



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/18467/2019**

**THE IMMIGRATION ACTS**

**Heard at the Birmingham Civil Justice  
Centre  
On 8<sup>th</sup> June 2022**

**Decision & Reasons  
Promulgated  
On the 3<sup>rd</sup> January 2023**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA  
and  
DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**MRS AMRUTBEN HARJIBHAI TANK  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Hingora, counsel, instructed by Primus Solicitors

For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellant is a national of India. She was born on 1<sup>st</sup> March 1941 and is now 81 years old. She arrived in the United Kingdom on 7<sup>th</sup> June 2014 with entry clearance as a family visitor valid until 4<sup>th</sup> December 2014. On

2<sup>nd</sup> December 2014 she applied, in-time, for leave to remain in the UK outside the rules. That application was refused by the respondent and the appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Landes for reasons set out in a decision promulgated on 6<sup>th</sup> April 2017. On 5<sup>th</sup> October 2017, the appellant made a further application for leave to remain outside the immigration rules on Article 8 grounds. That application was refused by the respondent on 30<sup>th</sup> October 2019. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Young-Harry ("Judge Young-Harry") for reasons set out in her decision promulgated on 21<sup>st</sup> January 2020.

2. The appellant was granted permission to appeal to the Upper Tribunal and the decision of Judge Young-Harry was set aside by Upper Tribunal Judge Grubb ("Judge Grubb") for reasons set out in his decision promulgated on 15<sup>th</sup> October 2021. It was common ground that the findings set out in paragraphs [20] to [23] of the decision of Judge Young-Harry (*with the exception of the final sentence in paragraph [23]*) should be preserved. There was disagreement between the parties as to whether findings adverse to the appellant should also be preserved. Having considered the submissions made by the parties, Judge Grubb directed that the findings made by Judge Young-Harry in paragraphs [23] to [26] and at paragraphs [20] to [22] are preserved. He directed:

"30. In remaking [the] decision, the judge will consider both the appellant's claim under the Rules (para 276ADE(I)(vi)) and Art 8 outside the Rules including having regard to any argument concerning "historic injustice" and also any Chikwamba argument relying upon the Adult Dependent Relative rule in Appendix FM. "

3. It is against that background that the appeal was listed for a resumed hearing before us to remake the decision. Although the appellant attended the hearing before us, we were informed at 12:30pm that she had attended in a wheelchair and felt uncomfortable. We were informed that neither the appellant nor any member of her family would be called

to give oral evidence and that the hearing before us would proceed on submissions only.

4. At the outset of the hearing, Mr Hingora identified the issues in the appeal as follows:
  - a. Whether the requirements of paragraph 276ADE of the immigration rules are met;
  - b. Whether the requirements of the 'adult dependent' route of the immigration rules are met
  - c. Whether the decision to refuse leave to remain is disproportionate having particular regard to:
    - i. Any historic injustice
    - ii. The decision of the Upper Tribunal in Chikwamba v SSHD [2008] UKHL 40

The decision of First-tier Tribunal Judge Landes promulgated on 6<sup>th</sup> April 2017

5. Because it forms the starting point to our decision, it is helpful for us to record the previous findings made by First-tier Tribunal Judge Landes ("Judge Landes"). We remind ourselves of the guidelines set out in Devaseelan v SSHD [2003] Imm AR 1. For present purposes it is sufficient to note that the decision of Judge Landes stands as an authoritative assessment of the claim that the appellant was making at the time (2017). We can consider and make our own assessment of facts that have occurred since the decision of Judge Landes.
6. The appellant did not attend the hearing before Judge Landes. Judge Landes accepted the medical evidence before her that the appellant was not in a position to give evidence coherently or follow the proceedings. She did however hear evidence from the appellant's daughter and son-in-law, Mr and Mrs Ladva, with whom the appellant lives.
7. Judge Landes said, at [24]:

"24. ... given that both Dr Ganapathy and the community mental health team have referred to the appellant as suffering from PTSD or

PTSD like symptoms with depression and cognitive impairment and that Dr Ganapathy's report is clearly based on his own examination rather than simply what was reported to him by others I am satisfied on the balance of probabilities that the appellant is suffering from those mental health problems. I am satisfied that her mental health problems mean that she needs supervision to ensure that she takes her medication regularly, and that she is unable to cook or clean for herself and now needs some supervision more generally because of her cognitive impairment... I am satisfied therefore that the appellant is now unable to live on her own in the sense that she now needs someone to look after her"

8. Judge Landes said that it was more difficult to obtain a reliable picture of the appellant's physical problems or indeed how the appellant's problems have changed since she came to the UK. At paragraph [29], she said:

"Although I am satisfied that the appellant is not in a position to be able to care for herself for the reasons I have set out at paragraph 24 above, and also has some mobility problems and needs help with washing and dressing, I consider that there has been some exaggeration by the witnesses of the severity of the appellant's condition. I say that because of the lack of consistency between the witnesses as to the condition of the appellant when she arrived in the UK, that the aids reported in evidence by Mr Ladva as being suggested by the occupational therapist indicate that the appellant is able to walk with the help of a stick rather than not be able to walk at all without support from a family member and that the psychiatrists' reports do not suggest that the appellant's condition has deteriorated to such an extent that she often needs to be spoon-fed"

9. At paragraphs [30] to [43] of her decision, Judge Landes considered the availability of the required level of care in India. She noted the family's evidence to be vague and unclear, particular regarding the treatment the appellant was subjected to by her son and daughter-in-law. Having considered the evidence before her, Judge Landes found, at [35], that the appellant cannot return to the family home where her son lives, or be looked after by her son. She did not however find it credible that the appellant's family knew nothing about the problems the appellant had faced in India, until the appellant came to the UK. She considered it much more likely that the appellant's problems with her son were at least part of the reason for her coming to the UK and the family wanted to hide that.

10. Judge Landes considered the claim made by the family that the appellant's daughter, Rasila, is unable to help the appellant in India. At paragraph [37], Judge Landes said:

"The witness statements sworn in November 2014 all say the appellant's daughter Rasila is not able to help the appellant as she does not have enough money or room in her house to accommodate the appellant. However the appellant stayed with her daughter Rasila after she had been thrown out by her son. Rasila looked after her and took her to hospital when it proved necessary. Rasila may not have much money or space in her home but the appellant's family in the UK were supporting her to some degree even when she was living in India (see p 141). The family in the UK have explained in their statements that they are well off.... In those circumstances I see no reason why the family in the UK would not be able to provide additional financial support so that Rasila was able to look after the appellant in sufficient comfort and space, providing additional or alternative accommodation as necessary. Rasila is described as very old with grandchildren but the family were vague as to Rasila's age other than saying that she must be over 60. Mrs Tank said that Rasila was looked after by her family but this contradicts the evidence that Rasila looked after the appellant when she was thrown out by her son. If Rasila's family (her son and her son's wife who are described along with Rasila's husband as the people living with Rasila) were looking after Rasila they could also look after the appellant."

11. Judge Landes considered the more general problems that it was claimed the appellant would face if she returned to her home village. At paragraph [41], she said:

"Bearing in mind what I have said in the above paragraph and that I have found that the witnesses have not been telling the complete truth in the sense that they have exaggerated some of the appellant's problems and that they have not been credible about when they knew about the appellant's problems in India, I am not satisfied that the appellant would have problems from her son or difficulties in the community if she were to return to India rather than live with her son (which seems to have been the cause of the problems when he married) and live with Rasila."

12. Judge Landes considered the level of care that would be available to the appellant in India and at paragraph [43], she said that she was not satisfied that "the required level of care" is not available in India. She said that the care can be provided by Rasila and her family with financial support from family members in the UK so that the appellant can live

with them in adequate accommodation and be adequately maintained. Having reached her findings of fact, Judge Landes accepted there is a family life between the appellant and her family in the UK such that Article 8 is engaged. However, for reasons set out in paragraphs [48] to [56] of her decision, Judge Landes concluded the decision to refuse leave to remain is proportionate and strikes a fair balance between the private and public interests concerned.

### The preserved findings of First-tier Tribunal Judge Young-Harry

13. As set out in the error of law decision of Judge Grubb, the findings set out at paragraphs [20] to [26] of the decision of Judge Young-Harry are preserved:

“20. I accept the appellant suffers from PTSD with symptoms of depression and cognitive impairment. I accept that the updated medical evidence contained in a report prepared by Dr Patel dated the 9<sup>th</sup> March 2018, states that the appellant is now suffering from significant mental illness, depressive illness and Alzheimer’s dementia, so things have progressed. Given Dr Ganapathy suggested that the appellant was developing dementia like symptoms in 2015, this is unsurprising.

21. According to a letter dated the 14<sup>th</sup> March 2018, the appellant may need to be fitted with a pacemaker. I note however that one has not been fitted and there is no up to date medical evidence regarding heart problems. I note there is a lack of medical evidence to suggest that the appellant is not fit enough to return.

22. Neither does the medical evidence provided support the claims made by the appellant’s daughters, regarding the degree of care the appellant requires or the severity of her condition. I find that they have once again, like they did in 2017, exaggerated the appellant’s condition and care needs. Having considered the appellant’s health problems, I find her conditions do not meet the threshold in *N v UK*.

23. In line with the findings of the 2017 tribunal, I accept that the appellant’s mental health condition means she needs supervision and cannot live alone, this is not suggested. I accept the appellant could not live with her son on return. The appellant is still on only one type of medication. The claim made by the appellant’s daughters that their mother requires constant care, including being watched during the night, I find is not borne out by the medical evidence.

24. I find the appellant's children in the UK, are of sufficient means, to financially assist with the appellant's care on return. It is not suggested that the appellant live in a care home, thus the JCWI report Mr Khan referred me to, is not relevant in this case. I accept also that there is adequate healthcare in India and the appellant can receive treatment on return.

25. In line with paragraph 37 of the appellant's 2017 appeal determination, I find the appellant can live with her daughter Rasila's family on return and be cared for by Rasila's two sons and her daughter-in-law, particularly if she requires gender specific care.

26. I find her children in the UK can provide financial assistance for any of the appellant's needs. Given Rasila's personal challenges, in order to reduce the burden, the appellant's children in the UK may seek to arrange and pay for additional care if necessary. Such an arrangement will ensure the appellant receives the additional assistance she needs at this stage of her life. The appellant's children in the UK, can also visit their mother regularly to ensure she is being appropriately cared for."

### **Remaking the decision**

14. The appellant has appealed the respondent's decision to refuse her application for leave to remain, under s.82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s.6 of the Human Rights Act 1998.
15. We have before us, the evidence that was previously before the First-tier Tribunal. At the outset of the hearing before us, Mr Hingora confirmed the appellant had not filed and served any further witness statements and there was no application to the Upper Tribunal to rely on additional evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2018. The appellant had been given permission to rely upon a report prepared by Mr Mathew Akal, a Consultant Psychologist, previously.

### **The report of Mr Mathew Akal**

16. Mr Mathew Akal is a Consultant Chartered Clinical Psychologist. He has prepared a report dated 9<sup>th</sup> May 2022 following a clinical interview. In paragraph 4.1.1, he claims the clinical interview took place on "04/04/2022". The date of his assessment as recorded on the face of his report is said to be 4<sup>th</sup> May 2022. Attached to his report is a statement made by Usha Kanani, in which she confirms that she attended an appointment on 4<sup>th</sup> May 2022 between 4:30pm and 5:30pm during which she assisted in translation from the Gujarati language to English. Although the length of the clinical assessment is not recorded by Mr Akal we are prepared to accept that it took place over a period of 1 hour on 4<sup>th</sup> May 2022. The appellant was accompanied by her son-in-law, Mr Praful Ladva. Mr Akal sets out the documents that he reviewed at paragraph 3.3 of his report.
  
17. Mr Akal sets out his opinion that the appellant is experiencing symptoms of post-traumatic stress, generalised anxiety, and depression. He recommends a course of trauma-focused cognitive behavioural therapy or eye movement desensitisation and reprocessing, and ongoing specialist management of her dementia symptoms by an older person's community mental health team. He expresses the opinion that the appellant should receive treatment and remain in the care of her close family in the UK. He claims it is highly likely to have a significantly detrimental effect on the appellant's mental health and well-being if she is now required to live in India without her family support, and in isolation, with potentially no access to treatment. He states that the appellant's only family in India is her daughter who has terminal cancer and thus is unable to provide long-term gender specific personal care. He states the appellant needs assistance with everyday tasks which she is incapable of performing (e.g. washing, dressing and cooking) and tasks such as the management of her bodily functions; difficulty with mobility; communication, and other activities of daily living. He states the appellant is physically unable to care for herself, cannot eat on her own and could not hold a spoon and needs spoon feeding. Mr Akal states that



in his opinion, the appellant's care and support needs cannot be replaced in India by anyone else other than her close family members in the UK. It is his opinion that the appellant will not be able to access the same level of specialist healthcare in India that she is currently benefiting from in the UK. He claims that in India, there is social stigma and discrimination which would prevent the appellant from recovering. He claims the appellant has no home in India after being thrown out by her son and daughter-in-law, and she is completely dependent on her daughters and son-in-law. Mr Akal states that if the appellant is able to access psychotropic medication in India, there is always a significant risk that there may be interruptions in the supply of medication, and there will remain significant risks to her underlying physical health if she does not receive monitoring of her conditions on an annual basis. Mr Akal claims the appellant is elderly and frail and could not fly on a long flight back to India. He states that in his opinion it is highly likely that the appellant will experience a severe decline in her state of health resulting in intense suffering or a significant reduction in her life expectancy due to inadequate care in India.

#### The parties submissions

18. The parties' submissions are a matter of record and there is little to be gained by us setting out the submissions at any length in this decision. Broadly stated, Mr Hingora submits the evidence before the Tribunal establishes the requirements of paragraph 276ADE(vi) of the immigration rules are met. He submits appellant has obtained further medical evidence to support her claim and the evidence now before the Tribunal establishes there are very significant obstacles to the appellant's integration in India. When we pressed Mr Hingora to identify the "very significant obstacles", he relied upon the preserved findings made as to the appellant's health and the report of Mr Akal, in which, at paragraph

[5], he refers to the index events that have resulted in the appellant experiencing symptoms of post-traumatic stress, generalised anxiety and depression. He submits the opinion of Mr Akal is that the removal of the appellant to India, away from her close family in the UK, is highly likely to have a significantly detrimental effect on the appellant's mental health and well-being. Mr Hingora accepted we have not heard any evidence from the appellant's family in the UK, and that Mr Akal did not have the benefit of considering the findings and conclusions reached by the Tribunal previously or of taking into account the findings made that the appellant's family have consistently exaggerated the appellant's condition and care needs.

19. Mr Hingora submits Mr Akal has identified the treatment that is required by the appellant and commented upon the social stigma and discrimination that would prevent the appellant from recovering. Mr Hingora submits the expert's views are supported by the respondent's CPIN 'Country Policy and Information Note India: Medical and healthcare provision Version 1.0 October 2020', which records in section 11, the high prevalence of stigma towards persons with mental illness. According to the 'National Mental Health Survey of India, 2015-16: 'Because of the community's perception about the illness experience, most of the persons with severe mental health problems usually undergo unnecessary treatment in faith healing practices before they receive any professional care. They try to hide their illness from the family and community and become reluctant to seek medical care. Sometimes they are taken away to far away places and left ... destitute because of stigma, high cost of the treatment and lack of knowledge.'. The CPIN records, at [11.8.8], that media sources have indicated that few people with mental health problems in India sought professional help or care because of widespread social stigma and poor access to mental healthcare. The problem appeared to be particularly acute for women with mental illness, who faced abandonment by their husbands and families.

20. Mr Hingora referred to the Affidavit of the appellant's daughter Rasila Gadhiya that is at page 82 of the appellant's bundle. She confirms that she only temporarily looked after the appellant and that she is unable to take care of the appellant on a permanent basis. She claims that she will not be able to deliver proper care to the appellant and the appellant will suffer as a result. Mr Hingora submits the evidence before us of an on-going deterioration in the appellant's mental health is such that her needs have increased, and that is capable of undermining the findings of Judge Young-Harry that the appellant can live with Rasila's family on return and be cared for by them, particularly if she requires gender specific care.
21. Mr Hingora accepts the appellant cannot meet the requirements for leave to remain as an adult dependent relative set out in Appendix FM of the immigration rules, having arrived in the UK with entry clearance as a visitor.
22. Mr Hingora submits the requirements of the immigration rules are not met, in our assessment of whether the decision to refuse entry clearance is proportionate, there are two particular factors that weight heavily in favour of the appellant. The first is what he describes as the 'historic injustice', and second, the principle in Chikwamba v SSHD [2008] UKHL 40, that there is no public interest in removal because after leaving the UK the appellant will be granted entry clearance as an adult dependent relative.
23. As for the 'historic injustice', Mr Hingora submits that the appellant's father, Mr Duda Kachra who was born in 1902 and her mother Mrs Nathibai Duda, born in 1908 were Citizens of the United Kingdom and Colonies. He submits that although the appellant held Indian nationality, she and her parents were recognised as British subjects pre-1948.
24. Mr Hingora submits that in NH (Female BOC's, exceptionality, Art 8, para 317) British Overseas Citizens [2006] UKAIT 00085, the Tribunal held that

female British overseas citizens only obtained UK citizenship from 1 April 2003. The Nationality, Immigration and Asylum Act 2002 was passed to “right and historical wrong”, which is something that should be taken into account in the assessment of proportionality. In ECO v NH (India) [2007] EWCA Civ 1330, the Court of Appeal confirmed the Tribunal had been correct to take into account legislation which had prevented a Kenyan UK citizen from settling in the UK previously, when determining whether her son ought to be granted entry clearance. The Court of Appeal held that the refusal to grant him entry clearance had breached his rights under Article 8. In Patel & others v ECO [2010] EWCA Civ 17, the Court of Appeal confirmed that British overseas citizens had settled in the United Kingdom after having been prevented from doing so by a discriminatory law. If, by the time they were refused entry clearance, the adult children of those citizens were still part of their family life, the history of the discriminatory arrangements would be a potentially decisive factor in determining whether the children's right to respect for their family life under Article 8 had been breached. Finally, in Patel (historic injustice: NIAA Part 5A) [2020] UKUT 00351 (IAC) the Upper Tribunal confirmed the expression “historic injustice” is reserved for cases concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now.

25. Mr Hingora submits the statutory scheme that previously operated was discriminatory and the appellant was previously prevented from coming to the UK. He submits the appellant's right of abode was taken away from her by the 1968 Act. The appellant was a female over the age of 30 by the time of the 1968 Act, and she could not therefore benefit from the voucher scheme that was operated. He submits the scheme prevented people like the appellant from benefitting from the rights bestowed on her.

26. As far as an application for entry clearance from India as an adult dependant relative is concerned, Mr Hingora accepts that the question whether the appellant requires long-term personal care to perform everyday tasks as a result of age, illness or disability and whether the appellant is able to meet the additional requirement set out in paragraph E-ECD.2.5 of Appendix FM, stands and falls with our assessment of the appellant's needs, and the care and treatment available to her in India.
27. In reply, Mr Williams submits the preserved findings establish that gender specific care and treatment will be available to the appellant in India. He submits the report of Mr Akal should be treated with caution. Mr Akal does not set out the instructions that he received, and he was not provided with a number of key documents including the respondent's decision and the previous decisions of the First-tier Tribunal and Upper Tribunal. The failure to have regard to findings made impacts upon Mr Akal's assessment of what the appellant will face in India. Mr Williams submits Mr Akal strays beyond his expertise and provides opinions upon matters he has no qualifications or experience upon which to provide an opinion. For example, he has no apparent expertise regarding the availability of treatment in India. Mr Williams submits there remains a lack of evidence regarding the physical care needs of the appellant and the evidence of her daughters has previously been found to be exaggerated. Judge Landes previously said that there is no obvious reason why the appellant's mobility is impaired. The gaps in the evidence are still not addressed and there remains no evidence of any medication taken by the appellant for any physical issues.
28. Mr Williams submits that although the appellant's daughter, Rasila, states in her Affidavit that her family in India were assisting at a time of emergency when the appellant was thrown out by her son, the appellant would now also have the support of her UK based family who now know of the problems that they were previously unaware of.

29. Mr Williams submits that although the appellant refers to background material relating to social stigma in India, the appellant does not need to worry about a job, education, or marriage. The appellant would, on the preserved findings, return to stay with her daughter, with the support of her family in the UK. The appellant is unlikely to arouse attention. She is someone that is withdrawn and will not, on balance, be in the public eye. The appellant has family that can accompany her to India that can help her establish herself and gain the necessary support and services. Mr Williams submits the evidence does not establish that that there would be very significant obstacles to the appellant's integration in India.
30. Mr Williams acknowledges that there will be individuals that have suffered 'historic injustice' in this context. He submits the question is not whether the injustice exists, but how the appellant has been affected. He acknowledges that both the appellant's parents were issued with CUKC passports. He submits that in the intervening years, the family chose not to come to the UK and by the time the rights were restricted in 1968, the appellant was married and had formed her own independent family unit. Mr Williams refers to the judgement of Sedley LJ in Patel & others v ECO [2010] EWCA Civ 17. In paragraph [2], he drew upon the decisions of the Tribunal and Court of Appeal in NH (India) as to the development of the statutory scheme. He noted the Special Quota Voucher Scheme ("SQVS") had been introduced from 1968 to assist both CUKC's and subsequently British Overseas Citizens. The SQVS was outside the Immigration Rules and it allowed persons, latterly BOCs, who had no other citizenship, and were under pressure to leave their country of residence and had nowhere else to go, to settle in the UK. The SQVS was only available to heads of household, as defined, and to their dependents and was therefore applied in a manner which discriminated between men and women on the grounds of marital status. The scheme was abolished on 5<sup>th</sup> March 2002. At paragraph [15] of his judgment, Sedley LJ said:

"15. As the individual cases to which I now turn illustrate, the effect of this is to reverse the usual balance of art. 8 issues. By the time they

come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of art. 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of art. 8(1), the balance of factors determining proportionality for the purposes of art. 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in *NH (India)*, the family would or might have settled here long ago.”

31. Mr Williams refers to the decision of the Court of Appeal in *AP (India) v SSHD* [2015] EWCA Civ 89, in which Elias LJ considered the comments of Sedley LJ in *Patel and Others* (paras. 13-15) and referred, at [19], to the need for a causal connection between the historic injustice and the appellant's circumstances. He said that if a sponsor would not have come to the UK any earlier than he did, even had the right not been removed from him, no prejudice would have been occasioned by the historic injustice and it would be immaterial to the proportionality exercise. Mr Williams submits that here, the rights vested were not exercised by the appellant's parents and the appellant would not have been entitled, not because of her gender, but because she held Indian citizenship.
32. Mr Williams acknowledges that in view of the length of time the appellant has been in the UK and the loving care that she receives from her family, it is understandable that the appellant would prefer to remain in the UK for the latter years of her life. However, in all the circumstances, the decision to refuse leave to enter is not disproportionate.

### Findings and conclusions

33. Judge Landes previously found that there is family life between the appellant and her family in the UK such that Article 8 is engaged. That finding remains unchallenged, and the appellant continues to live with

her daughter and son-in-law. We accept the family life established between the appellant and her family in the UK will only have grown stronger with the passage of time and we find that the decision to refuse the appellant leave to remain has consequences of such gravity as to engage the operation of Article 8. We accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The central issue in this appeal is whether the decision to refuse leave to remain is proportionate to the legitimate aim. The burden shifts to the respondent to establish that the decision is proportionate.

34. In a human rights appeal, although the appellant's ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.
35. We have already set out the findings previously made by Judge Landes and the preserved findings of Judge Young-Harry. We have considered for ourselves whether there is anything in the evidence before us that undermines those findings.



36. We have carefully read the report of Mr Akal. His opinion that the appellant is experiencing symptoms of post-traumatic stress, generalised anxiety, and depression is consistent with the evidence previously considered by the Tribunal and we accept that opinion. However, we treat the remaining opinions expressed by Mr Akal with caution and attach little weight to his opinions. The report is based on a clinical interview of one hour duration and self-reporting by the appellant and her son-in-law. The appellant's family has already been found by two separate Tribunals to have exaggerated their evidence regarding the appellant's needs.
37. Mr Akal sets out the documents that he reviewed at paragraph 3.3 of his report. In his summary of treatment recommendations, at [2], Mr Akal states it is highly likely to have a significantly detrimental effect on the appellant's mental health and well-being if she is now required to live in India without her family support and in isolation. Regrettably, Mr Akal had not been provided with the decisions of either First-tier Tribunal Judge Landes, First-tier Tribunal Judge Young-Harry or Upper Tribunal Judge Grubb. It is now well established that the more an expert opinion is dependent on assuming that the account given by the appellant is to be believed, the less likely it is that significant weight will be attached to it. Had he had regard to those previous decisions of the Tribunal, Mr Akal he would have seen the findings made by the Tribunal that the appellant can live with her daughter Rasila's family on return to India and she will be cared for with adequate arrangements for gender specific care. He would have also seen the finding made that the appellant's children in the UK can provide financial assistance for the appellant's needs and any challenges that looking after the appellant may present for Rasila.
38. We are also concerned to note that Mr Akal bases his report upon a one-hour clinical interview without any formal assessment as to the appellant's physical care needs. He states the appellant needs to be provided care with everyday tasks which she is incapable of performing,

but he fails to identify any tests that he completed or records that he consulted, to support his opinion. He appears to have simply taken at face value everything that he was told in reaching his conclusion and expressing an opinion that the appellant is physically unable to care for herself at all. His opinion that the appellant's care and support needs cannot be replaced in India by anyone else other than her close family members in the UK, is entirely unexplained. His belief that any family in India are unable and or unwilling to care for the appellant at all, and that all her primary carers are in the UK, disregard entirely the findings previously made by the Tribunal. His opinion that the appellant will not be able to access the same level of specialist healthcare in India is unexplained. In any event there is no evidence before us regarding Mr Akal's expertise and qualifications to provide an opinion as to the healthcare facilities available in India. Similarly, we are at a loss to understand his qualifications and expertise regarding any social stigma and discrimination the appellant may face in India. Mr Akal states that the appellant is elderly and frail, and cannot fly on a long-haul flight back to India without any further elaboration or explanation. We do not accept his vague assertions.

39. It was not for Mr Akal to determine whether funds sent to India by the family in the UK, to pay for private care and medical treatments would reach the appellant. His opinion that it is highly likely that the appellant will experience a severe decline in her state of health resulting in intense suffering or a significant reduction in her life expectancy due to inadequate care in India, strays beyond his expertise because he has no expertise as to the medical care that may be available in India, and in any event disregards the gender specific care the Tribunal has found will be available to the appellant to meet her day to day needs.

### The immigration rules

40. We have considered whether the appellant is entitled to have to remain on private life grounds under paragraph 276ADE(1)(vi) of the immigration rules. That is, she is aged 18 years or above, has lived continuously in the UK for less than 20 years, but there would be very significant obstacles to the appellant's integration in India. The phrase 'insurmountable obstacles' involves a stringent test, to be interpreted in a sensible and practical, rather than a purely literal way. The phrase "very significant" equally connotes an "elevated" threshold, and as Underhill LJ noted in Parveen v SSHD [2018] EWCA Civ 932, that test will not be met by "mere inconvenience or upheaval". In the end, the task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".
41. We have considered the background material before us regarding social stigma in India. We accept social stigma is sometimes a barrier to accessing mental health care, but societal attitudes typically vary to an extent from one community to another. However, there has been a media campaign under the national Mental Health Programme to generate awareness and reduce stigma. The appellant's mental health must be considered in context. She does not have a mental disability that might cause her to transgress social norms, or to display any abnormal behaviour so that her mental health would attract the attention of the local community. The appellant would have the emotional support of her daughter's family in India, and we have no doubt that her daughter Rasila in particular, is someone that is uppermost in the mind of the appellant.
42. In reaching our decision we have had regard to the appellant's age and her health in particular. We have also had regard to the diagnosis made by Mr Akal that that the appellant is experiencing symptoms of post-traumatic stress, generalised anxiety, and depression, and the treatment

that he recommends. There is no evidence before us that treatment for the appellant's physical and mental health would not be available to her in India. We have had regard to the length of time the appellant previously lived in India and to the findings made and preserved regarding the support and care that would be available to the appellant from her daughter Rasila's family. There is nothing in the evidence before us to undermine those findings. The appellant will not be without emotional or practical support. Although the appellant has now spent a number of years in the UK, we find that any difficulties that she might encounter in adjusting to life in India would be short lived, while she settles back in. We are entirely satisfied she is enough of an insider in terms of understanding how life in India is carried on and that with the support and care available to her, she has a capacity to participate in it. Quite simply, there is nothing in the evidence before the us that establishes that the stringent test set out in paragraph 276ADE(1)(vi) is met.

43. Mr Hingora, quite properly in our judgment, accepts the appellant cannot satisfy the requirements for leave to remain under the adult dependent provisions set out in Appendix FM of the immigration rules.
44. We have considered Appendix FM GEN.3.2 and whether there are exceptional circumstances which would render refusal of leave to remain a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the appellant, and her family. We acknowledge the close relationship the appellant enjoys with her family in the UK and it is quite understandable, as Mr Williams accepts, that the appellant would wish to remain in the UK. That however does not equate to a right to do so. Although the refusal of leave to remain will impact upon the appellant's ability to see her daughters and extended family in the UK as often as they might like, we are not satisfied that the refusal of leave to remain results in unjustifiably harsh consequences for the appellant, and the wider family. The family has demonstrated its ability to provide

support and maintain their close relationships when the appellant lived in India previously. They are now aware of the breakdown of the appellant's relationship with her son and daughter-in-law and the troubles the appellant faced. We are satisfied that this is a close and loving family and that they all pull together to support and assist each other whenever necessary. We accept individuals have their own work commitments and will not be physically present in India to provide day-to-day care, but as the Tribunal has found before, the appellant's family in the UK are able to provide financial assistance for any of the appellant's needs. Furthermore, they are able to, and we find, will assist Rasila to reduce the burden on her, by paying for any additional care and support that is required by the appellant to ensure the appellant receives the additional assistance she needs at this stage of her life. The appellant's family in the UK are also able to visit India to see the appellant and ensure she is being appropriately cared for. Any shortfall in provision, we are satisfied, will be paid for and accommodated by the appellant's family in the UK.

45. It follows that in our judgment, the appellant cannot meet the requirements of the Immigration Rules. The appellant does not therefore qualify for leave to remain under the immigration rules.

Whether refusal of leave to remain is nevertheless disproportionate

46. We have carefully considered whether the decision to refuse the appellant leave to remain is nevertheless disproportionate. The ultimate issue is whether a fair balance has been struck between the individual and public interest; GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630. Section 117A(2)(a) of the 2002 Act requires us to have regard to the considerations listed in section 117B in considering the public interest question. The public interest question is, in turn, defined in section 117A(3) as being the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). There is, however, an element of flexibility

within this provision. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, at [49], Lord Wilson observed that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under Article 8 inconsistently with the article itself.

47. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, Lord Reed emphasised that the failure to meet the requirements of the Immigration Rules is a relevant and important consideration in an Article 8 assessment because the Immigration Rules reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In making our assessment, we attach due weight to that important consideration.

#### Historic injustice

48. The appellant claims she suffered a historic injustice in that she and her parents were Citizens of the United Kingdom and Colonies as evidenced by the copies of her parent's passports that are in the evidence before us. We accept that evidence. The appellant claims she would have come over to the United Kingdom much earlier. Mr Hingora submits the rights of the appellant are analogous to the rights of the appellants in the decision in Patel & Others [2010] EWCA Civ 17. Her claim to British nationality arose from the British Nationality Act 1948. At birth she became a citizen of the United Kingdom and Colonies ("CUKC"). However her rights and the rights of her parents were restricted by the Commonwealth Immigration Act 1968. Subsequently, the SQVS was introduced to benefit CUKC's whose rights had been restricted by the 1968 Act. The scheme was only available to heads of households and to their dependents, but was applied in a manner that discriminated between men and women on the grounds of marital status. It was abolished on 5<sup>th</sup> March 2002 by amendments to sections 4 and 14 of the

British Nationality Act 1981. As Elias LJ said in AP (India) v SSHD [2015] EWCA Civ 89:

“16. The effect, therefore, was that the unrestricted right of entry was removed from 1968 until May 2003; that there was a limited discretionary right for part of that period for male heads of household only following a condemnatory ruling from the Strasbourg court; and that the purpose of the 2002 Act was to correct what was somewhat euphemistically termed an “historical anomaly”.

49. Elias LJ referred to the decisions of the Court of Appeal in ECO v NH (India) [2007] EWCA Civ 1330 and the later decision in Patel v ECO [2010] EWCA Civ 17 and said:

“19. ... there must be a causal connection between the historic injustice and the appellant's circumstances. If the sponsor would not have come to the UK any earlier than he did even had the right not been removed from him, no prejudice would have been occasioned by the historic injustice and it would be immaterial to the proportionality exercise.”

50. In R (on the application of Gurung) v Secretary of State for the Home Department [2013] EWCA Civ 8, the Master of the Rolls, Lord Dyson, referred to Sedley LJ's comments in paragraph [15] of Patel v ECO but added, at [38], that any historic injustice was only one of the factors to be weighed against the need to maintain a firm and fair immigration policy, albeit he went on to say, at [42]:

“... If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now adult) child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now.”

51. He noted that this principle would apply whether the historic injustice was to the Gurkhas or the British citizens from East Africa. The onus is on the appellant to show that she was entitled to come into the United Kingdom and where as here, she alleges that there is prejudice as a result of a historical wrong, it is for her to identify why that is alleged to be the case. There is however no evidence before us that even begins to establish that but for any historic injustice, the appellant would have

come to the UK at a time when the appellant was a child or that the appellant's parents would have come to the UK any earlier but for any historic injustice.

52. It is uncontroversial that neither the appellant nor the appellant's parents sought entry to the UK under the SQVS that was introduced to benefit CUKC's whose rights had been restricted by the 1968 Act. That is unsurprising on the part of the appellant because the scheme was only available to heads of households and to their dependents, and was applied in a manner that discriminated between men and women. The evidence before us in the witness statement of the appellant's daughter, Mukta Ladva, which we accept, is that the appellant went to Africa with her parents as a child. Her parents came to live in the UK in 1977 as the dependent relatives of the appellant's brother, Mafatlal Shingadia, who passed away in 2019.
53. On the evidence before us we do not accept there is any causal connection between any historic injustice and the appellant's circumstances. The causal link is more difficult to establish as the years pass because the longer the delay from the time when the right was conferred in May 2003, before an individual exercises the right to enter, the more difficult it is to show that he/she would have come earlier had there been no barrier to entry before 2003. Although the evidence before us is very vague, we find the appellant acquired Indian nationality, and had established an independent family unit of her own and lived in India with her husband until his death. We do not accept on the evidence before us, that the appellant previously had any intention of coming to the UK to exercise any rights that may have been conferred on her by operation of law. There is no evidence before us of any prejudice suffered by the appellant by reason of any historic injustice.

An application for entry clearance



54. We have also considered whether it would be disproportionate to require the appellant to return to India to make an application for entry clearance as an adult dependent relative; Chikwamba v Secretary of State for the Home Department [2008] UKHL 40. In Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423. Holroyde LJ, said at [45], (emphasis added):

“I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in Agyarko) referred to Chikwamba. It is relevant to note that he there spoke of an applicant who was certain to be granted leave to enter if an application were made from outside the UK, and said that in such a case there might be no public interest in removing the applicant. That, in my view, is a clear indication that the Chikwamba principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain.”

55. In Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) the Upper Tribunal summarised the position in the judicial head note in these terms:

“An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’) including section 117B(1), which stipulates that ‘the maintenance of effective immigration controls is in the public interest’. Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.”

56. The difficulty for the appellant here is that on the findings already made and preserved, we cannot be satisfied that the appellant would be certain to be granted leave to enter if an application were made from outside the UK. Paragraph E-ECDR.2.4 of Appendix FM requires the appellant to establish that as a result of age, illness or disability, she requires long-term personal care to perform everyday tasks. Even if we were to accept that that requirement is met in view of the medical evidence and the previous findings made by the Tribunal, paragraph E-ECDR.2.5 requires the appellant to establish that she is unable, even with the practical and financial help of her family in the UK, to obtain the required level of care

in India 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. We have found that the required level of care will be available to the appellant in India from her daughter Rasila and Rasila's sons and daughter-in-law, and any additional support and assistance required can be met through the practical and financial help available to the appellant from her family in the UK.

57. In reaching our decision, we have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. The appellant is supported and accommodated by her family in the UK. They are however nothing more than neutral factors in our assessment of proportionality.
58. In our final analysis, we have considered all the evidence before us in the round. We have had due regard to factors that weigh in favour of the appellant including her age, mental and physical health, the length of her presence in the UK and the strong relationships that she has with her daughters and her family in the UK. We have also had regard to all the medical and background evidence before us. We acknowledge the appellant arrived in the UK lawfully and has taken steps to regularise her immigration status. The appellant clearly has family relationships that were formed prior to her arriving in the UK rather than whilst her immigration status was precarious. She has lived with her daughter in the UK for several years such that the bond between them is likely to have deepened with the passage of time. We accept a return to India will mean that the appellant would be separated from her children and grandchildren in the UK.
59. On the other side of the scales we have had regard to the findings made regarding the support available to the appellant in India, her long-standing connections to India and the fact that the appellant is unable to

meet the requirements of the immigration rules. In the end, standing back, although we have accepted the refusal of leave to remain will interfere with the appellant's family and private life, even giving due weight to the factors that weigh in favour of the appellant, in our judgement, the interference for the purposes of the maintenance of effective immigration control is proportionate and, it follows, lawful.

60. It follows that we dismiss the appeal.

**Notice of Decision**

61. We dismiss the appeal on the basis that the refusal of leave to remain does not breach section 6 Human Rights Act 1998 (based on Article 8 ECHR).

62. No anonymity direction is made.

Signed **V. Mandalia**

Date 5<sup>th</sup> December 2022

**Upper Tribunal Judge Mandalia**