



**IN THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM CHAMBER)**

UI-2023-002680

Case No:

HU/56604/2022

First-tier Tribunal No:

LH/00167/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6th September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

**APC
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr E. Terrell, Senior Home Office Presenting Officer

For the Respondent: Ms N. Bustani, counsel instructed by Nasim & Co solicitors

Heard at Field House on 18 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of India, born on 14.7.53. She arrived in the United Kingdom on 30.1.21 as a visitor and thereafter remained. On 23.7.22 she applied for leave to remain pursuant to article 8 and paragraph 276(1)ADE of the Immigration Rules, on the basis that her husband died in 2000 and her 3 adult sons, their wives and grandchildren all reside in the UK. One of her sons lived with her until 2013 when he relocated to the UK and thereafter the Appellant would spent 6 months in India and 6 months in the UK until the coronavirus pandemic, during which time she became very unwell with a UTI, was found unconscious at home by neighbours and was hospitalised and lost a kidney.
2. Her application for leave to remain was refused in a decision dated 17 September 2022. The Claimant appealed and her appeal came before First tier Tribunal Judge Farmer for hearing on 28 April 2023. In a decision and reasons promulgated on 29 April 2023, the appeal was allowed.
3. An application for permission to appeal to the Upper Tribunal was made, in time, on 11 May 2023 on the basis that the Judge made material misdirections in law and failed to provide adequate reasons:
 - (i) in allowing the appeal under the Immigration Rules when there is no power in law to allow the appeal on that basis alone;
 - (ii) in failing to have regard to the public interest considerations pursuant to section 117A-D of the NIAA 2002;
 - (iii) in finding that the Claimant would be unable to integrate in India due to her physical and mental health and that this amounted to a very significant obstacle and in making contradictory findings, at [18] finding that the Claimant's physical needs could be met adequately in India but at [23] and [25] finding her physical needs form part of the conclusion that she met the requirements of paragraph 276ADE;

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(iv) due to the failure to consider proportionality, in failing to have regard to the relevant caselaw *viz Mobeen v SSHD* [2021] EWCA Civ 886, with reference to *Ribeli v ECO Pretoria* [2018] EWCA Civ 611.

4. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Parkes in a decision dated 14 July 2023 in the following terms:

“3. The Judge found that there is treatment available for the Appellant in India, paragraph 18, it is not clear in paragraph 22 whether the Judge found that care was not available, the central sentence is phrased ambiguously. Given the contradictions it is arguable that the Judge may have erred in the overall assessment.

4. The grounds disclose arguable errors of law and permission to appeal is granted.”

Hearing

5. At the hearing before the Upper Tribunal, Mr Terrell on behalf of the SSHD

accepted that Grounds 2 and 4 do not achieve anything if the requirements of paragraph 276ADE(1)(vi) of the Rules are met, because that is a complete answer to the question of proportionality and there is no need to look at section 117B NIAA 2002 as there would be no need to conduct an outside the Rules analysis of Adult Dependent Relatives.

6. With regard to Ground 1 of the grounds of appeal, Mr Terrell submitted that the Judge has to go through the *Razgar* [2004] UKHL 27 stages to see if there is a disproportionate breach of article 8 of ECHR. He submitted that the first stage is whether article 8 is engaged and that is important because there is a dispute on this issue: see the Respondent’s review at [3a] and [7] on this point. He submitted that there are no findings one way or another as to whether article 8 is engaged and that is clearly an error. Mr Terrell further submitted that there are no findings regarding *Kugathas* [2003] EWCA Civ 31.

7. With regard to Ground 3, as Judge Parkes observed in the grant of permission to appeal, there are contradictory findings at [18] versus [22] and [23]. At [18] the Judge finds that treatment for physical health is available in India and so this does not amount to a very significant obstacle to integration. At [22] in response to the SSHD’s suggestion that the Claimant be put into a care home, whilst that might meet one aspect of her needs, there is emotional support which a home would not be able to provide for and so that aspect of care would be missed. However, at [23] the Judge takes account of the Claimant’s physical needs which is inconsistent with her earlier

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finding at [18]. Consequently, Mr Terrell submitted that there were material errors of law and invited the Upper Tribunal to so find and set aside the Judge's decision and reasons.

8. In her submissions, Ms Bustani accepted there is an error in terms of allowing the appeal only with reference to the Immigration Rules but she submitted that the fact that it was found that the Claimant meets the requirements of the Rules is determinative of ground 2 and the proportionality assessment. She submitted that it has not been argued that the Judge did not make a finding as to family or private life. Looking at the judgment it is quite clear that the Judge considers all the family circumstances at [3] and [4] and that all the Claimant's family are in the UK: 3 sons, 3 daughters in law and at the date of hearing, 6 grandchildren. At [4] the Judge refers to the Claimant's age and lack of family support in India. Ms Bustani submitted that although there is no specific reference in the article 8 context to the existence of family or private life, that is not material at [3] and [4] given that all the family are in the UK and there are no family members in India. Consequently, she accepted that there was a clear error of law but submitted that this was not material because on the same findings made by the Judge she would have allowed the appeal under article 8 also.
9. With regard to Ground 3, Ms Bustani submitted that this was merely an attempt by the SSHD to re-argue the case and that there is no error in the judge's assessment and conclusions in respect of the Claimant's need for her family's support. If one looks at the wording at [18] the Judge does say she is satisfied the Claimant's physical health issues can be treated in India, but it is quite clear that straightforward medical treatment is not a significant obstacle. It is also clear at [20] that the Claimant has significant difficulties in managing her own care needs and mental health and [21] and [22] where it is clear that the Judge finds deterioration in the Claimant's mental health condition would affect her physical health.
10. Ms Bustani drew attention to the fact that there were two expert reports, from Dr Razia Hussain and an Independent Social Worker, Angeline Seymour. When asked whether a lack of emotional support can constitute a very significant obstacle she submitted that it can, looking at the Claimant's particular circumstances, where all her support and expert reports confirm she needs emotional support and that is in the UK. Ms Bustani submitted that the Judge would have had in mind the trigger event where the Appellant was found unconscious with a UTI infection which resulted in the removal of a kidney and which is a clear indication she was not able to take care of herself.
11. Ms Bustani submitted that the option of care in India was addressed in the skeleton argument. The SSHD's position is that the Claimant

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could go into a care home and the Judge concluded at [22] that is not appropriate. In so doing she was clearly placing emphasis on the Claimant's emotional needs and there is a clear finding that the emotional aspect of the support she needs cannot reasonably be provided by paid help. Consequently, it was submitted that there is no material error of law.

12. In reply, Mr Terrell submitted that Ground 1 was the only basis under which the Judge can allow the appeal under article 8 and that is broader than proportionality. He asserted that article 8 had been raised and so needed to be considered.
13. The parties agreed that were I find the error of law set out in Ground 1 of the grounds of appeal was material that I could proceed to re-make the decision without further recourse to the parties. I reserved my decision which I now provide with my reasons.

Decision and reasons

14. It is clear from the judgment of the former President in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) at [46]-[48] that the statutory appeal scheme set out in sections 82-86 NIAA 2002 permits a judge to allow an appeal only on human rights (or protection) grounds.
15. I have had regard to the judgment of the former senior President in TZ(Pakistan) [2018] EWCA Civ 1109 at [34] which makes clear that: *"where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."*
16. Both parties agree that the First tier Tribunal Judge erred but disagreed as to the materiality of that error. Having carefully considered the Judge's decision and reasons and the parties' submissions I have concluded that the error is material in that there are simply no findings on article 8 and whether it is engaged, the Judge having decided that the requirements of paragraph 276ADE(vi) of the Rules were met.
17. It is clear and I accept Mr Terrell's submission that the Judge was required to determine whether or not article 8 was engaged, the ability to meet the requirements of paragraph 276ADE(vi) being positively determinative of the proportionality aspect of article 8. It is also good practice to refer to the *Razgar* [2004] UHL 27 criteria and apply them to the facts of the individual case, which was also not done by this Judge.

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18. The SSHD also challenged the Judge's findings of fact with regard to paragraph 276ADE(vi), in particular that her findings as to whether the Claimant's physical needs could be met in India were contradictory and that this undermined her overall finding that there would be very significant obstacles to her integration in India.
19. I have carefully considered the Judge's findings, which I set out below:

"18) Turning firstly to her health needs. I am satisfied that treatment for her physical health is available in India. She has been treated in India for her medical problems historically. The medical evidence provided in the bundle confirms that there is no requirement for her health conditions to be treated in the UK. The case is not advanced on the basis that her physical health needs mediation or any treatment she might require. Her straightforward medical treatment is not therefore a very significant obstacle...

20) The significant difficulties lie in her managing her own care needs and in her mental health.

21) The report of Dr Razia Hussian, whose expertise was not challenged, states that the appellant suffers from mixed anxiety and depressive disorder. These are such that she has difficulties performing everyday activities. Robin's evidence was that she can physically perform her care activities but she needs encouragement and watching when she does so. She has a tendency to "zone out" forget what she is doing. The social worker report of Ms Seymour (whose expertise was not challenged) reports that since the incident when she collapsed in India she has lacked motivation to care for herself and lacks motivation to take her medication. She lacks motivation to cook. Based on the psychiatric evidence, the social worker evidence and the oral evidence of her son, Robin, I am satisfied that the appellant, due to her poor mental health, lacks motivation to perform some of her care needs. She needs prompting and encouragement to do so. If she returned to India she would be living alone and I find it is more likely than not that she would neglect her personal care and her mental health would deteriorate. If she forgets her medication (and I accept she needs prompting to take it) this would lead to a deterioration in her physical health as well.

22) It was suggested by Mr Bassi on behalf of the Home Office that she could be placed in an adult care facility or a private carer could be found to care for the appellant. It was submitted that there is a high rate of elder abuse in care homes in India (over 50%) and there are no DBS checks or other way of checking whether a private carer is reliable and safe. Although I accept there are certain difficulties with both private care and care homes, I am not satisfied that

neither would be available. But that is not the test I must apply. It is a very significant obstacles test. Physical care is just one aspect of the care that the appellant needs. She is lonely and isolated and the fact that she collapsed with an infection that went unchecked as she was living alone and this has led to deterioration in her mental health is a significant aspect of her needs. I am satisfied that her emotional needs are such that she does need someone to look after her, make her feel supported and cared for. This cannot reasonably be provided by paid help. BRITCITS v SSHD [2017] EWCA Civ 368 found that the care must be reasonable both from the perspective of the provider and the perspective of the applicant and the standard of such care must be what is required for that particular applicant.

23) I am satisfied that although some care provision would be available in India, the required level of support is not reasonably available in India to meet her mental health and physical needs. This would make attending to her personal care (including motivation to cook, take her medication) and even collecting medication a very significant difficulty for her. She is likely to isolate herself and therefore she would not socialise and properly re-integrate, when looking at all the evidence holistically I find that this would also be a very significant difficulty to re-integration.

24) I am further satisfied that a move back to India would lead to a deterioration in her mental health. This is likely to lead to further isolation and neglect of her personal care which in turn would make re-integration into life there a very significant difficulty. [p. 11 Ms Seymour's report]".

25) For these reasons I am satisfied that there would be very significant difficulties in her re-integration into India and the appeal is allowed under Paragraph 276ADE(1)(vi)."

20. The SSHD asserts that the contradiction lies in the finding at [23] where the Judge takes account of the Claimant's physical needs, which is inconsistent with her earlier finding at [18] that her physical needs could be met in India. Whilst I accept that at [23] the Judge makes reference to both the Claimant's mental health and physical needs, it is clear in the context of her finding at [20] that the significant difficulties in this case stemmed from the Claimant having to manage her own care needs and in her deterioration in her mental health. Therefore, I find in reality that there is no contradiction. Were the Claimant's case based only on her physical health needs the Judge found, on the evidence, that care would be available to her in India. However, in light of the expert evidence of the psychiatrist and independent social worker, along with the oral evidence of the Claimant's son, Robin, the Judge found that there would not be care available in India which would meet the

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Claimant's mental health needs, as a result of which she would further deteriorate and neglect her personal care.

21. Therefore, I have concluded that the SSHD's challenge amounts only to a disagreement with the Judge's findings of fact, which were open to her on the evidence before her.
22. Notably, presumably due to the fact that the Claimant is present in the UK, having entered as a visitor, her application for leave to remain was made with regard to paragraph 276ADE(vi) rather than Appendix EC-DR of the Rules. As the Judge correctly directed herself at [22] the test she had to apply was one of very significant obstacles (to the Claimant's integration). Whilst clearly it would have been possible to reach a different conclusion on this issue, the Judge provided reasons for her findings, based on the evidence before her and I find no material error of law in this respect.
23. Consequently, I preserve the Judge's findings of fact, which are uninfected by error of law and proceed to re-make the decision with reference to article 8 of ECHR.
24. Whilst the Claimant's application for leave to remain was made on the basis of her family and private life in the UK, the SSHD's refusal of 17 September 2022 fails to determine whether article 8 is engaged on the facts of the case but proceeded to decide that removal would not breach article 8 of ECHR.
25. The skeleton argument prepared for the First tier Tribunal hearing provides at [9] (a) that whether article 8 ECHR is engaged through private and/or family life required determination and at [13]-[14] it was asserted, with reference to Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160, which was approved by Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWCA Civ 8 and Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 that there could be no doubt that the relationship between the Claimant and her children is one characterised by real or committed support, given that she required constant and involved personal care from her children and is dependent upon them for this and the level of dependency goes beyond normal emotional ties.
26. The Respondent's review dated 23 December 2022 maintains the position that there are no exceptional circumstances that would render the Claimant's removal unjustifiably harsh and at [7] takes issue with the skeleton argument rejecting the contention that there was evidence to demonstrate that the Claimant was dependent upon her children and/or their wives for her day to day care. However, there is no indication whether or not the Respondent accepts or rejects the contention that article 8(1) is engaged.

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27. The psychiatric report of Dr Razia Hussein at RB 75 makes reference to the Claimant's very strong emotional attachment to her family (children and grandchildren) in the UK and that detachment from them may lead to significant deterioration in her mental and physical health.
28. The independent social worker report of Angeline Seymour dated 26 June 2021 opines at page 14 that: "*Ms C..., her sons, daughters-in-law and grandchildren, are currently sharing a family life together in the UK.*" Whilst the definition of family life applied by Ms Seymour is from the perspective of a social worker rather than the more restrictive definition to be found within the immigration law jurisprudence relating to extended family members, I consider that it is an opinion to which weight can be attached, given Ms Seymour's interview with the entire extended family and the context of that interview, which considered the Claimant's engagement with the various family members, particularly the grandchildren and the care that she is provided with by her children and their wives.
29. I have also taken account of the witness statements by the Claimant's three sons and two eldest grandchildren, which make clear that she is an integral part of the family, not just since her last arrival in the UK in January 2021 but through 6 month visits to the UK from 2013 to 2019, thereafter interrupted by the coronavirus pandemic.
30. In light of all the evidence, I find that family life is established between the Claimant and her three sons, their wives and children and that the relationships can properly be characterised as demonstrating more than normal emotional ties between them *cf. Kugathas (op cit)*.
31. Applying the five step process set out in *Razgar (op cit)* in light of my finding that article 8 is engaged, removal of the Claimant to India would interfere with that family and private life, as the entirety of the extended family cannot reasonably be expected to relocate to India, given the children are settled in school, two sons and their families are British and the third son has ILR and is in the process of applying for British citizenship. Nor has the SSHD suggested that this would be a reasonable course of action. Whilst interference with the Claimant's family and private life would be in accordance with the law and could be deemed necessary in order to maintain immigration control, it would not be proportionate to the legitimate end sought to be achieved in light of the finding by the First tier Tribunal Judge that the Claimant meets the requirements of paragraph 276ADE(vi) of the Immigration Rules (now Appendix Private Life).

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32. Following the judgment in *TZ(Pakistan) (op cit)* the Judge's finding that the requirements of the Rules are met, which I have upheld, is positively determinative of the appeal. As was conceded by Mr Terrell during the course of the hearing, there is consequently no need to consider the statutory public interest considerations pursuant to section 117A-D of the NIAA 2002 and the proportionality of the decision with regard to an article 8 consideration outside the Immigration Rules or with reference to GEN 3.2. of Appendix FM of the Immigration Rules.

Notice of Decision

33. The First tier Tribunal Judge erred materially in law in allowing the appeal with reference to the Immigration Rules and failing to determine the Claimant's human rights appeal. I remake the decision, allowing the Claimant's appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

2 September 2023