IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004015

First-tier Tribunal No: HU/58631/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11th of September 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE HOFFMAN
UPPER TRIBUNAL JUDGE RASTOGI

Between

Omana Peter
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms T. Srindran, Counsel, instructed by Qualified Legal Solicitors
For the Respondent: Ms Z. Young, Senior Home Office Presenting Officer

Heard (remotely) at Field House on 8 August 2024

DECISION AND REASONS

1. On 25 February 2020, the appellant, a citizen of India born in 1952, arrived in the United Kingdom pursuant to her 10 year multi-entry visitor that had been issued in 2013. She was to spend time with her son, daughter-in-law, and her granddaughter, J, who was born in January 2019, as she had done many times previously. Within a few weeks, the United Kingdom was subject to COVID–19 restrictions and international travel became very difficult. The Secretary of State granted the appellant so-called "exceptional assurances" until 4 October 2021. Unfortunately, in July 2021 the appellant had a heart attack and had to have a pacemaker fitted. She received other medical treatment. She experiences a number of health conditions including severe asthma, hypertension, hyperthyroidism, cancer and anxiety and depression. She now does not want to return to India because she considers she will not receive the care and support that she receives from her family in this country in India.

The human rights claim and its refusal

2. On 3 October 2021, the appellant made a human rights claim to the Secretary of State for leave to remain on the basis of her private life in light of her deteriorating situation, and in respect of her family life. She claimed to have no remaining links or family in India, and to need the support and assistance of her son and daughter-in-law to care for her in all aspects of her daily living, in light of her health conditions and the prospective isolation she would face in India.

3. By a decision dated 2 November 2022, the Secretary of State refused the appellant's human rights claim, concluding that she would not face "very significant obstacles" to her integration in India, and there were no exceptional circumstances such that it would be unjustifiably harsh to expect her to return. Her health conditions were not such that it was necessary to grant leave outside the rules. The appellant's family relationships were nothing more than the usual bonds of emotional ties experienced between adult family members. She did not have parental responsibility for J. She would be returning to a country where she had resided for the majority of her life. She would be well placed to settle back into life in India.

The appeal to the First-tier Tribunal and the appeal to the Upper Tribunal

4. The appellant appealed to the First-tier Tribunal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Her appeal was heard remotely on 25 July 2023 by First-tier Tribunal Judge Hawden-Beal ("the judge"). By a decision promulgated on 2 August 2023, the judge dismissed the appeal. The appellant now appeals against the decision of the judge with the permission of Upper Tribunal Judge Sheridan, which was sought and obtained on the basis that the judge failed adequately to address the best interests of the appellant's granddaughter, J, and the relationship the appellant enjoyed with her.

5. Ms Srindran submitted a skeleton argument dated 8 August 2024. It is not restricted to the original grounds of appeal, and purports to be an application for permission to appeal to advance wholly new grounds of challenge. We address this issue below.

The decision of the First-tier Tribunal

6. The judge found that the appellant would not face very significant obstacles to her integration in India. Although she disagreed with some aspects of the Secretary of State's reasoning, the judge found (para. 47) that there was no evidence that paid-for help could not be arranged in India, and that with appropriate assistance from such care, the appellant would be able to participate in Indian society. Her heart problems had begun some years previously (there were GP notes from 2014), and there was no evidence that appropriate care would not be available in India. Appropriate facilities would, the judge found at para. 50, be available in Kerala, the appellant's home State.

7. As to whether the decision was proportionate for the purposes of Article 8(2) of the European Convention on Human Rights ("the ECHR"), the judge said, at para. 54:

> "I have considered her family life under section 17(B)(4) [*sic*] and have borne in mind that the appellant was well aware of the precarious nature of her status in the UK, given her frequent previous visits to the UK and the fact that until 2020, she returned to India in full compliance with her visa conditions and that compliance in 2020 was prevented by the pandemic... I am satisfied that her family life

> was established here in the UK when she was here lawfully and thus some weights can be attached to that fact. ”

8. At para. 55, the judge addressed section 117B(5) of the 2002 Act, which provides that “little weight should be given to a private life established by a person at a time when the person's immigration status is precarious”. Since the appellant’s private life had been established while she was here legally, albeit precariously, the judge placed little weight upon it.

9. The judge accepted that the appellant and her son and his family enjoyed “family life” together. Having referred at para. 57 to *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, she found that:

> “…there is clear dependency by the appellant upon her son not just in emotional and financial matters but also in practical matters. She requires his and his wife’s help for her daily activities and importantly her medical conditions. The support which they give to her is clearly committed, effective and very real.”

10. The judge noted that the appellant’s health had deteriorated further since she had initially made the human rights claim to the Secretary of State. However, drawing on the Secretary of State’s guidance concerning exceptional circumstances, a period of hardship while a person adjusts to their new surroundings was to be expected.

11. As for the appellant’s mental health conditions, the judge said that she was not taking any medication at the present time, nor was she undergoing any therapeutic treatment. The judge referred to evidence that there were cancer treatment centres in India, as well as mental health facilities. At para. 63, the judge said:

> “I do not doubt for a moment that the appellant does not want to go back to India with her poor health or that her son and his family would dearly like her to stay where she can be cared for by them but in order to do that, they have to show that there is no care available to her in India and that the treatment which she is receiving here principally for her cancer and her heart condition but also other conditions is not available there or not accessible to her and they have unfortunately not demonstrated that. Sending the appellant back to a country which cannot treat her conditions or where she cannot access such treatment will have unjustifiably harsh consequences for her and her family, but that is not the case here and not liking the idea of anyone but family looking after the appellant or not trusting outside carers (as had been the appellant’s case) is not an exceptional circumstance which will cause unjustifiably harsh consequences for the appellant and her family.”

12. At para. 64 the judge addressed *AM*. She accepted that the appellant would, without treatment, suffer an irreversible decline in her health leading to a reduction in her life expectancy. However, that was not a fate the appellant faced. Treatment was available in India for her conditions. She added:

> “[the appellant] may have to pay for such treatment, but the sponsor and his wife have said that if the appellant has to go back, they will continue to support her. Therefore, there is no breach of her article 3 rights.”

13. The judge's global conclusion was at para. 65. There was no evidence that paid for care would not be available to her in India. Her principal conditions could be treated in India in facilities which "are accessible to her". That being so, the judge said there was no evidence before her of any exceptional circumstances or of any unjustifiably harsh consequences resulting from the Secretary of State's decision. The appellant had not established that the public interest considerations which justified maintaining the decision had been outweighed by the matters relied upon by the appellant. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

14. As originally pleaded, there were two grounds of appeal:

    a. First, the judge erred by applying the "little weight" family life provisions contained in section 117B(4) of the 2002 Act to the appellant. Those provisions were not engaged by the appellant's relationship with her family since she was not a "qualifying partner" for the purposes of section 117B(4), and, in any event, she had been lawfully resident at all times.

    b. Secondly, the judge failed adequately to address the appellant's broader family unit when concluding that her removal would be proportionate, and did not apply the five-stage *Razgar* [2004] UKHL 27 process to the inevitable severing of her family life that her removal would entail. Pursuant to *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278 (IAC) at para. 21, family life could not be maintained through correspondence.

15. Ms Srindran's skeleton argument sought to introduce a number of reformulated grounds of appeal. The reformulated grounds are not summarised as succinct propositions, but rather feature as a number of criticisms set out in narrative form, in the course of discussing the decision of the judge.

16. On a fair reading, to the extent they do not address matters already covered by the existing grounds of appeal, the reformulated grounds are as follows (numbered sequentially):

    a. Thirdly, the judge failed to address the emotional and psychological support the appellant receives from her family in the United Kingdom.

    b. Fourthly, the judge failed properly to apply the guidance given by this tribunal in *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 131 (IAC), in particular in relation to the absence of a support network in India to help the appellant access the treatment that is available, the prospective distance of the treatment from the appellant's daughter-in-law's family in India, and the cost of obtaining such treatment and care.

17. As we indicated at the hearing, it is less than satisfactory for the appellant, through her legal representatives, to seek to rely on wide-ranging additional grounds of appeal at the door of the court. Other than Ms Srindran explaining that she had only recently been instructed, there was no good reason for this significant lack of procedural rigour.

18. Procedural rigour is important in this jurisdiction. However, Ms Young accepted that she would not be prejudiced by Ms Srindran's reliance on the reformulated grounds, and was in a position to respond to them. We decided that it was in the interests of justice to permit Ms Srindran to rely on the reformulated grounds.

The law: general principles

19. As constituted in these proceedings, the jurisdiction of the First-tier Tribunal was to determine whether the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998: see section 84(1)(c) of the 2002 Act. Articles 3 (prohibition of torture) and 8 (private and family life) are relevant in this appeal.

20. An appeal to the Upper Tribunal lies where the decision of the First-tier Tribunal involved the making of an error of law: see section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

21. At para. 45 of *Zedra Fiduciary Services (UK) Ltd v HM Attorney General* [2023] EWCA Civ 1332, the Court of Appeal recently endorsed what was said in *Re Sprintroom Ltd* [2019] EWCA Civ 932 at para. 76 concerning appellate scrutiny of first instance "evaluative" decisions:

> "…on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'."

Ground 1: the judge did not err when ascribing weight to the appellant's family life

22. Section 117B of the 2002 Act contains public interest considerations to which a court or tribunal must have regard when considering whether a person's removal would be proportionate for the purposes of Article 8(2) ECHR. Section 117B(4) to (6) provides:

> "(4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

23. The term "qualifying partner" is defined in section 117D(1) to mean a British citizen or someone who is settled in the UK.

24. We agree that section 117B(4) was not engaged in these proceedings. The appellant, a widow, does not have a "qualifying partner"; her son and daughter-in-law are not captured by the concept. Nor has she ever been here unlawfully; she entered the United Kingdom lawfully as a visitor, was given exceptional

assurances until late 2021, and applied for further leave to remain before the expiry of her final exceptional assurance. To that limited extent, this ground is made out.

25. However, the appellant's relationships with her UK-based family would, taken at their highest, only ever be capable of attracting little weight. The jurisprudence of the European Court of Human Rights is clear that a non-settled migrant's private and family life ordinarily attracts little weight. The judge quoted from *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at para. 19 which underlines the little weight that family life developed during a precarious stay attracts. We have not been taken to any authority which states otherwise. The considerations contained in section 117B are just that: considerations, to which regard must be had. They are not a complete code to the exclusion of all other factors. The judge applied the spirit of section 117B(4) to the appellant's circumstances, and did so in a way which reflected the underlying requirements of the ECHR, and a recent authoritative judgment of the Supreme Court, *Agyarko*.

26. The appellant entered on a visitor's visa which, by definition, was only in the expectation of that being a limited (albeit repeated) visit. She had no expectation of settlement, and would have travelled to the United Kingdom in the full expectation that she would, as she had previously, return to India. Of course, the pandemic and her own health intervened, and her plans were surpassed. But the impact of those developments was a question of weight. The judge was entitled to conclude that family life developed in precarious circumstances attracts little weight. That was, in our judgment, entirely consistent with the underlying requirements of the ECHR itself, and *Agyarko*.

27. Moreover, the judge correctly applied section 117B(5) to the appellant's private life; her immigration status was precarious, and the private life she had developed in the United Kingdom therefore attracted little weight.

28. This ground is without merit. It relies on the premise that the judge's reasoned analysis was in error because it failed to ascribe determinative significance to factors the judge was entitled to consider attracted only little weight. Properly understood, section 117B imposed no such obligations on the judge.

Ground 2: no error on account of the best interests of the appellant's granddaughter, or the wider circumstances of her UK-based family

29. Judge Sheridan granted permission to appeal on the basis that it was arguable that the appellant's granddaughter's best interests were not taken into consideration adequately.

30. There are a number of facets to this ground. None of them reveals an error of law.

31. Taking a step back, the judge plainly had in mind the overall family situation of the appellant, her son, daughter-in-law and granddaughter. She was fully aware of the strong emotional desire on the part of all family members concerned for the appellant to remain in the United Kingdom: see para. 63, quoted above. The judge was sitting as an expert judge in a specialist tribunal. She would have taken this factor into consideration. Moreover, in any event, for the reasons set out above the appellant's UK-based family life attracts little weight on account of the precarious nature of the appellant's immigration status at all relevant times. In reality, that is a complete answer to this ground.

32. There are other reasons why this ground lacks merit. Pursuant to section 117B(6) of the 2002 Act, Parliament has concluded that two criteria should be

satisfied in order to defeat the public interest in the removal of an individual who does not otherwise enjoy a lawful basis to stay on grounds relating to a child.

33. First, there must be a genuine and subsisting parental relationship with a qualifying child. J is a "qualifying child" as defined in section 117D(1), but there was no evidence before the judge that the appellant enjoys a parental relationship with her. The appellant may well have a close bond with J, and may well be a close and loving grandmother. But that is not a *parental* relationship. She has not stepped into the shoes of J's parents. On the contrary, her son and daughter-in-law perform a full role in that respect. The appellant is J's grandmother, not her mother.

34. Secondly, even where there is a genuine and subsisting *parental* relationship between an appellant and a British child, it is only where it is not "reasonable" to expect the child to leave the United Kingdom that the public interest does not require the individual's removal. That is an assessment that is to be performed by reference to the best interests of J, which itself must be determined by reference to the "real world context" of the child and her family unit (see *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53). Ms Srindran accepted that there had been no evidence before the judge which contended that it would be unreasonable for J to be expected to leave the United Kingdom in any event, and that this point was not litigated in the way Ms Srindran now seeks to pursue the point.

35. We are not persuaded that the prospect of the family having to make regular visits to India would be an interference with the family life of the appellant's son, daughter-in-law and J such that it was an error for the judge to reach the conclusion she did. J's parents were born in Kerala. While they are now British citizens, the family unit as a whole is well-placed to visit India, in particular Kerala. The appellant does not speak English, meaning they must speak an Indian language, most likely Malayalam at home. We make these observations not because we are reaching a finding that it would be reasonable to expect J and her parents to relocate to India, but rather to demonstrate that nothing in the approach of the judge was inconsistent with the statutory regime in so far as it related to J, even taking her best interests at their highest.

36. Finally, we address the criticism that the judge did not refer to the report of Angeline Seymour, an independent social worker, dated 13 February 2023. There is no merit to this criticism.

37. First, the judge did refer to the report at para. 29, summarising its conclusions that the appellant and J enjoyed a very strong bond with each other. The judge accepted the strength of the bond between the appellant and J. Nothing turns on the fact she did not refer expressly to the remaining provisions of report in the course of reaching this finding later in her decision.

38. Secondly, it is not necessary for a judge expressly to refer to all evidence and submissions made. See *Volpi v Volpi* [2022] EWCA Civ 464 at para. 2(iii):

> "An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it."

39. Thirdly, it is difficult to see how the detailed consideration of the report would have been capable of meriting a different overall conclusion. The report itself is

14 pages long. The substantive analysis addresses the physical and mental health required by the appellant, and her caring needs (although it is not immediately apparent how Ms Seymour was qualified to address those matters), as well as the appellant's relationship with J. The report concludes by recommending that it would be in the appellant's best interests for her to be granted leave to remain with her family in the United Kingdom. That is a surprising conclusion and not one which would ordinarily fall within the remit of an independent social worker. In relation to the appellant's claimed relationship with her family, we have already addressed why the judge was entitled to attach little weight to the family life aspect of her appeal. Other than assertions about the perceived importance to the appellant of being able to continue to reside in the United Kingdom with her family, which go primarily to the appellant's private life and Article 3 claims, the report adopted a relatively light touch approach to the substance of the appellant's life with her UK-based family. Again, as we have observed above, it is clear from para. 63 of the judge's decision that she had the broader needs of the family unit family in mind when reaching a conclusion.

40. Fourthly, nothing in *LD (Article 8 – best interests of child) Zimbabwe* calls for different conclusion. It is trite that modern means of communication are no substitute for face-to-face family life. The question for our consideration is whether the judge was entitled to ascribe little weight to the appellant's family life, and the ensuing rupture of it that would inevitably follow the appellant's removal to India. For the reasons we have given above, she was so entitled.

41. Finally, the criticism that the judge conducted the *Razgar* analysis by express reference to the appellant's private life rather than her family life is a criticism of form over substance. The judge had extensive regard to the appellant's family life and the proportionality of her prospective removal, for the purposes of Article 8(2) ECHR. There is no merit to this criticism.

42. This ground of appeal is dismissed.

Ground 3: adequate assessment of the emotional and psychological support received by the appellant from her sons and family

43. Properly understood, this reformulated ground of appeal is a different facet of ground 2. For the reasons already given, the family life established by the appellant pursuant to her residence in the United Kingdom attracted little weight. The judge accepted that the appellant's emotional dependence on her son and daughter-in-law engaged Article 8 (1) of the ECHR. She took that consideration into account when, in reliance upon *Agyarko*, she concluded that the family life enjoyed by the appellant attracted little weight. That analysis was open to the judge.

44. Ms Srindran also submitted that the judge reached contradictory findings. At paras 44 and 45, the judge observed that the Secretary of State's guidance concerning an individual's integration upon their return says that a returnee can be expected to look to friends and family for assistance with re-establishing themselves, but noted that that guidance does not extend to an expectation that friends and family would be expected to provide personal care for the individual concerned. That, submitted Ms Srindran, was inconsistent with the judge's findings elsewhere that the appellant's son and daughter-in-law would provide remitted support for her. It was also inconsistent, submitted Ms Srindran, with the logical conclusion of the judge's overall approach, which was that the appellant's son and daughter-in-law would have to travel to India intermittently in order to care for her, even if they did not relocate.

45. This submission is without merit for two reasons. First, the guidance in question was to the Secretary of State's officials, not to independent judges of the First-tier Tribunal. Secondly and in any event, there was no inconsistency in the judge's findings. The judge did not find that the appellant's extended family members and acquaintances in India would provide her immediate personal support. Rather, the judge found that the appellant's son, and her daughter-in-law, with whom the judge accepted there was Article 8 family life, would continue to provide financial support for the appellant, as they themselves had accepted in their oral evidence (see for example, para. 17). The judge also summarised the appellant's son's evidence at para. 64: "if the appellant has to go back, they will continue to support her". There is nothing before us to demonstrate that that was not the evidence of the appellant's son or daughter in law, nor that that finding was otherwise not open to the judge. Although the appellant's son's evidence had been that the quality of care available in India was poor and carers could not be trusted, as the judge observed at para. 47, there was no evidence of that before her. On the judge's findings, the appellant's son would be able to fund the necessary medical treatment in India.

46. That was a finding that was rationally open to the judge. This criticism is without merit.

Ground 4: analysis of the appellant's Article 3 health claim open to her

47. There are a number of facets to this ground. We take them in turn.

48. First, it is said that the judge erred in relation to the availability of medical treatment and personal care in India. We have already dealt with this criticism under ground 3, above.

49. Secondly, it is said that the judge failed adequately to engage with the medical evidence concerning the appellant's inability to fly. The judge addressed this at para. 61, noting that the difficulties lay in long haul flights, and that there was no evidence pertaining to short haul flights. We also note that the medical report of Professor M. R. Graham, which concluded at part 9 that the appellant was not fit to fly and upon which this reformulated ground of appeal is based, did not address the prospect of a medically assisted flight, arranged by the Secretary of State. A human rights claim based on the process of removal, rather than the destination of removal itself, would only be able to succeed where the claimant demonstrates that, despite the Secretary of State taking the necessary medically advised steps to effect removal, the journey itself would entail a real risk of deterioration or some other ill-treatment. That was not how the appellant's case was put before the First-tier Tribunal. The focus of Professor Graham's report (see para. 9.3) was the appellant's prospective difficulties arising from the oxygen concentration in the cabin on what we assume would be a non-medically assisted commercial flight. The report does not address whether the provision of oxygen directly through appropriate breathing apparatus, or other levels of medical support, would alleviate the concerns set out in that part of the report. There is no merit to this facet of this reformulated ground.

Conclusion

50. Drawing this analysis together, we conclude that the judge's decision did not involve the making of an error on a point of law. The judge was charged with reaching an evaluative decision, based on a multi-factorial analysis of fact and law. As a first instance judge, she was pre-eminently best placed to perform that assessment. Her analysis did not feature any identifiable flaw; in the words of *Re Sprintroom*, it did not feature a gap in logic, a gap inconsistency, or a failure to

take into account some material factor. Nor did it feature any of the other facets of an error of law as described at paragraph 9 of *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982.

51. This appeal is dismissed.

Notice of Decision

This appeal is dismissed.

The decision of First-tier Tribunal Judge Hawdon-Beal did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 September 2024