



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01360/2020
[CCD HU/50625/2020]

THE IMMIGRATION ACTS

Heard at Field House
On 12 January 2022

Decision & Reasons Promulgated
On 27 January 2022

Before:

The Honourable Mrs Justice Heather Williams
sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Gill

Between

Mrs Gurdev Kaur
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr N Uddin, of Counsel, instructed by Charles Simmons
Immigration Solicitors.

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a national of India born on 25 March 1955, appeals against a decision of Judge of the First-tier Tribunal Eldridge (hereafter the "judge") who, in a decision promulgated on 27 May 2021 following a hearing on 14 May 2021, dismissed her appeal on human rights grounds (Article 8) against a decision of the respondent of 8 October 2020 to refuse her application of 26 July 2019 for leave to remain in the United Kingdom on human rights grounds (Article 8).

2. The grounds assert that, given the findings of fact made by the judge, his ultimate decision (that the respondent's decision was not disproportionate) was irrational/perverse and/or inadequately reasoned. Judge of the First-tier Tribunal CJ Gumsley granted permission to appeal. Whilst he reminded himself that an appeal based on such submissions "*may well have a high hurdle to overcome*", he said that he was nevertheless persuaded that, given the findings of fact made by the judge, the grounds were at least arguable.
3. Before the judge, it was argued that the respondent's decision was disproportionate on account of the following (in summary):
 - (i) the appellant's health, in that, she suffers from a moderate to severe depressive disorder, requiring medication and therapeutic intervention;
 - (ii) care that it was said she needed without which her condition would deteriorate; and
 - (iii) her relationships with her adult son and daughter in the United Kingdom and private life established since her arrival in the United Kingdom.
4. The evidence before the judge was that the care that it was said the appellant needed was being provided to her in the United Kingdom by her adult son and adult daughter. Both have settled status in the United Kingdom. The appellant would not receive such care in India, partly because her son in India (her third child) would not provide such care and partly because she had no partner to turn to in India as her husband had been abusive towards her before her arrival in the United Kingdom.
5. Article 3 of the ECHR was not relied upon before the judge (para 9 of the judge's decision).

Immigration history

6. The appellant entered the United Kingdom on 5 October 2003 as a visitor with a visa that was valid until 29 March 2004. On 7 April 2004, she applied for an extension of that visa. Her application was refused. She made no further applications until 21 May 2014 when she made a human rights claim that was refused. On 4 January 2017, she was encountered by immigration officers and served with documentation concerning her liability to removal as an overstayer.
7. On 6 March 2017, the appellant made a further human rights claim which was again refused. Her appeal against that decision was dismissed on 25 May 2018 by Judge Powell. She exhausted her appeal rights on 6 June 2018. On 13 September 2018, she made another application based on her human rights but this was also refused on 27 February 2019 with no right of appeal.
8. The appellant's most recent application was made on 26 July 2019 (not 26 June 2019, as stated at para 3 of the judge's decision), again on human rights grounds with reliance being placed, in particular, upon her medical condition and that she had no connections to family or anyone else in India. This is the application that was the subject of the respondent's decision dated 8 October 2020.

The judge's decision

9. The judge heard evidence from the appellant, her son and her daughter.
10. The judge considered the decision and findings of Judge Powell and reminded himself of the guidance in Devaseelan [2002] UKIAT 702*. He considered the evidence before him and made several findings in the appellant's favour which stand in the appeal before us. Accordingly, no useful purpose would be served by our setting out the findings of Judge Powell in detail.
11. The findings and reasoning of the judge may be summarised as follows:
 - (i) The appellant is married with at least three children. She has lived in the United Kingdom continuously since her arrival. She has been living with her adult son and daughter in the United Kingdom. Both of them now have settled status here. She has a younger son who continues to live in India (para 24).
 - (ii) The appellant is "*basically an uneducated woman*" and would not have undertaken meaningful work outside her home in India (para 28). She was in an abusive relationship with her husband before she came to United Kingdom (para 25). Her younger son has lived with his father throughout and continues to do so (para 26). On balance, the judge accepted that the appellant's son in India, having been abandoned by his mother for 17 years and being brought up by his father, wants to have little or nothing to do with the appellant (para 30).
 - (iii) The judge noted that Judge Powell had found that there was an engagement of Article 8 in respect of both family and private life. He agreed that that was the position before him (para 37). However, whilst he noted that Judge Powell had found that the appellant's dependency on her children in the United Kingdom in terms of finance, emotional and physical support, was by choice and not necessity (para 37), the judge considered (para 38, referring in particular to the report from Dr Burman) that the evidence before him drove "*a somewhat different conclusion*". He found that the dependency remained and that it had shifted more towards necessity although there remained an element of choice, not just for the appellant but the whole family here (para 38).
 - iv) After an absence of 17 1/2 years, it was unlikely that the appellant would have meaningful support from any friend she may have had there previously and that there is no family member to whom she could turn for practical support for any enduring period on return to India (para 31).
 - v) Having considered the medical reports from Dr Salma Burman, a GP, and Dr Javaid Sultan, a consultant psychiatrist, the judge said that he was satisfied that the appellant suffers from a moderate to severe depressive disorder, requiring medication and therapeutic intervention and that, as Dr Sultan put it, her condition "*will be highly likely to worsen if she received only limited support in her life*" (paras 32-33).
 - vi) Due to her mental health illness, the appellant requires personal care to perform everyday tasks reliably. These include important tasks such as taking her medication, attending medical appointments, some basic household activities and some help as regards personal care (para 40). At para 38, he said that the appellant would not now be able to look after herself to an acceptable

standard for much of the time if she were living alone and, at para 40, that the appellant needs long-term personal care.

vii) Having considered the relevant evidence in the Country Policy Information Note ("CPIN") entitled: "*India: Medical and healthcare provision*" issued in October 2020, in particular, the evidence at para 18.1 of the CPIN, the judge considered that statistically any individual has as low as a 10% chance of finding a place in a residential care home for the elderly in India (para 35).

viii) The appellant's son and daughter in the United Kingdom were both in work and appeared to have some funds. They had been maintaining their mother here. They had also found the money, in recent years (but not before), to pay a number of her medical bills. The possibility of paying someone to look after their mother, in modest accommodation, in India had not been explored. It had not been explained to him (the judge) why the appellant's daughter could not accompany her to India. Although the judge said that he could understand that she is married and living here, he noted that she did marry in India. The judge accepted that the appellant's son in the United Kingdom, who was also married, had recently had a child with his wife and that it would be more difficult for them to uproot. He therefore did not regard that this would be reasonable or practical in the son's case (para 36).

ix) Given the appellant's immigration status, an application for leave to remain as an adult dependent relative under the provisions of the Immigration Rules and Appendix FM could not succeed, nor had it been suggested before him that it could (para 39).

x) At paras 39-41 of his decision, the judge considered the likelihood of an entry clearance application being successful. He concluded that entry clearance was not guaranteed. This was because it had not been shown that the sponsors (the appellant's son and daughter in the United Kingdom) between them could not provide her with practical and financial help to obtain the care that she needed in India. It had not been shown that one of them could not reasonably return to look after the appellant or that there was no one else who could be employed to assist on a day-to-day basis to the necessary level or that such assistance was unaffordable if not provided by her son or daughter.

xi) The appellant lived in India until she was 48 years old (para 42). She continues to speak Punjabi (and, apparently, not English). She lives within an Indian household with her children who were born in India and lived there well into their adulthoods. The evidence was that they, too, had married Indian nationals. The judge considered that there were no cultural issues to the appellant's reintegration in India. It had not been shown that she could not be supported emotionally, practically and financially in India. She could live a reasonably normal life there. There were no "*very significant obstacles*" to the appellant's integration once more into life in India. He therefore did not find that she met the requirements of para 276ADE(i)(vi) of the Immigration Rules.

xii) At para 43 onwards, the judge turned to consider the Article 8 claim outside the Immigration Rules. Paras 43-46 read:

"43. In any appeal based upon the Appellant's Article 8 rights, I must have regard to the provisions of Part VA of the 2002 Act and, in particular, section 117B. That section sets out considerations applicable in all

such cases. The first of those is that the maintenance of effective immigration controls is in the public interest. Those controls are primarily expressed through the Rules and I have explained why the Appellant has not been able to demonstrate that she meets the requirements of the Rules in respect of her current application and, indeed, that I would have been unable to conclude that she met those requirements in an application for leave to enter from India.

44. Of particular significance, however, in this appeal is the fact that she entered in 2003 with very limited leave and then basically disappeared for about 10 years. Additionally, when served with a notice informing her of her liability to removal, she did not act upon it but has remained since. She has remained in this country for about 17 years without leave and that is an important factor. When she made this application she was under the age of 65 and did not speak English. Today, however, it is not a requirement of the Rules that she can speak the language but I find it does not help her case that she cannot. She is not herself financially independent but I have accepted that in terms of day-to-day living, she is financially self-sufficient insofar as her children in the United Kingdom are accommodating her and looking after her normal daily needs. [I]t is my finding, however, that for many years she must have been a burden on the State. As was noted elsewhere, she has had in excess of a hundred appointments within the NHS and has only paid for any consultation or treatment since 2017.
45. She has acquired a private life in this country. It is almost entirely in relation, however, to her living with her family. Subsection (4) requires me to attach little weight to a private life formed when she was here unlawfully. Subsection (5) says the same thing applies to any private life established whilst any leave was precarious. The Appellant has only had leave for six months by definition that leave was precarious.
46. On the basis of what I have set out to [sic] far, I have found that Article 8 is engaged and that the Appellant's removal would be an interference with her Article 8 rights. That interference is lawful and justified in respect of the maintenance of immigration controls and economic interests of the country. The question is whether it is proportionate? Having regard to my findings of fact and conclusions otherwise, I consider that the decision was proportionate. The interests of the State are strong for the reasons I have stated. The Appellant's removal will not be easy for her or her family but, as I have said, those effects can be ameliorated. Whilst understanding that no one within the family in the United Kingdom wishes the Appellant to have to return to India, I consider it is proportionate to expect her to do so."

12. It can therefore be seen that, although the judge made several positive findings in the appellant's favour, including (importantly) that her mental health condition is such that she requires long-term personal care, he dismissed the appeal because, in the main: (i) it had not been shown that her daughter could not accompany her to India or that her son and daughter could not between them employ someone in India to look after her on a day-to-day basis; and (ii) the state's interests in this particular case were strong, for the reasons he gave at paras 43-46.

The grounds

13. The grounds contend as follows:

(i) It was irrational for the judge to conclude that the appellant could lead a reasonably normal life in India and that she does not satisfy the criteria in para 276ADE(1)(vi) of the Immigration Rules (para 10 of the grounds). In reaching this conclusion, the judge erred in taking into account that it was possible for someone to be employed in order to assist the appellant because this reasoning failed to take into account the dependency between the appellant and her adult children in the United Kingdom (para 11 of the grounds).

(ii) The judge erred in taking into account the possibility of the appellant's daughter returning to India because this was an immaterial consideration in relation to para 276ADE(1)(vi). The appellant's daughter is settled in the United Kingdom and her husband is lawfully resident in the United Kingdom. The requirement in para 276ADE(1)(vi) must be assessed on the basis of circumstances as they stand and not as the Tribunal may perceive them to be in the future.

14. Para 13 of the grounds appears to suggest that the judge had incorrectly stated that the appeal was put on the basis of the appellant's Article 8 claim outside the Immigration Rules and that reliance had been placed before the judge on para 276ADE(1)(vi).

15. At the hearing before us, Mr Uddin accepted, in relation to para 13 of the grounds, that the approach of the judge as set out at para 22 of his decision was correct. At para 22, the judge said that there was no right of appeal on the ground that the respondent's decision was not in accordance with the Immigration Rules. He stated that, although the only right of appeal was on human rights grounds, the Court of Appeal had explained at para 34 of TZ (Pakistan) (Pakistan) [2018] EWCA Civ 1109 that, if an appellant does meet the requirements of the Immigration Rules for the leave that was being sought, that is determinative of the appeal on human rights grounds, there being no effective balancing exercise to undertake in the public interest.

Assessment

16. We provided the parties at the hearing before us with a copy of the judgment of the Court of Appeal in Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611.

17. The Ribeli case concerned an entry clearance application by an appellant as an adult dependent relative of her daughter in the United Kingdom. The daughter had a good career in London as a doctor. She wished to live and pursue her career in London. She did not wish to return to South Africa in order to provide her mother with emotional and other support. The appellant in Ribeli suffered from a degenerative back disease, osteoarthritis and fibromyalgia. The First-tier Tribunal allowed her appeal but the Upper Tribunal reversed the decision of the First-tier Tribunal.

18. In relation to Article 8 outside the Immigration Rules, the Court of Appeal said in Ribeli that it was important to recall that the test under Article 8 was an objective one,

whatever the subjective feelings of a person may be. At paras 69-71 of Ribeli, the Court of Appeal said:

"69. The crucial point (and it is a powerful point as a matter of common sense as well as a matter of law) is that the Appellant's daughter could reasonably be expected to go back to South Africa to provide the emotional support her mother needs as well as to provide practical support. For example, if the concern is that the Appellant may be cared for in her home by people who may turn out not to be trustworthy, there is no reason why her daughter cannot live and work in South Africa to supervise the care arrangements made for her mother.

70. As the UT Judge observed, at the end of the day, what this case is about is the *choice* which [the appellant's daughter] has exercised and wishes to be able to continue to exercise of living and working in a major international centre like London rather than in South Africa, which is her own country of origin. She is entitled to exercise that choice. But, in those circumstances, the UT cannot be faulted for having come to the conclusion that any interference with the Appellant's right to respect for family life conforms to the principle of proportionality.

71. This is especially so in a context where, as Mr Sheldon has submitted, "appropriate" or "due" weight must be given on the other side of the balance to the assessment by the Secretary of State and by Parliament (which has approved the Secretary of State's changes to the Immigration Rules) of what the public interest requires. Depending on the context the weight which is appropriate or due may be "considerable" weight: see *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, para. 44 (Lord Reed JSC), citing *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para. 16 (Lord Bingham of Cornhill); and also paras. 46 and 50; and *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11; [2017] 1 WLR 823, para. 47 (Lord Reed JSC)."

19. We allowed the parties some time to consider the judgment in Ribeli, having expressed our view that, although the Ribeli case concerned an application for entry clearance as an adult dependent relative, the case serves to show that it is in principle permissible to consider what other family members can reasonably be expected to do in order to provide any necessary care and support.

20. In view of the judgment in Ribeli, which Mr Uddin did not address, we reject the contention in the grounds that the judge erred in taking into account an immaterial consideration. We reject Mr Uddin's submission before us that the judge erred in principle when he considered the possibility of the appellant's daughter returning to India.

21. Mr Uddin submitted that the judge should have considered the facts as at the date of the hearing and not speculated about what might or might not happen in the future. However, this submission can have no traction in view of the judgment in Ribeli, in particular, at 69-70.

22. Mr Uddin submitted that the judge could not have made a finding that it would be reasonable for the appellant's daughter to relocate to India because there was no evidence to show how easy relocation would be for her. In addition, Mr Uddin submitted that it was unreasonable on the facts for the judge to have found that the

daughter could return to India to look after the appellant because the daughter had spent a long period of her life in the United Kingdom and she would have to uproot herself, look for work in India and find accommodation.

23. However, the fact is that the judge did *not* make a finding that it would be reasonable for the appellant's daughter to relocate to India. He said, for example at para 41, that "*... it has not been shown that one of them could not reasonably return to look after the mother or that there is no one else who could be employed to assist on a day-to-day basis to the necessary level or that, such assistance is unaffordable if it is not provided by her son or daughter*". It is therefore plain that no evidence had been adduced to the judge as to whether it would be reasonable to expect the appellant's daughter to relocate to India, nor did Mr Uddin suggest that there was any such evidence before the judge.
24. Mr Uddin referred to the witness statements of the appellant's son and daughter which stated that private care in India was not regulated and that there was a risk of abuse or negligence. However, the fact is that a similar argument failed in Ribeli (see para 69).
25. Mr Uddin's submission that it was in any event unlikely that the appellant could obtain private care and that there was no evidence to support the judge's finding that such care could be obtained ignores the fact that the burden of proof was upon the appellant and that she simply failed to submit to the judge evidence to address the issue.
26. Para 11 of the grounds contends that, in taking into account the possibility of someone being employed in India to assist the appellant, the judge had failed to take into account the dependency between the appellant and her adult children in the United Kingdom. However, the fact is that the judge specifically considered the dependency between the appellant and her children in the United Kingdom, at para 37. There is no reason to think that he did not bear that in mind when considering the options for the appellant's care in India.
27. For all of the reasons given above, we are satisfied that the judge did not err in law in reaching his finding, in relation to para 276ADE(1)(vi), that there were no insurmountable obstacles to the appellant's reintegration in India.
28. Mr Uddin submitted that the judge's positive findings in the appellant's favour were inconsistent with his conclusion on proportionality. He also submitted that the judge gave inadequate reasons for his decision on proportionality. We can deal with these submissions together. They ignore the fact that the judge found that the interests of the state were strong in the instant case, for the reasons he gave at paras 43-46 where he considered the weight to be given to the state's interests in immigration control. In summary:
 - (i) The judge took into account that the appellant did not satisfy the requirements of the Immigration Rules in her current application, nor could she satisfy the requirements for entry clearance to be granted as an adult dependent relative.
 - (ii) He considered it of particular significance that the appellant had entered in 2003 with very limited leave and "*then basically disappeared for about 10*

years". She did not act upon a notice informing her of her liability to removal but remained for about 17 years without leave, which he considered was an important factor.

(iii) Although ability to speak English was no longer a requirement in the appellant's case, it did not help her case that she could not speak English.

(iv) Although the appellant's children in the United Kingdom were accommodating her and looking after her normal daily needs, the judge found that she must have been a burden on the state for many years as she had had in excess of a hundred appointments within the NHS and had only paid for consultation/ treatment since 2017.

(v) Although the appellant had acquired a private life in this country, the judge found that her private life was almost entirely in relation to her living with her family. In any event, as she had only had leave for six months, her leave was precarious, by definition, and that s.117B(4) and (5) of the 2002 Act applied.

29. It is therefore simply untenable to suggest that the judge's positive findings were inconsistent with his conclusion on proportionality and/or that he gave inadequate reasons for his conclusion on proportionality. In reality, in advancing this submission, Mr Uddin is simply disagreeing with the judge's conclusion on proportionality.
30. For all of the reasons given above, we are satisfied that the judge did not err in law. Indeed, we take the unusual step of making the point that the grounds fall far short of reaching the hurdle of establishing irrationality or perversity. We make this point in the hope that it serves to reinforce the high hurdle required to show irrational or perversity. We are satisfied that irrationality/perversity was not even arguable and permission should not have been granted.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. We dismiss the appellant's appeal to the Upper Tribunal.

Signed

Upper Tribunal Judge Gill

Date: 17 January 2022

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