IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003767

First-tier Tribunal No: HU/02062/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 December 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

VEMKATARAM GANESAN THACHAKADU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Sood, via Direct Access – attending remotely.
For the Respondent: Ms Rushforth, a Senior Home Office Presenting Officer.

Heard at Cardiff Civil Justice Centre on 18 December 2024

DECISION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Lester ('the Judge'), promulgated on 6 June 2024, in which he dismissed the Appellant's appeal against the refusal dated 2 November 2023 of his application for leave to remain in United Kingdom on the private life route.
2. The Appellant is a male citizen of India born on the 23 December 1936.
3. The Judge records the issues at large at the hearing as being:

   (i) Are there very significant obstacles to the Appellant's integration in India?
   (ii) Can the Appellant meet the immigration rules as an adult dependent relative?
   (iii) Would removal of the Appellant result in a disproportionate interference with his Article 8 rights?
   (iv) Would returning the Appellant to India breach Article 3 of the ECHR?

4. The Judge notes there was no witness statement from the Appellant due to his medical condition. There was, however, a substantial bundle of evidence from

other sources and the Judge refers to witnesses who attended and who were cross-examined.

5. The Judge's findings are set out from [15] of the decision under challenge. In relation to the first issue the Judge finds:

a. Until coming to the UK in September 2021 the appellant had lived his life in India apart from various legal trips to visit her daughter and her family in the UK. Judge noted the appellant speaks the language and is familiar with the customs and society in India, on the evidence of his daughter he has a brother in India, and that the appellant and his daughter maintain contact by telephone. The Judge records the medical evidence of a Dr Arora describing the appellant as digitally savvy and that he could use common modern gadgets [22].
b. The appellant retains an apartment in Mumbai and has a doctor who he deals with and that he knows people within his apartment block [23].
c. The medical evidence shows the appellant is an older gentleman who has a number of medical issues identified by the Judge, who notes he conveys and toilets himself, is reasonably mobile for a gentleman of his age, but is described as having dementia with moderate cognitive impairment [24].
d. The appellant 's daughter and son-in-law had on their evidence carried out some investigations into the provision of residential care homes in India and concluded the provision available was not suitable, but only limited evidence of that was provided other than the assertions. The appellant claimed to send emails with very limited or no replies with no evidence provided from any of the actual care homes [25].
e. It was disputed by the daughter that residential care homes were available and that she and her husband had the financial means to pay for it, their argument was that the care homes were not suitable although the Judge noted they provided no evidence from any of the care homes to support that [26].
f. The Judge records the daughter and her husband saying they had spoken to people who told them care homes are poor and not suitable but there was no evidence from any of those people [27].
h. The Judge finds the appellant had not established to the relevant standard that there are very significant obstacles to his integration [28].

6. In relation to the second issue, whether the appellant could meet the immigration rules as an Adult Dependent Relative (ADR) the Judge found:

a. The appellant is in the UK having entered with a visit visa. An adult dependent relative application can only be made by someone outside the UK certain if conditions are met. Insufficient evidence had been provided support the case the appellant was unable to travel such as to return to India in order to make an appropriate application [30].
b. As the appellant was not eligible to make such an application he does not meet the requirements of the rules as an adult dependent relative [31].

7. In relation to the fourth issue, would removal be a disproportionate interference with his Article 3 ECHR rights, which the Judge took out of turn:

a. The Judge considered the test in AM (Zimbabwe) [2020] UKSC 17 and other relevant authorities at [35].
b. The Judge records the appellant accepting that medical care and treatment is available in India [38]. The Judge records it was asserted the appellant cannot

access such care himself and that there was no available support in India, all of which was said to cumulatively adversely affecting his health sufficient to engage Article 3 [39].

c. The Judge considered the report of Dr Junaid, relied upon in support of the appellant's position, from [40] noting it was not clear whether the author's conclusion were his or the opinion of the family that it was extremely unlikely the appellant will be able to receive appropriate acceptable level of care if returned to India, and if Dr Junaid was simply repeating what had been related to him by the family or it was Dr Junaid's own opinion [46]. The Judge also records concerns at [47] regarding another conclusion of Dr Junaid.
d. The Judge considers the evidence of Dr Jadhav dated 14 September 2021 which had not been updated, who is based in India, who had not seen the appellant since September 2021, a social care report of Vicky Lynn Davison, and other sources identified in the determination.
e. The Judge records not being directed to specific medical evidence in relation to suicide risk and that there did not appear to be any specific medical evidence on that point within the appellant's bundle [57].
f. The Judge notes a number of issues with the medical material which suggests the different reports may not be fully compliant with the guidance on expert evidence [62] although putting such issues aside the Judge finds the appellant has not established that he is a seriously ill person and fails to reach the appropriate standard to establish he is, and so could not satisfy the AM Zimbabwe test [63].
g. In relation to Article 8 ECHR, the Judge considers this issue from [64]. Having weighed up the factors in favour of the appellant and those in favour of the Secretary of State the Judge concludes not being satisfied on the evidence that the appellant had shown he should be able to bypass the requirements of the Immigration Rules in order to regularise his presence in the UK and that the factors in favour of interfering with a protected right outweigh the factors against it [75], leading to the Judge finding the decision is proportionate [76].

8. The Appellant sought permission to appeal which was refused by another judge of the First-tier Tribunal on 25 July 2024. The application was renewed to the Upper Tribunal where permission was granted by Upper Tribunal Judge Bulpitt on 2 September 2024, the operative part of the grant being in the following terms:

> 2. The stated ground of appeal is "procedural unfairness" however no such procedural unfairness is identified. Instead it is asserted in the body of the grounds that the Judge has failed to consider arguments put forward on behalf of the appellant, failed to consider medical evidence adduced on behalf of the appellant and failed to apply relevant case law when considering the appellant's Article 3 claim.
>
> 3. Much of the grounds of appeal amount to little more than disagreement with the Judge's assessment of the evidence and his findings. The suggestion that the Judge has failed to give appropriate consideration to the medical evidence is especially weak given the Judge's careful consideration of that evidence from [36] onwards.
>
> 4. It is however arguable that the Judge has erred in his assessment of "issue (ii) – Can the appellant meet the immigration rules as an adult dependant relative?" The Judge deals with this briefly and only by considering the fact that the application was made in the UK and so could not succeed applying Appendix ADR to the Immigration Rules. It is arguable that as asserted in the grounds this approach failed to resolve the appellant's argument, set out in the appeal skeleton argument, based on the "Chikwamba principle" that the

appellant met the remaining requirements of the ADR rules and that requiring the appellant to return to India to make an ADR application would in those circumstances breach his article 8 Convention rights. Permission is therefore granted.

9. The application is opposed by the Secretary of State in a Rule 24 reply dated the 18 September 2024, the operative part of which reads:

2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.

It is submitted that the FTTJ did not make an error in his assessment that would make a material error of law. The SOFS would submit that the decision needs to be read as a whole. The FTTJ is correct the Adult dependant relative application does need to be made from abroad but also the following applies,

ADR 5.1. The applicant, or if the applicant is applying as a parent or grandparent, the applicant's partner, must as a result of age, illness or disability require long term personal care to perform everyday tasks.

ADR 5.2. Where the application is for entry clearance, the applicant, or if the applicant is applying as a parent or grandparent, the applicant's partner, must be unable to obtain the required level of care in the country where they are living, even with the financial help of the sponsor because either:

(a) the care is not available and there is no person in that country who can reasonably provide it: or

(b) the care is not affordable.

The Respondent submits that the FTTJ in his determination at [38] states it was accepted by the appellant that medical care and treatment were available in India. From the IJ's findings under different headings there was not such evidence, in fact the Appellant and sponsors acceptance that medical care and treatment is available in India is noted [38]. Furthermore, including issues with the evidence lacking on care facilities in India, the presence of family there and a support network, it is not clear that the Appellant would succeed in an entry clearance application under ADR.

The R will also submit regarding Chikwambe "*Chikwamba does not state any general rule of law which would bind a court or tribunal now in its approach to all cases in which an applicant who has no right to be in the United Kingdom applies to stay here on the basis of his article 8 rights. In my judgment, Chikwamba decides that, on the facts of that appellant's case, it was disproportionate for the Secretary of State to insist on her policy that an applicant should leave the United Kingdom and apply for entry clearance from Zimbabwe*."

The case law of Alam & Anor V SofS 2023] EWCA Civ 30 is relied upon with reference made to para 6 (1-ii) where it states the following

> For the reasons given in this judgment, I have reached five conclusions. Three are matters of general principle. The others concern the present appeals.
>
> i. The decision in Chikwamba is only potentially relevant on an appeal when an application for leave to remain is refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance.
> ii. Even in such a case, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8

claim, they must be given weight, and they may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance.

iii. A fortiori, if the application is not refused on that procedural ground, a full analysis of all the features of the article 8 claim is always necessary.

iv. Neither tribunal erred in law in its approach to Chikwamba.

v. The F-tT did not err in law in the case of A1 by applying the test of 'undue harshness' rather than the test of 'insurmountable obstacles'.

3. The Respondent submits that there is no material error of law and the decision of the FTT should be upheld.

Preliminary issue

10. In her skeleton argument Mrs Sood made an application pursuant to the Practice Direction of the Immigration and Asylum Chambers of the First-tier and Upper Tribunals 2014 to rely upon an unreported determination. That document, written by Upper Tribunal Judge Grubb, in the case of Navida Ajmal and Khawaja and Ajmal Ahsan Butt v Secretary of State for the Home Department, citation HU/19298/2019 and HU/19305/2019 was promulgated on 25 August 2021 but not reported by the Upper Tribunal.

11. Mrs Sood correctly notes in her skeleton argument that the requirements of the Practice Direction are as follows:

a. That a full transcript of the determination must be provided;
b. That the person seeking to rely upon the determination must identify the proposition which the determination is to be cited; and
c. Certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and has not been superseded by the decision of a higher authority.

12. Mrs Sood sought to rely upon the decision in support of the point she was taking concerning the decision in Chikwamba and what is described as “the ADR point”. It was submitted in the grounds seeking permission to appeal that the Judge omitted consideration of the appeal ground raising the ADR concession which should have been included in the ruling. That is understood to be a reference to the submission that during the time of the Covic pandemic the Secretary of State had a policy which enabled people to apply for leave under the ARD route from within the UK without having to return to their home countries.

13. Although Miss Rushforth accepted there were concessions made by the Secretary of State at this time she was unaware of any specific concession in the terms of those submitted by Mrs Sood.

14. Mrs Sood herself stated she was relying upon Judge Grubb’s determination as she could not find any other source material to support her argument. That may be indicative of the fact that the alleged concession was not made. It is also the case that I have not been provided with a copy of any published policy containing such a concession.

15. The Coronavirus Extension Concession (CEC) and Exceptional Assurance Concession (AE) were published by the Secretary of State as a response to the COVID-19 pandemic to ensure that individuals in the UK did not face uncertainty in relation to their immigration status because of circumstances outside their control. It was stated they applied to people whose immigration status had

expired, or was due to expire, during the covid period but who could not leave the UK.

16. The CEC period ran from 24 January 2020 to 31 January 2020, with a grace period to 31 August 2020.
17. The AE concession, including short-term assurances, ran from 1 September 2020 to 28 July 2023.
18. The application for leave on human rights grounds, leading to the impugned decision, was made on 15 February 2022 on the private life route. It was not an application made on the ADR route. It was therefore an application made after the grace period provided for by the CEC had expired.
19. The Exceptional Assurance Concession was introduced as a response to ongoing international travel disruption caused by the Covid-19 pandemic following the earlier grace period which had come to an end. It was an assurance given upon a successful request to the Home Office by individuals who provided details of their full name, date of birth, and reasons for requesting an exceptional assurance. The policy states that Exceptional assurance did not grant any form of immigration permission to individuals, but instead prevented current or future adverse consequences from overstaying during the period of assurance given. The policy intent was that during a period with exceptional assurance or short-term assurance the holder would not be regarded as an overstay or suffer any detriment in future applications relating to that period. A person granted exceptional or short-term assurance were informed they could apply for permission to stay or leave the UK before the expiry of the assurance.
20. Paragraph 39E(5) of the Immigration Rules was amended so that overstaying during periods where the person had an exceptional assurance or short-term assurance will be disregarded and will not break continuous residence. The period did not, however, count towards lawful presence.
21. It is not made out the appellant made any application under either of the concessions. It is not made out that any adverse decision was made against him as a result of the fact he had overstay during the UK during the period of the COVID-19 pandemic for that reason alone.
22. The comment by the Judge that the appellant had not made an application for leave to enter under the ADR, one of the requirements, is factually correct. The appellant may argue this was because he could not return to India to make the application but it is clear he had no intention of returning to India as evidenced by the fact that his application was made for leave to remain on human rights grounds, and the basis on which the application was made.
23. Judge Grubb's determination is of no assistance in relation to the specific point or other issues in this appeal.
24. Having heard submissions I refused permission to rely upon the unreported determination on the basis that the requirements of the Presidential Guidance when properly applied did not warrant it being introduced.

Decision and reasons

25. In considering the merits of this appeal I have had regard to the guidance provided by the Court of Appeal in Volpi v Volpi [2022] EWCA Civ 462 at [2], Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 at [26] and Hamilton v Barrow and Others [2024] EWCA Civ 888 at [30-31].
26. The application for permission to appeal refers to the decision of the Upper Tribunal in Ainte (material deprivation – Art 3 – AM (Zimbabwe)) [2020] UKUT 00203 (IAC) the headnote of which reads:

(i) *Said [2016] EWCA Civ 442 is not to be read to exclude the possibility that Article 3 ECHR could be engaged by conditions of extreme material deprivation. Factors to be considered include the location where the harm arises, and whether it results from deliberate action or omission.*

(ii) *In cases where the material deprivation is not intentionally caused the threshold is the modified N test set out in AM (Zimbabwe) [2020] UKSC 17. The question will be whether conditions are such that there is a real risk that the individual concerned will be exposed to intense suffering or a significant reduction in life expectancy.*

(iii) *The Qualification Directive continues to have direct effect following the UK withdrawal from the EU.*

27. The finding of the Judge is, however, that there was no evidence that the appellant is likely to suffer extreme material deprivation on return to India for the reason stated.

28. The Judge is criticised for not specifically referring to the appellant's age and in relation to a number of factors relevant to the appellant's case, but it is clear from a reading of the determination that the Judge was aware of the appellant being an elderly gentleman of the date of birth he claimed, as there is an indication of that in a number of documents that were provided. The Judge was also clearly aware of the content of the medical evidence which is dealt with in detail in the determination.

29. It is submitted in Mrs Sood's skeleton argument that the maintenance of effective immigration control and the public interest were not impacted by the grant of leave for an elderly parent/grandparent whose Covid arrival and bonding have to be posited against effective closure of the ADR route. Reference is made in a footnote to House of Lords Justice and Home Affairs Committee report for 2022-2023.

30. The Adult Dependent Relative route is for persons aged 18 or over who are sponsored by a relative in the UK and where the sponsor is able to maintain, house and care for the applicant without reliance on public funds. There are a number of formal requirements such as the applicant requiring long-term personal care to perform everyday tasks due to age, illness or disability and that care must be either not available or not affordable in the country where the applicant is living.

31. It is also a requirement that the applicant must apply for and obtain entry clearance as an Adult Dependent Relative before their arrival in the UK. It is not disputed that that did not occur.

32. The original route under the Immigration Rules was replaced by Appendix Adult Dependent Relative on the 9 March 2023, Statement of Changes to the Immigration Rules HC1160 indicating that an application could have been made on this route if it was believed the requirement was made an application out of country have been waived as a result of any concession. No such application was made. The previous rules were to be found in Appendix FM which was in force at the relevant time.

33. The findings of the Judge are that if an application was made it would be refused in any event. This finding is supported by the content of the Rule 24 response:

> *ADR 5.1. The applicant, or if the applicant is applying as a parent or grandparent, the applicant's partner, must as a result of age, illness or disability require long term personal care to perform everyday tasks.*

ADR 5.2. Where the application is for entry clearance, the applicant, or if the applicant is applying as a parent or grandparent, the applicant's partner, must be unable to obtain the required level of care in the country where they are living, even with the financial help of the sponsor because either:

(a) the care is not available and there is no person in that country who can reasonably provide it: or

(b) the care is not affordable.

34. It is argued the Judge's finding that care is available in India was not one reasonably open to the judge on the evidence. Reference is made to research undertaken by the appellant's daughter with whom he lives in the UK in relation to this specific point. It may be that a number of attempts were made to contact care homes who did not respond but it appears that the geographical area in which such enquiries were made was limited to that of the appellant's previous home area as a result of his contact with that area and friends he has there.
35. Questions were asked of the care homes in question some of which did respond and some of which did not. The fact they did not respond, for which there may have been good reasons, does not mean that those homes are unable to provide the required degree of care. It is also clear that not all the available care homes were contacted. It is also clear that the basis on which it was considered those homes contacted were not suitable, in addition to failure to respond, is on the appellant's daughter subjective assessment that to her mind they would not be suitable. The daughter is a doctor practising in the UK and it is not clear on what basis this assessment has been made. It appears to be a subjective assessment that she is not satisfied with the standard of care her father could have rather an assessment of whether the required level of care is available in India to meet his needs. That does not need to be the same level of care he is receiving in his home at the moment.
36. I do not find legal error has been made out in the Judge's assessment that the appellant is unable to satisfy the requirements of Appendix ADR. Such care is affordable based upon the evidence of the appellant's family in relation to this issue and was an issue considered by the Judge in detail as noted above.
37. The grounds refer to extracts from the medical reports but as noted above, the Judge clearly considered the evidence with the required degree of anxious scrutiny analysing the particular requirements of the appellant, both physical and emotional/psychological, and how they could be met. Whilst the appellant disagrees with the Judge's analysis of the medical evidence and how it factors into the overall equation, disagreement is insufficient, and the Judge's conclusions have not been shown to be rationally objectionable. As noted in the grant of permission to appeal, no procedural unfairness is identified, that much of the grounds of challenge appear to amount to little more than disagreement with the assessment of the evidence and its findings, and that the suggestion the Judge failed to give appropriate consideration to the medical evidence is especially weak given the Judge's careful consideration of that evidence from [36] onwards.
38. The point on which permission was granted relates to the argument based on the Chikwamba principle.
39. This is not a case in which the Secretary of State refused the application solely on the basis that the appellant could return to India and make an application for leave to re-enter the UK lawfully under the ADR route. It is also not a case involving a third party having to travel to a country which they could not reasonably be expected to return to such as that in Chikwamba where the spouse

had been granted refugee status from Zimbabwe and could not be expected to return to Zimbabwe with the appellant.

40. The Judges assessment pursuant to Article 8 ECHR follows the required structure, identifying the need to answer the questions set out in the Razgar test and balancing the competing arguments in a careful analytical manner. This is not a case in which returning the appellant would mean he would lose all contact with his family. The Judge at [69] wrote:

> 69. In her evidence his daughter accepted that if the appellant returned to India they could visit him, and that they could be in contact using technology. She accepted that prior to his coming to the UK they had been in contact with each other using technology. I have set out above high within the medical report of Dr Arora the appellant was noted to be able to use common modern gadgets and that he was digitally savvy. His neighbour Dipu (AB 183-4) describes how he has assisted the appellant with wifi so that he can speak to his daughter.

41. The Judge records at [74] that the underlying principle of Article 8 does not give a person the right to choose where they wish to live and where their family and private life is carried on. The Judge accepts the appellant has been in the UK for some time although finds most of that has been with precarious status. It is only having undertaken the necessary balancing exercise that the Judge concludes the factors relied upon by the appellant are insufficient to outweigh those relied upon by the Secretary of State.

42. It is clear that neither the appellant nor his family wanted the Judge to make this decision and that they will do everything they can to enable the appellant to be allowed to remain in the UK with them, but the task of the Judge was to assess the evidence and arrive at a legally sustainable decision. The Court of Appeal have reminded appellant judges not to interfere in a case unnecessarily, as highlighted in the authorities I have referred to above. The key question is whether the decision under challenge is within the range of those reasonably open to the Judge on the evidence.

43. I find it is, for having assess the evidence with the required degree of anxious scrutiny, it not having been shown the Judge failed to consider all the evidence or failed to factor in or assess that evidence in a proper manner (including the cultural issues raised), the Judge undertook the required balancing exercise before arriving at his adequately reasoned findings and conclusion. The grounds, whilst expressing disagreement and desire for a more favourable outcome, do establish material legal error in the decision. On that basis the appeal must be dismissed.

Notice of Decision

44. The First-tier Tribunal has not been shown to have materially erred in law. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 December 2024