



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23132/2014
IA/23137/2014

THE IMMIGRATION ACTS

Heard at Taylor House
On 23 October 2015

Decision & Reasons Promulgated
On 17 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHINDER SINGH
SURINDER KAUR
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:

For the Appellant: Ms A Brockleby-Weller, Home Office Presenting Officer
For the Respondents: Ms S Iqbal of Counsel instructed by Gurusinghe & Co.

DECISION AND REASONS

1. These linked appeals have come back before me to remake the decision following my decision that First-tier Tribunal Judge Hunter had erred in law in allowing the appeals in his decision promulgated on 9 March 2015.
2. Although before me the Secretary of State is the Appellant and Mr Singh and Ms Kaur are the Respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Singh and Ms Kaur as the Appellants and the Secretary of State as the Respondent.

Background

3. I have previously rehearsed the background to these appeals in the 'Error of Law' decision made following the hearing on 15 September 2015. For ease of reference I repeat the germane paragraphs here:

"The Appellants are nationals of India born on 16 February 1942 and 10 July 1944 respectively. They last entered the United Kingdom on 25 June 2013 pursuant to entry clearance as family visitors. They have resided with their eldest son, Mr Jasvir Singh Matharu (the 'sponsor'), ever since. They have previously made visits to the United Kingdom and have themselves been visited in India by both their eldest son and their second son who also resides in the United Kingdom.

I pause to note that the First-tier Tribunal Judge found that when the Appellants last entered the UK they came as genuine visitors, and have not sought to disregard the Immigration Rules. However, their plans changed because of a change of circumstances (see First-tier Tribunal decision at paragraph 60). Mr Jarvis [the Home Office Presenting Officer] before me acknowledges the soundness of that conclusion.

The change of circumstances relates to the health of the First Appellant. On 28 August 2013 he was admitted to Charing Cross Hospital after having had a stroke. It is to be noted that he also has a history of asthma and respiratory problems following the removal of a lung. He has also suffered from bouts of pneumonia whilst living in the United Kingdom and a mild cardiac attack. It was against this background that applications were made for variation of leave to remain as the adult dependent relatives of the sponsor.

The Respondent refused such applications on 2 May 2014 for reasons set out in a 'reasons for refusal' letter of that date. Decisions to remove the Appellants further to section 47 of the Immigration, Asylum and Nationality Act 2006 were also made."

4. The focus of the Appellants' cases before the First-tier Tribunal was essentially the submission that the Appellants satisfied the requirements under Appendix FM of adult dependent relatives save for the fact that the Immigration Rules did not permit switching into that category whilst in the United Kingdom; further it was submitted that there were good reasons for granting leave outside the Rules, there being compelling circumstances not sufficiently recognised under the Rules, in particular with regard to the First Appellant's state of health. At the 'error of law' hearing I concluded that the Judge's favourable findings in respect of paragraph E-ECDR.2.5 were in error as he had failed to have regard to the evidential requirements under the Rules pursuant to Appendix FM-SE, in particular paragraphs 34 and 35; such an error was material because it had informed the Article 8 assessment outside the Rules.
5. At the 'error of law' hearing new evidence was presented in respect of the deteriorating health condition of the First Appellant. The Respondent's representative on that occasion indicated that in such circumstances the Secretary of

State would like to re-assess the case in light of the evidence before proceeding to a re-hearing of the appeal; the appeal was adjourned accordingly. In the event, as I was informed by Ms Brockleby-Weller, the Respondent has not reviewed the case: nonetheless Ms Brockleby-Weller invited the Tribunal now to proceed with re-making the appeal without a further adjournment.

Re-making the decisions in the appeals

5. The Appellants' cases are now advanced on essentially the same basis as previously, but rely on further evidence.
6. The error of law decision did not disturb the First-tier Tribunal Judge's findings of primary fact. Further Ms Brockleby-Weller indicated that she did not have any questions for the Appellants or their supporting family member witnesses. Both representatives were content to proceed on the basis of submissions.
7. Ms Iqbal accepts that the Appellants cannot qualify for leave to remain under the Rules because they did not have entry clearance as 'adult dependent relatives': see paragraphs E-ILRDR.1.2 and D-ILRDR.1.4 of Appendix FM. Accordingly reliance is placed on Article 8. It was common ground in this regard that the only issue was in respect of 'proportionality' - the parties were in agreement that the first two **Razgar** questions should be answered in the Appellants' favour and there was no issue in respect of the third and fourth **Razgar** questions, (e.g. see decision of First-tier Tribunal, paragraphs 38-45).
8. The Appellants also persist in the submission that save for the 'prior entry clearance' requirement they meet the terms of the adult dependent relative Rules, and to that end in any proportionality assessment their circumstances are essentially permissible under the Rules and therefore their removal is not justifiable by reference to the imperative of maintaining effective immigration control - it being otherwise contended that it would be unreasonable and unrealistic to expect persons with such infirmities to quit the UK temporarily merely to apply to return.
9. In this context I remind myself again of the requirements of paragraph E-ECDR.2.5:

"The applicant or, if the applicant and their partner are the sponsor's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living because:

 - (a) *it is not available and there is no person in that country who can reasonably provide it; or*
 - (b) *it is not affordable."*
10. I also note the evidential requirements pursuant to Appendix FM-SE, paragraphs 34 and 35:

“34. Evidence that, as a result of age, illness or disability, the applicant requires long-term personal care should take the form of:

(a) Independent medical evidence that the applicant's physical or mental condition means that they cannot perform everyday tasks; and

(b) This must be from a doctor or other health professional.

35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

(a) a central or local health authority;

(b) a local authority; or

(c) a doctor or other health professional.”

11. I pause to emphasise that the focus of these provisions is on ‘long term *personal care*’, rather than medical treatment, albeit the need for personal care might arise due to illness. Paragraph 34(a) is indicative of the concept of ‘personal care’ being related to the performance of everyday tasks.

12. The Respondent has not, before me, sought to re-open any of the findings of primary fact of the First-tier Tribunal, and has not sought to challenge the veracity and reliability of the more recent supporting medical evidence. Bearing this in mind, and drawing from both the findings of the First-tier Tribunal and all of the available evidence on file, I consider the issues in the appeals against the background of the following facts in respect of the Appellants’ health and care needs.

13. The First Appellant: Mr Mohninder Singh.

(i) Mr Singh was born on 16 February 1941, and so at the date of the hearing was 74 years old.

(ii) He has a history of TB, which was treated by a right lung lobectomy (removal of a lobe of the lung). He is asthmatic and also prone to recurrent chest infections. He has attended hospital with episodes of pneumonia in April 2014 and June 2014 (when he was admitted in relation to a heart attack); there was a further admission from 22 August 2014 to 26 August 2014 with haemoptysis and asthma. More recently, shortly before the error of law hearing, the First Appellant was admitted to hospital from 12 August 2015 and discharged on 21 August 2015 suffering from pneumonia. A few hours after his admission on this occasion he went into PEA (pulseless electrical activity) arrest (i.e. cardiac arrest) secondary to hypoxia, and required resuscitation. He has been diagnosed with bronchiectasis in both lungs which makes him vulnerable to recurrent chest infections.

(iii) On 28 August 2013 he had a stroke (basal ganglia bleed) which left him with a feeling of numbness on his left side limiting his mobility (see his GP Dr Sekhon's letter, 25 November 2013). Whilst, I note that in the letter dated 15 April 2014 from Dr Sekhon it was said that the First Appellant had made a full recovery from stroke and did not have any residual neurological deficits, and that this was repeated in a letter dated 30 April 2014, it is also the case that Dr Sekhon comments upon the Appellant having problems with his memory and speech since his stroke, and the family commenting on short term memory deterioration. This has been followed up, and an assessment by a consultant psychiatrist (referenced in a letter from Dr Sekhon dated 29 December 2014) suggested a degree of brain damage following cerebral haemorrhage, and evidence of vascular dementia. Dr Sekhon opines "*it is likely that his vascular dementia will progress and that he will continue to have cognitive decline*".

(iv) In this context I note that there are two reports on file by Consultant Psychiatrist Dr Gilbert Andrews, dated 3 June 2014 and 29 December 2014. In the first report Dr Andrews identifies a risk of self-neglect, and refers to a need for assistance with activities of daily living, specifically: washing and dressing; personal hygiene; supervision whilst feeding to avoid choking; supervision and encouragement to ensure an adequate fluid and food intake; assistance with medication; assistance with travel. It is also said that the First Appellant is forgetful and can become distressed, for example when he misplaces personal belongings. He also becomes agitated easily and requires reassurance; he often asks for his son when his son is out at work; he is emotionally fragile, yet resents his dependence on others which can cause him to become tearful. Dr Andrews also opined that the First Appellant lacked capacity to plan and decide on matters of health and finance. The second report indicated a "*clear impression that there was further deterioration*" noting that this was to be expected following the myocardial infarction of June 2014.

(v) There is a history of hypertension. In June 2014 the Appellant had a myocardial infarction (heart attack), and a subsequent angiogram resulted in a diagnosis of severe coronary heart disease (3 vessel disease).

(vi) The First Appellant has an enlarged prostate. He has had an episode of diuresis and made use of catheters. There have been episodes of incontinence.

(vii) Other diagnoses include cataracts, iron deficiency, and anaemia.

(viii) His son, Jasvir Matharu helps with personal care such as helping him to shower, helping him use the toilet, giving him massages, and helping him to dress. His daughter-in-law ensures he takes his medication on time, and prepares meals for him.

14. In summary I conclude that the First Appellant has deteriorating vascular dementia and is in cognitive decline, suffering from short-term memory loss and forgetfulness; he is emotionally fragile; he also suffers from heart disease and bronchiectasis and

asthma which limits his mobility because of shortness of breath; he is also extremely prone to recurrent chest infections which are significantly debilitating and have habitually required hospitalisation for treatment. He requires assistance with most basic activities of daily living. His wife is not able to provide the level of assistance required (see further below). He is not able to make plans for himself in respect of his healthcare or his finances. The Appellant's care needs are more than adequately met by his son and daughter-in-law, who are also able to assist with his emotional fragility.

15. The Second Appellant Ms Surinder Kaur

(i) Ms Kaur was born on 10 July 1944, and so at the date of the hearing was 71 years old.

(ii) She has been diagnosed with diabetes (Type II), hypertension, hypercholesterolaemia, panic attacks, and visual problems.

(iii) Her GP, Dr Sekhon, observed in a letter dated 20 May 2014 that there were concerns over the Second Appellant's control of her diabetes that might be attributable to stress and anxiety - "*the stress of looking after her husband has resulted in a deterioration in her own medical problems and I saw her on 17 May 2014 when recent blood tests had shown poor diabetic control*". In the same letter Doctor Sekhon expressed the opinion in respect of both Appellants that "*return to India would have a severe detrimental effect on their physical, emotional and psychological well-being*", and has repeated this opinion in subsequent letters.

(iv) In addition to the emotional impact on the Second Appellant, there are concerns over her practical ability to meet the care needs of her husband - see in this context letter from Dr Sekhon dated 29 December 2014 - "*I think it will put increasing strain on Mrs Singh to look after her husband in the future. This will naturally impact on her well-being and possibly cause a deterioration in her health*". The First-tier Tribunal Judge found that it was not "*a practical proposition to expect the second Appellant to be able to provide the necessary care for her husband in India*" (paragraph 50).

(v) The Second Appellant receives assistance from her son and daughter-in-law to dress, and also has her meals prepared for her.

16. The Appellant's two sons live in the UK; their two daughters live in India. Both daughters are married and have their own children, and both daughters - in accordance with custom - are responsible for caring for their own in-laws who are also said to be elderly and needing constant care and attention. One daughter lived approximately 370km away from the Appellants in India, and the other, whilst living closer at 30km distance, had her own health problems (See in this context also the observation at paragraph 52 of the decision of the First-tier Tribunal, also quoting from the Respondent's IDIs on adult dependent relatives which remind decision-

makers that relevant cultural factors should be borne in mind, “such as in countries where women are unlikely to be able to provide support”.)

17. I accept that it follows from the above that if the Appellant’s personal care needs are to be met in India, this will be by some third-party outside agency.
18. In an attempt to meet the evidential requirements of Appendix FM–SE – the Rules being pleaded in aid as part of the Article 8 assessment, rather than being expressly relied upon in absence of prior entry clearance as adult dependent relatives – the Appellants rely upon a letter signed by Dr Vikas Patil of the Wadhwa Hospital in Jalandhar district dated 7 October 2015.
19. Dr Patil provides a summary of his understanding of the Appellant’s case, and refers to having had sight of some of the documents that are before me in relation to the Appellant’s conditions and treatment in the UK. He then says “*I can confirm although the medical treatment he requires is available in India there are a considerable amount difficulties and obstacles Mr Singh will have to face if he is to be returned to India*”. Thereafter the letter emphasises the practical difficulties in reaching a hospital, and emphasises the fact of the PEA arrest and that the outcome might have been fatal had it not been possible for the Appellant to receive immediate remedial treatment because he was already at a hospital: “*In my opinion Mr Singh is to have an episode where he need immediate attention the practical issues which I’ve highlighted above would not permit him to get to a hospital which will be able to assist his condition*”. In purported answer to the specific issue of the ability to obtain “*the level of care in India*”, Dr Patil refers to the medical treatment that the Appellant’s underlying medical conditions might require – the giving of oxygen and antibiotics, and the provision of a Medicare team to give first aid until an ambulance service arrives.
20. In my judgement this evidence does not address the requirements of the Rules which is in respect of the provision of personal care to perform everyday tasks, rather than the availability of medical care to treat any particular underlying medical condition, or manage any episodes of medical crisis. Accordingly, I find that the evidence relied upon does not meet the requirements of the Rules.
21. It does not follow that the Appellant’s case must be dismissed under the broader consideration of Article 8. Indeed my conclusion – as I indicated to the parties at the completion of the hearing – is that the appeals should be allowed.
22. Although the evidence of Doctor Patil is not ‘on point’ as regards the Rules, it is nonetheless useful evidence in understanding the predicament that the Appellant will more than likely face if returned to India. In my judgement it is more likely than not that the Appellant will suffer recurring episodes of respiratory infection, with a substantial consequent risk, and in any event an underlying risk irrespective of respiratory infection, of further cardiac arrest and/or cardiovascular accident (stroke). In the event of such episodes there is a very real prospect of death.

23. In this context I have had regard to **GS (India) and others v Secretary of State for the Home Department** [2015] EWCA Civ 40, in particular at paragraph 111. The concluding sentences of that paragraph are in these terms:

“... two essential points are being made. First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the “no obligation to treat” principle”.

24. On the facts here it is not simply the aspect of medical treatment that is relied upon as engaging Article 8. Indeed it seems to me that the primary aspect of Article 8 is the enjoyment of close family life with the Appellants’ sons in the UK and the particular care that both Appellants, and in particular the First Appellant, receive in respect of daily living activities in a practical sense, as well as the emotional support that both receive by living in the same household as their son and his family. The medical aspect is a further factor – and indeed in my judgement a significant factor – but it is not the only factor, and as such may appropriately be taken into account in the proportionality exercise.
25. I take all of the above matters forward into my consideration of proportionality.
26. Although, as noted above, there is no issue between the parties in respect of the first and second **Razgar** questions, it is appropriate that I make some observations as to the quality of family life enjoyed in the UK, and the extent of the interference that would result consequent to the removal of the Appellants. In my judgement it is clear that there has been a significant deterioration in both the underlying medical conditions and the concomitant care needs of the First Appellant, such that his ability to meet his own care needs, even with the assistance of his wife, is now severely limited in comparison with the circumstances prior to the couple’s arrival in the UK. Whilst the Appellants have failed to put any evidence before me to indicate that arrangements could not been made for the provision of personal care in India, it is to be acknowledged that any such care would lack the familial affection enjoyed in the UK, and that both Appellants would in any event be without the emotional support they receive from being in the presence of their son and his family. In this context I note in particular the emotional fragility of the First Appellant, and the fact that he frequently asks for his son when his son is absent from the home at work.
27. Whilst the visits of the Appellant’s sons to India on an occasional basis may have provided some temporary assistance and respite from the burden of caring for each other, with the increasing care needs such occasional visits are more likely than not going to have an increasingly marginal remedial effect.

28. In my judgement it is a significant enhancement to the quality of life of both the First Appellant and the Second Appellant that they are able to reside in the same household as one of their children, and that their needs, both emotionally and practically are being met. I find that such needs would not be met to the same standard, and this would have an impact on the emotional well-being of both Appellants with a concomitant risk to their physical health. As such the interference with the Appellants' Article 8 rights inherent upon their removal would be significant and impact upon aspects of both family life and private life (personal integrity).
29. I have had regard to the public interest considerations set out at section 117B of the Nationality, Immigration and Asylum Act 2002. I recognise and acknowledge the public interest in the imperative of maintaining effective immigration control, and also that this is generally best done so far as possible by the consistent application of a set of published Rules.
30. As regards the Appellants' immigration histories I note that it is accepted that the applications for leave to remain were prompted by a genuine and unanticipated change of circumstance; further there is no suggestion in this case at all that the Appellants have attempted to do anything other than observe the requirements of immigration control, by duly making an appropriate application within the period of their leave - there is no suggestion of an attempt to 'play the system' by securing entry in one capacity and cynically seeking to switch once present in the UK. Whilst ultimately such compliance with the requirements of immigration control are a neutral factor in the overall balance, it is appropriate to record that there is no negative aspect, or adverse weight to be accorded, in this regard.
31. In respect of section 117B(2), under the Immigration Rules both Appellants would be exempt from the English language requirements because they are over 65 years old. Realistically, given their age and infirmity this is not a case where there is much prospect of integration into wider society. In all such circumstances I accord some, but not significant, adverse weight to the inability to speak English.
32. No issue has been taken in respect of the financial support available to the Appellants through their sons. In this context I note that the letter of application dated 11 December 2013 indicated household income in each of the tax years ending 2012 and 2013 in excess of £50,000. It is also the case that the sponsor was habitually giving an allowance to his parents whilst in India of between £3000 - £4000 each year - funds which are necessarily available to expend upon them in the UK.
33. As regards section 117B(4) and (5), this case is premised more on the family life aspect than the private life aspect of Article 8, and so the precarious nature of immigration status is less germane.
34. On the very particular facts of these appeals, I find there to be compelling circumstances that would make removal of the Appellants disproportionate. There is

an accumulation of factors: the extent of the deterioration in health of the First Appellant; the impact emotionally on the Second Appellant – in my judgement exacerbated by her awareness of her own inability to provide the care needed – and the potential impact physically upon her in the event of return; the practical difficulties in accessing medical care in India in the event of crisis with potentially fatal consequences. All of these circumstances are substantially ameliorated by the Appellants continuing presence in the UK with the love and support (emotional, practical, and financial) of their sons, and in particular Mr Jasvir Matharu and his wife and children with whom they live. The removal of such support by the removal of the Appellants would not be adequately remedied by the support possibly available in India through agency care or similar. I find on balance that that the extent and gravity of interference with the Article 8 rights of the Appellants would be disproportionate - it is not justified in the public interest.

Notice of Decision

35. The appeals are allowed.
36. No anonymity directions are sought or made.

Signed

Date: **13 May 2016**

Deputy Upper Tribunal Judge I A Lewis

To the Respondent

Fee Award (*This is not part of the determination*)

I have allowed the appeals, but have done so in significant part on the basis of evidence not before the original decision-maker; I also note that the material provided in support of the applications for leave to remain was not sufficient to meet the evidential requirements of the Immigration Rules. In all the circumstances I make no fee award.

(Although I have heard this appeal in my capacity as a Deputy Judge of the Upper Tribunal, I make the Fee Award decision in my capacity as a First-tier Tribunal Judge.)

Judge of the First Tier Tribunal I. A. Lewis **13 May 2016**