Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05480/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 August 2013	**On 6 September 2013**
Prepared 28 August 2013	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MRS VIJAYA WISHNU SHENOY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Sharma, of Counsel instructed by ICS Legal
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of India born on 5 October 1933 appeals, with permission, against a decision of Judge of the First-tier Tribunal Walters who in a determination promulgated on 28 June 2013 dismissed the appellant's appeal against a decision of

the Secretary of State to refuse indefinite leave to remain as the dependent parent of a person present and settled in Britain under paragraph 317 of HC 395, as amended.

2. The appellant's evidence was that in 1989 her elder son Raghavendra bought land and built a house on it. The appellant, her husband (who died in 1997), Raghavendra, his wife and child and the appellant's younger son, Rajiv, lived together in the house. In 2000 Rajiv obtained work in Bangalore and the appellant moved with him to live there. Rajiv married and in 2005 came to Britain to work.

3. Although the appellant came to Britain as a visitor in 2006 she returned to India when she learnt that she was not entitled to remain here. Rajiv had intended to return to India but he did not do so and is now resident here with his immediate family.

4. When the appellant returned to India she lived in Raghavendra's house. Rajiv had agreed with Raghavendra that he would pay for the appellant's food - approximately Rs.1,000 a month and would also pay for all her medical treatment. Rajiv had also told Raghavendra that he would stay in Britain for approximately two or three years.

5. In 2009 Raghavendra expressed dissatisfaction with the arrangement and it was Rajiv's evidence that he had offered Raghavendra money but that had been refused.

6. The appellant claimed that she was abused by Raghavendra's wife and that he had hit her and tried to strangle her in October 2011. She had then spent two months with her brother as an emergency measure before returning to live at Raghavendra's house on 28 November 2011.

7. On 3 March 2012 the appellant arrived in Britain as a visitor. She made an application for indefinite leave to remain as a dependent relative on 2 June 2012.

8. The application was refused on the basis that the appellant had not shown that she was wholly or mainly dependent on Rajiv, had not shown that she had no other relatives in her own country to whom she could turn for financial support and that her rights under Article 8 would not be infringed by her removal.

9. The appellant appealed that decision and Judge Walters heard evidence from both the appellant and from her son Rajiv, the sponsor. He set out his findings of fact in paragraph 7 onwards of the determination. He noted the evidence from Rajiv that in February 2012 he had tried to negotiate with Raghavendra so that the appellant could continue to stay with him but that Raghavendra had refused. That had prompted the appellant to apply for the visitor visa.

10. In paragraph 22 the judge stated that he accepted that the appellant was assaulted by Raghavendra but stated that:-

"This was an isolated incident. I do not accept that the appellant's brother would have sent her back to Raghavendra's house if he believed she was in danger of further assault. I also noted that no further assaults actually took place".

11. In paragraph 24 he noted that the appellant had said in her witness statement that she received £40 per month (Rs.3,200) in dividend income and that she estimated that she received between Rs.30,000 and 40,000 a year. He then went on to say in paragraphs 25 onwards:-

"25. Unfortunately the evidence on this point has not been satisfactorily proved. The documentary evidence of the appellant's dividends over the last 12 months should have been produced and also the capital value of her shares. That is necessary in order to determine whether or not she is financially wholly or mainly dependent on Rajiv.

26. In Rajiv's witness statement he sets out the years in which he travelled to India. He says that he financially supports his mother by giving her cash when he gets there. The witness statement says that he made no journey to India in 2011 (and presumably he gave her no cash that year). He details his other visits being in 2006, 2008 and 2009 and states that the amount of cash given to his mother varied between Rs.20,000 and 30,000 on each of those visits.

27. There are therefore no remittance advices showing the movement of funds from Rajiv to the appellant.

28. The appellant has a bank account but the statement produced only runs from 1 November 2011 to 12 December 2012.

29. The bank account statement shows two deposits from Rajiv to the appellant. The first is on 5 January 2012 for Rs.40,000; and the second is on 13 February 2012 for Rs.38,000.

30. The appellant was asked about these in her evidence and also about a withdrawal (the amount is obscured) but from the balance it would appear to be about Rs.70,000 in favour of 'Akbar Travels' on unknown date in February 2012. The appellant confirmed that that sum had been paid to Akbar Travels for her air ticket to the UK.

31. No satisfactory evidence has therefore been produced to show the movement of funds between Rajiv and the appellant. If, as he claims, he gave a cash sum to his mother on each visit he made to India, then I would have expected those cash sums to have appeared in bank statements.

32. I therefore found that the financial evidence produced is wholly inadequate in demonstrating that the appellant was financially wholly or mainly dependent on Rajiv when she was in India.

33. I accepted the evidence from the appellant's brother and sister-in-law that they would be unable to financially support the appellant."

12. The judge therefore found that the appellant could not succeed under the Immigration Rules.

13. In assessing the rights of the appellant under Article 8 of the ECHR he found that family life existed between the appellant and Rajiv and his family in the UK and he accepted that Rajiv had financially assisted in the maintenance of the appellant while she was in India. He went on to say:-

> "I simply found that it has not been satisfactorily proven that the appellant was financially, wholly or mainly dependent on him".

14. Having found that family and private life rights were engaged and having noted that the appellant could not succeed under the Rules he considered the proportionality of the removal of the appellant. He noted that the appellant had had two heart attacks, the second of which had been when the appellant visited Rajiv in February 2006. He noted a report from Maidstone and Tunbridge Wells NHS Trust recommending that the appellant be investigated on return to India but stated there was no evidence that that had happened. He also noted a letter of 18 February 2013 in which the appellant's general practitioner in Britain had stated that the appellant would find it difficult to perform cooking, cleaning and shopping.

15. He noted that Rajiv had bought property here, his daughter was in full-time education and their review had said he would not be happy if his mother returned to India to live in rented accommodation possibly with the assistance of domestic servants.

16. In paragraph 47 he stated:

> "Considering these finances and the low cost of living in India, I did not accept that accommodation could not be found for the appellant near her brother and a domestic servant employed to look after her. Nor did I accept that a return to Raghavendra's house is out of the question. I did not accept Rajiv's evidence that Raghavendra has never asked for more money to help look after their mother. He is a bank clerk and his financial resources are obviously far less than Rajiv's. A more generous financial contribution towards the appellant's upkeep from Rajiv would, I find, greatly improve the relationship."

He therefore concluded that it would not be disproportionate to remove the appellant.

17. Grounds of appeal referred to the fact that the sponsor had a profitable business and a home here and asserted that the judge had accepted that the cost of living in India was low. They then argued that the test of proportionality "must be given in understanding where the decision reached a legitimate aim" – a claim which I do not understand. The grounds appeared to state that the appellant be accommodated and maintained without recourse to public funds and that she would continue to seek

medical treatment in Britain without recourse to public funds matters which were ot questioned. .

18. The grounds also stated that bank statements had been provided which confirmed that the appellant was maintaining his mother with cash withdrawals when he visited India and appears to suggest that the fact the judge had indicated that he should continue paying for all medical fees, clothing, cash and cash bonds enabling the assistance of "pay to day care" as well as taking full responsibility for renting the appellant a flat and have full-time care for her and to be responsible for transportation, communication and all other expenses and additional costs indicated that the judge had accepted that the appellant was financially dependent on the sponsor as she could not afford to rent a house and pay for a maid servant on her own.

19. The grounds went on to state that the judge was wrong to indicate that he considered the appellant could return to Raghavendra's house given that Raghavendra had been violent towards her and referred to the suggestion by the judge that further accommodation should be found for the appellant.

20. It was also claimed there was an error in law in the findings of the judge on the credibility of the sponsor and the appellant.

21. As to the claim that there were exceptional circumstances – in this case – reference was made to the letter from Maidstone NHS in 2006.

22. Ms Sharma at the hearing before me relied on the grounds of appeal. She emphasised that the sponsor and the appellant had lived away from Raghavendra for five years and that it had only been intended that the appellant would live with Raghavendra for a short period. She further argued that it would be disproportionate for the appellant to be removed when the sponsor was able and willing to support her. It was wrong for the judge to expect the sponsor to provide a separate household for the appellant in India.

23. With regard to the issue of the Immigration Rules she accepted that there was only one bank statement but referred to a copy of a dividend in the appellant's name at page 148 of the bundle which indicated that that holding was in joint names. She stated that the sponsor had put assets in his mother's name as a way of supporting her. Moreover, she referred to the evidence of the emotional support given by the sponsor to the appellant.

24. She stated there was a cultural bias towards a son giving support for his mother and that that should have been taken into account.

25. She was unable to give me any evidence relating to the cost of living in India or of average earnings there.

26. I asked her what errors of law there were in the determination. She stated that the judge had not taken into account the medical treatment here had been paid for by Rajiv. Moreover, the judge had placed insufficient weight on the assault on the appellant by Raghavendra.

27. With regard to the issue of the Article 8 rights of the appellant the judge had failed to take into account the additional costs of buying accommodation in India. Moreover he had not placed sufficient weight on the oral evidence that funds were transferred to India by the sponsor.

28. In reply Ms Holmes argued that the conclusions of the judge were fully open to him on the evidence. No evidence that the appellant was supported by the sponsor was placed before him. There was no adequate trail to show the money from Rajiv going into the appellant's account.

29. With regard to the issue of the appellant's rights under Article 8 of the ECHR she argued that the judge was entitled to reach the conclusion that it was relevant no further assaults had taken place against the appellant after the one assault by Raghavendra in 2011.

30. She asked me to find that the judge's decisions on both the appellant's claim under the Rules and that under Article 8 of the ECHR were fully open to the Judge.

31. The issue before me is whether or not there was any material error of law in the determination of the Immigration Judge. In this case I find that the judge did consider all the evidence before him and that the conclusions he reached were fully open to him.

32. The reality is that he did not have before him (and neither did I) any evidence relating to the cost of living in India or average earnings against which the income of Rs.30,000 to 40,000 per year which the appellant said that she received from dividends would be insufficient for her needs in India. Moreover the judge was entitled to conclude that there was insufficient evidence to show that the appellant had been supported in India by the sponsor. In paragraph 25 he stated that documentary evidence of the appellant's dividends should have been produced and also the capital value of her shares. That was, I consider, a fair comment as was the conclusion of the judge that that would be necessary in order to determine whether or not the appellant was financially wholly or mainly dependent on Rajiv. Moreover, there was no evidence before the Immigration Judge to show money being transferred by Rajiv into his mother's account in India or the sums which he stated he had given to her over the years being deposited in her account at times which coincided with his visits. The claim in the grounds that bank statement showing the money received from Rajiv was incorrect.

33. The judge did refer to the deposits in January and February 2012 totalling Rs.78,000 but quite correctly noted that about Rs.70,000 had been paid out to Akbar Travels

some time in February 2012, noting that the appellant had said that that had been paid to Akbar Travels for her air ticket.

34. In all I consider that the judge was entitled to reach the conclusions which he did.

35. Ms Sharma endeavoured to claim that the fact that the judge had stated that Rajiv could arrange accommodation for the appellant in India and pay for a maid indicated that he believed that the appellant was wholly or mainly dependent on the sponsor was incorrect. The reality is that the judge considered the situation of the appellant on return to India as part of his exercise in assessing whether or not her removal was disproportionate. He concluded that her removal would not be disproportionate. That, I consider, was again a decision which was open to him.

36. I consider that the judge, again, reached conclusions which were open to him.

37. The reality is that the necessary evidence showing the support by Rajiv of his mother was not before the judge. It may well be that the evidence of the bank accounts both of the appellant and of the sponsor can be produced and might show that money had been transferred and indeed there might be evidence of share certificates showing that the dividends which the appellant received came from holdings which had either been transferred to her by Rajiv or were in joint names. That evidence however has not been produced. No doubt, if it were to be produced, the Secretary of State might consider again the appellant's position. I would add that it is clear from the evidence that was produced that Rajiv did pay for the appellant's medical care when she was here in 2006.

38. I note finally the point that Ms Sharma indicated that, in India it was the custom for sons to look after widowed mothers. I accept that that is the case but of course it is the case that Raghavendra is the eldest son and that that is an obligation which would at least equally fall on him. I also consider that it was a fair comment of the Immigration Judge to state that he found it difficult to accept that Raghavendra would not ask for additional sums so that he could provide further support for the appellant.

39. For the above reasons I find there is no material error of law in the determination of the Immigration Judge and that his decision dismissing this appeal on immigration and human rights grounds will stand.

Signed Date

Upper Tribunal Judge McGeachy