



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/00886/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 18 July 2017

**Decision &
Promulgated
On 04 August 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MRS VASINTHA DEVI GOVENDER
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mold, Counsel

For the Respondent: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

Introduction and background

1. The appellant is a South African citizen who was born on 25 May 1949. Her daughter is Esayvanie Goury, born on 15 April 1971, who is the sponsor. She came to the UK in 1999 to work as a nurse and was subsequently granted British citizenship.
2. On 2 June 2015, the appellant applied for entry clearance on the basis that she was a dependent relative of the sponsor. Her application was

considered by the Entry Clearance Officer under Appendix FM paragraph EC-DR 1.1 of the Immigration Rules. The ECO decided that the appellant did not satisfy the criteria of the Rules. Specifically, it was not accepted that the appellant who had previously applied to settle in the UK satisfied the criteria because there was no evidence that she required personal care in the short term or in the long term, or in order to perform everyday tasks. There was no adequate medical evidence to support her case and on that basis the decision went against her on 2 June 2015.

The First-tier Tribunal appeal

3. The appellant appealed to the First-tier Tribunal. Her appeal came before Judge of the First-tier Tribunal N M Paul (the Immigration Judge) on 28 March 2017 sitting at Taylor House. The Immigration Judge's decision was promulgated on 12 April 2017. The Immigration Judge, having heard evidence from the appellant, decided to dismiss the appeal and the appellant now appeals that dismissal. The First-tier Tribunal dismissed the appeal specifically on human rights grounds as it seemed to be conceded before him that the appellant did not satisfy the criteria for the Immigration Rules, although the criteria for the Immigration Rules were relevant. The appellant appealed the decision of the First-tier Tribunal to the Upper Tribunal.

The appeal to the Upper Tribunal

4. The appellant sought permission to appeal against the decision of the First-tier Tribunal. The grounds of appeal were considered by Judge of the First-tier Tribunal M Robertson (Judge Robertson), who gave permission to appeal on 31st of May 2017.
5. The first ground of appeal was on the basis that the NHS costs had been mistakenly referred to by the Immigration Judge as "public funds". This was incorrect. They were not "public funds" for the purposes of the Immigration Rules. Accordingly, it was contended that the appellant's future dependence upon the NHS should not have weighed in the balance against the appellant when Article 8 was considered.
6. The second ground related to the appellant's ability to speak the English language. Immigration Judge Robertson, considered there to be less merit on this point. However, he allowed the appellant to argue that the Immigration Judge had erred in finding that the appellant's first language was Tamil, in which she was a fluent speaker, and that this was a relevant factor to the ability of the appellant to integrate for the purposes both of Section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and for the purposes of Article 8 more generally. It was submitted that the Immigration Judge had erred in finding that the appellant's first language was Tamil, given that the appellant had given evidence that she had grown up speaking English and Afrikaans in South Africa, where of course those languages are widely spoken. It was

therefore submitted that it was factually incorrect that the appellant did not speak adequate English and her knowledge of Tamil was irrelevant.

7. Judge Robertson decided that there was some arguable merit in the grounds. He decided that it was at least arguable that the proportionality assessment was flawed. If the First-tier Tribunal was going to consider the possible burden of the appellant on public funds it should also have to consider the surcharge by which the appellant would have to pay back into the system. However, on the other hand, Judge Robertson did not consider there was as much merit in the second ground, which argued that the Immigration Judge had erred in assuming that the appellant's first language was Tamil. Judge Robinson specifically granted permission on the first ground, the NHS/public funds ground, but he did not refuse it on the second ground. It follows that both grounds may be argued.
8. At the hearing before the Upper Tribunal I heard submissions by both representatives. Mr Mold, who appeared as Counsel for the appellant, suggested there was no rational basis for the Immigration Judge's findings in relation to the language aspect. He said that her first language might have been Tamil, but of course the fact that she spoke Afrikaans and English were the relevant points as far as integration was concerned. As far as the appellant's degree of financial independence was concerned, he referred me to a recent Court of Appeal decision in **Rhuppiah [2016] EWCA Civ 803** in which the Court of Appeal had stressed that in these cases the expression "financially independent" was a phrase in ordinary English usage, and it did not require any technical definition, although the Court of Appeal went on to find that in fact the appellant was not financially independent in that case. The court found that the appellant's lack of financial independence was a relevant matter in the balancing exercise. Being financially independent of others, being able to support oneself is a matter which tends to minimise the risk as an immigrant might need to have resort to public funds. The case discusses that issue in greater depth. In this case it was suggested that the receipt of NHS treatment was not public funds and did not impact on the issue of financial independence, and even if it were relevant that she was receiving NHS treatment, there was in fact a requirement to pay money into the NHS by way of a bond as a condition of entry clearance. The Immigration Judge had been wrong to refer to the financial aspect in this way because the appellant would almost certainly be given permission to enter the UK conditional upon having no resort to public funds in any event.
9. Mr Avery on the other hand said that Section 117B simply set out a number of considerations which needed to be considered when weighing up an Article 8 claim. It did not in any way state that any one of those was determinative, but they were factors that courts and Tribunals were entitled to consider. The fact that the appellant would be likely to make demands on the National Health Service was not an irrelevant consideration. He referred me to a number of passages in the decision, including paragraph 28, which stated that the precise state of her medical

health was not in any event of such grave character that it meant that she was dependent on others, and there was no evidence to suggest that the appellant could not properly take care of herself. Mr Avery recognised that the appellant may have difficulties from time to time with activities like shopping, but there was no compelling evidence before the Immigration judge to show that the appellant could not continue to live an independent life in South Africa. Mr Mold tried to urge on me that there was a difference between independence and leading a fulfilled and independent life. I accept that such a distinction exists but, I drew his attention to the clear findings of fact by the Immigration Judge and the fact that those findings were against his client on this point.

Discussion

10. It is for the Upper Tribunal to decide whether there is a material error of law in the decision of the First-tier Tribunal and if so to decide whether to set aside the decision in whole or in part (see section 12 of the Tribunal's, Courts and Enforcement Act 2007).
11. The decision of the First-tier Tribunal was solely to determine the appellant's appeal on human rights grounds. In particular, it appears to have been conceded before the First-tier Tribunal that the appellant did not meet the requirements of the Immigration Rules and in any event, following the commencement of the Immigration Act 2014, appellant's appeal rights were limited to human rights grounds in any event.
12. I have carefully read the decision of the Immigration Judge. It seems to be a well-balanced and carefully appraised decision which took fully into account the evidence the Immigration Judge had heard. There were aspects of the evidence that the judge could have emphasised to a greater degree. I accept, and I believe it was conceded by the respondent, that "public funds" did not include the receipt of NHS treatment. It may be that the Immigration Judge failed to refer to the Migrant Health Surcharge introduced by the last Coalition Government in 2015. However, I can see no reference to that being made in the submissions on the appellant's behalf before the First-tier Tribunal and Section 117B of the 2002 Act gave the First-tier Tribunal a wide discretion to consider a number of public interest considerations in all cases on which article 8 is relied. Subsection (3) provides that it is in the interests of the economic well-being of the U K that those who seek to enter or remain here are financially independent and not a burden on taxpayers. The burden on taxpayers would include the appellant's reliance on the National Health Service. Therefore, the extent of the extent of the appellant's reliance on the N H S, a burden on taxpayers, was a relevant matter to which the Immigration Judge was entitled to attach weight. Clearly, the Immigration Judge attached some weight to this. The question would therefore be whether he attached excessive weight to this fact or whether he allowed it to tip the scales too much in favour of the respondent.

13. The Immigration Judge went on to make a finding on the question of the appellant's ability to speak the Tamil language. The appellant grew up in South Africa. The fact that their first language is Tamil does not seem relevant given the appellant's ability to speak English. However, I do not think it was the main reason for the respondent's decision to uphold the respondent's decision to refuse leave to enter the UK in this case. Nor does it seem to have featured prominently at the hearing. Insofar as the Immigration Judge attached significant weight to the appellant's ability to speak English he would have been wrong to do so. But, it seems to have been very much a secondary reason for his decision. Overall, the appellant's ability speak the English-language did not affect the outcome and therefore it was not a material error of law.
14. The main reason for the Immigration Judge's decision was that the appellant had failed to satisfy the First-tier Tribunal that the respondent's decision to refuse entry clearance in this case was a disproportionate one in the light of his findings in relation to the appellant's state of health. It was a key importance that the appellant was not in such state as she was unable to take care of herself (see paragraph 28). These were findings the Immigration Judge was entitled to come to on the evidence presented to him.

Conclusion

15. The Immigration Judge was considering an appeal against a refusal on human rights grounds. He carried out a balancing exercise and reached a conclusion that was open to him on the evidence. He made no error of law that was material to the outcome.

Decision

16. The appellant's appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal stands.
17. No anonymity direction is made.

Signed

Date 3 August 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 3 August 2017

Deputy Upper Tribunal Judge Hanbury