



IAC-AH-KRL-V1

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

Appeal Number: IA/18274/2014

THE IMMIGRATION ACTS

**Heard at Stoke-on-Trent Bennett House
On 20th March 2015**

**Decision & Reasons Promulgated
On 5th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS PRABHA VERMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Sood of Counsel

For the Respondent: Ms Johnstone, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. The appellant before this Tribunal is the Secretary of State for the Home Department who I will refer to as "the Secretary of State". The respondent to this appeal is Mrs Prabha Verma, who was the appellant in the Tribunal below. I will refer to her as "the appellant".
2. The appellant is a citizen of India and she was born on 5 February 1939. She arrived in the UK on 10 September 2013 under a visit visa. She subsequently applied to vary

her leave but the application was refused on 9 April 2014. The Secretary of State set out her reasons for the refusal in a letter dated 9 April 2014.

3. The appellant appealed the refusal to the First-tier Tribunal (FtT) when her appeal was heard at Nottingham on 11 August 2014 before First-tier Tribunal Judge Atkinson (the Immigration Judge). The Immigration Judge decided on the evidence given to allow the appeal “under Article 8 of the Human Rights Convention”. The Immigration Judge dismissed the appeal under the Immigration Rules. No anonymity order was made but he did make a fee award in the sum of £140.
4. The Secretary of State appealed that decision by notice of appeal dated 28 August 2014.
5. The judge who granted permission to appeal to the Upper Tribunal, Judge of the First-tier Tribunal Denson thought that compelling circumstances had to be shown before the appellant’s application outside the Immigration Rules under Article 8 could be allowed. The Immigration Judge had not made adequate findings so as to identify such compelling circumstances so as to justify a finding that the appellant was entitled to remain in the UK outside the Immigration Rules. Accordingly, Mr Denson gave permission to appeal.
6. Standard directions were sent out informing the parties that no new evidence would be heard by the Upper Tribunal unless an application was made setting out why the evidence had not been obtained before the FtT.
7. The appellant provided a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Rule 24 response by Ms Sood, on behalf of the appellant, states that the decision of the FtT was one open to it having regard to recent case and statute law and more than borne out by the evidence. The decision was a proportionate one in all the circumstances and the Upper Tribunal should uphold it.

The Hearing

8. At the hearing, which lasted approximately one hour, I heard submissions by both representatives. The appellant did not give oral evidence. Ms Johnstone argued that there was public and private social care provision in India, that the appellant had family there, albeit they may be unwilling to help, and it is clear from the refusal that the Secretary of State’s view was that the appellant could return to India. Before the Immigration Judge decided to go outside the Rules he ought to have regard first to the provisions of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) and in particular to those provisions inserted by the Immigration Act 2014 at part V(A) (“the 2014 Act”). There were public interest considerations to be taken into account in all cases by virtue of s. 117B of the 2002 Act and particular requirements to be met to ensure that applicants for leave to remain were financially independent and not a burden on taxpayers. The Immigration Judge had not taken these factors fully into account. I was also referred to **Dube [2015] UKUT 90 (IAC)**, decided since the 2014 Act came into force. In that case it was held that the new provisions were additional considerations which did not constitute a radical departure from the previous case law. There continued to be a requirement for a structured approach in

line with the leading case of Razgar [2004] UKHL 27. However, it was an error of law not to refer to 117A-D.

9. It was submitted that the Immigration Judge's reasoning was flawed. I was referred in particular to paragraph 37 of the determination of the FtT. There, the Immigration Judge suggests that the appellant would be:

“Socially isolated and could not rely on the practical and immediate support of family members. The appellant requires support in undertaking and completely (sic) everyday living tasks. I accept the view that there is limited provision of public and private social care in India, where there is an expectation that such matters are the responsibility of the family. In those circumstances, the appellant is likely to be at risk of neglect; her physical (sic) would deteriorate from lack of compliance with prescribed medication and inadequate nutrition ...”

10. Ms Johnstone therefore submitted that even the Immigration Judge appeared to accept that the appellant could return to India. Furthermore, if the judge wanted to go outside the Rules he should first of all consider the requirements of Section 117A. The Immigration Judge had already found (at paragraph 27) that the appellant had a good understanding of English by virtue of her university education. He went on to assume that the appellant would be treated outside the NHS but, it was submitted, there were no proper grounds for concluding that the appellant would be “financially independent”, nor could it be guaranteed that the appellant would not resort to the NHS in old age (she is presently 76).
11. By reply Ms Sood submitted that there was a great deal of medical evidence before the Tribunal or the FtT (for example she referred to page 29 of the appellant's bundle). It was submitted that the appellant suffered from a degree of dementia and her removal could worsen this condition. The Immigration Judge made clear findings at paragraph 11 of his determination. Paragraph 11 of the determination showed that the Immigration Judge was persuaded that the appellant had a degree of Alzheimer's disease and that she was unable to give evidence and the sponsor gave evidence instead. The appellant had not “deliberately evaded the Rules” but her Alzheimer's disease had overtaken her. It had not been diagnosed until the appellant came into the UK. There were relatives in India but they would provide limited support. In particular there was an elder sister. Given the appellant's deterioration in her cognitive state the Immigration Judge was justified in making the finding he had in relation to family life. There was a social care report as well. The appellant was “mobile” but “needs resources”. There was evidence that she would not depend on the NHS.
12. In reply the respondent pointed to the requirements for bringing an elderly relative into the UK which are contained in Appendix FM at E-ECDR (Phelan at page 1169). It was pointed out that there were financial requirements that must be met under E-ECDR (Phelan p1170). Suitable undertakings were required before an application under this Rule could have succeeded, for example, accommodation and care for a period of five years must be available before ILR will be granted.

13. At this point Ms Sood pointed out that her client's case was not solely based on her medical condition but wider considerations applied.
14. At the end of the hearing I reserved my decision as to whether or not there was a material error of law in the decision of the FtT.

Conclusions

15. The Immigration Judge made reference to Sections 117A-D of the 2002 Act, quoting the legislation at length in paragraph 10 of his determination. According to Section 117B, certain public interest considerations apply in all cases. These include:
 - (1) the interests of the wellbeing of the United Kingdom being to admit persons who are less of a burden on taxpayers; and
 - (2) the fact that those who are financially independent are better able to integrate into society.
16. The Immigration Judge also referred to the requirements introduced by the legislative changes in the 2014 Act at paragraph 27 of his determination. However, it was insufficient for the Immigration Judge to refer to those requirements. It was necessary for him to consider those requirements as against the facts of the case before him before departing from the Immigration Rules and making a "free-standing" assessment under Article 8. Although the leading cases relied on by the Secretary of State of Nagre and Gulshan must now be considered in the light of later authorities, as well as the legislation to which I have referred, it is nevertheless appropriate to consider whether there are compelling circumstances preventing the appellant's return to India. It is necessary to ask whether the Secretary of State's decision to remove is in all the circumstances unreasonable or whether it leads to an unjustifiably harsh outcome. The Immigration Rules are intended to be a complete code and they should be departed from only where the circumstances justify that departure.
17. I am not satisfied that the Immigration Judge kept fully in mind the requirements of the Rules and the requirements of Sections 117A-D of the 2002 Act. If the appellant met the requirements of the Rules based on the financial means of the sponsor and her husband, why could she not apply under those Rules? The fact that her daughter and son-in-law can buy the appellant private medical treatment does not mean that they will or that this is a proper basis for finding that her human rights would be infringed. The Immigration Judge's conclusion that because her English family had money she would not become a burden to taxpayers and ultimately use the NHS was not one reasonably open to him. Generally, a person's human rights are not enhanced by the fact that she does not, or does not intend to, claim public funds to which she is entitled.
18. As the respondent submitted, the UK is not the world's health service provider and the appellant's circumstances are not so compelling that she could not return to India, a country where she has lived all her life up to 2013, where she owns property and where she has a large number of relatives. I find that the Immigration Judge did

not adequately consider the presence of relatives in India and in particular a sibling, the appellant's husband's family and her two daughters. There is also the possibility of paid health care, which is expressly referred to in Dr Junaid's report. Indeed, the appellant's circumstances may be better in India, with her strong family network, than in the UK where she is more likely to become dependent upon the state.

19. The Immigration Judge was entitled to find that the appellant suffered from moderate Alzheimer's disease. It is not established by the medical evidence when the appellant first suffered an onset of Alzheimer's disease. However, it is clear that she will be able to cope with this condition with suitable carers and paid help. India has its own system of health care. Although this may not be as sophisticated as an advanced western economy it is not for the Secretary of State to protect the health of foreign nationals. There is no general right to good health and no general right to choose the country one lives in for the purposes of availing oneself of the health system there.
20. There is no Article 3 claim here. The medical evidence does not indicate that the appellant is incapable of flying or that her Alzheimer's disease has deteriorated to such an extent that she will suffer serious harm if she returns to India. Indeed, I find, there is no basis for concluding that it would be disproportionate in all the circumstances for her to return to her own country. The medical evidence does not support the conclusion that the appellant will suffer some irreparable harm which prevents her removal from the UK. It merely suggests that certain aspects of her health have improved since she came here.
21. I consider in all the circumstances that the decision was one the Immigration Judge was not reasonably entitled to come to. His decision was not merely a generous one. He had an inadequate regard to the provisions of the Immigration Rules and the 2014 Immigration Act in reaching his conclusion. Simply by referring to the provisions does not mean he has properly analysed them. The facts of this case, in my judgment, do not support the conclusion that the respondent would be acting in a disproportionate manner by removing the appellant.

Notice of Decision

22. I find that the decision of the First-tier Tribunal contains a material error of law such that it requires to be set aside.
23. I substitute the decision of the Upper Tribunal which is to allow the Secretary of State's appeal. Accordingly, the Secretary of State's decision to refuse the appellant leave to remain and issue directions for the appellant's removal stands.

Signed

Dated

Deputy Upper Tribunal Judge Hanbury