



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/07811/2015  
OA/07812/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 September 2017**

**Decision & Reasons  
Promulgated  
On 13 September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

**BAWA SINGH  
PARKASH KAUR**  
(ANONYMITY DIRECTION NOT MADE)

Appellants

**and**

**THE ENTRY CLEARANCE OFFICER, NEW DELHI**

Respondent

**Representation:**

For the Appellant: Mr R Sharma, Counsel

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are married citizens of India aged over 65. They brought appeals against decisions of the respondent, dated 2 April 2015, refusing them entry clearance to join their son, Mr Lakhbir Singh Bhat, in the UK as his adult dependent relatives. Judge of the First-tier Tribunal Callow heard the appeals at Taylor House on 3 August 2016 and, in a decision promulgated on 10 October 2016, dismissed them. He found the

Immigration Rules were not met and there was no need to consider article 8 of the Human Rights Convention separately outside the rules.

2. Judge Callow's decision was set aside in a decision of Deputy Upper Tribunal Judge Hutchinson, promulgated on 15 June 2017, a copy of which is attached as an appendix to this decision.
3. Judge Callow's decision that the requirements of the Immigration Rules, specifically paragraph E-ECDR.2.5 of Appendix FM<sup>1</sup>, were not met was upheld. He had erred by confining his consideration to the circumstances appertaining at the date of decision but his error was not considered material by Judge Hutchinson. It is helpful to set out Judge Callow's finding (paragraph 11 of his decision):

"... However, in the event I am in error in reaching this conclusion, it has not been established in evidence that the required level of care in India where the appellants live is not available and that there is no person in India who can reasonably provide it. The unsupported assertion that there is no available care in the family village or that the appellants could not be cared for in one of the many cities in India, does not discharge the requirements of the rule in issue. The alternate of affordability does not arise in this appeal. The financial circumstances of the sponsor to support the appellants without recourse to public funds have been established. Accordingly the appellants' appeals under the Rules fail."

4. Judge Hutchinson rejected a submission that Judge Callow had failed to recognise that the "required level of care" depended on the particular circumstances of the case and that it was possible to contemplate that, having regard to cultural factors, certain types of personal or intimate care could only reasonably be provided by an individual's family members<sup>2</sup>. She concluded (paragraph 10),

"Although I accept that the opinion and recommendation at page 4 of the psychological report indicates that the support of the second appellant's own family would be "central" and that in the clinical psychologist's report medical and financial support was unlikely to help them at their current age and that they needed the emotional support of their own family, I am not satisfied that this discloses any error in Judge Callow's alternative assessment that it had not been established that the required level of care was not available in India and that there was no person who could reasonably provide it."

5. Judge Callow's finding that the requirements of paragraph E-ECDR.2.5 were not met was thus preserved. However, his treatment of the

---

<sup>1</sup> "The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, 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."

<sup>2</sup> This argument drew on an unreported decision of this Tribunal (OA/18244/2012), which Judge Callow had in fact considered.

alternative article 8 ground was found to be erroneous and, for that reason, the decision was set aside. Judge Callow considered there was no “gap” between the rules and article 8 such that it was not necessary to go on to consider article 8 outside the rules. However, Judge Hutchinson considered that this approach was erroneous given the age of the appellants (87 and 82 respectively) and the evidence of their ongoing medical conditions. She directed that there be a continuance hearing so that the decision could be re-made with respect to article 8 only. So, the appeal came before me.

6. I have the respondent’s bundle and two bundles from the appellants, which I have considered. I heard oral evidence in English from Mr Bhat, the sponsor, and also from his wife, Mrs Charanjit Kaur Bhat. I have recorded their evidence in my record of the proceedings and taken it into account. I have also recorded the closing submissions made by the representatives and taken them into account. At the end of the hearing I reserved my decision.
7. The burden of proof is on the appellants and the standard of proof is the ordinary civil standard of a balance of probabilities. I may consider the circumstances appertaining as at today.
8. The appellants must show that they currently enjoy protected rights and that there would be a significant interference with their human rights as a result of the decisions, although in entry clearance cases the correct approach to this issue is to assess whether the decisions amount to an unjustified lack of respect for family life, focusing on the UK’s positive obligations to facilitate family reunion (*Shamim Box* [2002] UKIAT 02212). It is for the respondent to show that the interference is in accordance with the law and in pursuit of a legitimate aim. I must then assess whether the decisions are necessary in a democratic society, including whether they are disproportionate to the legitimate aim identified.
9. The representatives were in agreement that family life had been established in this case and that the determinative issue was the proportionality of the decisions. I accept there is dependency as between the appellants and the sponsor, not limited to financial dependency, which goes beyond the usual ties of love and affection which exist between adult children and their parents.
10. The rules are expressed as providing a complete framework for the consideration of article 8 but the notion that they represent a “complete code” is incorrect. The approach in cases involving the relationship between the rules and article 8 was previously understood to be as explained in the case of *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387. In particular, the Court considered there was a threshold for engaging article 8 outside the rules. In general, compelling circumstances would need to be identified, which was lower than a test of exceptional circumstances. However, in cases such as the present one, in which family life could not be resumed in the UK unless and until the rules were met, it is appropriate

to apply a similar test to exceptional circumstances (see paragraphs 37 and 67). More recently, the Supreme Court in *Hesham Ali v SSHD* [2016] UKSC 60, a deportation case, explained there is no particular threshold which has to be reached and the need for there to be ‘exceptional circumstances’ did not mean that something out of the ordinary had to be shown. In short, the Tribunal must find the facts and conduct a balancing exercise as between the public interest and the family life of the appellant to ensure a proportionate result is achieved.

11. In considering the public interest justifying the interference with family life, I am required by section 117A(2)(a) of the 2002 Act to have regard to the considerations listed in section 117B<sup>3</sup>.
12. In *Britcits v SSHD* [2017] EWCA Civ 368, the Court of Appeal dismissed an appeal against the refusal of an application for judicial review challenging the legality of the adult dependent relative rules introduced in July 2012. In rejecting a submission that the rules should be struck down as disproportionate, the Court held that considerations of the reasonableness of the care available and the level of care required were capable, with appropriate evidence, of embracing the psychological and emotional needs of elderly parents.
13. I now turn to the facts. I am satisfied that both the sponsor and Ms Bhat assisted the Tribunal to the best of their ability by providing truthful and accurate answers to the questions put. There were no significant inconsistencies or discrepancies in their evidence and I did not understand Mr Bramble to challenge any of their evidence. No challenges were made to the three medical reports provided and I accept their contents are accurate. I can therefore set out the following as my findings of fact:
  - (1) The appellants live alone in a rural village in the Punjab, Jalandhar District;
  - (2) The first appellant is 87 and the second appellant is 82;

---

<sup>3</sup> **Article 8: public interest considerations applicable in all cases**

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
  - (a) are less of a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  - (a) are not a burden on taxpayers, and
  - (b) are better able to integrate into society.

- (3) Their five children all live abroad: the sponsor and three of their daughters live in the UK and one daughter lives in the US;
- (4) The sponsor, their only son, came to the UK to settle in 1980;
- (5) The appellants were granted residency in the US to live with their daughter in 2005 and 2007 respectively but the move was not successful due to tensions with their daughter's in-laws created by the appellants living with her such that the appellants left the US in 2009;
- (6) After that they made annual visits to the UK until 2013;
- (7) There are no close relatives residing in India;
- (8) The second appellant has significant mobility problems due to back pain and she requires help to get out of bed and must use a stick or walking frame to walk even short distances, such as across the room;
- (9) Most of the time the second appellant stays in bed and only gets up to use the bathroom;
- (10) The first appellant assists the second appellant as best he is able with mobilising, taking care of her personal hygiene and dressing;
- (11) The first appellant does the housework, laundry and cooking as best he is able;
- (12) The cause of the second appellant's disability has been diagnosed as osteoporosis of the spine<sup>4</sup>;
- (13) The second appellant was assessed by a psychologist<sup>5</sup>, who considered she suffered from mild depression and anxiety which could not be treated with medication but which required her to be in a secure, nurturing environment, as would be provided by her family;
- (14) The first appellant underwent prostate surgery in May 2017<sup>6</sup>;
- (15) The appellants are financially dependent on the sponsor;
- (16) The sponsor and his siblings are able to visit the appellants and stay with them for periods of around two weeks but there are gaps between these visits and most of the time the appellants are alone;
- (17) The sponsor telephones the appellants every day and the second appellant is usually tearful;
- (18) The appellants feel lonely and are anxious about their situation;

---

<sup>4</sup> See the report of Dr Shankar, dated 28 April 2015.

<sup>5</sup> See the report of Dr Pershad, dated 21 June 2016.

<sup>6</sup> See the reports of Dr Goel, dated 5-8 May 2017.

- (19) There are professional care providers in large cities in India but the appellants are unwilling to move to the city where they do not know anyone;
- (20) The sponsor might be able to find a servant in the area to help the appellants with cooking and housework but the second appellant is reluctant to have a stranger assisting her with her personal care; and
- (21) The sponsor and Ms Bhat would provide a comfortable home for the appellants, in which their care needs would be fully met, so as to provide them with a good quality of life during their remaining years.

- 14. I now apply the law to those findings.
- 15. Anyone viewing the factual circumstances of this case, as summarised above, cannot help but feel sympathy for this family. The appellants are living their last years without the benefit of having any of their children or grandchildren near them. The second appellant, in particular, has health problems which have left her reliant on assistance with mobilising and looking after herself. Being associated with old age, the appellants' health conditions are going to get worse and their need for assistance will increase. The first appellant's ability to undertake care tasks for the second appellant will diminish over time. Their wish to relocate to the UK to be looked after by the sponsor and his family is entirely understandable.
- 16. However, such considerations do not equate to a finding that to refuse entry clearance at this time amounts to a breach of fundamental rights. Article 8, the right to family life, is not an absolute guarantee. The answer to the question of whether the appeals must be allowed on human rights grounds is to be found by conducting a balancing exercise between, on the one hand, the public interest in maintaining immigration controls and, on the other, the appellants' interests in enjoying family life in the UK. I am required by law to give considerable weight to the respondent's view of where the balance lies which has been given expression in the published rules.
- 17. The representatives were in agreement that the starting point for this appeal was the fact the appellants did not meet the requirements of the rules. The rules present a formidable hurdle in such cases but not an unlawfully high one (*Britcits v SSHD*). I remind myself that the decision of Judge Callow under the rules, which has been preserved by Judge Hutchinson, means that it has not been shown that the required level of care cannot be obtained in India because it is not available and there is no person in India who can reasonably provide it. Put the other way round, the required level of care probably is available in India.
- 18. Having heard oral evidence from the sponsor and Ms Bhat, it became apparent that the second appellant was reluctant to be cared for by a stranger and the appellants were reluctant to leave their village in order to be cared for in a residential setting in a city where they would not know

anyone. Both those feelings are entirely understandable but they shine a clear light on the heart of this case, which is that the required level of care is available in India, either through the provision of a domestic helper or in a care home environment, but neither option is ideal and all parties would prefer that the appellants be allowed to join the sponsor's household in the UK. The facts fall short of the example given by UTJ Grubb in the unreported case cited to Judge Callow.

19. The stark reality is that Parliament has enacted rules which provide a clear answer to circumstances such as these. Public policy is to limit to very few the numbers of adult dependent relatives who are entitled to join relatives living in the UK in order to protect the public purse (see the discussion in *Britcits v SSHD*).
20. As said, I am required to have regard to section 117B. The representatives were in agreement that it has little impact in this case because, whilst the appellants do not speak English, they would not be expected to as a condition of entry under the rules and, whilst they are not financially independent, they would be accommodated and maintained without recourse to public funds. The appellants are not at an age at which they can reasonably be expected to integrate.
21. The harshness of the appellants' circumstances is lessened by the fact their children are able to make fairly regular visits to see them and they have each other for company and support.
22. Having balanced the respective interests of the parties, it is clear that the public interest prevails and the decisions to refuse entry clearance are proportionate to the legitimate aim of maintaining immigration controls.

### **Notice of Decision**

The First-tier Tribunal's decision contained a material error of law and has been set aside. The following decision is substituted:

The appeals are dismissed on human rights grounds.

No anonymity direction has been made.

Signed

Date 11 September 2017

**Deputy Upper Tribunal Judge Froom**

### **FEE AWARD**

I have dismissed the appeals and therefore there can be no fee award.

Signed

Date 11 September 2017

**Deputy Upper Tribunal Judge Froom**

---

## Appendix

### **“DECISION AND REASONS**

#### **Background**

1. *The appellants in this case are married citizens of India. The first appellant was born on 3 June 1930 and the second appellant was born on 10 June 1935. The appellants appealed to the First-tier Tribunal against the decision by the Entry Clearance Officer dated 2 April 2015 to refuse the appellants' entry clearance as the adult dependant relatives of their son Lakhbir Singh Bhat the sponsor, a British citizen present and settled in the UK. In a decision and reasons promulgated on 10 October 2016, following a hearing on 3 August 2016, Judge of the First-tier Tribunal Callow dismissed the appellants' appeals both under the Immigration Rules and Article 8.*
2. *The appellants appeal with permission. The appellants' grounds of appeal were as follows:*

*Ground 1 – that the First-tier Tribunal erred in its approach to the evidence on ill-health and frailty of the appellants.*

*Ground 2 – that the First-tier Tribunal erred in failing to consider Article 8, ECHR outside of the Immigration Rules.*

#### **Decision on Error of Law and Directions**

#### **Immigration Rules**

3. *It was submitted that the judge ignored the evidence of the appellants' ill-health stating specifically that it was not established on a balance of probabilities that all the circumstances were appertaining at the date of the respondent's decision. However the appellants relied on the fact that Section 85A of the Nationality, Immigration and Asylum Act 2002 was repealed from 20 October 2014 and therefore there was no barrier to post-decision evidence being admitted by the judge.*
4. *Section 85 of the Nationality, Immigration and Asylum Act 2002 provides as follows:*

#### **85 Matters to be considered**

- (1) *An appeal under Section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under Section 82(1).*
- (2) *If an appellant under Section 82(1) makes a statement under Section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in Section 84 against the decision appealed against.*



- (3) *Sub-Section (2) applies to a statement made under Section 120 whether the statement was made before or after the appeal was commenced.*
- (4) *On an appeal under Section 82(1) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of decision.*
- (5) *But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.*
- (6) *A matter is a “new matter” if –*
  - (a) *it constitutes a ground of appeal of a kind listed in Section 84, and*
  - (b) *the Secretary of State has not previously considered the matter in the context of-*
    - (i) *the decision mentioned in Section 82(1), or*
    - (ii) *a statement made by the appellant under Section 120.*

5. *Although it was argued on behalf of the appellants that the judge was wrong to confine himself, as he appeared to do in [11] of the decision and reasons to evidence appertaining at the date of decision, the judge made findings in the alternative as follows at the latter part of paragraph [11]:*

*“However in the event that I am in error in reaching this conclusion, it has not been established in evidence that the required level of care in India where the appellants live is not available and that there is no person in India who can reasonably provide it. The unsupported assertion that there is no available care in the family village or that the appellants could not be cared for in one of the many cities in India, does not discharge the requirements of the Rule in issue. The alternate of affordability does not arise in this appeal. The financial circumstances of the sponsor to support the appellants without recourse to public funds have been established. Accordingly the appellants’ appeals under the Rules fail.”*

6. *Mr Sharma on behalf of the appellants submitted (although it has to be said without any great force) that the judge had failed to take into consideration that the Upper Tribunal in the unreported decision of Osman OA/18244/2012 had considered the provision of E-ECDR.2.5 of Appendix FM that appellants must be unable, even with the practical and financial help of the sponsor to obtain the required level of care in the country 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.*

7. *However, Judge Callow set out Upper Tribunal’s Grubb’s reasoning that:*

*“An example where that latter requirement might well be satisfied would be where the ‘required level of care’ needed requires a particular type of carer, for example a close family member, none of whom live in the individual’s country. The evidence would have to establish in such a case the need for a particular type of carer such as a family member and not simply that the individual required personal care from someone .. it is .. possible to contemplate, having regard to cultural factors, that needed ‘personal care’ involving intimate or bodily contact may require a gender specific carer from the*

*individual's family. What is the 'required level of care' and who may appropriately provide it will depend upon the circumstances and the evidence in any given case."*

8. *Although the findings of Upper Tribunal Judge Grubb were not binding on Judge Callow I am satisfied that he nevertheless took into consideration that the "required level of care" depends on the circumstances of the individual case and there was no error in his alternate findings that it had not been established that the required level of care in India was such that there was no person in India who could not reasonably provide it. Mr Sharma was unable to provide any argument to challenge those alternate findings (and indeed they were not challenged in the grounds of appeal).*
9. *As Mr Bramble indicated in his submissions the evidence which postdated the circumstances of the date of decision (as conceded by Mr Sharma) consisted of a medical certificate at page 127 of the appellants' bundle and a psychological assessment at pages 128 to 131 of the appellants' bundle.*
10. *Although I accept that the opinion and recommendation at page 4 of the psychological report indicates that the support of the second appellant's own family would be "central" and that in the clinical psychologist's report medical and financial support was unlikely to help them at their current age and that they needed the emotional support of their own family, I am not satisfied that this discloses any error in Judge Callow's alternative assessment that it had not been established that the required level of care was not available in India and that there was no person who could reasonably provide it. There is no material error in the judge's decision that the requirements of the Rules are not met.*
11. *As I indicated at the hearing the decision of the First-tier Tribunal in relation to the Immigration Rules does not disclose an error of law and shall stand.*

#### **Decision on Error of Law – Article 8**

12. *It was conceded by Mr Bramble at the beginning of the hearing that given in particular the ages of the two appellants who are now aged 82 and 87, whilst the appeal could not succeed under the Immigration Rules Mr Bramble conceded that the judge ought to have undertaken a separate consideration under Article 8 and the judge ought to have undertaken fact-finding in relation to the appellants' circumstances.*
13. *The judge in his decision and reasons in relation to Article 8 relied on the case law including **R (Sunassee v Upper Tribunal) (Immigration and Asylum Chamber) & Secretary of State for the Home Department [2015] EWHC 1604 (Admin)** which provided that the failure to qualify under the Rules would tend to suggest that the public interest requires refusal of leave unless some countervailing factors are present which are not already taken into account under the Rules.*
14. *The judge went on to find at [14] that the relevant Immigration Rules had not been met and that no factor had been identified that was not covered under the Immigration Rules and that accordingly, as set out in **Sunassee**, there was no "gap" that needed to be addressed in a freestanding Article 8 claim outside the Rules.*
15. *Richards LJ in **SS(Congo) and Others [2015] EWCA Civ 387**, said that what is in issue in relation to an application for leave to enter is more in the nature of an appeal to the state's positive obligations under Article 8. As reaffirmed in **MM(Lebanon) [2017] UKSC 10** however, the issue is always whether the authorities have struck a fair balance between the individual and public interests. I agree with both representatives that given in particular the age of these appellants and that there was evidence in relation to ongoing medical conditions, the judge fell into error in not undertaking his own assessment of the facts in*

order to determine whether there were circumstances that might warrant a grant of leave under Article 8.

16. *As I indicated at the hearing this is a matter which can properly be remade in relation to Article 8 only in the Upper Tribunal. Unfortunately it was unclear precisely what further evidence, including medical evidence, was to be relied on on behalf of the appellants and there were a number of bundles including a bundle produced for the first time by Mr Sharma (although he indicated his instructing solicitors stated it had been submitted to the Tribunal, neither the Tribunal nor Mr Bramble had received this bundle) in relation to a report from Goel Kidney Care and the first appellant Mr Bawa Singh's medical conditions. In addition the Tribunal, but unfortunately not Mr Bramble, had been provided with further evidence under cover of letter dated 2 May 2017, which included a copy of a doctor's report and scanned copies of e-tickets in relation to the trip by the sponsor and his wife to visit the appellants.*
17. *Although it is of some concern that instructing solicitors have ignored the directions of the Upper Tribunal in relation to providing, at the very least, an indexed and paginated bundle of documents including all the material that was before the First-tier Tribunal together with a supplementary index and a paginated bundle of any proposed new evidence, I was satisfied on this occasion it was in the interest of fairness to allow the appellants an adjournment in order to ensure that all relevant evidence in relation to remaking the decision under Article 8 is provided.*
18. **DIRECTIONS:**
  - (a) *The decision of the First-tier Tribunal promulgated on 10 October 2016 in relation to the Immigration Rules is preserved. The decision of the First-tier Tribunal in relation to Article 8 is set aside and will be remade in the Upper Tribunal by any single Upper Tribunal Judge.*
  - (b) *The appellants are to file and serve, so that it is received no later than 15 July 2017, a consolidated indexed paginated bundle containing all the materials the appellants wish to rely on in relation to their Article 8 appeal. The bundle is to separately tabulate: (i) the evidence relied upon before the First-tier Tribunal; and, (ii) the additional evidence that it is now sought to rely upon before the Upper Tribunal. The bundle must include all medical evidence that is relied on. A skeleton argument in relation to Article 8 is to be provided.*
  - (c) *The Tribunal would be assisted by the sponsors giving oral evidence at the hearing and it is anticipated that the aforementioned bundle will include updated witness statements from both, to stand as their evidence-in-chief.*

*Any failure to comply with these directions may lead the Tribunal to exercise its powers to decide the appeal without a further oral hearing, or to conclude that the defaulting party has no relevant information, evidence or submissions to provide.*

### **Notice of Decision**

19. *The decision of the First-tier Tribunal in relation to the Immigration Rules is upheld. The decision in relation to Article 8 is set aside and will be remade.*

*No anonymity direction was sought or is made.*

Signed

Date: 15 June 2017

*Deputy Upper Tribunal Judge Hutchinson*