



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal number: HU/18020/2019 (P)**

**HU/18021/2019 (P)**

**HU/18018/2019 (P)**

**THE IMMIGRATION ACTS**

**Heard Remotely at Manchester CJC**

**Decision & Reasons Promulgated**

**On 2 September 2020**

**On 7 September 2020**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**ISMAIL IBRAHIM NOOR**

**HASINA ISMAIL NOOR NOOR**

**JAVED IBRAHIM NOOR**

**(ANONYMITY ORDER NOT MADE)**

**Respondents**

For the appellant: Mr C Howells, Senior Presenting Officer

For the Respondents: Mr J Byrne, instructed by Visa Inn Ltd

**DECISION AND REASONS (P)**

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This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. Whilst the Secretary of State has brought this appeal, I have referred to the parties below as they were before the First-tier Tribunal in order to avoid confusion.
2. The appellants are all citizens of India, comprising husband, wife, and their adult son, now 43 years of age. With the benefit of a multi-visit visa, the appellants have regularly visited the UK and last entered in April 2019.
3. The Secretary of State has appealed with permission against the decision of the First-tier Tribunal promulgated 22.4.20, allowing on human rights grounds the appellants' linked appeals against the decision of the respondent dated 28.10.19 to refuse their applications made on 10.7.19 for leave to remain in the UK on private and family life grounds. The appellants relied on article 8 ECHR outside the Immigration Rules.
4. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal. At the outset of the hearing Mr Byrne forwarded me his late-served skeleton argument and I confirm that I have read and taken it into account.
5. For the reasons set out below, I find such error of law in the making of the decision of the First-tier Tribunal as to require it to be set aside and remade de novo.
6. The grounds assert that the First-tier Tribunal Judge erred in conducting an inadequate article 8 proportionality balancing exercise, and that her conclusions on the availability of care for the third appellant in India were flawed. At the hearing Mr Howells concentrated his oral submissions on the alleged error as to the NHS surcharge, which he argued was relevant to the proportionality balancing exercise. He submitted that the key issue was who would provide the third appellant's unchallenged personal care needs but argued that the judge had confused the availability of care with delivery of care, suggesting that the judge had reversed the burden of proof.
7. In his submissions, Mr Byrne relied on his helpful skeleton argument and responded to Mr Howells' oral submissions. He also sought and was granted a further opportunity to make submissions in response to Mr Howells' reply.
8. Permission to appeal was granted by the First-tier Tribunal on 2.6.20, considering it arguable that the First-tier Tribunal Judge erred in the proportionality balancing exercise, particularly in assuming that the health surcharge had been paid for the treatment received by the third appellant. In addition, it was considered arguable that the judge erred in giving no consideration to the possibility of the third appellant remaining in the UK and his parents returning to India, and erred as to

whether the level of care required by the third appellant would be available to him in India. At [74] of the decision the judge observed that there was no evidence either way as to the availability of care but arguably ignored the fact that the burden of proof rested with the appellants. It was also considered arguable that the judge “confused the availability of care with the practicalities of delivering it to the third Appellant, who clearly preferred to be cared for by his close family members.”

9. The appellants’ case at the First-tier Tribunal was that the third appellant required daily personal care in all aspects of his life. Until recently, this had been provided by his mother, but she has become too frail to continue to do so, so that since April 2019 his care has been provided by his cousins in the UK, with the limited assistance of his parents where physically possible. It was asserted that there was no one else in India who could provide the personal care the third appellant needs, because he would not accept care from strangers and because no one in his village would be willing to provide it.
10. The unchallenged care needs were evidenced by the medical report of Dr John Jestico, consultant neurologist, who confirmed that the third appellant has a severe global higher function deficit, a static condition unlikely to respond to treatment, probably arising as a result of trauma at birth or neurological or encephalitic illness in early infancy. He is able to walk independently but can use few words and is largely incapable of understanding. He also exhibits irritable and aggressive behaviour from time to time. At [46] and [47] of the decision the judge noted the evidence of the parents that they strongly believed that the third appellant would not tolerate care given by anyone outside the family. Mr Byrne also pointed to evidence that the third appellant had been uncooperative during medical examinations.
11. The second appellant mother is suffering from osteoarthritis and will likely require left knee replacement surgery. The first appellant father suffers from age-related conditions of hypertension, high cholesterol, and diabetes, as well as claiming back problems to the extent that he cannot walk more than a few steps without becoming out of breath. It was submitted that these conditions prevented the parents from providing the necessary care and support to their adult son.
12. At [96] of the decision, the judge concluded that although, “the scales are finely balanced, I find that they ultimately tip in the Appellants’ favour due to the Third Appellant’s very significant and lifelong care needs, the fact that those needs could only be met by a paid carer in India with great difficulty, if at all, and the exceptionally strong and dedicated family life between the various members of the Appellants’ extended family in the United Kingdom.”
13. Whether or not this was a finely balanced proportionality exercise, which I question, I am satisfied that there were clear errors without which the scales could well have tipped in favour of removing the appellants from the UK. I cannot say that without these errors the outcome of the appeal would have been the same.

14. I do not accept the submission in the grounds that the judge ignored section 117B of the Nationality, Immigration and Asylum Act 2002 in relation to financial independence, as this was set out at [17] and addressed at [91] of the decision, where the judge found the appellants were economically independent and met the maintenance and accommodation requirements of the ADR Rules. However, in the proportionality balancing exercise the judge appears to have ignored the statutory requirement that little weight is to be accorded to private life developed in the UK whilst immigration status was precarious.
15. Contrary to Mr Byrne's skeleton argument, the application made to the Home Office was not for leave to remain as adult dependent relatives (ADR). The application forms state clearly that reliance was placed only on private life. It is clear that the appellants could not meet the requirements of the Rules and relied on article 8 ECHR outside the Rules. However, I accept Mr Byrne's submission that the extent to which the Rules may have been able to be met is relevant to the proportionality exercise. The judge was not wrong to consider the ADR requirements from [22] of the decision. However, in relying on *BritCits v SSHD* [2017] EWCA Civ 368 and the Court of Appeal's definition of 'reasonably' in considering whether the care required by the ADR applicant can be reasonably provided, the judge may have lost sight of the correct issue. In relying on the Court of Appeal's finding that 'reasonably' required that provision of care must be reasonable both from the perspective of the provider and the applicant, the judge may have lost sight of the correct considerations in an article 8 proportionality balancing exercise.
16. The correct question the judge should have asked in relation to care was whether the appellants had demonstrated on the balance of probabilities that the unchallenged care needs of the third appellant could not be met in India and could only be provided in the UK.
17. In relation to the availability of care, the judge made a number of important findings against the appellants. For example, the judge found at [68] of the decision that the family had not made any serious effort to look into the possibility of personal care for the third appellant in India. The only evidence was the appellants' witness statement assertions, which could carry but little weight without supporting evidence. I pause here to note that in respect of an ADR application requires the specified independent evidence of care needs set out in Appendix FM-SE. It is obvious that the evidence relied on by the appellants was woefully inadequate to meet those requirements.
18. I also find that between [71] and [76] of the decision, the judge lost sight of the fact that the burden of proving no care would be available in India rested with the appellants, stating that she placed no weight on the respondent's unevidenced assumptions that care must be available in India. The judge also relied on the alleged fact that the respondent had not put her mind to this issue at all in the refusal decision. I am satisfied that there was a confusion over the burden of proof, which led the judge into the conclusion at [72] of the decision, that "on balance, I find that paid personal care would not be provided by anyone in the village where the appellants live." As the judge had noted there was no credible evidence to that effect.

The judge went on at [73] of the decision to point out that the appellants had done nothing to explore whether care might be hired from further afield or a professional agency. At [74] the judge concluded that she was not satisfied that paid personal care would be unavailable in India. The judge then stated, "I cannot find, however, that it would be available. There is simply no evidence either way on this broader question." Again, whilst this may be factually correct, the judge has lost sight of the fact that the burden of proof rests with the appellants and she has asked the wrong question. The correct question was not whether necessary care was shown to be available but whether the evidence demonstrated that it was not available.

19. The error is exacerbated by the statement at [76] of the decision that although the judge found that paid personal care may be available in India, "it would be exceptionally difficult to find, and once found, to retain. "The conclusion is unsustainable as it is without evidential support. I take into account in this regard Mr Byrne's argument that the judge had accepted the unchallenged evidence that the third appellant was reluctant to accept care from anyone outside of the family, which was supported by evidence of his lack of cooperation at medical examinations. His submission was that it is irrelevant that care from a stranger may be available as the third appellant would not accept it. However, [76] goes much further than that limited evidence justifies, to conclude that even if care could be found, it could not be retained. Without cogent evidence in support that finding cannot stand. Further, the judge did not consider whether with the parents' continued if limited care of the parents in India some third-party privately funded or other professional or non-professional carer could be introduced to the third appellant gradually so as to gain the cooperation that might be refused to a stranger.
20. In this regard, Mr Howells also argued that the judge failed to consider whether the third appellant could obtain the necessary care by remaining with his cousins in the UK and his parents returning to India. Alternatively, the third appellant could have applied from India for entry clearance as a ADR under the Immigration Rules. However, I note the findings at [96] and elsewhere that there was an exceptionally strong and dedicated family life between the parents and the third appellant, so that it would follow that their separation from him would be a disproportionate interference with their article 8 ECHR right to respect for family life. I also note that whilst the large part of his care is provided by his cousins, his parents retain an important role. In reality, this is a case where all three appellants either stay or leave together.
21. There are other errors in the impugned decision. The judge was incorrect to conclude at [88] of the decision that the appellants had paid the NHS surcharge, which discharged the public interest that those in the UK pay for their care. I accept Mr Howells' submission that this was a relevant factor in the proportionality balancing exercise and the error tended to undermine the reliability of a finding that the balance fell in the appellants' favour, especially when the judge considered the matter finely balanced. Mr Byrne pointed to the evidence that the appellants had paid privately for medical consultations and asserted that they would pay privately for any knee operation, which the consultant considered likely to be required.

However, I cannot ignore that the appellants have no independent financial resources and are entirely dependent on the limited means of their sponsors. They are each in a greater or lesser degree of ill-health. Whilst, as the judge pointed out at [87] the third appellant is physically fit and well and his needs are for care not medical treatment, it is inevitable that the appellants will access NHS treatment in the UK. The relevance is that the public interest is not addressed by the NHS surcharge, as this is not payable by those entering on visit visas. Whilst it is not a major factor, it is relevant to what the judge considered to be a finely balanced proportionality exercise.

22. Mr Howells and the written grounds argued that although the evidence strongly pointed to the appellants having decided to settle in rather than visit the UK in order to access NHS care, the judge misconstrued and gave little weight to the evidence that they had deliberately attempted to circumvent immigration controls when conducting the proportionality balancing exercise. At [49] the judge noted the evidence that the second appellant and her daughter stated that they always expected that the third appellant would be cared for by his relatives in the UK, when the time came that his parents were no longer able to care for him. At [68] the judge noted their evidence that that day had come sooner than they had expected. At [89] the judge was minded to find that their plan for the third appellant to join his relatives in the UK when they became too frail to care for him should weigh against them in the proportionality assessment. However, she was dissuaded by Mr Byrne's argument that the ADR rules expressly accept that it may be in the public interest for dependent adults to join relatives in the UK.
23. The judge has again asked the wrong question. The evidence suggested that rather than an innocuous future or eventual plan for the third appellant to obtain entry clearance as a ADR, the appellants returned to the UK from Turkey on yet another visit visa in order for care to be provided by UK relatives. Mr Byrne argued that the appellants' case was that there was no intention to seek to remain in the UK when they entered but rather that their hand was forced by the deterioration in the health of the first and second appellant, particularly the injury sustained by the second appellant during a trip to Turkey. However, there cannot have been such a deterioration in health during a visit visa stay; the medical evidence does not support such a scenario. Whilst the judge accepted at [90] that there was no pre-conceived plan to enter on a visit visa, the finding appears naïve. It rather appears from the evidence that the accident in Turkey was the precipitating factor. To enter the UK in those circumstances and then make application for leave to remain must be, if not a deliberate circumvention of immigration control, highly relevant to the proportionality balancing exercise and should properly have been taken into consideration. The ADR rules for entry clearance are irrelevant to this consideration.
24. Taking all these factors together, including that the appellants could not meet the Rules and that under s117B little weight is to be given to private life developed in the UK, it is very difficult to see how the judge could have reached a reasoned and balanced conclusion that the scales tipped in the favour of all three appellants. Nothing in the evidence or circumstances sufficiently demonstrated that requiring

the appellants to return together to India would be unjustifiably harsh so that the respondent's decision would be disproportionate.

25. In the circumstances and for the reasons set out above, I find multiple material errors of law in the decision of the First-tier Tribunal such that it must be set aside to be remade in its entirety with no findings preserved.
26. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
27. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

## **Decision**

The appeal of the Secretary of State to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade de novo.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 2 September 2020