



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/42460/2013

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Centre
On 28 April 2015**

**Decision and reasons
Promulgated
On 30 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SURJIT KAUR

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Ms D Dhaliwal, instructed by Charles Simmons
Immigration

DECISION AND REASONS

1. On 15 January 2015, Designated Judge Woodcraft granted the Secretary of State permission to appeal to the Upper Tribunal against the decision and reasons statement of First-tier Tribunal Judge Chohan that was promulgated on 28 November 2014. Judge Chohan allowed Mrs Kaur's appeal against the immigration decisions of 2 October 2013 refusing to vary her leave and to remove her by way of directions. Judge Chohan found that although the appellant could not meet the requirements of the immigration rules she succeeded under article 8 ECHR when applied directly.

2. Mrs Kaur was born on 1 August 1928 and is a citizen of India. She last arrived in the UK on 30 September 2012 as a visitor. She had previously been resident in the UK but any settlement status ended many years ago when she returned to live in India in the 1970s. She was widowed in May 2001.
3. Having heard from both representatives, as I indicated at the end of the hearing, I dismiss the Secretary of State's appeal to the Upper Tribunal, thereby upholding the decision of the First-tier Tribunal. I reserved my reasons, which I now give.
4. Although the Secretary of State mounted five grounds of appeal, taken together they seek to challenge the Judge Chohan's assessment of the proportionality of the immigration decisions. I mention at the outset of my consideration of the case that Judge Chohan did not allow the appeal because of any issue relating to article 3 or in relation to Mrs Kaur's medical needs. He allowed the appeal solely in relation to article 8 and it is only that decision which is challenged.
5. Mr Smart acknowledged that the author of the grounds was disadvantaged by not having sight of the Home Office file when preparing the application for permission to appeal. As such it would appear that the author failed to understand that Mrs Kaur has no relatives living in India, despite her son having gone there to secure her property and assets. Her son, whom it is claimed took possession of her land and assets in India, is resident in the UK. Mr Smart submitted that it was not clear whether Judge Chohan had himself been confused about these matters. However, when pressed, Mr Smart was unable to identify anything in the decision and reasons statement that would suggest Judge Chohan failed to appreciate the evidence. Ms Dhaliwal took me through the statement of reasons and I am satisfied, given the description of the whereabouts of Mrs Kaur's children in paragraph 4 of the statement of reasons, that Judge Chohan was fully aware of the evidence about their residence.
6. It is evident from the statement of reasons that there was no dispute between the parties as to whether Mrs Kaur could obtain adequate medical care in India. She could. This, however, was not the central issue for Judge Chohan to determine. He was asked to consider Mrs Kaur's care needs. He clearly identified this central issue in paragraph 18 of his decision and reasons statement. Since arriving in the UK as a visitor in September 2012, Mrs Kaur had been diagnosed with dementia (Alzheimer's disease) and depression. The medical evidence was not disputed by the Secretary of State. Judge Chohan found that the evidence showed that it was more likely than not that Mrs Kaur was (and is) incapable of looking after herself on a daily basis and required the support of her daughter and other relatives in the UK because she has no family member to look after her in India (see paragraph 25 of the decision and reasons statement). That finding is unchallenged.
7. In paragraph 19 of his decision and reasons statement, Judge Chohan

identified the importance of considering the public interest when assessing proportionality. He refers specifically to part 5A of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. In paragraph 27 he found that Mrs Kaur's circumstances were exceptional and in the following paragraph weighed her personal circumstances against the public interest considerations. He found the exceptional circumstances outweighed the public interest considerations.

8. The Secretary of State challenges that assessment on the basis that Judge Chohan did not address each element of s.117B of the 2002 Act. Mr Smart sought to raise particular concerns as to the English language ability of Mrs Kaur and with regard to the precarious nature of her immigration status. Any private life had been established in the knowledge that she could have had no expectation to remain in the UK.
9. I chastised Mr Smart regarding the English language issue that he sought to pursue. Not only does the Secretary of State have general policies indicating that such an issue is not relevant where a person is over the age of 65, such issues are also irrelevant in circumstances where a person has some mental or physical impairment that would make the learning of English impossible. This policy intention has been part of immigration law for many years and is currently set out in a number of places in the Immigration Rules, for example paragraph 3.1 of Appendix KoLL. The undisputed medical evidence and Mrs Kaur's age mean there was no need for Judge Chohan to make specific findings on such issues. Mr Smart's contention that the policy considerations were overridden by the statutory provision of s.117(5) is unarguable given that it has never been argued that Mrs Kaur should not benefit from the published policy. Only one conclusion was possible and it should have been obvious to the author of the grounds and to Mr Smart.
10. The issue of what weight should have been given to the fact that any private life established by Mrs Kaur was established whilst her immigration status was precarious is a more significant issue. However, even though Judge Chohan did not specifically mention it, he was clearly aware of her status and the law. He describes her immigration status in paragraph 2 and as I have already indicated he makes reference to s.117 of the 2002 Act in paragraphs 17 and 28. It is also evident that Mrs Kaur's circumstances, being exceptional, must outweigh the public interest considerations. Her vulnerability if returned to India is so clear that it would undermine her moral and physical integrity to remove her. On the facts found, no other conclusion would be logical or reasonable.
11. In reaching my conclusion I have had regard to the Upper Tribunal's reported decision, Dube (ss.117A-117D) [2015] UKUT 90 (IAC). Of course, it was not available to Judge Chohan or to the author of the grounds. I refer to it simply because it expresses how the First-tier Tribunal should approach part 5A of the 2002 Act. However, as will be evident from what I have said above, I am satisfied that Judge Chohan properly considered the public interest considerations set out in s.117B of the 2002 Act even

though he has dealt with them as a whole rather than individually. There can be no requirement for a judge to have to spell out the obvious.

12. This is a case where the Secretary of State is unhappy with the outcome but makes no sustainable challenge to any of the judge's findings. Those findings, because of the exceptional nature of Mrs Kaur's circumstances, lead to only one possible conclusion, that her circumstances outweigh the public interest considerations. Although I am satisfied that Judge Chohan did not err in law, even if he did, given the findings any error would be immaterial.
13. I add two comments which were not raised by the Secretary of State either in her grounds or through Mr Smart. Judge Chohan might have been asked to make a finding as to whether Mrs Kaur enjoyed family life with her daughter and other relatives in the UK. The care needs would suggest that she would meet the family life test set out in Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC). However, this was never pursued before the First-tier Tribunal. I make no findings in relation to this issue but it would clearly have enhanced Mrs Kaur's rights had it been considered.
14. Secondly, there has been no argument as to whether it might be reasonable for Mrs Kaur's daughter or some other relative to relocate to India to care for Mrs Kaur. I presume this was not argued because the daughter and other relatives are all British citizens with strong connections to the UK making such a prospect unreasonable. Again, the point was not argued before the First-tier Tribunal or raised in the grounds. I make no finding on it other than to say that the time for making such arguments has passed.
15. For all the reasons I have given, I dismiss the Secretary of State's appeal to the Upper Tribunal and uphold the decision of the First tier Tribunal.

Decision

The decision and reasons statement of First-tier Tribunal Judge Chohan does not contain an error on a point of law and the decision is upheld.

Signed

Date

John McCarthy
Deputy Judge of the Upper Tribunal