



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001885
UI-2023-001886

FTT No.s: HU/55836/2022
IA/08426/2022
HU/55837/2022 IA/08428/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 November 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Kulwant Singh Bal
Malkit Kaur Bal
(no anonymity order made)

Respondents

Representation:

For the Appellant: Ms Z. Young, Senior Home Office Presenting Officer
For the Respondents: Mr Marfat, Newcastle Law Centre

Heard at Phoenix House (Bradford) on 1 November 2023

DECISION AND REASONS

1. The Respondents are both nationals of India. They are respectively a husband (date of birth 1st February 1949) and wife (5th July 1945). They seek leave to remain in the United Kingdom on human rights grounds. On the 28th April 2023 the First-tier Tribunal (Judge Gumsley) allowed their linked appeals. The Secretary of State was granted permission to appeal against that decision on the 4th July 2023.
2. The Respondents came to the UK as visitors in 2020. This was not their first trip here to visit their son and daughter, both now British citizens, and there is no suggestion that the Respondents had any intention to remain in the UK at that stage. They had another daughter and a family home back in India.

Unfortunately their trip coincided with the outbreak of Covid-19, and with the imposition of world wide restrictions on travel. Unable to get back to India, as the months went by their health deteriorated. On the 20th August 2022 they made applications to be able to remain in the United Kingdom with their daughter Ms Sabjit Kaur.

3. The applications were refused on the 22nd August 2022. The provisions in the rules relating to adult dependent relatives normally only benefit those seeking entry to the UK, as opposed to those already here, but the Secretary of State exercised her discretion in the applicants' favour because she recognised that the unusual situation that they found themselves in as a result of the pandemic and consequent lockdown. She therefore considered the applications under Appendix FM on the hypothetical footing that the Respondents were back in India. Having done so she concluded that they could not succeed, because the applicants had failed to demonstrate that they met the requirements of paragraphs E- ECDR 2.4 and 2.5, the then rules governing the entry of adult dependent relatives. The Secretary of State did not accept that either of the applicants could show that "as a result of age, illness or disability" they required "long-term personal care to perform everyday tasks". Nor could they show that they are "unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living (ie India) because it is not available and there is no person in that country who can reasonably provide it or it is not affordable".
4. These were the matters in issue when the appeal came before the First-tier Tribunal.
5. The Tribunal began by confirming the undisputed fact that there is a family life at stake here, that the decision presents an interference with it, and that it is a decision that it was legally open to the Secretary of State to take. It proceeds then to consider proportionality, reminding itself that if the Respondents could show that they met the requirements of the rules, then the appeals would fall to be allowed on Article 8 grounds: TZ (Pakistan) and PG (India) and SSHD [2018] EWCA Civ 1109. The witnesses were found to be straightforward and credible, and the Tribunal commended the Presenting Officer for her empathy and sensitivity in her cross examination.
6. Having examined the evidence the Tribunal concludes, in unchallenged findings, that each of the Respondents meets the requirements of E-ECDR 2.4.
7. Mr Singh Bal has for some time suffered from stomach problems, anaemia, high blood pressure, type II diabetes and a hiatus hernia. He has also had long term problems with his kidneys and urinary tract. More recently his arthritis has become much worse to the extent that he no longer ventures outside much and has difficulty using his hands. GP notes in the UK also refer to spells of dizziness and chest pain. Of even greater concern is the deterioration in Mr Bal's mental wellbeing. His family report him being forgetful and unfocused and medical notes make reference to him experiences some symptoms of dementia. A Consultant Psychiatrist who prepared a report on Mr Singh Bal, a Dr Bashir, concludes that meets the diagnostic criteria of moderately severe depression:

"...Dr Bashir also opines that if Mr Singh Bal were to return to India his depression will be prolonged, as well as expressing concerns about what support he would have and raises the risks of falling, of accidents and concerns about taking medicine. He

also considers the pressure of living without practical and emotional support 'will be huge' in their (referring to both Appellants) old age, and considers this may lead to self-neglect with both being highly vulnerable".

8. Mrs Kaur Bal is slightly older than her husband. She attended court in a wheelchair and appeared to the Tribunal to be "very frail". The medical evidence presented in respect of Mrs Kaur Bal was that she suffers from diabetes, degenerative joint disease and osteoarthritis so severe that she has lost mobility in her shoulder and legs. She requires assistance with getting up, getting dressed, washed and going to the bathroom. She has lost the vision in one of her eyes, and is partially blind in the other. The Tribunal accepted the evidence of family members in the UK that they are juggling their own lives and commitments to ensure that someone is with her at all times.

9. Turning to the requirements of E-ECDR 2.5 the Tribunal then says this:

25. ... I am satisfied that the Appellants cannot provide the care needed in the case of each to each other without long term assistance. If returned to India as a couple Mrs Kaur Bal is incapable of providing the care Mr Singh needs, and vice-versa. I accept the evidence that they live 40 km from the nearest hospital, and that the village in which they live has only nurses. They said with a degree of sadness that even the neighbours do not assist.

26. As I have found they plainly need support I must therefore consider whether they would be unable to obtain the required level of care in India from another sources, taking into account the practical or financial help the Sponsor could provide for that care. In this respect I have no doubt that the Sponsor would wish to do whatever she could do to assist her parents, and she accepted that she had provided some assistance in the past. However at that time the financial assistance was not directed to intensive support and care, and her visits to India were essentially to see her elderly parents who could then still manage their own care needs. That position, I find, has changed. It is clear that the Sponsor and her husband have a reasonable income as well as cash savings. The Appellants have some form of pension themselves. Although there is plainly a cost involved in maintaining the Appellants in the UK, and that India may well be cheaper in many regards, I accept that additional costs in feeding and caring for the Appellant in the same household as the Sponsor are likely to be less than trying to support two households with care being provided in the Appellants own home or in supporting a place in a care home for them both. Whilst there may well then be cost issues in relation to the provision of care in India, the aspect of affordability has really not been investigated by the Appellants. Given the lack of evidence on this point I find it difficult to be satisfied that care would be unaffordable. However, I must also consider whether the required level of care is available and whether there is a person who can reasonable provide it.

27. In considering this I am satisfied that care would need to be intensive and essentially, because of toileting and feeding needs, likely to involve someone within easy reach if not permanently present around the clock. I am also mindful of the cultural issues which arise as to those who might be thought suitable to provide such care. The Sponsor made it clear, expressing emotion as she did, of not only the expectation that children should look after their parents but also her desire to do so. She also spoke of the reluctance of her mother allowing help to even her daughter to assist her at first, due to matters of modesty and a shame at needing help. There was also reference to the shame which would be brought on the family if the Appellants were not looked after by family.

28. I have also been mindful of what was said in Britcits v SSHD [2017] EWCA Civ 368 namely that 'the provision of care in the home country must be reasonable both from the perspective of the provider and the perspective of the applicant, and the standard of such care must be what is required for that particular applicant. It is possible that insufficient attention has been paid in the past to these considerations, which focus on what care is both necessary and reasonable for the applicant to receive in their home country. Those considerations include issues as to the accessibility and geographical location of the provision of care and the standard of care. They are capable of embracing emotional and psychological requirements verified by expert medical evidence. What is reasonable is, of course, to be objectively assessed.'

29. As to whether care could be reasonably provided by others, Ms Yoxall referred to the CPIN India: Medical and healthcare provision October 2020 and specifically to the section on care for the elderly. She specifically referenced that there was legislation which placed a legal obligation on all adult children to provide for their elderly parents.

30. Considering then if there would be family who could assist. Firstly, I find it is unrealistic and unreasonably to expect the Sponsor to in some way relocate to India to look after her parents. She is a British citizen, and has not only a husband here but also has British citizen children who are being educated in the UK, as well as a business which provides her income. The Appellant's son does not live in India, and lives between the UK and Canada. Again I find it unrealistic that he would be able to himself provide the required care in India. The Appellants do have another daughter in India. However, there is medical evidence which deals with the medical situation in relation to this daughter and her husband. Although Ms Yoxall cross examined on how this medical evidence had been obtained in this regard, I am satisfied that the answers were reasonable, namely that it was simply obtained by the daughter in India from the respective medical sources and emailed. There appears to be nothing on the face of the two letters provided which cause concern. One letter refers to the Appellants' daughter having been treated since July 2021 for a

heart condition (ie. DCM), and I received evidence that she had recently had a pacemaker fitted. Treatment is ongoing. The other letter refers to the husband having had a below knee amputation due to gangrene as a complication of his diabetes. I accept these letters. In the circumstances, and notwithstanding the legislation in India, whilst she may indeed wish and even try to do so, given her own problems and those of her husband, I accept that the amount and nature of care required by the Appellants or either of them is such that it could not reasonably be provided by the Appellants' daughter in India.

31. It is perhaps the cultural and legal norms which prescribe that families must assist which mean, as the CPIN in my view actually confirms, that residential care, which in reality the Appellants I find would most likely need, is extremely limited, indeed scant. Although it is said there is an emergence of care homes, the CPIN quotes that although there is little information their number is estimated to be 'more than 1000.' If 1000 is right (and no clear evidence of any number substantially greater has been given) and noting that the population of India was agreed by both parties to be around 1.4 billion, there would only be one home for each 1.4 million (albeit of all and not all elderly) of the population. Regulations only say that local authorities may establish such homes with a capacity of a minimum of 150 (emphasis added). Of course in both of the Appellant's cases as well as residential care, specific medical care would also be needed. The CPIN speaks of 'no specialized training in geriatrics in most medical schools,' with units being in urban areas and highly expensive. There is also reference to NGOs providing some care, although these are said to be 'urban based, expensive and focused on tertiary as opposed to primary care.' I consider it a reasonable inference to draw that any movement to a residential facility would, because of the nature of the village where they presently live, necessitate moving locations from that home area (where they have lived for most of their lives) and involve the upset of then being looked after by complete strangers, as well as the loss of the companionship, emotional support and consistent presence of their own family, which Dr Bashir credits as being of significance and importance to them, even if such a place could actually be found which, on the evidence, I consider to be a remote prospect at best.

32. For the avoidance of doubt I should say that I have read Dr Bashir's report where it purports to deal with the social care system in India. However, these comments are perhaps ones to be expected from a country expert, which there is no indication he is and there is no supporting any source material, with lots of information clearly coming from matters told to him rather than any clear independent knowledge. In the circumstances I consider this strays outside Dr Bashir's expertise. Ms Yoxall considers I should attach little weight to this, a view with which I agree. I take a similar view in respect of the report of Mr Kumar who says that he is an advocate practising in Human rights, criminal and civil rights cases and has 15 years experience as an advocate practising in various types of cases in India. It seems to

me a little odd that he has provided his 'independent opinion in the matter of Mr Kulwant Singh Bal.' He does touch upon questions of Indian law but, it seems to me, trespasses upon the decisions which are for this Tribunal, with little source material in support. In addition a large part of the report appears to be him merely reciting what must have been told to him. In reality, this report amounts to a lawyer simply stating what he thinks of certain aspects of the system and culture, from the view of one lawyer and nothing more. Again, I can afford this only the most minimal of weight.

33. Notwithstanding my views as to the expert evidence on this point, drawing all the evidence together, I am however satisfied that it is more likely than not that the Appellants both individually meet the requirements of 2.5, in that the reality of the situation is that, even with the help of the Sponsor, they would not be able to obtain the level of care required for them or either of them, because it would not be available and there is no one who could reasonably provide it.

34. I therefore find that the Rules, as required to be met by the Respondent in this case, are in fact so met. Given the concessions made in such an event, the appeals of both of the Appellants must succeed, as otherwise the Respondent refusal of their respective claims would be a breach of their Article 8 human rights. In these circumstances it is unnecessary for me to consider the case on the basis of other Rules which may be applicable or the other grounds asserted.

10. I have set that part of the decision in full in order to answer the first of the Secretary of State's complaints in this appeal: it is said that the First-tier Tribunal failed to adequately reason its conclusions. As the foregoing illustrates, this is simply unarguable. The Tribunal conducted a nuanced and detailed analysis of the evidence before it, and reached a balanced and rational decision. In particular I reject the suggestion that the Tribunal did not direct its mind to whether remaining relatives in India could provide the required level of care.
11. The real substance of the appeal is however this. That in reaching its decision the Tribunal appears to have overlooked the requirements of Appendix FM-SE to the effect that in order to meet the requirements of Appendix FM E-ECDR 2.5 the applicant must provide the following:

35. Independent evidence that the applicant is unable, even with the practical and financial help of the sponsor in the UK, to obtain the required level of care in the country where they are living should be from:

- (a) a central or local health authority;
- (b) a local authority; or
- (c) a doctor or other health professional

12. This was not a matter raised in the refusal letter. Nor was it raised at the hearing. As Mr Marfat rightly says, it appears that there is good reason for that. Paragraph 35 of Appendix FM-SE is concerned with applications made from

abroad, where it makes sense that the evidence about the individual's circumstances, in that place abroad, would come from particular authorities in that place. Here the applications were made, with the express consent of the Secretary of State, from the UK. That is no doubt why the provision was not cited or relied upon, that is until now. In Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC) the President Mr Justice Dove held as follows (headnote paragraphs 4 and 6):

It is a misconception that it is sufficient for a party to be silent upon, or not make an express consideration as to, an issue for a burden to then be placed upon a judge to consider all potential issues that may favourably arise, even if not expressly relied upon. The reformed appeal procedures that now operate in the First-tier Tribunal have been established to ensure that a judge is not required to trawl through the papers to identify what issues are to be addressed. The task of a judge is to deal with the issues that the parties have identified.

Unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.

13. This was certainly not a *Robinson* obvious point – I have never heard of this provision before. I am further satisfied, for the reasons Mr Marfat suggests, that there was a specific reason why it was not relied upon in these appeals by the Secretary of State. It cannot be relied upon now.

Decisions

14. The decision of the First-tier Tribunal is upheld.
15. There are no orders for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
22nd November 2023

