



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006067
On appeal from: HU/52369/2022
IA/03654/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 May 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SUKHWANT KAUR
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paul Richardson of Counsel, instructed by Pioneer Solicitors

For the Respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

Heard at Field House on 24 April 2023

DECISION AND REASONS

Introduction

1. The appellant challenges the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 1 April 2022 to refuse her leave to remain in the UK outside the Immigration Rules HC 395 (as amended) based on her age, her health, and her dependency on her British citizen daughter. She is a citizen of India, a widow now 74 years old.
2. For the reasons set out in this decision, I have come to the conclusion that [conclusion and outcome].

Procedural matters

3. **Vulnerable appellant.** The appellant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance.
4. **Mode of hearing.** The hearing today took place face to face.

Background

5. The main basis of the appellant's case is that there are exceptional or compelling circumstances in her case by reason of her health problems, both physical and mental.
6. The appellant lived in India without difficulty until the death of her late husband in February 2017. Her son then looked after her, but unfortunately, he also died on 8 November 2019. The sponsor, the appellant's British citizen daughter, travelled out to India in November 2019, remaining until January 2020, and again from March 2020 to July 2020, during the initial Covid-19 pandemic lockdown period. She and her husband have three children: while she was in India caring for her mother, the sponsor had to leave her 3 year old son with her husband, because her mother had nobody to care for her in India.
7. In November 2020, the sponsor had to go back again to India: the appellant needed surgery on her bladder and kidneys, so the sponsor went out to care for her there. The appellant had been supported by a maid who lived in, but the maid returned to her home town. In December 2020, the appellant came to the UK on a visit visa and did not return. That would have been about the time of the second Covid-19 lockdown. After arriving, her health deteriorated further: physically, her bladder and kidneys were not functioning well and she was hospitalised for a week. She is followed up by her daughter's GP and by Hillingdon Hospital on a regular basis.
8. The sponsor shares a room with the appellant and helps her with personal care: the appellant cannot walk or stand for long periods of time, and needs help dressing. In March 2021, she had a dizzy spell and a fall. She has had no falls since then.
9. The appellant's memory is also troubling her, according to the sponsor and to Dr Kashmiri. She told Dr Kashmiri that she wanted to return to India where her son and daughter-in-law could look after her. She did not remember that her son had died. The appellant expressed frustration to Dr Kashmiri about her memory. Apparently, one of her brothers was also alive in India, but like the appellant, he would not be very young. The appellant was unable to tell Dr Kashmiri the date, or where she was living, though she knew it was in England and that the year was 2022.

10. By reason of her absences, the appellant's daughter was subject to disciplinary action in her job as a security officer at Heathrow Airport and had to resign from her post. She now runs a business jointly with her husband, which is very successful, but she describes her job as 'housewife': she cares for her mother, taking her to appointments and blood tests.
11. In her oral evidence, the sponsor admitted that the appellant did have a living sister in India, but she lived far away and was herself unwell. Care for the appellant's sister was arranged by her own children, who live in Canada and in Australia. At the hearing today, Mr Richardson told me that the appellant's sister unfortunately has now died. The health of her brother is not known.
12. The sponsor's evidence was that her mother would not be safe in India. She gets aggressive and there was a risk that she would slap a carer, because she will not allow anyone to touch her except her family members. The sponsor said that there was a high rate of people being killed in India by their carers. They had seen a psychiatrist in India who advised a change of environment, but no report was available from that consultation.

First-tier Tribunal decision

13. First-tier Judge Moon dismissed the appeal principally because, although he felt sympathetic both to the appellant and her sponsor daughter, he considered that the medical evidence was based on a false factual matrix in certain important respects, and that the appellant could be cared for adequately in India by an employed maid or carer, together with her surviving siblings, and occasional visits from the sponsor.
14. Judge Moon noted that the appellant should have made an application for entry clearance as an adult dependant relative, rather than coming as a visitor and then applying. He considered that the evidence did not reach the Article 3 ECHR standard: see *Paposhvili* and *AM (Zimbabwe)* [2020] UKSC 17. The judge concluded that the Article 3 ECHR threshold was not reached. There was some (albeit limited) mental health treatment available and if the underlying depression were addressed, her dementia or pseudodementia would be reversible, according to Dr Kashmiri's report.
15. The First-tier Judge went on to consider whether the appellant could succeed under the adult dependent relative route. He was not satisfied, on the evidence, that the appellant had long-term personal care needs. If she did, the required level of care could be obtained in India by hiring a maid or other carer, as had been done previously.
16. As regards paragraph 276ADE, the judge was not satisfied that there were no family or friends who could accompany her for short walks outside and assist her generally.

17. The First-tier Judge accepted that Dr Kashmiri had the necessary expertise but considered that she had been misdirected as to the length of time required for the memory clinic to assess her (12 months not 6) and that Dr Kashmiri had been given the impression that the appellant had been diagnosed with dementia by her GP, which had not yet occurred. Given these facts, the First-tier Judge gave reduced weight to Dr Kashmiri's conclusions and opinion.
18. As to Article 8 ECHR outside the Rules, which was the basis of the present application and appeal, the First-tier Judge relied on *Mobeen v Secretary of State for the Home Department* [2021] EWCA Civ 886 at [78] in the judgment of Lady Justice Carr, with whom Lord Justices Underhill and Baker agreed. The First-tier Judge dismissed the appeal on all grounds.
19. The appellant appealed to the Upper Tribunal.

Permission to appeal

20. The appellant advanced 5 grounds of appeal:
 - (1) That the First-tier Judge erred in fact, at the level of an error of law, in his application of *Mobeen*, which found that the adult dependent relative rules, even where no such application had been made, were highly relevant to an assessment of Article 8 ECHR proportionality, and that insufficient weight had been given to her declining mental health;
 - (2) That the sponsor's sacrifices to protect her mother in India after her brother's death were a strong indicator of a need for her personal care, which could not be met in India;
 - (3) That the appellant here was not in the same position in as the appellant in *Mobeen*: the court in that case approved and applied the analysis in *Britcits v Secretary of State for the Home Department* [2017] EWCA Civ 368 at [59] that the care had to be reasonable from the perspective of the provider and receiver and meet the standard of what was reasonable, objectively assessed;
 - (4) That the First-tier Judge's treatment of the evidence of Dr Kashmiri was erroneous; and
 - (5) That the judge failed to put to the sponsor in her evidence the concerns about Dr Kashmiri's evidence which were relied upon in the decision.
21. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Rodger who considered that the First-tier Tribunal had arguably failed to take into account the appellant's mental health, and had 'wrongly rejected the expert report and rejected the report in a procedurally unfair way.
22. The respondent filed a Rule 24 Reply, arguing that the grounds of appeal were little more than a disagreement with findings open to the First-tier Judge on the evidence or lack thereof. The First-tier Judge had engaged with the evidence of Dr Kashmiri, including the mental health evidence; the respondent considered the 6 month/12 month error regarding referral

to a memory clinic to be highly material; the care provided by the appellant's sponsor daughter in India was not synonymous with the notion that she needed a certain level of personal care; and it had not been shown that there were exceptional circumstances which would result in unjustifiably harsh consequences for the appellant if she were to be returned.

23. The respondent struggled to understand the relevance of the difference between dementia and pseudo-dementia as a diagnosis. The respondent did not address ground 5 explicitly.
24. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

25. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

Dr Kashmiri's report

26. Dr Mariam Kashmiri MBChB MRCPsych MSc MBA is a consultant psychiatrist working at South London & The Maudsley NHS Foundation Trust, Heather Close Complex Rehabilitation Service, Lewisham, London providing care to patients with chronic mental health problems who cannot be safely managed in the community.
27. Her expertise was not disputed at the hearing. After setting out the background, her opinion begins at [14]. She considered the appellant to be:

"14.1 ... a vulnerable elderly female of Indian origin who would be at risk of harm and exploitation if returned to India, given her current mental and physical health status. She has a close attachment and bond with her daughter who is her primary caregiver. This close attachment and bond has been developed, much more since her health issues have become more complex and deteriorating, leaving her heavily dependent on Aman for her caregiving needs. Although she wishes to return to India, she does not have any family to care for her there. Furthermore, she does not understand the extent to which her illness will affect her daily living in India where she would lack social and family support. ... Mrs Kaur lacks the ability to care for her own specific needs due to her deteriorating mental and physical health accompanied by her old age. She is fully dependent on her daughter who helps her with her daily activities such as preparing her meals as well take care of all her basic hygiene such as bathing, dressing and even accompanying her to the toilet in the middle of the night. Aman assists and support with her mobility, accompanies her to her doctor's appointments, prepare and provide her with her meals and administers her medication. Her daughter provides her with the emotional support and love which any other carer cannot give."

28. The appellant's symptoms met the diagnostic criteria for Major Depressive Disorder: she was angry and irritable most of the time, experiencing memory lapses which left her frustrated and tearful. She had decreased mobility and needed supervision at all times to ensure that she did not fall again and hurt herself. She remained in denial of the loss of her son in 2019.
29. The appellant had complex health issues and needed 24-hour care from her daughter, based on 'confidence, trust, love and feelings of safety and security' which could not easily be found in a carer. Dr Kashmiri diagnosed pseudo-dementia which 'tended to improve after successful treatment for depression', albeit sometimes not as quickly as the depression. In India, her mental condition was likely to worsen and her ability to access mental health services in India might be compromised.
30. Dr Kashmiri concluded:

"15.11 Mrs Sukhwant Kaur's mental health is likely to remain relatively stable if she is allowed to stay in the UK where she has the necessary family support, with the availability of adequate treatment facilities, given her mental health status. She may also benefit from primary care level psychological input, this could be offered even when her condition has improved, to help her to cope with her mental illness.

15.12 Mrs Sukhwant Kaur needs to be further assessed at a memory clinic to rule out underlying dementing process and offer specialist care to her and support her family."

Conclusions

31. I note that there is no challenge to the Article 3 ECHR analysis and therefore I need not address it.
32. That leaves the Article 8 ECHR challenges, based on *Mobeen*, set out principally in grounds 4 and 5. The criticism by the judge of Dr Kashmiri's evidence is unsound: it is clear from her report that she was well aware of the 6-month referral period and also, that she was aware that there was as yet no formal dementia diagnosis. Dr Kashmiri herself diagnosed grief and depression, and pseudo-dementia which might well be alleviated (but not definitely) if the underlying depression were addressed.
33. While it is always a matter for the fact-finding judge what weight is given to the medical evidence, given Dr Kashmiri's acknowledged expertise, which was not questioned by the First-tier Judge at the hearing, I consider that it was both procedurally and substantively unsound to dismiss Dr Kashmiri's conclusions on the basis of errors in the factual matrix which did not, in fact, occur. I do not find that it was open to the First-tier Judge to dismiss the evidence of Dr Kashmiri for the reasons given. That was a material error of law and it will be necessary to remake the decision.

Remaking the decision

34. At the end of the hearing, Mr Richardson asked me, if I decided to set the decision of the First-tier Judge aside, to proceed to remake the decision on the evidence before me. Mr Melvin did not object.
35. I have considered all the evidence which was before the First-tier Tribunal. It is right that the sponsor did not mention the appellant's sister and brother until late in the day; however, the sister is now dead and the brother is no doubt also old. The evidence is clear as to the appellant's memory problems, her physical and mental health have declined since she came to the UK, and she is highly dependent on the sponsor, on the facts.
36. The factual matrix in this appeal is distinguishable from that in *Mobeen*, where there was a finding of fact that one of the appellant's several children would return and live with her if she were to be returned. In this case, following the death of the appellant's son, her daughter spent most of the following year in India looking after her mother and has done so to the detriment of her employment and of her relationship with her young son. She shares a room with her mother, takes her to the toilet at night, dresses and undresses her, and has to keep an eye on her to ensure that she takes her medications and does not fall. Dr Kashmiri said it was like having a very young child. The sponsor does all this while the appellant is angry, and sometimes aggressive, stating that she wants to return to India and live with the sponsor's late brother.
37. The appellant's memory is fading. There is very little psychiatric provision in India and I have regard to the evidence of Dr Kashmiri that given her pseudo-dementia, without family support the appellant would probably have difficulty accessing the support which does exist.
38. On the facts of this appeal, applying the *Britcits* test, I do not find that the care which would be available in India from a paid maid or carer would be reasonable from the perspective of the provider and receiver and meet the standard of what was reasonable, objectively assessed.
39. The appeal is therefore allowed.

Notice of Decision

40. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 24 April 2023