



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003915
First-tier Tribunal Nos:
HU/57889/2022
IA/11041/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE METZER

Between

MR HARSHADBHAI JETHALAL SHAH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel instructed by London Imperial Immigration Services Ltd

For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 18 June 2024

DECISION AND REASONS

1. This matter is listed for a re-make hearing following my decision of 6 November 2023 promulgated on 14 December 2023, in which I allowed the appellant's appeal on the basis of an error of law which I found established in respect of the failure of First-tier Tribunal Judge Zahed ("the Judge") who when dismissing the appeal under the adult dependent relative Rules and under Article 8 outside the Immigration Rules, made a material error of law in that he failed to undertake any or any sufficient balancing exercise, despite referring to Article 8 and the hardship placed upon the appellant and paragraph 117B of the 2002 Act. The parties were represented by the same representatives who attend today. It was accepted at paragraph 8 of my Decision that Mr Parvar conceded that no balancing exercise was carried out. In the circumstances although the Judge did make specific reference to the test required I found there was an error of law as

he did not carry out the necessary balancing exercise. I also found that the Judge was duty-bound to explain the reasons why he found no exceptional circumstances and it would not be sufficient to find this may be implicit in the factual findings at paragraph 16 and 17 and accordingly material errors of law were made and the decision could not stand. I indicated that having heard submissions from both parties in which no challenge was made to anything contained within paragraphs 1 to 26 of the Decision, the material contained within those paragraphs remained and that the matter would be retained for this re-making on the question of proportionality.

2. I gave permission to the appellant to adduce further evidence from the appellant and the sponsor within 28 days and gave permission for attendance at the retained hearing.
3. I note that there is no witness statement from the appellant, either in relation to the original hearing before the Judge, or indeed for the present appeal, despite my permission being provided for such evidence to be adduced. I am informed that the appellant is in the United Kingdom but there is no such witness statement. That does seem surprising to me particularly as I accept the evidence of the sponsor, his son, Mr Rahul Kumar Shah, who sought to produce a hard copy, that there is such a statement in existence but it was not included. I also accept the evidence adduced in re-examination that nothing material turns on the appellant's statement as it really repeats matters contained within the evidence of the sponsor and the appellant's two other children, his daughters Mrs Nehabahen Shah and Mrs Mihira Shah, who provided witness statements both in the original bundle and in a supplementary bundle for the purposes of this rehearing. I nonetheless record that a witness statement from the appellant, especially as it had been produced, should have been included in the witness bundle but I make it clear I do not hold that absence against the appellant.
4. As indicated, the sole question for determination is whether or not in carrying out the necessary balancing exercise, the appellant's rights under Article 8 of the European Convention of Human Rights, specifically his right to family life, would be breached were he not to be permitted to remain here, or indeed return to the United Kingdom.
5. The factual matters are not in dispute and can be summarised as follows. The appellant is a 79-year old widower whose wife died on 23 September 2021 after which the appellant's own health has got progressively worse, he has become mentally depressed and physically incapacitated to a substantial degree as is clear from unchallenged medical evidence from the Maitri Hospital in India and medical documents from the Jethwa Eye Hospital and from the haematology department where the appellant has been treated.
6. The appellant's son and sponsor, Rahul Shah, earns in excess of £175,000 and the appellant is financially dependent upon him. The sponsor is in constant daily contact with the appellant and his sisters and I accept as it was unchallenged, that it was a cultural norm for a person in the position of the appellant to be cared for and looked after by the son if at all possible. The sponsor has travelled many times to India in order to make sure the appellant is well cared for and dependency between the father and son has markedly increased after the death of the appellant's wife and the sponsor's mother in September 2021. There are other factual matters contained within the original determination of the Judge which it is unnecessary to deal with at length, save to note that in the original

appeal there were witness statements from not just the sponsor, but also the appellant's two daughters, as well as medical evidence.. There is also a reference to the appellant having a walking stick at home that he uses but did not at that stage use a wheelchair. The appellant lives in a three bedroom flat in India in Anand, Gujarat in India and it would appear that the sponsor's sisters spend time alternatively with their father. The evidence was that one sister lives 18 kilometres from the appellant, the other 50 kilometres from the appellant. In oral evidence, the sponsor indicated that one sister was more like 30 kilometres away- suffice it to say that is some, but not a huge distance, albeit travel is probably not very convenient. It was noted at paragraph 17 of the Decision that the sponsor could get a 24 hour carer to look after the appellant if he did not want the appellant to be taken care of in a care home in India and that the appellant has many options of obtaining support he needs for the medical conditions of mobility issues he is suffering from at the moment. There was oral evidence before me in relation to updating of the physical and mental circumstances of the appellant and I accept that there has been some deterioration. There was discussion particularly in cross-examination about whether the appellant could be in a care home and the evidence from the sponsor was that that would be culturally not something that would be desired in relation to the appellant. It is clear that he does not have a 24 hour carer. Noting that the sponsor has travelled many times to India, and that the appellant has spent quite a long time in the United Kingdom on visit visas, that the appellant is well cared for both in India by his daughters and in this country by the sponsor and his family. I note and agree with the previous finding that the appellant is financially dependent on the sponsor and there is evidence of regular money transfers to support that. I also accept the previous evidence that there is daily communication by video call and on chat platforms when the sponsor is not with the appellant and that dependency is markedly increased.

7. I wish to state at the outset that there was no challenge to any credibility issues. I was extremely impressed by the sponsor who is clearly a very dutiful son and an impressive man and I wish to make that very clear that it is no part of my findings to suggest that he is not doing everything within his power to assist the appellant.
8. The necessary test which I have to apply is summarised at paragraph 4 of the Decision of the Judge, namely when one is considering an application under Article 8 outside the Immigration Rules is whether there are exceptional circumstances to allow the appeal because it would lead to unjustifiably harsh consequences for the appellant or his family in relation to his Article 8 family life rights. I have been taken to **Mobeen v Secretary of State for the Home Department [2021] EWCA Civ 886** in which Lady Justice Carr (as she then was) held that failure to meet the adult dependent Rule "will be a powerful factor in any Article 8 assessment of proportionality". It is important to note at the outset that there is an important factual difference between the appellant in **Mobeen** and the present case because ,as was described at paragraph 70 of **Mobeen**, the appellant in that case was presenting his physician with a "fait accompli" in circumstances where he did not have leave to remain and indeed there being a period of around nearly two years between the expiry of her visitor's visa in July 2015 and her making the present application. That feature is wholly absent in the appellant's case who has at all times been lawfully within the United Kingdom, has left as and when he needs to under the terms of his visit visas. Nonetheless, there is considerable guidance in relation to that decision which I have been asked by both parties really to consider and I do that with

care. I note particularly what is contained at paragraphs 1, 48, 50, 68, 70, 75 and 78 of that judgment.

9. As I indicated the question of what amounts to exceptional circumstances is also referred to in that case when it was made clear applying the decision in **Agyarko [Judge Metzger to insert full citation]**, namely circumstances in which a refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.
10. The test to apply is well-known and of course featured in the leading cases of **Razgar [2004] UKHL 27** and **Huang [2007] UKHL 11**, namely applying the five-limbed test taking into account the respondent's legitimate interest in immigration control and Section 117B of the Immigration Rules 2002.
11. I apply all those criteria in relation to the balancing exercise which is necessary to carry out in determining the question of proportionality. In the appellant's favour are the following. He is very dependent upon the sponsor; he has at all times lawfully been in the United Kingdom and there is undoubtedly a close relationship between the sponsor and his family and the appellant as well as recognising that the appellant unfortunately has conditions which are becoming increasingly difficult both physically and mentally. I also take into account that his daughters who presently look after him have their own obligations to other family and it is taking its toll on them and I accept that there is some cultural indication that the daughters' in-laws take priority over the appellant.
12. However, it is also necessary to carry out in determining the balancing exercise the fact that the appellant does have two daughters in India who have already as with the sponsor carried out their duties very dutifully and impressively as of course the sponsor has done when the appellant has been in the United Kingdom and/or when he has visited him. The appellant does own his own property, he does not require a full-time carer and is not in a care home, and it needs to be borne in mind that wherever the balance lies there is burdens placed upon the families now. I of course accept the sponsor does it with a great sense of care and respect and of course I accept that but the point made in relation to the appellant's daughters and the burdens upon them would be equally of course the position in relation to the sponsor and his family were the appellant to be in the United Kingdom. I also note that the appellant has spent considerable periods of time perfectly lawfully in the United Kingdom since the loss of his wife. I note, and I think these dates are correct, from 2 November 2021 to 25 April 2022; from 31 May 2022 to 11 November 2022; from 8 June 2023 to 5 August 2023, and from February 2024 to date when he returns next month in July. In addition, from the evidence that I have read and accept the sponsor has spent considerable time also visiting the appellant in India and spending time looking after him there. There are clearly funds available to ensure both arrangements will continue in terms of the appellant assuming his health permits it being able to continue to visit the United Kingdom and for the sponsor and/or his family to spend time and look after the appellant in India to lessen the burden upon the sponsor's sisters.
13. In determining this matter I note the observation of Lord Justice Underhill at paragraph 78 of **Mobeen** when there is reference made to sympathy with the appellant's wish, as indeed I find in the present case now, that in relation to that appellant she should be able to live permanently in the United Kingdom now that

she is widowed. In that case all her children are settled in the United Kingdom but then went on to say and I quote:

“But I am afraid that that is not the test. When people from overseas choose to make a life in the United Kingdom they are not entitled to expect that they will later be able to bring their parents to join them. The Government has decided as a matter of considered policy that that right should generally be restricted to cases satisfying the strict criteria set out in the sections denoted EC-DR and ILR-DR under Appendix FM to the Immigration Rules; and in *Britcits* this Court has found that policy to be legitimate. The Appellant did not apply under those rules, no doubt because she could not on the evidence have satisfied their requirements. That is not in itself conclusive that the refusal of leave to remain would be proportionate; but, as Lady Justice Carr explains, it is highly material, and like her I can see no error of law in the Judge’s evaluation”.

14. Applying the relevant criteria in terms of exceptionality outside the Immigration Rules and taking into account the appellant’s Article 8 (2) rights accepting that there is a prima facie article 8 claim, and the respondent’s legitimate interest in immigration control, I do not find it would be unjustifiably harsh for the appellant not to remain in the United Kingdom or to return to India and, although I make clear again that I was very impressed with the sponsor’s evidence,
15. I therefore find that this appeal under Article 8 of the European Convention of Human Rights in respect of the appellant’s family life is dismissed.

Anthony Metzger KC

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 June 2024