEN PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr M Nadeem, Legal Representative, City Law Immigration

DECISION AND DIRECTIONS

1. The appellant (hereafter the Secretary of State or SSHD) has permission to challenge the decision of First-tier Tribunal (FtT) Judge M Davies sent on 19 January 2017 allowing her appeal against a decision made by the SSHD on 26 April 2016 refusing leave to remain in the UK on compassionate grounds outside the Immigration Rules. The claimant is a citizen of India, aged 73, who last came to the UK on a family visit visa in September 2015. She did not leave within the permitted period of stay but submitted an application for leave to remain on 26 January 2016.

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2. The SSHD's grounds of appeal were essentially threefold. It was submitted that the judge erred in law (1) in failing to consider the claimant's circumstances through the lens of the Immigration Rules; (2) when assessing the claimant's Article 8 circumstances outside the Rules, in failing to take into account any of the statutory considerations contained in ss.117A-D of the NIAA 2002; and (3) in wrongly allowing the appeal on the basis that "the [SSHD] should have exercised his discretion outside the Immigration Rules to allow the [claimant leave to remain]".

3. The submissions I heard from both representatives were concise and proficient. Mr Tufan pointed out a further ground of concern which although not strictly an aspect of grounds 1-3 does identify a relevant feature of the judge's decision-making and which for this reason I shall call ground 4. This alleges that the judge improperly failed to permit the Home Office representative to cross-examine the claimant.

4. It is convenient to address grounds (3) and (4) first of all. In relation to ground 3, I find it is fully made out as it is clear from the terms of ss.82-86 NIAA 2002 that the judge had no jurisdiction to allow the appeal in respect of a failure on the part of the SSHD to exercise discretion outside the Rules. However, as the author of the grounds and Mr Tufan conceded, this error was not material as the judge also allowed the appeal on human rights grounds in respect of which he did have jurisdiction.

5. In relation to ground 4, I see force in Mr Tufan's argument that the judge did not approach application of the Joint Presidential Guidance on Vulnerable Witnesses with sufficient vigour. At paras 18-19 the judge wrote:

> "18. I noted that the Appellant Vimiaben Patel of [ ] was pushed into court by one of her daughters in a wheelchair. From my observations it was clear she was in a particularly frail condition and I noted her exceptionally small stature and lack of weight. Undoubtedly her condition had come about not only due to her age but as a result of the fall she had suffered in the United Kingdom resulting in her being confined to a wheelchair. The evidence supported by the Appellant confirmed that situation.
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> 19. In the process of identifying her she became exceptionally distressed and I therefore indicated to the representatives that I would treat her as a vulnerable witness and it would seem totally inappropriate and perhaps impossible for her to be cross-examined. Helpfully Miss Chaudhry accepted that that was the case. Miss Chaudhry indicated she would like to ask the other witnesses a few questions but I suggested to her bearing in mind the Appellant was a vulnerable witness the appeal and the evidence should be heard in her presence and that any questioning of her two daughters would cause her further considerable stress. On that basis Miss Chaudhry agreed that I should proceed by simply receiving submissions."

6. The difficulty with the judge's treatment of this issue is that it appeared to consider the mere fact that a witness was to be treated as a vulnerable witness as entailing that they were to be excused having to give oral testimony. The judge had no medical evidence stating that the claimant was unable to give oral testimony and it is far from clear that he could not have considered expecting her to give oral evidence subject to a sensitive approach being taken to her initial state of distress. At the same time the fact of the matter is that although the Home Office Presenting Officer requested permission to ask the claimant "a few questions" (even after the judge had said he did not want her to have to give evidence), she did not press this further when the judge again stated he considered this would be inappropriate; nor did the SSHD raise the matter in the written grounds.

7. I turn then to grounds 1 and 2.

8. I have had regard to the relevant provisions of Appendix FM set out in the sections dealing with R-LTRP and D-LTRP as well as paras A277C and 276ADE. The SSHD had regard to these provisions. In the course of her considerations the SSHD also took account of the claimant's essential reason for seeking to stay, namely her health problems, including those caused or exacerbated by her fall in the UK on 26 September 2015. The SSHD then turned to consider whether these circumstances justified a grant of leave outside the Rules on Article 3 or 8 grounds. It is salient to set out the relevant parts of her human rights assessment as set out at pp.4-5 of the refusal letter:

> "You have provided representations dated 16/1/2016 and medical evidence from India dated 23/1/2008 and 26/10/2015 in support of your claim with regard to your health problems which originated during your life in India for which you claim to require constant medication. However, it is acknowledged that treatment for all of these medical condition(s) is available in India. Indeed, your evidence from Doctor Mayur M Shah dated 26/10/2015 gives full details of your medical treatment which you have been receiving for the past 5 years. This treatment would appear to have been successful in maintaining your health as you have been fit enough to travel to the United Kingdom on at least 3 occasions (30/7/2011, 11/6/2012, 27/8/2014) prior to your latest arrival and also to travel to Australia on 9/2/2015. Whilst, it is accepted that the health care systems in the U.K. and in India are unlikely to be equivalent, this does not, in itself, entitled you to remain here. The fact that your circumstances would be less favourable in India than they are in the U.K is also not decisive from the point of view of Article 3. The United Kingdom is not obliged to provide you with medical treatment, which may or may not be lacking in India. However, objective and factual evidence, you have provided, suggests that there is appropriate help which you could access, should the need arise.
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> You have also made mention in your representations that you are suffering from reduced mobility following a fall in the United Kingdom on 26/9/2015 and that you would now have trouble with everyday tasks and maintaining yourself in the event of your return to India. However, it is noted from your

Entry Clearance application dated 17/8/2015 that you have stated that you have funds amounting to £2000. It is also noted that your daughter claims to earn around £1600 per month and you have provided Western Union receipts showing that your sponsor has previously sent funds to you in India by transfer. Consequently, it is believed that this arrangement could continue on your return to India and you could continue to receive support from your United Kingdom based family. It is believed that your level of income would enable you to obtain medical services and also access a level of care in India as and when required. This care could be arranged by your UK and Australia based family and enable you to have appropriate day to day help with everyday tasks, as and when required. Therefore, it is considered that your issues with reduced mobility, difficult though they may be for you, do not, in themselves, make your circumstances exceptional and would not enable you to reach the threshold to allow you to remain in the United Kingdom under Article 3 medical.

It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. Your relationships with your family and your private life in the United Kingdom have been dealt with above. Whilst it is acknowledged that you may face difficulties on your return to India, it is not believed that those difficulties amount to exceptional and insurmountable circumstances. You have 2 daughters in the United Kingdom and a daughter in Australia. Whilst they may not be able to support or care for you on a day to day basis due to their own commitments, it is considered that a care package could be arranged or carried out by them to see that you get a similar level of care to that which you receive in this country. This care package could be financed by your UK based relatives providing financial support via Western Union, in the same manner as happened previously when you were residing in India. Your UK and Australia based family would also have the option to visit you in India on a regular basis in order to maintain contact. It has therefore been decided that there are no exceptional or compellingly compassionate circumstances in your case. Consequently your application does not fall for a grant of leave outside the rules."

9. Bearing in mind that the Immigration Rules have been held to reflect the SSHD's understanding of the public interest and that that understanding must inevitably inform the assessment of whether there are compelling circumstances warranting a grant of leave on Article 8 outside the Rules, it was incumbent on the FtT judge to address the SSHD's assessment both under the Rules and outside the Rules. Instead the judge's only direct treatment of the Rules was confined to the observation at para 24 that:

> "[It] has not been argued in this appeal that the Appellant can meet the requirements of the Immigration Rules as a dependent relative because of course it is accepted that the Appellant entered the UK as a visitor".

Thereby the judge completely ignored the respondent's reasons for considering the claimant did not meet the requirements of Appendix FM. In addition, the judge's treatment of the claimant's circumstances outside the Rules was confined to the following paras:

> "26. In my view the Respondent did not give proper consideration to granting the Appellant leave to remain outside the Immigration Rules on a discretionary basis. He had been provided with evidence as to the Appellant's condition and the suggestion she should be returned to India by herself to make an application for entry clearance from there seems to ignore the Appellant's predicament. How the Appellant was expected to make an application for entry clearance from India without the assistance of her family has not been explained. She may have been able to afford medical care whilst making such an application to require her to do so appears to me to be totally unreasonable.
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> 27. I also make it clear that the evidence that has been put before me indicates that the Respondent's decision does amount to an interference with the Appellant's right to respect for her family life. The evidence that is put before me clearly indicates there is a situation of total dependence by the Appellant upon her daughters. That dependence is both physical and emotional and I cannot imagine any circumstances in which the Appellant could be returned to India in those circumstances. To return her in all probability taking into account her physical and mental state of health would probably lead to her demise.
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> 28. On the basis of my findings above I find that the interference caused by the Respondent's decision would have consequences of such gravity as to potentially engage the operation of Article 8. Whilst the interference would be in accordance with the law and may be necessary for one of the reasons set out in Article 8 it would in no way be proportionate to the legitimate end of, for instance, maintaining effective immigration control."

10. There are a number of difficulties with these paragraphs. First of all there is no indication whatsoever that the judge weighed in the Article 8 proportionality assessment any public interest factors. There was just the simple assertion that the decision "would in no way be proportionate".

11. Second, the judge appeared to simply assume from his finding that the claimant was totally dependent on her daughters in the UK that this automatically precluded the possibility that she could be adequately cared for in India where she had been able to receive satisfactory medical treatment for five years previously and where, on the strength of the evidence as to how she had lived in India prior to her visit, family

arrangements for her to receive care in India might be made. A troubling backdrop to the judge's assessment is that not only did he decide somewhat prematurely not to allow the claimant to give oral testimony; he did not consider receiving oral testimony from the two daughters. He seemed prepared to take the claimant's and witnesses' assessment of her health circumstances at its highest even though the SSHD in her refusal letter plainly did not consider it sufficiently serious to prevent her from returning to India. It cannot be said that the medical evidence before the judge obviously demonstrated that her health circumstances met the high threshold established by jurisprudence on either Article 3 or Article 8. I am not concerned here to indicate one way or the other whether on a properly conducted proportionality assessment the claimant could succeed; only to note that the judge's attempted proportionality assessment was singularly flawed since it effectively just adopted the claimant's account without any attempt at testing even by way of hearing from the two daughters.

12. Turning to ground (2), the point made above regarding the judge's failure to show that he weighed public interest factors in the balance in fact applies not just to his disregard for the Immigration Rules dimension to that public interest, but also to those he was statutorily required to take into account by virtue of s.117B of the 2002 Act. There is nothing to suggest that he weighed against her the fact that she was not financially independent, or that she lacked English language capability. Mr Nadeem makes the fair point that the latter is not a requirement imposed under the Rules for persons over 65, but no such limitation is specified under s.117B and it was still incumbent on the judge to explain why it was not a consideration to which he should attach any significant weight. Finally, the judge nowhere shows he attached negative weight to the s.117B consideration of her precarious immigration status. It was certainly relevant to assessment of precisely how much weight he should attach to her precarious immigration status that he was satisfied that it was never her intention to overstay her visit and that she only did so because of her fall; but that did not negate the need for him to show that he had reduced the weight that he could attach to her immigration conduct.

13. In short, the judge's proportionality assessment was vitiated by significant legal errors capable of having a material effect on the outcome of the appeal. For the above reasons I set aside his decision.

14. In the circumstances this case falls squarely within the criteria set out in the Senior President's Practice Statement concerning remittal to the First-tier Tribunal.

15. In view of the SSHD's observations on the FtT's judge's treatment of the issue of whether the claimant as a vulnerable witness should not be required to give oral evidence, I direct that her representatives provide written clarification of whether they intend to call her as a witness or, if not (because they consider that inappropriate), provide up-to-date medical evidence to support that view. Irrespective of whether medical evidence is produced sufficient for the FtT to conclude that she is unfit to give evidence, her two daughters are directed to attend ready to give oral evidence.

No anonymity direction is made.

Signed Date: 15 November 2017

Dr H H Storey
Judge of the Upper Tribunal