



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006594
UI-2022-006595
First-tier Tribunal No:
HU/53026/2021
HU/53027/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 12 October 2023**

Before

UPPER TRIBUNAL JUDGE WILDING

Between

**(1)MR PARMJIT SINGH
(2)MS RANJIT KAUR**

(ANONYMITY ORDER NOT MADE)

Appellant

And

**SECRETARY OF STATE FOR THE
HOME DEPARTMENT**

Respondent

Representation:

For the Appellant: Mr M Afzal, Legal Representative
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 2 October 2023

DECISION AND REASONS

1. The appellants are husband and wife. They are Indian nationals, who applied for leave to remain in the UK on human rights grounds. They appeal, with permission, against the decision of First-tier Tribunal Judge Broe, who dismissed their appeal.

Background

2. The appellants entered the UK on 7 December 2019 as visitors. On 13 May 2020 they applied for further leave to remain because the impact of the Covid-19 pandemic made it impossible for them to leave the UK and travel back to India. Their leave was extended to 31 July 2020. On 21 August 2020 they made a human rights application for leave to remain.
3. The background to the application was that they both suffer from a variety of medical conditions. In particular the first appellant suffers from:
 - a. Hypertension
 - b. Dizziness resulting in tendency to falls and injuries
 - c. Severe osteoarthritis of left and right knee resulting in a reduced range of movement and ability to walk.
 - d. Subclinical depression and anxiety
 - e. Obesity
 - f. Acid reflux.

He is prescribed medication for high blood pressure, acid reflux and pain.

4. The second appellant suffers from:
 - a. Memory loss
 - b. Hypertension
 - c. Type 2 diabetes
 - d. Symptoms of cognitive impairment suggestive of dementia and moderate depression

She is prescribed medication for these ailments.

5. The appellants submitted that they are vulnerable individuals who require long term care to perform daily tasks and who rely on the emotional and financial support of their adult children in the UK. Family life exists between them and removal would interfere with that family life.
6. The appellants have a family and private life with their adult children and their respective families, including a minor grandchild. It is a close-knit family upon whom the appellants are dependent. They have significant physical and mental health difficulties. Neither can care for themselves. The expert evidence relied on outlined that the first appellant being totally reliant on his family. There was further expert evidence as to concerns over his ability to look after himself as he had no family members in India to assist.
7. The second appellant's cognitive impairment requires care and tests to investigate the possible diagnosis of dementia. She requires support from her family, returning without support would put her health and safety at risk.
8. The appellants accepted that whilst healthcare is available in India, the personal care they require is not. They are reliant on their family members in the UK, and enjoy a family and private life here. They submit that their removal would be disproportionate and their Article 8 rights outweigh the public interest.

9. I set out the above synopsis of the appellant's written submissions because it is important to understand the way in which the case was advanced before the Judge when his decision is considered.

10. Judge Broe dismissed the appeal. In his decision he outlined:

"25. I have given careful consideration to all of the documents before me and to the evidence and submissions which are recorded in the record of proceedings. The Appellants accept that they cannot meet the requirements of the rules.

26. I have had regard to the Appellants' immigration history. I accept that they travelled to this country on 7 December 2019 in good faith and that they intended to return to India on 24 May 2020. On 13 May 2020 they applied for further leave to remain because the covid pandemic made it impossible for them to travel back to India and leave was extended until 31 July 2020. They have provided evidence of return flights booked for 30 August 2020 which appear to have been booked on 31 July 2020. On 21 August 2020 they made the applications which led to these proceedings.

27. I note that the application on 13 May was made on the basis of their inability to travel. On 31 July they booked tickets to return to India. This was three weeks before the application for leave to remain.

28. The Appellants accept that they cannot meet the requirements of the rules although my attention has properly been drawn to paragraph EC-DR 2.4. because the Appellants case is that as a result of age, illness or disability they require long-term personal care to perform everyday tasks. The rules are relevant in the assessment or proportionality. I note that the evidential requirements of paragraph 34 of Appendix FMSE have not been met although that does not preclude a grant outside the rules. The letter provided is inadequate for those purposes.

29. I have nonetheless considered as part of the assessment what support might be available in India. I note that the Appellants have a home there and they do not argue that they have financial difficulties. The Sponsor is prepared to meet their medical costs in this country and would be able to do so in India. I note that they have had the benefit of hospital treatment in the recent past.

30. I have given careful consideration to the evidence of the Appellants' medical conditions and I accept that they are not in perfect health. I have no doubt that they are being cared for by their relatives in this country and that they would all prefer to be together as a family. I am not however persuaded that they require long term personal care to perform everyday tasks or that if they do need support it would not be available in India. I note that they have in the past employed a maid. It is clear that even three weeks before the applications they were contemplating a return home.

31. It is against that background that I have given careful consideration to the Appellants' Article 8 rights outside the rules. The human rights issue to be decided whether the decision amounted to a disproportionate breach of Article 8 rights. Following the decision in Beoku-Betts v SSHD [2008] UKHL 39, family life refers to the family unit as a whole, and each affected family member is to be regarded as a victim.

...

35. I accept that family life has been established in the precarious circumstances that have existed since the Appellants arrival in this country in December 2019. The effect of the decision is that they must return to India. They will then be in the same position as any other foreign national seeking entry to this country.

36. I have had regard to Paragraph GEN.3.2 but in the light of my conclusions above I am satisfied that there not would be unjustifiably harsh consequences if the Appellants are denied leave to remain.

37. On what is before me I am not persuaded that there are circumstances justifying the consideration of the grant of leave to remain outside the rules. If I am wrong about that I am satisfied that any interference with the right to enjoy private or family life would be lawful and for a legitimate purpose, the maintenance of immigration control. It would also be proportionate to that need.

38. Therefore on the totality of the evidence before me, I find that the Appellants have not discharged the burden of proof and the reasons given by the Respondent do justify the refusals. Therefore the Respondent's decisions are in accordance with the law and the applicable immigration rules. I see no reason to make an anonymity direction."

11. The appellant was dissatisfied and applied for permission to appeal on three grounds of appeal:

- a. The Judge erred in relation to making unsupported, unclear and unreasoned findings in relation to their health needs, and the finding that they do not require long term care.
- b. The Article 8 analysis is defective because the Judge has not undertaken a balancing exercise. He fails to outline a clear and reasoned balance sheet assessment in finding that their removal would be proportionate.
- c. The Judge finally erred in finding that "the effect of the decision is that they must return to India" is a misdirection of law.

12. Permission to appeal was granted by Judge Boyes on all grounds.

The hearing

13. I heard submissions from the two representatives. Mr Afzal made his submissions in line with the grounds of appeal. He accepted that the third ground of appeal was in reality a sub-ground of ground two, and accepted that if

he could not show either grounds one or two were made out, then ground three could not be.

14. There was no rule 24 response from the respondent. Ms McKenzie made oral submissions opposing the appeal. She submitted that ground one was a mere disagreement, there was nothing within the complaint that identified an error of law.
15. In relation to the second ground she submitted that the Judge identified the relevant authorities and whilst she accepted that the Judge did not outline in the body of the decision a balancing exercise, he must have undertaken and understood he was required to do one by the authorities he had highlighted. In any event she submitted that the error was not material as the appellant's would not succeed on the facts they advanced.

Decision and reasons

16. I find that the Judge did err in law. The primary reason for doing so is that, as per ground two and conceded by Ms McKenzie, the Judge has failed to undertake a balancing exercise. He has failed to identify the positive case advanced by the appellants and undertake an assessment of that case, set against the public interest, giving reason for why their Article 8 rights are outweighed.
17. The Judge appears to have undertaken a consideration as to whether the case requires consideration outside of the immigration rules:

"37. On what is before me I am not persuaded that there are circumstances justifying the consideration of the grant of leave to remain outside the rules. If I am wrong about that I am satisfied that any interference with the right to enjoy private or family life would be lawful and for a legitimate purpose, the maintenance of immigration control. It would also be proportionate to that need."

In my judgment this conclusion is essentially an application of the law set out in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC), an approach long rejected in a Human Rights appeal.

18. The Judge plainly did not undertake a balancing exercise, or if he did he did not given any reasons for concluding that it fell in the respondent's favour, there is no analysis as to the ailments that the appellants have, no consideration of the family life they have established in the UK with their children here, and no consideration as to whether in all the circumstances their removal would be proportionate. The Judge's decision on the critical aspect of the case was unreasoned, and as a consequence infected by an error of law.
19. In relation to ground one, I have considerable sympathy with the submission made. The Judge appears to condense an assessment of their list of ailments to the description that they "are not in perfect health". That in my judgment is inadequate. The ailments that they suffer from require analysis in so far as whether they are short or long lasting conditions, whether the treatment and support they receive is necessary, whether it is available in India and what the

impact on them will be were they to be removed. The Judge fails to undertake any analysis of this, an observation that they are not in perfect health is inadequate to understand the evidential position advanced before him.

20. The second limb of ground one is that the Judge has not reasoned the finding that "*I am not persuaded that they require long term personal care*". I agree with this submission. The Judge does not give any reasons for concluding this. The Judge's only reference to the evidence is that they have, in the past, employed a maid, however this ignores the evidential position that when they came to the UK they did, in fact, intend to return. It was during the time they have been in the UK that it was considered that they could not. It is therefore in my judgment inadequate to find that because they have in the past employed a maid, then they can find the treatment they need. Further this reason is no answer to the proposition that they require long term care. The Judge has found they do not, without giving any reason for such a finding.

21. For the above reasons the decision is infected by an error of law and I set it aside. There are no findings of fact which can be preserved.

22. At the hearing I did indicate that the remaking could remain in the Upper Tribunal dependent on my decision on ground one. Having considered the impact of my decision and having found that there are no findings of fact preserved, I consider that this is one of those cases where a remittal is appropriate to be heard *de novo*. The appeal in essence needs to be heard afresh, and start again.

Notice of Decision

The decision of the First-tier Tribunal was infected with an error of law and I set it aside. The case is remitted to a different constitution of the First-tier Tribunal.

Judge T.S. Wilding

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 5th October 2023