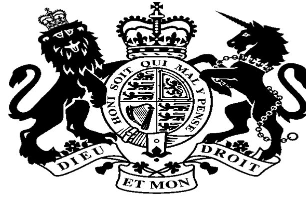

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA024012015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2016	**On 25 May 2016**
and 5 May 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

G K
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Cutting (Slough Immigration Aid Unit) (both hearings)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer) (February 2016)
Mr T Wilding (Senior Home Office Presenting Officer) (May 2016)

DECISION AND REASONS

1. This is the appeal of GK, a citizen of India born [ ] 1941, against the refusal of leave to remain and consequent removal directions made under section 47 of the Immigration Asylum and Nationality Act 2006. Her appeal having been dismissed by the First-tier Tribunal, she now appeals to the Upper Tribunal with permission.

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2. The immigration history supplied by the Respondent records that she entered the United Kingdom as a visitor from 25 July 2011 until 19 January 2012, from 29 March 2013 until 14 September 2013, and on the occasion leading to this application, on 3 June 2014 with leave to enter granted until 25 October 2014.

3. Her application was to remain as the dependent relative of her son MJ. The representations and materials supporting that application show that following her arrival MJ noticed a marked deterioration in her health since he had last seen her, and realised that she was increasingly unable to carry out everyday tasks such as washing, dressing and cooking, her mobility being severely restricted. The family believed she would no longer be able to return to live safely in India. MJ earned over £23,000 annually in his permanent post as a security officer, and he and his wife were only three years from paying off their mortgage. Supporting documents included a letter from Dr Nanra of New Delhi of September 2014 stating that she had suffered from Type 2 diabetes mellitus, hypertension and, for the last few months, additionally from Parkinson's disease. Dr Kumar of a medical centre in Slough wrote stating that she was on medication from India which she took regularly; recent blood tests showed she was suffering from anaemia and that her diabetes was poorly controlled. She needed help throughout the day with various tasks; he understood that in India she had only one son to look after her. He would appreciate it if her further stay could be considered favourably.

4. The application was refused because she had not been established that she was unable to integrate back in India and thus could not satisfy Rule 276ADE(vi), the only private life route potentially open to her given her limited period of residence in the United Kingdom. It was not accepted that there were exceptional circumstances present in her case given that her own medical evidence indicated that treatment for Type 2 Diabetes, Hypertension and Parkinson's Disease were all available in India: any differential in treatment between the countries did not justify her remaining here.

5. In his witness statement for the appeal MJ set out that his father had died some twenty years ago since when his mother had lived alone. His elder sister had lived near her and helped her to cope until her death in 2010. His other two sisters were married, lived with their husbands and were already responsible for looking after their own children and in-laws. His sister R had recently joined her husband in the USA. Although he had previously been aware his mother's health was deteriorating, it was only after her arrival on this occasion that he appreciated that she was no longer able to look after herself. She found it difficult to do the simplest of tasks, and could not remember whether she had taken her medication.

6. The First-tier Tribunal recorded that it could make no findings regarding the Appellant's financial circumstances as no evidence had been put forward as to her ownership of capital assets. It accepted that she suffered from the stated medical conditions but noted there was no evidence as to the rate of progression of her

illness. The affidavits from the daughters in India were afforded "scant evidential weight" as they were considered self-serving, aimed as they were at presenting a case that she lack care abroad. No financial details had been put forwards from family members besides MJ as to their ability to fund any required support.

7. The Tribunal did not accept that the Appellant would be unable to integrate in India, where she had lived for most of her life. Rule 276ADE(vi) was not a paragraph relating to hardship: it looked only to the existence of barriers to integration. The submission made on her behalf that the appeal could succeed outside the Rules, without having to return abroad to make an entry clearance as a dependent relative, failed absent clear evidence that she was dependent upon her son. There was no evidence as to her residential circumstances in India in terms of the help available to her at home. It would be wrong to allow an appeal based on dependency considerations within the rubric of an appeal based upon Rule 276ADE.

8. Grounds of appeal argued that the First-tier Tribunal had been wrong to state that the case had not been pressed both inside and outside the Rules, and that the judge was wrong to conclude that there was "quite literally, no evidence upon which I could properly conclude that the Appellant is dependent on her son."

9. Permission to appeal was granted by the First-tier Tribunal on 14 December 2015 on the basis that the judge may have erred in his assessment of there being no evidence relevant to dependency before him, and additionally because it was arguably erroneous to consider a Rule 276ADE appeal as hopeless by reference to whether an out-of-country application as a dependent relative might have succeeded.

Findings and reasons – Error of law hearing

10. Having heard submission ably made by both representatives at the original hearing, I found that the First-tier Tribunal was wrong to state that there was no evidence that could demonstrate dependency. To the contrary, there was witness statement and oral evidence from the Sponsor and other family members, as well as material from a General Practitioner, which was patently relevant to the issue. The failure to identify relevant evidence supporting the primary issue on the appeal was patently capable of amounting to a material error, given that the appeal was not one doomed to fail taken at its highest.

11. The First-tier Tribunal was invited to determine this appeal outside the Rules, and its statement at the end of the decision to the contrary was clearly misguided. It became rather confused as to its task, and failed to posit the critical question as to whether there was a compelling case to justify such departure, to which its error as to the available evidence regarding dependency doubtless contributed; and it additionally failed to adequately assess the relevance of considerations arising under the Adult Dependent Route, which cannot be said to be irrelevant merely

because an application cannot be made under it from within the United Kingdom, for it carefully expresses the imperatives of public policy towards applications of this nature as endorsed by Parliament. That too was an error of law.

12. Given the failure to take account of these considerations, I found that the decision of the First-tier Tribunal was flawed by material errors of law. As there was no need for wholesale redetermination of the appeal, I adjourned the appeal for substantive re-hearing in the Upper Tribunal.

Continuation Hearing

13. At the continuation hearing, I admitted further evidence by way of a GP's report of 3 May 2016 which set out that the Appellant continued to suffer from hypertension and diabetes for which she received prescription medicine from India. It made no mention of Parkinson's disease. Her diabetic control was described as average.

14. The Sponsor gave evidence, saying that of the two daughters resident in India, one had now moved to America. The other looked after her husband's family. They had sought further evidence from the doctor in India who had been treating her, but he had simply stated that she needed ongoing care. Cross examined, he said that his mother had been diagnosed with hypertension recently though corrected himself when reminded that it was said that she had received both her diagnoses around 12 years ago according to Dr Nanra. His sister in America had passed away five years ago. His mother had been living alone since then in India caring for herself. Although the family had been aware of all these ailments before she last entered the United Kingdom, they had not applied for entry clearance for her as a dependent relative because it was only after she arrived here that they realised how needy she was, a which point they decided to make the application giving rise to this appeal. If she went back to India they would try to financially support her but did not feel that they would be able to afford to do so as she would face medical charges as well as accommodation costs of around £700 a month. They received her medicine from India, usually by post, although on a past trip there he had picked up a few months' supply. As to relatives beyond his siblings, the younger family members were not close to her. There was no re-examination.

15. For the Respondent Mr Wilding submitted that there was no cogent evidence that established a high level of dependency between the Appellant and her family here. This was not a case where there had been a sudden deterioration of an applicant's health post-arrival: it was not shown that there would even be a need for a care home. For the Appellant Mr Cutting argued that the family were best placed to make the assessment in question and this was a credible scenario: the gaps in the evidence were to be regretted but the family had done their best, notwithstanding the failure of the doctor in India who had formerly been treating

her to detail the care package. The family here were able to look after her and genuinely feared that she would die alone if she returned abroad.

Findings and reasons – Continuation hearing

16. I do not consider that the claim has any prospect of success under the Rules, the only relevant route being the private life one under Rule 276ADE. The Appellant was plainly integrated in India, a country where she had lived for most of her life before she came to the United Kingdom, where she was receiving medical treatment for her health problems, and where she must be presumed to have connections by way of extended family and friends absent any evidence to the contrary: and so I do not accept that she would face significant obstacles to her integration on a return there.

17. The requirements of the Immigration Rules irrelevant to the lawful determination of the appeal. As it was put in *SS (Congo) & Ors* [2015] EWCA Civ 387, "it is accurate to say that the general position … is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules". At [48] the Court goes on:

> "What does matter, however – whether one is dealing with a section of the Rules which constitutes a "complete code" (as in *MF (Nigeria)*) or with a section of the Rules which is not a "complete code" (as in *Nagre* and the present appeals) - is to identify, for the purposes of application of Article 8, the degree of weight to be attached to the expression of public policy in the substantive part of the Rules in the particular context in question (which will not always be the same: hence the guidance we seek to give in this judgment), as well as the other factors relevant to the Article 8 balancing exercise in the particular case (which, again, may well vary from context to context and from case to case)."

18. Whilst I do not consider that this is an especially strong application for justifying a departure from the Rules for compelling reasons, I cannot rule out the possibility that it might succeed, or to put it another way, there is sufficient here to amount to an arguable case to justify a second stage consideration outside the Rules.

19. There are two Rules which potentially bear on applications of this nature: Rule 276ADE which, for an adult over the age of 25 who has not lived in this country for more than 20 years, focusses upon the prospect of integration abroad, and the dependent relative Rules under Appendix FM. I have already addressed the former, and accordingly take account of the fact that the Appellant would be able to integrate on a return to India in assessing the proportionality of the interference with her Article 8 rights.

20. The other Rule relevant by analogy is that under the Adult Dependant Relative route under Appendix FM which only permits applications to be made via the entry clearance route. Its other salient features are that:

(a) the individual must as a result of age, illness or disability require long-term personal care to perform everyday tasks (E-ECDR.2.4);

(b) they must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because it is not available and there is no person in that country who can reasonably provide it or it is not affordable (E-ECDR.2.5);

(c) they can be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds (E-ECDR.3.1); the sponsor must undertake to be responsible for their maintenance, accommodation and care, for a period of 5 years from a grant of indefinite leave (E-ECDR.3.2);

(d) the supporting evidence demonstrating those criteria are met should take the form of evidence from a doctor or other health professional, or where relevant from a central or local health authority (Appendix FM–SE).

21. The first imperative is the general absolute bar to an in-country application by an adult parent. A credible reason for making an application whilst a visitor might present a compelling reason for departing from this requirement: as shown by *Chen* (IJR) [2015] UKUT 189 (IAC), a strong evidence-backed case may demonstrate good reason for departing for the general requirement of prior entry clearance, having regard to the principle identified in *Chikwamba* [2008] UKHL 40. Secondly there is a very high substantive threshold set, which requires that no care be available, even with practical and financial help from the family here. Thirdly there are specific evidential requirements including the opinion of a doctor or other health professional as to their ability to perform everyday tasks, and additionally an indication of the needs in the country of origin.

22. I have already explained the relevance of the Rules governing the admission of adult dependent relatives. They pose a series of difficulties for the Appellant, in so far as they indicate the public policy position in cases of adult dependency which is relevant to the government's side of the balance when Article 8(2) of the ECHR is assessed, in particular that:

(a) Unfortunately, notwithstanding the encouragement I gave at the first hearing before the Upper Tribunal for further evidence to be provided, that opportunity has not been taken up, beyond the provision of a very brief updating report, so there is very limited evidence from medical practitioners as to her actual care needs, making it uncertain as to whether she truly requires long-term personal care to perform everyday tasks; equally there is very

limited evidence of her care regime in India, and one cannot overlook the fact that it is from that country from where her medicine is in fact obtained;

(b) The most recent medical evidence from her own doctor in this country does not suggest that she suffers from any symptoms or disadvantages caused by Parkinson's Disease;

(c) No evidence has been put before me to establish that there are friends and relatives who might be able to care for her abroad, or whether she has sufficient capital assets (a matter which concerned the First-tier Tribunal) to fund care arrangements for herself;

(d) There is no schedule of predicted earnings and expenses over the next few years (five years post-settlement being the proscribed period in the Rules) capable of providing an assurance that she would not be a burden on public funds.

23. Nevertheless I recognise that the Rules of course represent the starting point of departure for an assessment necessarily conducted outside them, and cannot be treated as a complete answer to the Appellant's case. In the wider context of the Human Rights Convention and Article 8 ECHR, bearing in mind the well-established principles in *Razgar* (2004) UKHL 27, it cannot seriously be disputed that the Appellant has established private and family life here, based upon her length of residence in a family unit, spending time with her children and grandchildren. I accept that she is partially dependent on the Sponsor and his family: that is only to be expected given her age. Plainly her departure as a consequence of the decision to refuse her application would interfere with that life. Article 8 is engaged.

24. The Respondent's decision is in accordance with the law and pursues a legitimate aim, i.e. the economic well-being of the country in terms of immigration control, and so the relevant issue in the appeal is thus proportionality: in a case of this nature, I must essentially ask whether the Respondent's decision strikes a fair balance between private right and public interest.

25. I accept that the family did not intend to circumvent immigration control by making the application leading to this appeal, given the credible evidence that her health was in their view worse than they had believed it to be before she travelled here: she has complied with immigration control on previous visits. So that public interest factor does not count against her.

26. At this point, however, I fear that the disadvantages already identified in my assessment of the case by reference to the available evidence as to her care needs and potential alternative arrangements in India outweigh the family life that she has established here. That family life has of course developed in the light of the knowledge that her residence here is temporary and to that extent precarious,

which is of course a relevant factor: I appreciate that her family are not qualifying partners as defined by section 117B, but nevertheless the position struck by the Strasbourg Court is that in general non-settled residence (and certainly residence for a period as temporary as that found here) is considered precarious, see for example Sales LJ in *Agyarko* [2015] EWCA Civ 440 at [28]: "since her family life was established with knowledge that she had no right to be in the United Kingdom and was therefore precarious in the relevant sense, it is only if her case is exceptional for some reason that she will be able to establish a violation of Article 8: see *Nagre*, paras. [39]-[41]; *SS (Congo)*, para. [29]; and *Jeunesse v Netherlands*, paras. [108], [114] and [122]." Whilst significant dependency on family members must be capable of tipping the balance in favour of the individual, in this case it is uncertain, for example, whether the difficulties with her health regime noted following her arrival were due to a temporary malady: it would appear, from the medical reports generally, that she recovered speedily, given the absence of similar reports more recently. The Appellant's son has chosen to make his life in the United Kingdom and that inevitably entailed separation from his mother given the absence of any route under the Immigration Rules that would secure her extended entry and residence here.

27. Applying the other factors in section 117B of the Nationality Immigration and Asylum Act 2002, it is difficult to hold any lack of English language proficiency against her given she would be living within the family unit and would not be entering the labour market. Whether she would be financially independent is unclear in the longer term given the family's limited means.

28. Overall I find that the interference with the Article 8 rights of Appellant and the Sponsor and his family is not disproportionate to the need to maintain immigration control.

Decision:

The appeal is dismissed.

Signed: Date: 24 March 2016

Deputy Upper Tribunal Judge Symes