



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

Appeal Number: HU/02929/2018

THE IMMIGRATION ACTS

**Heard at Birmingham Justice Centre
On 7 October 2019**

Decision & Reason Promulgated

On 27 January 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

**SK
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Solanki, Counsel, instructed by Atwel Law Solicitors

For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 This is the appellant's appeal against the decision of Judge of the First tier Tribunal Moan dated 16 April 2019 dismissing the appellant's appeal against the decision of the respondent dated 8 January 2018 refusing her human rights claim.
- 2 The appellant is a national of India, and at the time of the judge's decision was 69 years old. She entered the United Kingdom on 25 July 2016 with

entry clearance as a visitor. It was common ground before the judge that the appellant's husband, with whom she had lived alone for many years, had died in June 2016. Her children had gone to India and had taken the appellant back with them to the United Kingdom.

- 3 The appellant made an application for leave to remain on human rights grounds on 8 August 2017, asserting that she should be granted leave to remain in the United Kingdom to respect her rights under Article 8 ECHR, and relying upon paragraph 276ADE(1) of the immigration rules, asserting that in her new-found circumstances as a widow, the appellant would not be able to integrate into life in India. The appellant made reference to various health problems.
- 4 The respondent refused the application for leave to remain on 8 January 2018, finding that there were no very significant obstacles to the appellant's integration into India, given that she spoke Punjabi, a local language, and had lived in India for 66 years prior to her entering the United Kingdom, including her childhood and formative years. It was noted that the appellant had been living in the UK with members of her family for approximately one year but all were over the age of 18. The respondent referred to a GP letter stating that the appellant had been diagnosed with depression and needed help with daily tasks such as washing and dressing and that the appellant suffered pain in her shoulders. The respondent also referred to a psychiatric report dated 27 February 2017 (from a Dr Krishna Jethwa) which set out her medical history of arthritis, diabetes, strokes in the past, hypercholesterolaemia, and severe depressive episode due to low mood swings following her late husband's death. The respondent noted that the appellant had stated that she was being financially supported by family and friends in the UK, and it was asserted that there was nothing preventing them from continuing to do this from the UK if the appellant were removed to India.
- 5 The appellant appealed against the respondent's decision, the appeal being heard only on 1 April 2019, i.e. some considerable period of time after the respondent's decision. By then, there was also a further report dated 7 March 2019 from Dr Jethwa regarding the appellant's health, and commenting specifically on her capacity to act on her own behalf in the appeal proceedings, finding that she did not have capacity to conduct the proceedings. Dr Jethwa also completed a certificate as to capacity to conduct proceedings, confirming that the appellant lacked such capacity. A certificate of suitability of litigation friend was completed on 27 March 2019 suggesting that the appellant's son OSD could act as a litigation friend the appellant.
- 6 It is to be noted that at the outset of the judge's subsequent decision, the judge provided as follows at [1]:

"Noting the contents of the psychiatric reports, I assessed the Appellant as a vulnerable adult and made in anonymity direction. The appellant's son Mr (OSD) was appointed as her litigation friend."

- 7 The judge considered the evidence before her as to the appellant's ill-health, which included the two reports from Dr Jethwa, a GP letter dated 23 January 2017, and a copy of the appellant's GP records spanning the period 2010 to 15 January 2019 (appellant's supplementary bundle pages 1 to 51), as well as various UK hospital letters relating to the appellant's health, and some documents obtained from India relating to the appellant's health care whilst living there.
- 8 The judge considered that evidence and made a number of findings which included the following:
- (i) the appellant had been able to engage with Dr Jethwa in March 2017 [8];
 - (ii) given that the appellant's adult daughter JSK had given oral evidence that her late father had told her that he had previously had to 'administer' the appellant's medication due to her depression [10] it was then 'very surprising' that JSK stated that in the United Kingdom the family had left the appellant to take her own medication [11];
 - (iii) the witnesses written statements spoke of 'reminders' for the appellant to take her medication, this being in acute contrast with the suggestion that she had medication administered to her [12];
 - (iv) information provided by JSK said her father 'cared for' the appellant in India was different to the report from the appellant herself to Dr Jethwa [13];
 - (v) the appellant's report to Dr Jethwa in February 2017 that she did not suffer from depression prior to her husband's death conflicted with the oral evidence of the appellant's daughter who suggested that the appellant's depression was a long-standing problem [14];
 - (vi) there appeared to be some interaction with the appellant with extended relatives in India [15];
 - (vii) there were very contradictory reports about the appellant's suicidal inclination but there was little to suggest that actions were taken to prevent suicide or access to crisis teams [17];
 - (viii) the GP letter of 23 January 2017 contained no detailed analysis of the appellant's medical conditions or how they affected her ability to self care [19];
 - (ix) the witness statement of OSD suggested that the appellant was not eating was in contrast to the information in Dr Jethwa's report that the appellant may be putting on weight due to lack of exercise and the reports regarding the appellant's BMI in the GP notes, which suggested that her BMI was increasing in the UK rather than decreasing, which suggested a healthy appetite, and the appellant was recorded as being actively encouraged to lose some weight and embrace a healthy diet [20];

- (x) a suggestion that the appellant had refused to take antidepressant medication because it disagreed with her showed some insight into her condition [21];
- (xi) whereas the family had suggested that the appellant had memory difficulties, there was no memory functioning test; the family had stated that they could not afford to pay for one, despite paying for two psychiatric reports and offering to pay for the appellant's health care from the NHS [23];
- (xii) when the appellant returned to the United Kingdom in 2016 (she had previously visited the UK) she was assessed as having a minor osteoarthritis in her left shoulder and there was no long-standing depressive illness reported [24];
- (xiii) further visits to the GP on 7 September 2016 and 11 October 2016 were followed by a visit on 21 January 2017 when the GP notes that the family wished the GP to write a letter to the Home Office, describing the appellant's low mood and anxiety; the appellant was prescribed antidepressants (citalopram); the judge noted that it was only when her leave to enter (as a visitor) was about to expire that the issue of the appellant's mental health was raised [27];
- (xiv) there was scant mention of her mental health in the GP notes, the main issue being her shoulder; the judge was not satisfied that the appellant's mental health was a significant issue from the number of occasions she had accessed help from her GP or any intervention thereafter [28];
- (xv) the judge held that the family had exaggerated the assistance needed by the appellant, and that the history of the help she needed prior to her husband's death was inconsistent [29];
- (xvi) the appellant's weight did not support a need prompting to eat [29];
- (xvii) an ophthalmologist's letter dated 16 February 2018 confirmed that the appellant had a mild retinopathy following cataract surgery which had been successful, and that she was able to hear during the consultations and interviews with medical professionals and there was little to indicate functional hearing loss [30];
- (xviii) "The updated report of Dr Jethwa dated 7 March 2019 did not appear to recognise that the appellant's retinopathy was mild, or that she had not accessed mental health therapy or medication. Dr Jethwa recognised that the family said she had poor memory but that there was little record of concerns regarding her memory. Control of her diabetes had in fact improved. Whilst I agree that the appellant's condition had changed, it was for the better, and not for the worse" [31];
- (xix) "Dr Jethwa considered that whilst the appellant understood the proceedings, she needed help to conduct the proceedings. She formed the opinion that she could not retain information, even

though there were no medical concerns about her memory, presumably on the basis that during the second interview she could not recall dates. It was not clear to me on what basis Dr Jethwa made that assessment. Dr Jethwa recommended a memory assessment. Like her previous recommendation, this was not acted upon.” [32];

- (xx) the appellant’s main concern was a physical one, her left shoulder; she had not mentioned her depression immediately after the death of her husband; it was noteworthy that the GP recorded the request for a letter to the Home Office before the issues about her mental health were raised; she had not consistently raised her low mood despite frequent visits to her GP; she had not taken her antidepressants or sought alternatives; she had not accessed therapy as recommended by Dr Jethwa; the assertions about her memory are unsubstantiated and the family have not been credible or consistent about her care needs prior to the appellant’s husband’s death or thereafter [35];
- (xxi) the appellant was a lady of mature years, with some physical concerns, and of low mood since the death of her husband; she may feel isolated and alone in India but emotional support and prompting can take place remotely; there is little to suggest that the villagers/neighbours would not provide support, even if this had to be paid for [36];
- (xxii) on the subject of reintegration, the judge found that there had been little deterioration in the appellant’s health to prevent reintegration since she left India; on her own evidence her husband took charge of all the management the household the appellant took a backseat; thus she chose not to integrate to the level that he did; she would not have the support, husband upon return and this would have to integrate more fully with those around her [37];
- (xxiii) having spent so much time in India, the judge was unable to conclude the appellant would not be able to reintegrate there as a widow [39];
- (xxiv) the appellant appeared to have an understanding of her medication, having chosen not to take her antidepressants, but agreed to take other medication [41];
- (xxv) the appellant may find it more difficult to access healthcare from her village and this may necessitate a move; the lack of medical facilities in her home village is not a reason for the appellant to be permitted to access NHS healthcare which he has no right to access [41];
- (xxvi) “Regrettably the situation of the Appellant was an inevitable consequence of the children leaving India and relocating in the UK and leaving the parents in India. At some point one or both of the parents would grow older and may develop some physical or mental infirmity. They may need care and access to healthcare.

The children have the invidious choice of returning to India to care for their parents, to pay for their care in India if parents cannot afford to do so, or rely on family in India unless they meet the stringent test under the immigration rules.” [44];

(xxvii) the decision refusing the human rights claim was proportionate [46].

9 The appellant’s appeal was dismissed.

10 Permission to appeal against the judge decision was sought. Permission was initially refused, but the appellant’s renewed application for permission to appeal argued that the judge had erred in law, in summary, as follows:

(i) the assessment by Dr Jethwa that the appellant lacked capacity had been ‘ignored/rejected almost entirely’ when looking at the appellant’s case under the immigration rules and Article 8 ECHR; given that the appellant’s lack of capacity was said to be core to the issues in the claim, it was submitted that the judge’s approach to this matter amounted to a material error of law (grounds, paragraph 9-12);

(ii) failing to consider properly or at all the appellant’s claim under paragraph 276ADE(1)(vi) of the immigration rules regarding very significant obstacles to the appellant’s reintegration into India; the judge had failed to take account of objective evidence placed before the Tribunal on the position of elderly women in rural India (examples of which were set out further in the grounds of appeal at paragraph 18(a)-(g)), the appellant’s age, cultural considerations and the history of her upbringing, having had an arranged marriage as a teenager and having only attended school two years; the judge failed to make a broad evaluative judgement recommended in *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813, including the requirement to consider:

“whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual’s private or family life” (Grounds of appeal, paragraphs s13-19); and

(iii) erring in the judge’s approach to the credibility of the witnesses in the appeal:

(a) misconstruing the evidence given relating to the admission of medication/reminding the appellant taken medication;

(b) insofar as the judge found that the appellant could be reminded to take medication by the use of digital devices, in

failing to take into account that she was illiterate, lacked capacity and would not be filling familiar with such devices;

- (c) in purporting to find an inconsistency in the evidence given by JSK that her father had 'cared for' the appellant in India, and the appellant's own description of her health in India given to Dr Jethwa, in failing to have any or adequate regard to the actual evidence on those issues;
- (d) in appearing to find that the appellant had interaction with extended relatives in India, failing to take into account cultural considerations as to why the person who informed the appellant of her husband's death may have been described as 'uncle';
- (e) insofar as the judge 'held against the appellant' the fact that family members had asked the GP for a report on her health, that did not represent an adequate reason for holding any matter against the appellant;
- (f) in suggesting that OSD's evidence that his mother had not been eating was contrary to information contained in Dr Jethwa's report regarding the appellant's weight, the judge failed to have any or sufficient regard to the evidence contained in the GP records over time, which suggested that the appellant was indeed losing weight, not gaining it, between 2016 and 2018;
- (g) the judge's finding that 'I was not satisfied that her mental health was a significant issue from the number of occasions she had accessed help from her GP or any intervention thereafter' failed to take into account the oral evidence of JSK and the written evidence of OSD that it was, in summary, difficult to get the appellant to go to GP appointments and that the appellant had not been taken to mental health services or for a memory test because the appellant does not want to leave the house;
- (h) the judge had overall, misunderstood the evidence before her and failed to have regard to relevant evidence.

11 Permission to appeal was granted on 25 June 2019 by Upper Tribunal Judge McWilliam in following terms:

"According to the evidence of a consultant psychiatrist the appellant struggled to provide answers and she did not have capacity. Whilst the expert opined that she did not have capacity, he also recommended that the appellant's memory be assessed. The expert said that her past history of health problems is likely to indicate an increased risk of memory problems due to vascular problems.

There was no further assessment made of the appellant. Whilst it is arguable that there was no evidence about the cause of the problem, it is arguable that the judge did not adequately explain why he chose to

attach no weight to the assessment made by a consultant psychiatrist that the appellant lacked capacity.

All grounds are arguable.”

Submissions

- 12 On behalf of the appellant, Ms Solanki relied on the grounds of appeal and expanded on them, drawing my attention to various extracts of the medical evidence and country information.
- 13 Mrs Aboni resisted the appeal, arguing that the judge had correctly directed herself in law, taking all relevant evidence into account, and made a decision which was open to her on the evidence.

Discussion

Ground (i)

- 14 The appellant’s first ground does, ultimately, identify a ‘core issue’ in the appeal (Grounds, paragraph 12). The appellant’s case was sometimes put on the basis that the appellant ‘lacked capacity’. However, considerations of capacity should always be put into the proper context; what is it that the appellant was said to lack capacity to do? It is to be noted that capacity as defined under the Mental Capacity Act 2005 (‘MCA 2005’) must be approached on an issue-specific basis. Section 2(1) of the Act provides that:

“For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain” (emphasis added).

- 15 Being more specific, of course, it was asserted that the appellant lacked capacity to conduct the proceedings, those proceedings being the bringing and prosecution of a human rights appeal before the First tier Tribunal (Immigration and Asylum Chamber).
- 16 Under section 3(1)(b) MCA 2005 Act, a person is to be deemed unable to make a decision on a particular matter if he is unable to retain information relevant to the decision.
- 17 In Dr Jethwa’s second report (7 March 2019), the doctor observed as follows:

“47 In my opinion Mrs (K) understands that the proceedings related to her immigration case, however she does not have the capacity to act on her own behalf. She appears to struggle to answer basic

questions, she is likely to find the proceedings very stressful. She was not able to retain new information explained to her regarding those proceedings. She will be unable to make representations or follow the required legal procedure within her case. In my opinion she would require assistance from a solicitor to act on her behalf.”

18 The judge addresses that evidence in her paragraphs 31-32:

“31. The updated report of Dr Jethwa dated 7 March 2019 did not appear to recognise that the appellant’s retinopathy was mild, or that she had not accessed mental health therapy or medication. Dr Jethwa recognised that the family said she had poor memory but that there was little record of concerns regarding her memory. Control of her diabetes had in fact improved. Whilst I agree that the appellant’s condition had changed, it was for the better, and not for the worse.

32. Dr Jethwa considered that whilst the appellant understood the proceedings, she needed help to conduct the proceedings. She formed the opinion that she could not retain information, even though there were no medical concerns about her memory, presumably on the basis that during the second interview she could not recall dates. It was not clear to me on what basis Dr Jethwa made that assessment. Dr Jethwa recommended a memory assessment. Like her previous recommendation, this was not acted upon.”

19 Therefore, the judge does within that passage appear to query the conclusion of Dr Jethwa that the appellant lacked capacity to conduct the proceedings. The querying of the doctor’s opinion in that regard would certainly be consistent with the judge’s findings elsewhere, as I have summarised them above at [8(i), (x), (xiv), and (xx)], that the appellant’s mental health problems had been exaggerated.

20 There are many challenges to the way that the judge approached the medical evidence. However, a key question is; did the judge actually treat the appellant as lacking capacity to conduct the proceedings, or not? The general proposition within the appellant’s first ground is that she did not, and erred in law in failing to do so.

21 However such a proposition this must be contrasted with paragraph [1] of the decision, where the judge clearly appoints OSD as the appellant’s litigation friend. If the judge had considered it appropriate to appoint him as litigation friend, this must have been on the basis that the judge was satisfied that the appellant lacked capacity to conduct the proceedings.

22 However, in the light of the judge’s comments at [31]-[32], and her findings as I have summarised them above at [8(i), (x), (xiv), and (xx)], it is not all clear what ‘impairment of, or a disturbance in the functioning of, the (appellant’s) mind or brain’ the judge accepted existed. The majority of the judge’s findings within the decision tend to suggest that the judge was not satisfied the appellant had any real impairment of, or disturbance in the functioning of her mind or brain.

- 23 The judge ultimately described the appellant at [36] as being ‘a lady of mature years, with some physical concerns and of low mood since the death of her husband’. If that was, in reality, the judge’s assessment of the appellant’s health, then it is difficult to understand, in particular having regard to [31]-[32], why the judge agreed that the appellant required a litigation friend, as recorded at [1].
- 24 There is, therefore, I find, a fundamental dichotomy running through the whole of the judge’s decision, which the judge does not adequately resolve; either the appellant lacked capacity to conduct proceedings, because of an impairment of or a disturbance in the functioning of her mind or brain (and which must have had some significant effect on her, in order to deprive her of that which would ordinarily be presumed to exist (see MCA 2005 s.1(2)), or she did not. Elements of the judge’s decision tended to suggest that the judge accepted that the appellant had such an impairment or disturbance (para (1)), and others in which she did not.
- 25 I am of the view that on the basis of the evidence before the judge, she would not have been compelled to make findings one way or the other on the issue of whether the appellant had a sufficiently serious impairment or disturbance in the functioning of her mind or brain to result in her lacking capacity to conduct the proceedings; some of the judge’s observations regarding the quality of the medical evidence relating to the appellant’s mental health are perfectly understandable. However, the judge’s appointment of a litigation friend was inconsistent with the judge’s other findings in relation to the appellant’s mental health.
- 26 I find that that inconsistency undermines the whole of the judge’s decision. It is to be noted that whether or not the appellant lacked capacity to conduct proceedings would not necessarily be determinative of her ability to perform tasks of daily living such as learning how to go to the shops without the assistance of her late husband, buying goods at the market, paying for utility bills etc, in India, if she were required to return to live there, but it is clearly relevant to the assessment of her ability to engage in those activities.
- 27 In the light of my finding that the judge’s approach to the appellant’s mental health contained a fundamental and unresolved discrepancy, it is not necessary for me to consider the remainder of the appellant’s grounds of appeal.
- 28 Although I reserved my decision at the hearing, both parties agreed that should the judge’s decision contain a material error of law such that it needed to be set aside, the appropriate outcome would be for the matter to be remitted to the First tier, for fresh findings of fact to be made. I agree.

Decision

The judge's decision involved the making of a material error of law

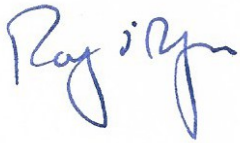
I set the judge's decision aside

I remit the appeal for rehearing by the First tier Tribunal.

29 The appellant shall advise the First tier Tribunal in writing if an interpreter is required for the remitted hearing.

Signed:

Date: 22.1.20

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Deputy Upper Tribunal Judge O'Ryan

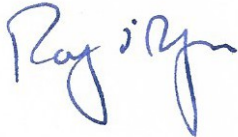
Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

I make an anonymity order under Paragraph 13, Upper Tribunal Immigration and Asylum Chamber, Guidance Note 2013 No 1: Anonymity Orders, on the grounds that this is a human rights appeal involving a vulnerable witness.

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies to the appellant and to the respondent and to all other persons save as may be required by other proceedings before any Court or Tribunal. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 22.1.2020

A handwritten signature in blue ink, appearing to read 'P. O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O’Ryan