



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

Appeal Number: IA/23324/2015

THE IMMIGRATION ACTS

**Heard at Birmingham
On 5 May 2017**

**Decision & Reason Promulgated
On 15 May 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MS RAJINDER KAUR

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Khurram (Solicitor)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellant's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (Judge Mathews hereinafter "the Judge") whereupon he dismissed her appeal against the Secretary of State's decision of 5 June 2015 refusing to grant leave to remain under Article 8 of the European Convention on Human Rights ("ECHR")
2. By way of brief background, the appellant is a national of India who was born on 27 March 1958. She entered the UK on 25 April 2000 as a visitor. She had leave as a visitor until 18 October 2000 but remained in the UK after that leave expired. She has been here ever since. She has family in the United Kingdom including her daughter Sukhpreet Kaur, Sukhpreet's husband and their three infant children. There is also another daughter Gagan Preet Kaur, her husband and their daughter Gina. Accordingly, the appellant does have a number of grandchildren in the UK. Since arriving in the UK she has lived with Sukhpreet and Sukhpreet's family.
3. It does not appear that she made any earlier attempts to regularise her status but she applied for leave to remain on human rights grounds in February 2015. In so doing she asserted that she had been mistreated in India by an abusive husband and that she is very close to her UK based family including her grandchildren who she helps to take to and from school. She also asserts that she would have no support from anyone if she were to return to India and that she has various health problems.
4. Her appeal against the decision to refuse to grant leave was heard on 5 July 2016. Both parties were represented. The appellant gave oral evidence but no other witnesses were called although it does appear that Sukhpreet was present. Having heard the evidence the Judge reached a number of findings which he set out and explained in this way:
 - “14. I have given careful consideration to all the documents before me. The appellant in her evidence in chief adopted her witness statement. It sets out the chronology and events that are summarised above. I accept and find that the appellant has been in the UK as an overstaying visitor since October 2000, the respondent does not dispute such matters.
 15. I turn to the suggestion that the appellant's husband was abusive to her, and now has a new wife. I note the witness statement from the appellant's daughter asserting that her father has 'married and moved on with his life', and from Ravi Chandla, the appellant's son in law, stating that the appellant has no supportive family remaining in India and that her husband has formed a new relationship. Yet neither of those witnesses attended to give oral evidence, their signed statements are of limited evidential weight given that they did not make themselves available for cross-examination.
 16. I also note that the appellant in cross-examination though stating that she was separated from her husband, confirmed that there had been no divorce from her husband. I also note that she claims to have had an abusive marriage prior to entering the UK, yet made no application in relation to any need for protection once in the UK. I recognise that she stated that she believed that previous representatives had made a claim to settle her status in the UK, yet on her own account she knew in 2006 that in fact they had made no such claim. Still she delayed taking any action to address her position for many years.
 17. I also note that the appellant on her own account was able to travel alone to the UK, and then allowed to remain as her husband returned before her after the wedding celebrations. I find those facts to be at odd with the assertion that he was a controlling man to the point that he did not allow her to have any friends in India.

18. A certificate dated 25th March 2016 in the bundle states that in July 1994 this lady sought medical attention for injuries at the hands of her husband, it refers to bruise and some injuries. I am afraid that the note gives scant detail, is in poor grammar, refers significantly to ‘some injuries’ without giving any of the detail that can properly be expected from a medical practitioner, and contains no confirmation as to how such details are recalled after such a period. For those reasons I do not find that it attracts any significant evidential weight.

19. I am not persuaded by the evidence before me to find on balance that this lady has had an abusive marriage of the type claimed. There is scant detail of the allegations, no previous application on the basis of such violence, an ability to travel independently, no divorce, and limited evidence on the point from other family members. The written statements before me, from friends and family, are of limited weight in the absence of witnesses attending to give evidence.

20. The appellant states that in the UK she lives with her daughter Sukhpreet and her family consisting of husband and three children aged 8, 7 and 3. I find that to be the case from the agreed evidence, identity cards for the children, and birth certificates.

21. I also accept that the appellant regularly sees her other daughter and her family, including her 15 year old granddaughter Gina.

22. I find from the photos and statements before me that the appellant is a loved grandmother who does assist with looking after the children. I note that it is said that she is able to take the children out, sometimes accompanying them into town. I find that she is dearly loved by her grandchildren as set out in their letters to me. They would clearly miss her if she were not in the UK.

23. As to the appellant’s medical position, I find that she is receiving counselling as set out in the appointment letters, has physiotherapy appointments and an appointment for an echocardiogram test. Yet I note that this lady is able to go out and about with her family. I have no report setting out her symptoms or details of the conditions being explored. Neither do I have any evidence that she has any conditions that could not be properly treated in India if so required.

24. On the question of a possible return to India, I note that the appellant spent over 40 years in India, that she speaks native languages to India, she explains that she is teaching them to her Grandchildren. I am not persuaded that she has no remaining family in India. I also note that she has a supportive family in the UK, they are in employment and I find that they would assist in any way that they could if she were to have to return.

25. Applying my findings to the applicable provisions of appendix FM, the appellant has no children under 18 in the UK, and no partner. I agree with the respondent that she does not come within any of the family life provisions in the appendix FM. The role in her children’s families in the UK is similar to that of many grandparents, there is certainly no dependency upon her by her children though I do not doubt how much they value having her to assist in matters such as childcare. I do not find that the grandchildren in this case could not be properly cared for if the appellant were not present.

26. Turning to the appellant’s private life and the provisions of paragraph 276ADE, it is accepted that given the appellant’s age and period in the UK of less than 20 years, she does not meet the required periods of residence. But I must consider asserted obstacles to the appellant’s return to India.

27. I note the period of time that the appellant has been in the UK, the fact, of the present relationship with her family there, and her health. But the appellant has still spent the majority of her life in India, she has family support and is fit and able to live alone, if required. I recognise that she will be disappointed to have to leave the UK, but she has always known that her position in the UK was illegal. She will be able to remain in contact with friends and family in the UK, and can seek entry clearance should she wish to do so. I note that the appellant’s daughter has recently visited India and I find that there is no bar to the appellant’s family visiting her in India. I do not find any significant obstacle to the appellant’s return to India. I do not find that the provisions of paragraph 276ADE are made out on the evidence before me.”

5. The Judge then said that, having found that the requirements of the Immigration Rules (in particular Appendix FM) were not met he would have to consider what he described as the “wider Article 8 position” which was clearly a reference to his having to consider Article 8 outside of those

Rules. He then reminded himself of the necessity to bear in mind the content of sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 (as amended) and referred to some case law. Having done that he said this:

“ 33. I also take full account of the article 8 rights of those family members that will be affected by this decision, in particular her family in the UK.

34. In **Dasgupta (error of law – proportionality – correct approach) [2016] UKUT OOO28** the Tribunal held that the question of whether there is a family life in a child/grandchild context requires a finding of something over and above normal emotional ties and will invariably be intensely fact sensitive. I have not found that in the present case there are ties over and above those that exist between many grandparents who assist their children in caring for their children. I do find that a family life exists between this appellant and her children and grandchildren.

35. Taking account of the above matters, I now conduct an assessment of article 8 outside of the applicable rules by way of a stepped **Razgar** approach. In doing so I am able to answer the first 4 questions in such a way as to require an assessment of the proportionality of the proposed decision.

36. In carrying out that assessment I keep in mind all of the matters considered above. This lady has been in the UK illegally and her family and private life as it is has been accumulated largely when in the UK illegally, that is relevant to public interest considerations, as is the expense that she has placed upon the NHS by accepting treatment that attracts a significant cost. I play close regard to the appellant’s settled life and family in the UK, I am willing to accept that it would be very upsetting for her to return to India, but it is a country in which she has lived the majority of her life. As I have already found above she will not in any sense be disconnected from her family in the UK, she can remain in contact with them and may pay and receive visits from them.

37. I take full account of the fact that the proposed decision will no doubt disappoint the appellant’s children and grandchildren. But I also note the warmth that they show to the appellant, and I find that they will assist and support her during any transition to India.

38. I take account too of the compelling public interest in the fair application of immigration control. Taking all matters together and in light of all the evidence heard and submissions made, I am not persuaded that the proposed decision is a disproportionate interference in the article 8 interests advanced in this appeal.

39. On the basis of the evidence produced I am not satisfied that the Immigration Rules are satisfied.

40. On the totality of the evidence before me, I find that the appellant has not discharged the burden of proof; the respondent’s decision was in accordance with the law and the applicable immigration rules.”

6. The appeal having been dismissed, permission to appeal was sought. In summary, it was asserted in the grounds that the Judge had erred in failing to consider and specifically address matters raised in a skeleton argument; in failing to adequately consider the medial situation; in wrongly stating that Sukhpreet Kaur was not in attendance and available to give evidence when she was present at the hearing; and in failing to consider the best interests of the grandchildren pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

7. The granting judge, having indicated that he was prepared to extend time, the application having been received one day late, then said as follows:

“ 2. It was contended in the grounds that the judge perpetuated a procedural irregularity in not requiring the appellant’s representative to call the appellant’s daughter, Sukhpreet Kaur, to give evidence. The appellant had intended to call Sukhpreet Kaur to give evidence but upon advice tendered by the appellant’s representative who appeared at the hearing decided not to call her. It was difficult to conceive of any error made by the judge. It was not for the judge to indicate who should be called to give evidence on behalf of the appellant. That was exclusively the function of the appellant acting on the advice of her representative. The

judge was entitled to state at paragraph 15 of his decision that neither witness (including Sukhpreet) who had provided witness statements attended the hearing.

3. It was contended in the grounds that the judge made only a cursory reference to detailed submissions advanced in a skeleton argument relied upon at the hearing and that the judge's failure amounted to a clear misdirection of fact and law. It was difficult to conceive of the basis of the appellant's claim. It was not incumbent upon the judge to consider each and every argument or evidence contained in the skeleton argument. However, a careful consideration of the judge's decision revealed a comprehensive decision in which all such arguments were considered and resolved. The judge was not prepared to find that the appellant had been the victim of an abusive husband (paragraph 19). The judge was not prepared to accord decisive weight to the appellant's medical conditions (paragraph 23). The judge considered whether it was reasonable for the appellant to return to India and concluded for reasons open to him on the evidence presented that the appellant could return to India, a country in which he has family (paragraph 24). The judge concluded that the appellant could maintain links and connections with friends and family resident in the United Kingdom (paragraph 27). Overall, the judge considered the contentions recited in the skeleton argument.

4. It was contended in the grounds that the judge had not considered or applied his duty pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. Relevant facts were not in dispute at the hearing. At that date the appellant lived as part of a household comprising Sukhpreet Kaur, Sukhpreet's husband, Ravi, and the couple's children, Aarush, Ruchika and Aarav aged 8, 7 and 3 years, as indeed the judge recorded at paragraph 20 of his decision. The best interests of the children could not fairly be said to be a minor or a peripheral issue. The sole reference to the judge's assessment of the best interest of the grandchildren and as to where that interest lay was to be found at paragraph 37 of his decision where he stated:

'I take full account of the fact that the proposed decision will no doubt disappoint the appellant's children and grandchildren. But I also note the warmth they show to the appellant, and I find they will assist and support her during any transition to India.'

5. It was arguable that the judge did not have sufficient regard to a relevant consideration, namely the appellant's grandchildren and as to where their best interests lay. That issue could not be understated given that at all material times the appellant has resided as a member of the household in which the grandchildren live.

6. The grounds disclosed an arguable error of law in respect of the Judge's consideration of Article 8 of the Human Rights Convention and permission is granted to such an extent only."

8. Permission having been granted the matter came before me for an oral hearing for the purpose of deciding whether the Judge's decision had involved the making of an error of law and, if so, whether that decision ought to be set aside. Representation was as stated above and I am grateful to each representative.

9. Mr Khurram, who had been the advocate before the Judge, said that he accepted the grant of permission was a limited one. Nevertheless, he also said that he would rely upon his grounds. He argued that the Judge had failed to conduct a proper proportionality assessment when looking at Article 8 outside of the rules. It was apparent that the appellant was a core member of the family. The fact that section 55 had not been raised in his skeleton argument to the Judge did not mean the Judge was absolved from considering it. Mr Mills, for the Secretary of State, contended that it was clear that the Judge had, in fact, considered the section 55 issues in substance even though he had not specifically referred to that section in terms. The Judge had found that there were no elements of dependency in the relationship between grandmother and grandparents. There were, in any event, strong public interest reasons as to why the appellant should not be permitted to remain in the UK bearing in mind that she had overstayed for some 15 years.

10. I have decided, as I indicated to the parties having heard their respective submissions that the Judge did not err in law. I explain why below.

11. The Judge was clearly very much aware of the family dynamics. He noted, at paragraph 13 of the decision, that the appellant had asserted she would help take the grandchildren to and from school and that she wished to remain in the UK living with her family. At paragraph 22 he accepted that the appellant was “dearly loved by her grandchildren”. At paragraph 25 he found that she played a role similar to that of many grandparents and added “I do not find that the grandchildren in this case could not be properly cared for if the appellant were not present”. At paragraph 27 the Judge found that there would be no bar of the appellant’s family visiting her in India. At paragraph 34, whilst accepting that there was family life for the purposes of Article 8 between the appellant and her children and grandchildren, the Judge also said that he had concluded that there were no “ties over and above those that exist between many, many grandparents who assist their children in caring for their children”.

12. What all of that reveals is that the Judge did make findings and reach conclusions regarding the overall situation of the grandchildren. I accept Mr Mills submission that there was no requirement for the Judge to refer, in terms, to section 55. I was not taken, for example, to any of the evidence which had been before the Judge and which had clearly pointed to anything more than a general assertion regarding the best interest of the children. The Judge can be taken, in particular bearing in mind what he had to say about the lack of anything over and above normal emotional ties, to have either concluded that the “best interests” issue was neutral or that even if it was a matter weighing in favour of the appellant it was not strongly so in the case of a person who had overstayed for a considerable number of years and who did not meet the requirements of what might be described as the Article 8 related Immigration Rules.

13. As to the proportionality point which was raised at the hearing, but does not seem to me to have been specifically raised in the written grounds, it is right that the Judge did not actually say very much about proportionality from paragraphs 36 to 38 of the decision. However, the decision has to be read as a whole and what is said within those paragraphs is essentially a series of conclusions stemming from what has been said earlier on in the decision regarding matters such as contacts in India, the relationship with UK based family members and the history of overstaying. When that is born in mind it is unsustainable to contend that the proportionality assessment was legally inadequate.

14. The various other points in the grounds were not pursued before me and, strictly speaking, it is not necessary for me to say anything about them at all. However, I would simply agree with what was stated about those grounds by the granting judge. In particular, I cannot detect anything in the skeleton argument which was not addressed at some point in the Judge’s decision even if the skeleton argument itself was only mentioned once. Perhaps, if one were to be pedantic, it might be said that the Judge, at paragraph 15, ought not to have said that Sukhpreet Kaur had not “attended” given that it does appear she was present at the hearing but, nevertheless, the fact is she was not called to give evidence, it was the decision of her own representative not to call her, it was not the job of the Judge to insist that someone should be called and he was entitled to attach only limited weight to a witness statement where the evidence had not been subjected to cross-examination.

15. Further, the medical aspects were properly considered by the Judge (see paragraph 23 of the decision) and he was not obliged to refer to each and every item of medical evidence or each and every argument which had been advanced about that evidence, in his determination.

16. For the reasons set out above, then, there was no error of law in the Judge’s decision. The decision shall stand and the appellant’s appeal to the Upper Tribunal is dismissed.

