



IAC-FH-CK-V1

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

Appeal Number: HU/18625/2019 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House
On 4 November 2020

Decision & Reasons Promulgated
On 25 February 2021

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**MRS HARBANS KAUR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Mr Khan, Counsel instructed by way of Direct Access
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Skehan promulgated on 25 February 2020. Permission to appeal was granted by First-tier Tribunal Judge Finch on 9 August 2020.

2. The hearing was held remotely. Neither party objected to the hearing being held by video. Both parties participated by UK Court Skype. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Both parties confirmed at the end of the hearing that the hearing was fair.

Background

3. The appellant is an 82-year-old national of India who entered the UK on 12 May 2018 with entry clearance as a visitor. On 28 August 2019, prior to the expiry of her visa she applied for leave to remain in the UK outside of the immigration rules on the basis of her family and private life in the UK. The application was refused on 1 November 2019.
4. The appellant claims to have established family life with her son and his family in the UK and asserts that her removal to India would constitute a disproportionate interference in her family life because of her age, frailty, and ill-health. Her daughter in India is unable to care for her because of her own family responsibilities and previous arrangements for carers to assist her were not satisfactory.
5. The position of respondent is that the appellant cannot meet the immigration rules in respect of adult dependent relatives because this category of application can only be made from outside the UK. In terms of Article 8 ECHR, it is not accepted that the appellant has family life in the UK with her son. There are no very significant obstacles to the appellant returning to India because she has lived in India her whole life, had family in India and owns land there. It is considered that there are no exceptional circumstances which would result in unjustifiably harsh consequences for the appellant such to warrant a grant of leave outside of the immigration rules. In particular, the appellant does not have a serious medical condition and alternative care is available for her in India. Her relationships with her family in the UK can be maintained from India.

The Decision of the First-tier Tribunal

6. It was not asserted that the appellant met any of the requirements of the immigration rules and only issue before the judge was whether the removal of the appellant from the UK would constitute a disproportionate interference in her family and private life. The judge heard evidence from the appellant, her son and a nephew. The judge found that Article 8(1) was engaged in respect of family life and that the appellant had family life in the UK. The judge found that the appellant was frail and elderly but that her only medical condition was high blood pressure for which she was receiving medication from India. The judge found that the appellant had lived with her daughter and daughter's family for a month prior to travelling to the UK with her son and that she had chosen to live with her son in the UK rather than with her daughter in India. Her daughter could assist her to arrange adequate carers. The judge was not satisfied that the appellant would not be able to find an adequate carer in India and nor that the appellant's son would not be able to accompany her to India.

7. The judge dismissed the human rights appeal finding that the removal of the appellant from the UK it is not a disproportionate breach of Article 8 ECHR.

Grant of Permission

8. Upper Tribunal Judge Finch granted permission on the basis that when considering the family and private life the appellant would enjoy in India, she failed to give sufficient weight to the cultural expectations relating to her daughter's role in her husband's family, the number of elderly relatives she was already responsible for and the short time she had actually spent in her daughter's home.

Preliminary issue - new evidence

9. In the original appeal the appellant's daughter in India did not adduce any direct evidence from herself such as a witness statement in respect of her family situation in India. An affidavit in respect of those circumstances was produced after the appeal in support of the application for permission to appeal to the Upper Tribunal.
10. Mr Khan sought permission to adduce the further evidence because he said it was relevant to the circumstances that the appellant would be returning to in India. Mr Melvin objected to the evidence being admitted because the evidence was not before the judge at the original hearing and was not relevant to the issue of whether the judge has made a material error of law. He also pointed to the fact that the new evidence was inconsistent with the evidence before the judge in respect of how long the appellant had lived with her daughter in India prior to coming to the UK. He submitted that the new evidence produced was an attempt to reargue the appeal.
11. When deciding whether to admit the evidence I had regard to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which state:

15 (2A) In an asylum case or an immigration case –

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence,
12. The evidence was adduced on 21 July 2020. It was accompanied by a letter asking the Tribunal to exercise its discretion to admit the evidence in accordance with rule 5 or rule 15. I find that the notice does not, in accordance with rule 15, explain why the evidence was not submitted to the First-tier Tribunal and Mr Khan could not enlighten me on this. The evidence was submitted 9 months after the appeal hearing

and after the refusal of permission to appeal by the First-tier Tribunal. There was no explanation for the delay in adducing the evidence. Mr Khan was not able to explain how the new evidence was relevant to the issue of whether there had been a material error of law in the approach of the judge.

13. Having heard the submissions from both parties, I decided to refuse to admit the further evidence. The appellant was represented at her appeal and produced statements from the appellant, her son and a nephew as well as a letter from an official in India. There is no explanation why this evidence from the daughter could not have been adduced prior to the appeal hearing. Further, the issue before me was whether the judge had materially erred in law on the basis of the evidence before him and the new evidence post-dates his decision. There were discrepancies in the evidence in the new affidavit with the evidence adduced at the appeal hearing. I formed the view that the new evidence was produced in attempt to relitigate the appeal.
14. Having considered the overriding objectives of the rules, I am satisfied that it is fair and in the interests of justice to refuse to admit the evidence because it is not relevant to the lawfulness of the decision First-tier Tribunal.

The Grounds of challenge

15. There is only one ground of challenge. It is said that the judge failed to give sufficient weight to the appellant's circumstances in India. The judge when finding at [8] that the appellant has chosen to live with her son in the UK rather than her daughter in India has failed to give weight to the fact that the appellant's daughter was not able to look after her mother in India because of her own family commitments as well cultural expectations and that arrangements with previous carers had been unsatisfactory. Mr Khan was not able to tell me whether the error was relating to adequacy or reasons/ irrationality or a misdirection in law.

Respondent's Position - Rule 24 response

16. The respondent opposes the appellant's appeal. It is submitted that the grounds amount to a disagreement with the decision. The judge's findings on the evidence are sustainable. The judge has directed herself appropriately in respect of Article 8 ECHR and has carried out a fair balancing exercise when considering the relevant factors.

Decision on Error of Law

17. Mr Khan's submission is that the judge failed to give weight to the fact that the appellant cannot live with her daughter in India because of her daughter's role in caring for her husband's elderly relatives and own family as well as for cultural reasons in that it is the appellant's son who culturally should take responsibility for his mother. The judge also failed to give weight to the fact that the appellant could not find a suitable carer in India. The appellant made an application in the UK out of necessity not out of choice. It was not her intention to migrate. Her health

deteriorated and her son went to fetch her. He had a duty to his immediate family and is expected to provide for his mother. The decision is not fair.

18. Mr Melvin submitted that the ground of appeal is no more than an attempt to reargue the appeal. The judge has made sustainable findings on the evidence before him. He has properly carried out the Article 8 ECHR proportionality exercise and given appropriate weight to the various factors. The judge's decision on proportionality is lawful.
19. It was not in dispute between the parties at the hearing that the appellant could not meet the requirements of the immigration rules in respect of dependent elderly relatives under E -ECDR 2.1. because the respondent has mandated that this application can only be made from outside of the UK. The appellant travelled to the UK as a visitor and made her application from within the UK. It is not suggested that the case was put on the basis that there were insurmountable obstacles to the appellant returning to India. The case for the appellant was put on the basis of Article 8 ECHR only.
20. The judge heard oral evidence from the appellant, the appellant's son and the appellant's nephew and recorded this evidence at [3] to [5]. The appellant's daughter did not produce a witness statement in support of the appeal. The judge noted the evidence that the appellant was over 80 and a widow. She had previously lived alone in India leading a reasonably healthy and comfortable life and had previously travelled to the UK frequently in order to visit her son, always returning to India within the currency of her visa. Her evidence was that her health had taken a downward trajectory and she was now reliant on her daughter-in-law in the UK to lead a reasonably comfortable life. She requires assistance to wash, take a bath and comb her hair. Her daughter in law cooks for her. She takes medication for high blood pressure every day. Prior to travelling to the UK, she had lived with her daughter in India for a month. The judge recorded her evidence that her daughter in India looks after 3 elderly people and her own children and that she could see that it was difficult for her daughter to look after her because of her own responsibilities. She had previously employed a carer, but this did not work out because the carers did not come on time and were unreliable. The appellant has land in India.
21. The judge noted the appellant's son's evidence that he brought his mother to the UK in 2019 because she suffered a deterioration in health. She needs physical and moral support and spends most of her time in bed. She would not be able to maintain her daily needs by herself and is dependent on his wife. It is not possible for the appellant to seek assistance from his sister in India because her links are now with her husband's family. Culturally, his mother is his responsibility. The appellant's son also confirmed that his mother previously had a carer who did not look after her very well. There would be the same problem with someone else. He was not aware that his mother had lived with his sister in India prior to coming to the UK. The judge also noted the nephew's evidence that when visited India in 2018 he noticed that the appellant was frail and was mostly living downstairs.

22. The judge at [6] turned to the evidence in the form of a letter from an official in the appellant's village which stated that there are no family members to assist with looking after the appellant in India. The appellant had a carer, but the carers in India are unreliable and untrustworthy.
23. The judge's findings are at found at [8] and are as follows;
- “The appellant is an elderly lady of nearly 82 years of age. She was obviously frail, was using a wheelchair and had her walking stick with her. Other than the obvious general frailty associated with old age, I was provided with no medical evidence in relation to any specific medical condition. The appellant referred to taking medication for high blood pressure and this medication was provided from India. There are inconsistencies within the evidence. The witness statement from the appellant's son places considerable weight on the cultural inappropriateness of the appellant residing with her daughter in India. This appears not to be the case as the appellant has resided with her daughter for a month prior to entering the UK. The appellant's evidence was that she chose to leave her daughter's home as she considered that she was too much of a burden on her daughter. In considering the entirety of the evidence set out above, it is difficult to escape the conclusion that the appellant has chosen to live with her son in the UK rather than her daughter in India, and has entered the UK on that basis.”
24. I am satisfied that the judge has made a clear finding at [8] that the appellant has chosen to live with her son in the UK rather than with her daughter in India. The inference from this finding is that she is able to live with her daughter in India should she choose to do so.
25. The grounds of appeal are that the judge did not place sufficient weight on the evidence that the daughter was not able to look after her mother because of her own caring responsibilities and because of cultural expectations. In essence, the ground of appeal asserts that the judge's finding in this respect is either inadequately reasoned or irrational.
26. I have had regard to the various authorities in relation to the adequacy of reasons and interference with factual findings. I refer to the words of Lord Justice Dingemans in Terghazi v SSHD [2019] EWCA Civ 2017 at [45] where it is said;
- “A further principle which it is relevant to note is that, even if an appellate court is entitled to hear an appeal because of an error of fact (because the appeal court has jurisdiction to hear appeals on facts) appellate courts should be very cautious in overturning findings of fact made by a first instance judge. This is because first instance judges have seen witnesses and take into account the whole “sea” of the evidence, rather than indulged in impermissible “island hopping” to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases costs and delay. Judges hearing appeals on facts should only interfere if a finding of fact was made which had no basis in the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified”.
27. It is manifest that that the judge took into account the evidence before her from both the appellant and her son including the evidence about the appellant's daughter's

caring responsibilities and the cultural difficulties in taking on responsibility for her mother. Nevertheless, there was evidence before the judge from the appellant herself that the appellant had lived with her daughter in India for a period of a month and had chosen to leave her daughter's home because she did not feel comfortable there. The judge was perfectly entitled to give weight to this evidence and to give little weight to the evidence to the letter adduced by the local official because it clearly misrepresented the appellant's position by claiming that the appellant had no relatives in India who could assist her which was inconsistent with the appellant's own evidence. The judge also noted that the son was not aware that his mother had lived with his sister. It was open to the judge to find that there were inconsistencies in the evidence. The judge was entitled in these circumstances, to make a finding that the appellant had chosen to live with her son rather than her daughter. This finding of fact was manifestly grounded in the evidence and the judge took into account the totality of the evidence before her when making this finding. I am not satisfied that there was a demonstrable misunderstanding of the evidence nor that there was a failure to consider relevant evidence. The finding cannot be said to be either inadequately reasoned. Nor can it be said to be "perverse" or "irrational". This is a demanding concept with a high threshold.

28. Further at [10 (v)] the judge found;

"Should the appellant not wish to live with her daughter in India, but to return to India, she will continue to have her daughter's support with matters such as recruitment of appropriate carers. The appellant has previously employed carers in India".

29. I am satisfied that at [10] the judge has made a further finding that in India the appellant also has the option of living independently with assistance from carers as she had done before. This finding is also supported by the evidence before the judge. Both the appellant and her son gave evidence that the appellant had previously had a carer and the judge has accepted that this was the case. The judge has taken into account that the carer was said to be unreliable and unsatisfactory. The judge was entitled to reject the letter from the local official because the letter was obviously incorrect.

30. It was manifestly open to the judge to give weight to the fact there was a lack of background evidence "that would leave me to conclude that all potential carers available to the appellant would be unreliable and/or untrustworthy workers". It was manifestly open to the judge at [10(v)] to conclude that;

"The appellant has not shown on the balance of probability that that any issues she experienced with her previous carers in India were bound to re-occur".

31. I also take into account that considerable deference should be given to specialist tribunals who are well equipped to weigh the evidence before them.

32. I am not satisfied that the judge erred in her approach to the factual findings.

33. It is alternatively asserted that the judge misdirected herself in law in respect of the Article 8 ECHR assessment by failing to give weight in the proportionality exercise to the fact that the outside carer was ineffective and the appellant only spent a short time with her daughter. In reality, this appears to be a disagreement with the factual findings.
34. I agree with Mr Melvin that the judge directed himself correctly at [10] referring to the five-step approach set out in Razgar v SSHD [2004] UKHL 27 in respect of Article 8 ECHR. The judge found that the appellant had family life with her son and his family in the UK because she was dependent on them. The judge concluded that the removal of the appellant from the UK would constitute an interference with her family life.
35. When carrying out the proportionality assessment, the judge took into account that the appellant had lived with her daughter prior to coming to the UK; that her daughter could assist her with matters such as recruitment of appropriate carers; that the appellant is able to travel and that her son could accompany her on the journey. The judge concludes that the appellant's wish to live in the UK with her son is a matter of choice.
36. I am satisfied that when carrying out the proportionality assessment the judge had in his mind the totality of the evidence including the appellant's age, her frailty, her medical condition, her need for carers, the availability of carers in India and the assistance she could obtain from family members in both India and the UK as well as the fact that she had a home in India. The judge was entitled to give weight to the lack of medical evidence to demonstrate that the appellant had a specific condition or that her health had deteriorated. I am satisfied that the judge adequately weighed up the relevant factors and reached a sustainable decision on the issue of proportionality. The reasons are brief, but the reasoning is tolerably clear.
37. In this respect I take into account the words of in Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [62];
- "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."
38. It may have been that another judge would have taken a more generous view in respect of the proportionality of removal, but the alleged harshness of this decision does render the decision unlawful.
39. The grounds do not assert that the judge misdirected himself in law for instance by failing to have reference to section 117B of the Nationality, Immigration and Asylum Act 2002 when undertaking the proportionality balancing exercise. Although the judge appears to have failed to assess these statutory factors including the appellant's ability to speak English, her financial independence and the precariousness of her immigration status in accordance with the statutory scheme, I am satisfied that any such error would not have made a material difference to the

outcome of the appeal because the appellant's immigration status in the UK was precarious at all times, she did not make the appropriate application from India under the rules, she has not demonstrated that she meets any of the immigration rules and she does not speak English. The fact that she is supported by her son in the UK and the fact that she has no criminal convictions are neutral factors in the balancing exercise. The judge had already found that she did not adduce specific medical evidence in respect of her health problems and found that she had a relationship with her daughter in India.

40. The judge's decision that the removal of the appellant is proportionate to the public interest in maintaining immigration control was manifestly open to her on the evidence before him.
41. I am in agreement with Mr Melvin that the grounds do not amount to more than a disagreement with the decision of the judge and an attempt to re-argue the appeal. The appellant has not satisfied me that there is a material error of law in the judge's decision.

Conclusion

42. It follows that the grounds of appeal are not made out and the appellant's appeal is dismissed.

Decision

43. The FtT decision does not contain an error of law and I do not set it aside.

Signed

R J Owens

Date

10 February 2021

Upper Tribunal Judge Owens