



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05347/2020
(V)**

THE IMMIGRATION ACTS

**Heard by a remote hearing at Bradford
IAC
On the 26 February 2021**

**Decision & Reasons
Promulgated
On the 09 September 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MRS SHAILA VENKATESH PAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Sharma, Counsel instructed on behalf of the appellant.

For the Respondent: Mr C. Bates, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Povey (hereinafter referred to as the "FtTJ") promulgated on the 14 April 2021, in which the appellant's appeal

against the decision to refuse her human rights application dated 18 February 2020 was dismissed.

2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.
3. The hearing took place on 1 September 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant's daughter who was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no technical problems were encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means.
4. I am grateful to Mr Sharma and Mr Bates for their clear oral submissions.

Background:

5. The appellant is a national of India. Prior to coming to the UK, she lived with her husband until his death on 12 March 2018. As regards her family circumstances, the appellant has 5 daughters and one son. Three of her daughters live in India and one daughter in the USA. She has one daughter present in the UK who has indefinite leave to remain but is an Indian citizen (referred to by the judge as "SB") and a son also present in the UK (referred to by the judge as "PP").
6. She entered the United Kingdom on 15 May 2019 using a 6 month visit visa. She was accompanied by her daughter Sharmila and her grandson. The purpose of the visit, according to the Visa application, was to spend time with her son, PP and her daughter SB and to undertake sightseeing in London. It is said that she had visited her children in the UK previously and had abided by the terms of previous visas granted. However, when her current visa expired on 6 November 2019, the appellant remained in the UK. It was claimed that during her visit, her son and daughter became concerned about how her health had deteriorated. On that basis an application was made by the appellant for leave to remain outside of the Immigration Rules on 18 February 2020.

The decision letter:

7. The application was refused in a decision made on the 31 March 2020. The decision letter states that the appellant had made a human rights claim for leave to remain in the UK on the basis of her private life in the UK and in addition she had applied for leave to remain outside of the immigration rules on the basis of her health.

8. Her application was considered under the private life rules under Paragraph 276 ADE, where it was noted that the appellant was a national of India who had entered the UK on 15 May 2019 and thus had lived in the UK for 9 months and it was not accepted that he lived in the UK continuously for 20 years; she was not between the ages of 18 and under 25 having lived in the UK for more than half her life and was over the age of 18 and therefore could not meet the requirements of paragraph 276 ADE(1 (iii)(iv) and (v).
9. As to paragraph 276 ADE(1) (vi) the respondent did not accept that there would be very significant obstacles to her integration into India if required to leave the UK because she resided in India all of her life, including her childhood, formative years and a significant portion of her adult life up to the age of 70. It was considered that she retained social, cultural, and linguistic connections to India and that she would be able to reintegrate into the culture and way of life in India. Consequently, she failed to meet the requirements of the Immigration Rules.
10. The respondent did not consider that there were any “exceptional circumstances” to warrant a grant of leave to remain and considered the issues that had been raised. As to the application made on the basis of her private life in the UK it was noted that she only entered the UK on 15 May 2019, and it was not accepted that she met the minimum residency requirements for a grant of leave under the private life route. Additionally she had not provided any evidence to show that she would not be able to re-establish a private life in India. The appellant had stated that she had family members in India and therefore it was accepted that they would be able to provide the necessary support required for her to re-adapt to life there.
11. Within the application the appellant had stated that she was previously a carer for her husband, but he died in 2018. She additionally stated that she had no one to care for her in India and that she would be vulnerable due to her age. The respondent considered that whilst it was understandable and accepted that the death of a relative was a significant change and loss to the family, it of itself was not a unique or sufficiently compelling circumstance to warrant a grant of leave outside the rules. Furthermore within the application the appellant had failed to provide any evidence to show that she would be vulnerable upon her return to India and that she would be unable to seek the necessary support she required.
12. As to the claim that her family were financially supporting her in the UK, the respondent considered there was nothing preventing them from continuing to do this from the UK and that whilst the current economic situation India may be poor, the appellant would not suffer any greater hardship than other people of that country.

13. Reference is made to the medical evidence provided with the application to show that she had been diagnosed with high cholesterol, high blood pressure, arthritis, diabetes and depression. However it was considered that apart from diabetes, the appellant had those medical conditions prior to her entry in the UK and that she failed to provide sufficient evidence to demonstrate that her physical health had deteriorated since her arrival in the UK in a significant manner. Reference was made to a report from Dr Burhan which stated that she had been diagnosed with moderate depressive disorder however it was not accepted that her medical conditions were life-threatening or that she would be unable to seek medical treatment in India. The appellant had not provided any evidence that she would be denied medical treatment nor that she would be unable to travel to obtain such treatment. Whilst it was accepted that the healthcare system in the UK and India are unlikely to be equivalent, it did not entitle her to remain in the UK.
14. Reference is made in the decision letter to the country materials relating to healthcare and support available in India and it was noted the treatment of anxiety and depression was available at the hospitals set out in the decision letter at page 5.
15. Further consideration was given to the claim that she had limited mobility and that her adult children provided her with both physical and emotional care. The respondent considered that her care needs could be met upon her return to India and that her adult children in the UK could continue to provide emotional support.
16. Reference was made in the decision letter to her claim to enjoy family life with her adult children in the UK who cared for her and who are present and settled. However, the respondent noted that the appellant had not made an application as an adult dependent relative and that the relationships of her settled family were not solely reliant on her presence in the UK and could be maintained from India.
17. Therefore the respondent did not find that there was any evidence to demonstrate that there were any "exceptional circumstances" established in her case. The application was therefore refused.

The appeal before the First-tier Tribunal:

18. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge Povey) on the 7 April 2021.
19. In a determination promulgated on the 14 April 2021, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rules in question and on Article 8 grounds. The judge

heard evidence from the appellant and also heard evidence from her and her daughter.

20. In summary, the First-tier Tribunal found that the appellant could not meet the requirements for a grant of leave to remain under the Immigration Rules under Appendix FM or paragraph 276ADE (at [48]) and that there were no “very significant obstacles” to the appellant’s integration to India in light of the support reasonably available to her to manage her health needs, that she had lived her whole life in India, she retained her own home and was familiar with the local area and culture of the country.
21. When considering Article 8 outside of the rules, the FtTJ found that the appellant required long-term personal care to perform everyday tasks and that her mental health would deteriorate without appropriate treatment and support (at [24]). The judge found that the appellant had provided no evidence to support her claim that appropriate medical treatment would be unavailable to her and noted at paragraph [30] that any shortcomings with the Indian health service had not been pursued during the hearing. The focus was on whether there was a lack of family support in India. When undertaking an assessment of the evidence relating to the support and assistance that she would have in India, the judge concluded that the appellant’s daughters, between them or individually, could adequately support their mother in India to meet daily living needs, meet her emotional needs and ensure that she could access the available medical services she required. At paragraph [54] the FtTJ undertook the balancing exercise taking into account the public interest considerations under section 117B and reached the overall conclusion having weighed the competing factors that on balance any interference in the appellant’s family life with her adult children or any private life she may have in the UK was proportionate when considered against the weight of the public interest in immigration control. The FtTJ therefore dismissed the appeal.
22. Permission to appeal was issued on the 24 April 2021 and on 6 May 2021, permission to appeal was granted by FtTJ Adio.

The hearing before the Upper Tribunal:

23. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 1 June 2021, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face- to- face hearing. Following the directions the parties indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

24. Mr Sharma on behalf of the appellant relied upon the written grounds of appeal. He also made reference to a Rule 15(2A) application made by email and received by this Tribunal on 28 August 2021.
25. There was a written response filed on behalf of the respondent dated 11 June 2021. Mr Sharma was provided with a copy of the Rule 24 response and was given time to consider its contents.
26. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear and helpful oral submissions.

The grounds and submissions:

The appellant's submissions: ground 1

27. It is submitted on behalf of the appellant that firstly, the FtJ erred in law in relation to the support available to the appellant if she returned to India and secondly there was an further error in relation to the reasonableness of the appellant's daughter relocating to India to provide care for her mother.
28. Mr Sharma referred to the preliminary facts found by the judge set out in his grounds at paragraph 7.
29. He submitted that the "headline findings" set out at paragraph [24] were that the appellant required long-term personal care to perform everyday tasks. He submitted the finding was made by the judge and was not challenged during the hearing and it follows from the unchallenged medical evidence set out at F5. The judge found that the appellant required a level of care and that her mental health and deterioration should be the lens that the tribunal should look through as to her care requirements.
30. The other factual findings relate to her family circumstances and that she was a widow, that she had 2 adult children in the UK a son and a daughter both had residence in the UK for lengthy periods namely 1996 and 2003 respectively at that her daughter was a nurse in the UK and that she had 3 daughters in India, 1 of whom she had no contact with and 2 remaining daughters. In relation to her daughter Sharmila she had a son who needed supervision and full-time attendance look after him (see [34]). This was supported by the evidence in the bundle at M3 and M1. In her witness statement she said that her son had autism and that he required 24/7 care. In that witness statement she also said that the living space was such that she could not care for a mother and therefore she specifically said she could not take care of her mother.
31. As to her other daughter, Shikha, she was married to a man working in Thailand and her plan was to go to Thailand long term. She provided a witness statement at N1 (undated) stating that she is planning to move to Thailand. The plan was to leave India in

September 2021 and that her mother could not be accommodated with her in Thailand and that the onus of care lied upon the relatives in the UK to take care of her.

32. Against those factual background is the judge distilled the factors down to 2 particular points -whether Sharmila's son required care and the planned move to Thailand.
33. Mr Sharma submitted that the first error of law in the FtTJ's decision was that he adopted a "blinkered" approach and failed to look at the position as to whether the appellant could be looked after at all. Mr Sharma referred the tribunal to paragraph [37] and that despite the evidence of the need for full-time care the judge found that it was not unreasonable for either daughter to care for their mother. However he submitted this was in direct conflict to the unchallenged evidence and failed to take account of the fact that her daughter's son required 24/7 care and secondly she said she could not provide the care that the appellant needed and therefore the judge had not considered that relevant evidence.
34. He further submitted that the same could be said in relation to the evidence relating to Shikha. The criticism mounted by the FtTJ at [40] was that there was a lack of corroborative evidence of her planning to move to Thailand and that the appellant did not make reference to it in her witness statement. However that is incorrect as it is set out in her daughter's letter, and it can be taken that as this is evidence in the appellant's bundle she therefore volunteered this information before the tribunal. Also the appellant did make reference to her daughter going to Thailand to the medical expert (see F4 home circumstances 4.1 "the other daughter is moving to Thailand"). Mr Sharma submitted that the judge failed to take this evidence into account and that she was medically examined on 24 October 2020 which predated the hearing in April 2021 therefore it was not right to say that it was evidence that had not been previously referred to.
35. Therefore Mr Sharma submitted that the error of law in the decision of the FtTJ related to whether or not the 2 daughters were able to care for her mother and the judge failed to take into account relevant considerations and relevant evidence on that issue.
36. Mr Sharma made the additional points that the FtTJ did not consider whether the care, if available, would be sufficient for the appellant's needs. The judge accepted that the appellant required 24 care but did not address whether the care that they could provide would be sufficient. SB is a registered nurse and can provide the care the appellant requires therefore without making reference to the supporting evidence it can be shown that the findings were inconsistent and insufficiently reasoned.

Rule 15 (2A) application:

37. At this stage Mr Sharma sought to formally make the application to admit further evidence which had been sent in an email to the tribunal on 20 August 2021. Mr Bates confirmed that he had received a copy.
38. Mr Sharma submitted that the FtTJ made findings in relation to the appellant's daughter. However they were not raised by the respondent and if the judge had raised concerns with the representatives as to lack of evidence then a response could have been provided and therefore the issue was decided without any notice to the appellant. He further submits that the evidence now submitted were not new matters but were addressed in the original evidence therefore the appellant is not raising anything new but was simply "filling the gaps" to assist the tribunal as to whether the findings made by the judge were inconsistent and therefore the evidence should be admitted. He submitted that it was open for those matters to be admitted and there was no prejudice to the respondent.
39. As to ground 2, Mr Sharma submitted that the judge having recognised that the appellant is cared for by her daughter in the UK as a registered nurse, the judge found that it was reasonable to expect her daughter to return to India to look after the appellant. As the appellant was a woman who required 24 hour care it would not be a short visit but would be a return full-time. He submitted that the consideration of reasonableness was made without any reference to SB's private or family life.
40. He further submitted as set out at paragraph 20 of the grounds, the judge failed to consider whether the proposed action was the least intrusive way to achieve the objective sought ("Bank Mellat") and this was relevant to proportionality.
41. Mr Sharma further submitted that the appellant's daughter was a registered nurse and the judge failed to take into account that such course of action (requiring SB to travel to India to look after her mother) would be depriving the United Kingdom of the benefit of SB's work as a nurse. The written grounds cite the decision in UE (Nigeria) and others v SSHD [2010] EWCA Civ 975.

The respondent's submissions:

42. Mr Bates on behalf of the respondent relied upon the rule 24 response dated 11 June 2021.
43. He submitted that the key finding made by the FtTJ was at [45] and that "the appellant's daughters, whether between them or individually, could adequately support their mother in India to meet her daily living needs, meet her emotional needs and ensure that she can access the available medical services she requires." He submitted that whilst it had been argued on behalf of the appellant that each of

the daughters in India had difficulties that argument failed to undermine the finding at [45] that even on their own each of the daughters concerned could provide adequate care for the appellant. Insofar as it was argued that the appellant relied upon SB because she was a registered nurse, there was nothing in the medical evidence to suggest that the appellant required specific care from a registered nurse. Although that would be a “bonus” the medical evidence before the tribunal did not suggest such a level of support was necessary and therefore any of the 3 daughters whether an registered nurse or not would be able to provide adequate care to their mother.

44. Mr Bates further submitted that the FtT] did not disregard the evidence that the appellant had provided to the doctor and the judge acknowledged this at paragraphs [31] and [32]. At paragraph [31] the judge accepted the circumstances relating to one of the daughter’s and that both the appellant and SB confirmed it in their oral evidence and that the medical expert had recorded the same being told to them. At [32] the judge again referred to aspects of the daughters’ circumstances having been mentioned to the medical representatives. Thus Mr Bates submitted the “key point” made by the judge was that the appellant in her own witness statement did not make any reference to this information. The appellant’s witness statement could be seen as the best source of information as to the core considerations that feature in her case. The judge noted that the issues were not raised in her witness statement at all (at [35]). In cross-examination and set out at paragraph [36] it was put to the appellant that given the size of her home Sharmila and her family could live with the appellant. The judge recorded that “the objection raised was not based upon the adequacy of care which could be provided by Sharmila rather the appellant was concerned that autistic grandson would wake up when she was sleeping (because of what she described as his eccentric behaviour).” Looking at that paragraph, the evidence given by the appellant was not based on any inadequacy of care from her daughter but the concern that her grandson may wake her when sleeping. The point drawn out by the judge at [35] and thereafter is that the appellant had not raised it herself and even when given the opportunity in cross-examination to elaborate her reasoning, she did not raise the point and that whilst her daughter had an autistic son the appellant did not say that her daughter would not be able to either live with or care for her.
45. He submitted that at paragraph [37] the judge identified that the detail in the evidence was lacking and that the daughter’s son’s care needs did not prevent Sharmila from caring for the appellant. He submitted that the judge was entitled find that there were 2 individuals who could potentially meet the care needs of the appellant but was not satisfied that the care for her son precluded the appellant’s daughter from giving care to her mother.

46. As regards the medical evidence in relation to the child's care needs whilst it referred to 24/7 it did not refer to any difficulties or provide any detail. The care of the child required did not mean that the mother would have to be in one room with the child for 24 hours and therefore the burden was on the appellant to demonstrate why her daughter would not be able to care for her, but the appellant had not gone far enough in the evidence to discharge the burden of proof. There was nothing irrational or perverse in the factual findings made and that was entitled to consider and have regard to the evidence and accepted whilst the child had medical difficulties it was not to the extent evidenced that care could not be provided by the appellant's daughter.
47. Mr Bates submitted that when looking at the accommodation, there was no challenge to the factual finding made that the appellant's daughter could live at the appellant's address or accommodation. This was set out at [36] and the appellant did not raise any issue in cross-examination of the suggestion of the accommodation being unsuitable in any way.
48. As to the evidence relating to the other daughter, the judge was aware of the witness statement however the judge was correct to say that it had not been raised by the appellant in her witness statement as a concern or as an issue as to why care could not be provided by her daughter. At [32] the judge was aware that this had been related to the medical Dr however the witness statement of both daughters could properly be seen as direct evidence which could not be tested in cross-examination and therefore the judge was entitled to consider the evidence in terms of weight that he gave it. There was no evidence in the appellant's witness statement on this point.
49. Mr Bates referred to the submissions made on behalf of the appellant where it was argued that there had been no reference to that evidence is not however the judge did not say that, but it was a matter of weight given to the evidence. The appellant was not raising it as an issue of real concern and therefore the judge had regard to that point as the appellant was not raising it herself. The appellant's daughter did not give evidence directly and there was a lack of direct corroborative evidence concerning the move to Thailand as identified by the judge. Mr Bates submitted that the judge had pointed out that there was no corroboration from the appellant's husband to even confirm that he is in Thailand or that there was any genuine intention to move. In terms of the findings made they were open to the judge in the context of the burden being on the appellant but that the evidence was not sufficient to discharge that burden.
50. As to the rule 15 (2A) application, Mr Bates submitted that it was an inappropriate application and the evidence had not been put before the FTT.

51. He submitted that the submission made that there was procedural unfairness, on the basis that there had been no issue raised by the respondent about the appellant's daughter, was not a submission or ground that had been raised in the grounds of challenge. If that was to be relied upon it should have been part of the grounds but was not.
52. He further submitted the burden of proof was on the appellant and the appellant provided evidence late and was inadequate. He submitted that it was significant that the evidence now is being sought to reduce was not adduced before the judge and it was a tacit acknowledgement that the evidence was in fact inadequate before the judge. This was also evidenced by the submission made that the present evidence now sought to be admitted "filled the gaps". He submitted that the admission of evidence cannot retrospectively establish an error in this way. By attempting to perfect the evidence by introducing new evidence as a result of the inadequacy of the other evidence demonstrates that the new material should not be admitted. It cannot be said that there was a failure to address the evidence given before the judge. It might be relevant to remaking but it cannot establish an error of law.
53. He submitted that the appellant knew what their case was based on the 2 daughters not being able to provide care and therefore it was reasonable to assume that that evidence would be required to have some support to it rather than a mere assertion. The judge therefore could not be criticised by taking the evidence as it was, and the judge was not satisfied that the evidence was sufficiently reliable to attach weight to it as the appellant would wish. Weight was a matter for the judge and the reasons given were not irrational or perverse.
54. Dealing with ground 2, it was submitted that the judge did not make a finding that SB was required to go to India (at [44]) and the judge made the point that it was a matter of choice for the appellant's daughter noting that she had transferable skills.
55. Whilst it had been argued that SB was a qualified nurse, and the UK would therefore lose her expertise the judge considered that argument at paragraph [54.6] and sets out the precise argument raised by the representative. However the judge stated there was no compulsion or requirement on SB to leave the UK and it was firmly her choice (also see paragraph 54.7).
56. Consequently the judge weighed all matters in the balance and reached the conclusion overall that it was not disproportionate to expect the appellant to return to India. The judge had to weigh up the appellant's reliance on the NHS treatment which was a factor and a countervailing factor in assessing removal. The judge had referred to the sum total of the evidence including that of the medical professionals whose reports were prepared to assist in the application and was mindful that there was some corroboration but ultimately

when weighing up the factors the judge was not satisfied that there was any direct corroborative evidence of the move to Thailand and the evidence relating to the other daughter's son and his care needs had not been sufficiently detailed and therefore found that both daughters in conjunction with SB would be able to care for their mother. Nothing in the evidence demonstrated that the appellant's needs were for a registered nurse and therefore the decision could not be criticised.

57. By way of reply, Mr Sharma submitted that the submissions made did not relate to the points he had set out in his submissions. The appellant did not say that she required a particular type of care, but the type of care was 24/7 and the help with everyday things and this had not been challenged. Therefore when considering Sharmila's circumstances an individual could not provide 24/7 care for 2 people and the feasibility of providing such care of the 2 individuals at the same time was not considered. There was no lack of evidence as the evidence referred to 24/7 care.
58. He further submitted that in relation to the other sister and the move to Thailand, was raised before the appeal hearing (to the medical representative) and there had been evidence in her letter. Whilst the respondent had referred to there being no cross-examination as she did not give evidence that could have been put to the appellant.
59. Lastly Mr Sharma submitted that he did not raise procedural unfairness as a ground but as a ground to support the admission of evidence and to show that the judge's findings were inconsistent. The appellant sought to provide the evidence to help the tribunal to see if the judge had made an error in the evidence did this.
60. He therefore invited the tribunal to find that the decision of the FtTJ involved the making of an error in a point of law and should be set aside.
61. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

62. I have given careful consideration to the submissions made on behalf of the parties and have done so in the light of the decision of the FtTJ and the evidence that was before him. Having done so, I have reached the conclusion that the grounds advanced on behalf the appellant do not demonstrate that the judge fell into error in reaching his overall conclusions and relevant to his Article 8 assessment. I shall set out my reasons for reaching that view.

63. The first ground advanced on behalf the appellant relates the factual assessment made by the FtTJ relating to the support available to the appellant in India.
64. I do not accept the submission made by Mr Sharma that the judge erred in his consideration of the issues by adopting what he described as a “blinkered” approach and that the judge was wrong to focus upon the evidence relating to the question of lack of support available from the appellant’s daughters in India. Mr Sharma submits the judge only considered the care needs of Sharmila’s son between paragraphs 33 - 37 and the circumstances of her other daughter in India and her move to Thailand between paragraphs 38 - 41 and this was an error. As Mr Bates submitted, those 2 issues had been advanced as the main reasons in support of the appellant’s case as to why the appellant could not live in India and thus should remain in the UK with her adult children. I see no error in the way the judge approached the issues and in the light of these considerations they plainly formed the core of the appellant’s claim before the FtTJ.
65. Nor do I accept the submission made that the FtTJ’s assessment on those core issues was in any way flawed.
66. The FtTJ set out his analysis of the medical evidence between paragraphs [17 - 24]. Dr Burhan had set out that the appellant had a number of health conditions, many of which she had for a number of years and for which she had received treatment for whilst resident in India. They included high cholesterol, history of raised blood pressure, her arthritis and reduced mobility and that she has suffered from depression from 2018 and that her diagnosis as a diabetic had been made 6 or 7 months ago. He described the appellant at [D6] as suffering from “ongoing chronic medical illnesses, raised blood pressure, diabetes, arthritis which are stable on medication.” On a functional assessment of the appellant it was concluded that she required assistance and prompting to undertake a range of daily activities and when assessing her mental health found symptoms suggestive of moderate anxiety disorder, mild - moderate depression and mild memory impairment. Dr Burhan’s opinion and prognosis was that the appellant’s physical health was stable on her prescribed medication. She needed “constant monitoring and support from loved ones to be able to detect any changes in memory.” He concluded that “it is highly likely that the combination of severe anxiety, moderate depressive illness and memory decline without lack of personal support in her home country will have negative and detrimental implication on her physical and mental health.”
67. As recorded in the decision of the FtTJ, Dr Burhan recommended that a psychiatrist should prepare a report and as a result Dr Bobdey

prepared a report following an examination on 29 October 2019. This report concluded that she met the “criteria for diagnosis of moderate depressive disorder with anxiety symptoms without psychotic symptoms as classified in ICD classification at F322 with a clear deficit in a cognitive functioning”. The report stressed the importance of both medical treatment and social support to mitigate against the deterioration in the appellant’s mental health.

68. At paragraph [23] the FtTJ set out the prescribed medication that she was taking.
69. It is not suggested by Mr Sharma that the FtTJ’s assessment of the medical evidence is in error and as noted at [24] the respondent did not seek to challenge the medical evidence as to the appellant’s health needs. The FtTJ therefore found that “by reasons of age, illness and disability, the appellant requires long-term personal care to perform everyday tasks.” The judge also found “her mental health will deteriorate without appropriate treatment and support.”
70. In the context of medical treatment (both for depression and for her other medical illnesses), the FtTJ took into account that when living in India previously her medical conditions had been treated by her doctor and that she had been prescribed medication (at [28]) and that whilst the appellant had sought to argue that appropriate medical treatment would not be available to her in India the judge recorded at [29] that the appellant had not provided any evidence to support the claim that appropriate medical treatment would be unavailable to in India. Furthermore, the judge recorded that any shortcomings in the Indian health service was not an argument that was pursued by counsel during the hearing. Thus the focus of the appeal was directed to the lack of family support in India.
71. Whilst Mr Sharma made the submission that the judge found that the appellant “needed 24-hour care” that is not what the FtTJ found nor is it the phrase expressly used in the medical reports. Even if that was, the report did not set out that she required any particular type of support, and this is relevant in light of the submission made that the judge did not consider what type of care would be sufficient for her needs and in the context also that the appellant’s daughter was a registered nurse and would be able to provide the care in the United Kingdom. As Mr Bates submitted, the report did not state specifically what type of support would be required.
72. Therefore against that evidential backdrop, the FtTJ undertook the assessment of support and assistance that would be available to the appellant and addressed this comprehensively at paragraphs [28 -

45]. Having considered that assessment and in the light of the submissions made I am not satisfied that the judge erred in that assessment by either failing to consider relevant evidence or reaching findings that were in conflict with the other evidence.

73. Mr Sharma submits that the FtTJ's overall finding that it would not be unreasonable for either daughter to care for their mother failed to take account of the evidence and in particular the evidence of one daughter who had the 24/7 care of her son, and that the other daughter was moving to Thailand. In his submissions he sought to challenge the assessment of the evidence.
74. The judge identified at [32] that it was the appellant's case that for different reasons her daughters were unable to provide her with the support she required or to manage her mental health. At [33 - 37] the FtTJ addressed the evidence relating to Sharmila's circumstances and contrary to the grounds expressly referred to the content of the letter from her and that her son was autistic and required continual, round-the-clock supervision that would prevent her from attending the appellant's care needs and that her home was too small to accommodate the appellant. At [34] the judge referred to the medical letter in respect of her son dated 23/3/21 confirming the diagnosis (although in different terms) and that he needed the supervision and attendance of his mother (at M3).
75. The FtTJ made the following findings:
 - (1) The appellant, in her witness statement referred to the fact that her 3 daughters were unable to care for her in India. However, no mention was made of the difficulties Sharmila faced in caring for her son or why that would prevent her from providing the required support and assistance for the mother. Rather, the appellant claimed that her daughters "have their own elderly parents in law who need their care round-the-clock. This practically means they cannot follow my medical treatment and look after me on day-to-day basis" (A2). The judge found that the statement was prepared by the appellant's legal representatives and that she had adopted it as evidence in chief without amendment or clarification (at [35]).
 - (2) The judge recorded the appellant's evidence at the hearing and that when it was put to the appellant in cross examination that, given the size of her home it would be feasible for Sharmila and her family to live with the appellant, the objection raised was not based on the inadequacy of care which could be provided by Sharmila. Rather, the appellant was concerned that her autistic

grandson would wake her up when she was sleeping (because of what she described as eccentric behaviour) (at [36]).

(3) The judge accepted that Sharmila's son had autism and required supervision and care but found that the "evidence adduced lacked detail and, importantly, did not sufficiently explain or show why the son's care needs would prevent Sharmila from providing a reasonable and acceptable level of support and assistance to the appellant (at [37]).

(4) The judge therefore concluded that those reasons he was unable to find that it would be unreasonable or implausible for Sharmila and her family to assist the appellant with her care needs in India."

76. Whilst Mr Sharma seeks to challenge paragraph [35] on the basis that the medical report referred to the circumstances of Sharmila son, that submission in my view does not undermine the factual assessment made by the FtTJ. Firstly, the FtTJ was correct in stating that in her witness statement the appellant referred to the fact that her 3 daughters were unable to care for her but made no mention of the difficulties Sharmila faced in caring for her son or why it would prevent her from providing the required support or assistance. I observe also that that was the position in the letter written by the appellant solicitors which accompanied her application to the respondent in February 2020.
77. The judge was also similarly correct to make the same point in relation to the evidence relating to her other daughter Shikha (at [39]).
78. The point made by the FtTJ was that despite the centrality of these issues to her claim and as it was advanced before the tribunal, there had been no reference to those difficulties in her witness statement. In my view it is reasonable to assume that the best source of information concerning the circumstances of her own case would be set out in her written evidence. The judge properly noted the omission of this at [35].
79. Mr Sharma submits the medical report filed earlier in the proceedings referred to those circumstances, and thus the judge failed to take that evidence into account when reaching that finding. However, at [33] the judge expressly set out that "aspects of their circumstances (referring to her 2 daughters) had been mentioned to Drs Burhan and Bobdey" and therefore the judge did not ignore that evidence. The references in the medical report however did not give any details of the claimed difficulties faced by either daughter and what was stated under "home circumstances" was that "one of the daughters has a son with special needs and the other daughter is moving to Thailand with her husband." At [37] the FtTJ stated that whilst he accepted that Sharmila's son had autism and required supervision and care, the evidence adduced lacked detail and did not sufficiently explain or show why her son's care needs would prevent her from providing a

reasonable and acceptable level of support and assistance to the appellant. In my judgement that was finding entirely open to the judge to make and supported by the earlier finding at [36] that when it was put to the appellant in cross examination that given the size of her home that Sharmila and her family could live with her, the objection that she raised was not based on the inadequacy of the care that could be provided by Sharmila but rather that the appellant was concerned that her autistic grandson would wake up.

80. The medical evidence provided in respect of Sharmila's son was brief in its contents with no real detail or any explanatory evidence as to the type of care required. The letter from his mother (at M1) stated "he is diagnosed with autism and requires 24/7 supervision. He requires help with day-to-day tasks including personal care and hygiene." Whilst there was a reference to 24/7 care the letter did not provide any further elucidation of what part her spouse played in any care arrangements or any reference to other care and assistance available to her.
81. In my judgement given the lack of detail in support of the claimed circumstances, the weight to be given to that evidence was a matter entirely for the judge. It was therefore open to him to reach the conclusion at [37] that when viewed cumulatively the evidence adduced lacked the requisite detail and failed to sufficiently explain or show why her son's care needs prevented her from providing any level of care to her mother.
82. Similarly, I find no error in the assessment of the evidence relating to the support that could be provided by the appellant's other daughter in India. The same submission was made the judge failed take into account the evidence in his assessment as set out at [38 - 41].
83. As set out in the preceding paragraphs, the judge was plainly aware that the medical report made a passing reference to the circumstances of Shikha in the light of his reference to the same at [32]. As also set out, the mention in the medical report was in the briefest of terms and gave no details whatsoever. The FtT] at [39] made the point that the appellant's witness statement again made no reference to the specific factor of the relocation to Thailand, but that Shikha had elderly in-laws to care for. The appellant's daughter in the UK also made no reference in her statement to her sister's plans to move to Thailand. The judge observed "this was all the more surprising as the statements were written in the knowledge that, in refusing her application, the respondent reached the following various conclusions regarding her family in India."
84. At [40] the FtT] addressed the evidence that had been provided consisting of a letter (N1). The letter stated "I am currently residing in Mumbai and am planning to move to Thailand where my husband works. I plan to leave India in September 2021." In the light of that

evidence, and against the evidential background the judge made a finding at [40] which was open to him to make. The judge found that “it was reasonable to expect more detailed evidence regarding Shikha’s travel plans and there was nothing to suggest that such evidence would not have been readily available.” In my view the judge was entitled to place little weight upon the evidence which he described as the only “direct evidence” and evidence that had not been the subject of any cross examination. I accept the submission made on behalf of the respondent that it was not the case of the judge failing to take into account that evidence but that the judge had reached the view that little weight could be attached that evidence in the view of its contents. In my view that was further supported by the assessment that there was no corroborative evidence from either the appellant’s daughter’s husband, or his employer and that no explanation had been given for the lack of any such evidence being presented.

85. At [41] the judge concluded that in the light of the lack of evidence which the judge found was “reasonable to obtain and adduce”, the lack of any explanation for its absence and the “inconsistency and omissions in the witness statements”, that he was unable to find that Shikha was planning to leave India as claimed or at all and thus it was reasonable to conclude that the support and assistance she had provided prior to May 2019 would be available to the appellant on return. The burden of establishing the factual circumstances lay upon the appellant and it was for her to provide evidence to establish those facts on the balance of probabilities. The FtTJ plainly and for good reason was entitled to reach the conclusion that the burden of proof had not been discharged on the basis of the evidence that had been presented to the tribunal.
86. Therefore I conclude that the FTJ’s overall assessment of the evidence relating to Shikha’s circumstances was sustainable on the evidence and open to him to make.
87. It is in this context that Mr Sharma seeks to admit fresh evidence. It consists of a bundle entitled “supplementary index”. Its contents include the following documents:
 - (1) a letter from Dr Garne relating to the child stating “is suffering from autistic disorder with severe mental retardation and sensory disorder. Due to the condition he cannot live independently and requires 24/7 care which includes personal hygiene, feeding, toileting and sensory needs. His mother is his full-time carer, she is not capable to look after anyone else in this current situation.” I note that the doctor who wrote this report is not the doctor who provided the previous report at M3.
 - (2) There is a letter from the husband of Shikha setting out that he will be applying for his wife to join him in Thailand and enclosing a

work permit issued in February 2020 expiring in March 2022 and a copy of his passport which appears to show it was issued in Bangkok in 2008.

88. The evidence was sent by email on 24 August 2021 accompanied by a letter stating the following “the appellant submits fresh evidence to support her appeal under Rule 15 (2A). All the enclosed evidence was not before the FTT because it is post -dated and not available at the FTT hearing. The appellant believes that the enclosed evidence is important evidence which will help the UT in re-making the decision.”
89. I have set out earlier this submissions made in support and against the admission of this evidence. Having considered those submissions, I refuse to admit that evidence for the following reasons.
90. I reject the submission that the judge had acted in a way which was procedurally unfair when assessing the evidence before him. The claim that the appellant’s daughter could not provide assistance had not been made in any detail before the respondent as evidenced in the decision letter and recorded by the FtT] at paragraph [39] of his decision. It is therefore unsurprising that it was not raised by the respondent in the decision letter in detail. As to the hearing itself, the ROP records the submission made on behalf of the respondent and that “concerns regarding quality of care and care home, nothing beyond oral evidence.” Therefore the submission made that the issue was decided without notice to the appellant is simply incorrect. In any event, in my view the judge was entitled to consider the circumstances of the appellant’s daughters on the evidence that was submitted. The burden was on the appellant to demonstrate the factual circumstances relied upon. The judge was therefore not required to raise any concerns about the inadequacy of the evidence to the parties.
91. Mr Sharma submits that the evidence should be admitted because it is not new evidence but “fills the gaps” to assist the Tribunal in assessing the error of law. Again in my view that is misconceived. The fact that it has been deemed necessary to “fill the gaps” demonstrates the judge was correct to identify the lack of cogent and detailed evidence put before the tribunal in support of the appellant’s case. As submitted on behalf of the respondent this submission was a “tacit acknowledgement” of the inadequacy of the evidence before the judge.
92. Furthermore I accept the submission made that the attempt to perfect the evidence by introducing new evidence as a result of the inadequacies of the earlier evidence is not a reason for admitting that evidence at this stage in the proceedings.
93. Finally I am also satisfied that the fresh evidence does not meet the test in Ladd v Marshall [1954] EWCA Civ 1 as it is has not been

demonstrated that the evidence could not have reasonably been obtained before the FtTJ. In my judgement it was open to the appellant to provide evidence in relation to her daughters' circumstances at the time, particularly as she was represented. In my view the judge accurately reflected the nature of the evidence before him, and it is the legality of the decision which is relevant. For those reasons I refuse to admit that evidence.

94. I now turn to ground 2. It is argued that the judge erred in law in relation to the reasonableness of expecting the appellant's daughter in the UK to relocate to India to provide care for her mother.
95. The submission made in the written grounds is that the judge failed to take account that such a course would deprive the UK of the benefit of her work as a nurse citing the decision in UE (Nigeria) (as earlier cited). I reject that submission. It is clear when reading the decision at paragraph 54.6 that the judge engaged with the submission made by counsel that it was not in the public interest for a qualified and experienced nurse to relocate to India and took into account the current immigration rules and the recognition of the shortage of nurses. Therefore it is incorrect to argue that the judge failed to take that into account in his assessment of proportionality.
96. Mr Sharma further submitted that the consideration was made in absence of any reference to her private and family life.
97. When addressing ground 2 it is important to look at what the judge actually stated in his decision. At [42] the judge set out SB's circumstances and that she had remained an Indian citizen although she had been in the UK since 1996. The judge expressly took into account her evidence that it would not be feasible for her to return to India due to her lack of experience of working in the Indian health service as a nurse and that she was not accustomed to living in India. At [43] the judge accepted that there would be "undoubtedly some challenges" for her in returning to India but that she would have the support of her mother and sisters and that prior to the pandemic she had been a regular visitor to India to see the appellant. The judge took into account that there was no evidence that she would experience the difficulties she had claimed regarding employment and that if anything, given her experience and qualifications as a nurse her employment prospects were better than "many in India". The judge did take into account that there would be a period of adjustment to a new working environment but that it was difficult to see how that would render a return to India unreasonable or implausible. At [44] the judge considered and took into account the evidence of her family and private life noting that she had no other relatives or family settled in the UK save for her brother; she did not own any property and her job as a nurse was "eminently transferable" between the UK and India. Thus he concluded that in his judgement it

would not be unreasonable for her to return to India to help care for the appellant.

98. When viewing those paragraphs cumulatively, the judge plainly considered the relevant aspects of the appellant's private and family life in the UK. However what the grounds fail to consider is that notwithstanding that assessment, the judge expressly stated that this was a choice and that she would be entitled to exercise that choice by remaining in the UK. The judge expressed the same point at paragraph [54.6] and that there was no compulsion on her to leave the UK but that this would be a choice that she could exercise should she wish to do so.
99. In any event, the judge concluded that even in the absence of the appellant's daughter relocating to India, the appellant's needs could be reasonably met in India (at [54.6]). This is further supported by the overall factual assessment at [45] where the judge found as a fact that the appellant's daughters, between them or individually, could adequately support their mother in India and to meet her daily living needs and to meet her emotional needs and ensure that she could access the medical services she required. The judge therefore made the point that all 3 dependents between them (whether they were in the UK or in India) would be able to provide the adequate care or arrange that support to ensure her needs were met.
100. Drawing those matters together I am satisfied that the grounds of challenge are not made out and it has not been established that the judge erred in law by either failing to take into account evidence or by reaching inconsistent findings upon the evidence was before the tribunal. In my judgement the FtTJ's decision was a comprehensive and sound decision in which the judge undertook a careful assessment of the evidence and made clear and cogent findings which were open to him to make. The assessment of proportionality was conducted in accordance with the law and as provided by section 117A (1), Part 5A applies where a Court or Tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and as a result would be unlawful under Section 6 of the Human Rights Act 1998. Section 117A (2) requires the Court or Tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B.
101. The FtTJ undertook that assessment at paragraph [54.1]-[54.8] and was entitled to attach considerable weight to the public interest as identified under section 117B (1) that the appellant could not meet the requirements of the Immigration Rules and that she had also failed to comply with the terms of a visit Visa having been in overstayer since November 2019. A court must accord "*considerable weight*" to the policy of the Secretary of State at a "*general level*":

Agyarko paragraph [47] and paragraphs [56] - [57]; and see also *Ali* paragraphs [44] - [46], [50] and [53]. However, the FtTJ directed himself in accordance with the law and the decision in *Agyarko*, that even when the requirements are not met, an applicant may still be granted leave if the consequences of removal are “unjustifiably harsh” (at [54 - 55] of that decision).

102. The FtTJ addressed section 117B(3) at paragraph [54.2] and that the appellant had accessed the NHS and that whilst the other financial and accommodation needs could be met by her UK family members, any ongoing care by the NHS would be a burden on the UK taxpayer. That is consistent with the public policy to protect public funds from bearing the cost of medical treatment. This goes beyond the question of whether a person can be maintained or accommodated.
103. The FtTJ took into account in the balance that little weight was afforded to any private life developed by the appellant in the UK (S117B(5)) in the light of her precarious status and the purpose of coming to the UK was to visit her children and not settle in the UK. The judge also took into account in the balancing exercise that her health and care needs could be adequately met in India. He considered the impact upon the Article 8 rights of her adult children in the UK but was entitled to reach the conclusion that both of them had lived away from the appellant for many years and that until May 2019 had conducted their relationship remotely and that there was nothing to suggest they could not continue to enjoy their relationship in the same way. Contrary to the grounds, the judge expressly considered the argument raised that it was not in the public interest for SB as a qualified nurse to relocate to India but as stated at 54.6, there was no compulsion on her to leave the UK and that would be a choice that she could exercise should she wish to do so.
104. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. At [55] the judge plainly weighed all the relevant factors in reaching his decision it was therefore open to the judge to reach the conclusion as he did that there were no unjustifiably harsh consequences identified that outweighed the public interest in effective immigration control
105. For the reasons given above, I am satisfied that the decision of the FtTJ did not make an error on a point of law and the decision of the FtTJ to dismiss the appeal shall stand.

Notice of Decision.

106. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtTJ stands.

Signed Upper Tribunal Judge Reeds

Dated 3/9/ 2021.

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.