Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08923/2019

THE IMMIGRATION ACTS

Decided at Field House	**Determination & reason Promulgated**
On 17th August 2021	**On 19th August 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THAN SINGH
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Mavrantonis, of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India born in 1957. He arrived in the UK in August 2018 as a visitor with leave to enter until 4th February 2019. On the 4th February 2019 he applied for leave to remain on Article 8 ECHR private life grounds. His application was refused on 2nd May 2019. His appeal against that decision was

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dismissed on human rights grounds by First-tier Tribunal Judge Obhi in a determination promulgated on the 17th October 2019.

2. Permission to appeal was granted and for the reasons set out in my decision at Annex A I found that the First-tier Tribunal had erred in law and set aside the decision and all of the findings. In light of the decision in R (JCWI) v President of UTIAC [2020] EWHC 3013 Admin I sought the opinion as to whether they parties had any objection to the error of law decision having been taken on the papers under Rule 34 of the Procedure Rules. Neither party raised any objections.

3. The matter comes before me now to remake the appeal. I accepted the submission for the appellant that he is a vulnerable witness on account of his being a frail wheelchair user having a number of serious physical medical conditions, which I set out below, which are not disputed by the respondent. The hearing was conducted with straight-forward open questions by the legal representatives, which were kept to the necessary minimum, and with a break after the evidence and prior to the submissions. The appellant used the Tribunal Punjabi interpreter to give his evidence, and confirmed that he understood him. There were some initial issues with the Punjabi interpreter finding the appellant hard to hear as he spoke too quietly, but these were overcome. The appellant was too tired to remain for all of the submissions, and it was agreed with his counsel that he would leave prior to the end of the submissions with his friends and carers Mr and Mrs Kapoor.

Evidence & Submissions – Remaking

4. The evidence of the appellant in his written statements and oral evidence is, in summary, as follows. He is 63 years old. He has visited the UK numerous times, and also travelled to other countries, and always left promptly in accordance with his visit visas in the past. After entering the UK in August 2018 however his health deteriorated rapidly. He suffered a blocked artery/ heart attack after entry which necessitated paramedics attending, his going to hospital and having a blood transfusion and 3 stents being put in his heart to unblock it. He is currently suffering from amongst other conditions chronic kidney disease and diabetes, and takes 6 types of medication. He feels very blessed by the care given to him by his friends Mr and Mrs Kapoor whom he was visiting as a friend at the time of his heart attack. Since he became unwell they have taken him into their home like a father. The appellant is not biologically related to Mr and Mrs Kapoor. His wife died in India a long time ago, and his son and his son's wife have neglected him for many years, and if he returned there he would sick and alone. He used to live with his son prior to entering the UK. He had previously owned a clothing shop, and has given this shop to his son. His son is not willing to have him back to live in his home in India however because of a problem between his son and his son's wife. His son has told him not to come back to his place and to stay in the UK after he became unwell. The appellant cannot turn to his two daughters for help as it is not their role, it is his son who ought to be his carer. He has not spoken to his daughters for quite a while, and his son no longer speaks to him. He needs

care because even matters such as getting out of bed or up from the sofa take a lot of effort and planning for him. He needs help with dressing, combing his hair, showering and can only walk about 30 steps with any ease. His eyesight is worsening due to his diabetes. He believes that he is not fit to travel because he does not have the strength to face the return journey to India. He found it very difficult to travel to the Tribunal (in central London) from Hounslow for the hearing due to his ill-health.

5. In their joint statement Mr Kulbir Singh Kapoor and Mrs Lakhbir Kaur Kapoor confirm, in summary as follows. They make their statement in support of their friend the appellant. They are both British citizens, and the appellant is father figure to them. They see him as noble, wise and a blessing to their lives. Their children are also very fond of him and see him as a grandfather. They met the appellant in India many years ago. Their son became ill whilst he was in India and the appellant arranged money and the necessary medical treatment for him. The appellant has lived with them since his arrival for his visit in 2018 and they look after his daily needs in the UK including helping with washing; going to the toilet; dressing; and cooking him food that he can digest. They believe that it would be extremely harsh to remove him to India because he would be alone in India without anyone to help him as his son will not provide help, and they can provide for him in their own home without recourse to any public assistance.

6. Mr Kulbir Singh Kapoor gave oral evidence and added, in short summary, the following. He and his wife are not related to the appellant., they are just friends having met in India as set out in his statement. The appellant has a long history of visits, and never wanted to stay beyond his visa until now as he has nowhere else to go. Things changed due to the appellant having a heart attack after his arrival, and due to his decline since that time. He used to be able to walk but now he cannot do things such as do up his buttons. The appellant's health has worsened over the past month, he is weaker and they have had to take him to hospital, initially this was because the appellant's GP said he needed a blood transfusion but the hospital decided that he needed medication instead. The appellant fell in the bathroom two days ago due to his legs becoming weak. Mr Kapoor said that he pays for the appellant's medication at the pharmacy. His evidence is that the appellant's son is refusing to take his calls, and has changed his phone number, although they do know the new number and so the social worker was able to speak to the appellant's son. Mr Kapoor said that at the current time he has sufficient funds to support the appellant even in India, although this might change and if he were there it would be more expensive for him, but he would be concerned that it would be very hard to send the money safely and arrange someone to care for the appellant in India, whereas this is something he and his wife are able and willing to do for their friend in their own home with ease.

7. Dr A Bonsu provides a medical report dated 16th June 2021 with respect to the appellant based on his medical notes and an examination. She lists his medical history as showing he suffers from: diabetic mellitus; diabetic nephropathy; hypertension; ischaemic heart disease; acute coronary syndrome; cerebrovascular

incident; maculopathy; and memory concerns. She notes that the appellant was in hospital for three days in June 2021 for urosepsis and normocytic anaemia. A letter from the nephrology clinic at Ashford and St Peter's Hospitals dated March 2021 concludes that the appellant has significant progressive kidney disease and is likely to reach end stage renal failure in the near future. On examination she finds him frail and elderly: he could walk slowly with a stick but has significantly swollen legs, shortness of breath and extreme fatigue. Her opinion is that he has heart failure coupled with anaemia and hypertension which would put him at increased risk of cardiac arrest and thrombosis during a flight. He has renal disease nearing the point where he will need dialysis which mean that he could dehydrate during a flight and have acute renal failure. He has to inject with insulin multiple times a day for his diabetes and he is unable to administer this due to his vision impairment, memory problems, lack of manual dexterity and frailty and without these injections he would not be able to maintain his blood sugars and could become hyperglycaemic and have a collapse or cardiac arrest. Her conclusion is that she would not recommend that he fly as he is high risk of harm and death from so doing.

8. The opinion of Dr Sethi dated 27th April 2019 , the appellant's GP, which was before the First-tier Tribunal, was that the appellant was not currently fit to travel due to his deteriorating chronic kidney disease which needed to be reviewed by a specialist in the context of his having acute kidney injury and chronic kidney disease. An updating report from Dr Sethi dated 4th May 2020 indicated that the appellant's renal function has deteriorated since October 2019, and that when considered in relation to all the appellant's medical conditions: "His condition continues to stay unstable and is vulnerable and therefore not fit to travel." Dr Sethi writes a further report dated 22nd April 2021 which confirms that the appellant has ischaemic heart disease, acute kidney disease and diabetes. His right eye has a drop in vision and he is awaiting further investigations with the vitro-retinal specialist, for his chronic kidney disease, with cardiology for chest pain, and for his progressive and probable end stage renal failure. He does not appear to have dementia but to be suffering from stress, anxiety and depression.

9. The report of the independent social worker Ms S Deacon dated 28th June 2021 was made by reviewing the various medical records, the Home Office refusal letter, the decision of Judge of the First-tier Tribunal Obhi and my decision on error of law, and by interviews with the appellant, his friend and carer Mr Kapoor, the appellant's GP Dr Sethi and the appellant's son in Delhi. She concludes that Mr and Mrs Kapoor and their children are the appellant's primary source of emotional and practical assistance; they share a close and supportive relationship; and are committed to caring for him as an elder in their family. Their children treat him as a grandfather as they do not have a biological one. The appellant's own son is not prepared to care for his father and there are no alternative family in India who will do this. As a result if the appellant were removed this would raise significant concerns about his physical condition and impact detrimentally on his mental health. Mr & Mrs Kapoor have explained that they could not pay for the appellant's medical expenses, rent, care and food in

India, as having the appellant in their own home is much cheaper as he is sharing their home, food and being cared for by them. Ms Deacon refers to country of origin evidence which suggests that the needs of geriatric Indians are not being adequately met. In the context of the appellant's compromised levels of emotional and physical resilience Ms Deacon concludes that there is a greater than normal family dependency between the appellant and Mr and Mrs Kapoor. That his own son is not willing to provide family support, and that return to India would have a catastrophic effect on his ability to survive due to his isolation there.

10. In the submissions of Mr Tufan for the respondent reliance is placed on the reasons for refusal letter of 2nd May 2019 and oral submissions. It is not accepted that the Upper Tribunal can apply the "limbo" argument based on RA (Iraq) v SSHD [2019] EWCA Civ 850 as this is a judicial review argument and not applicable to the framework of a statutory appeal. In any case the appellant has s.3C leave and so is not suffering as a result of the particular conditions of his leave to remain, and also there is no evidence that his removal was remote as there was no evidence that he might not get better and become able to fly.

11. In summary it is argued for the respondent, that the appellant would not have very significant obstacles to integration if returned to India as he could rely upon the assistance of his son and in light of his citizenship; and given he has lived in that country for the vast majority of his life, and given he has linguistic, cultural and social ties to that country. It is argued that there was some difference in the evidence about whether the appellant was in contact with his son, as initially Mr Kapoor had said the son had changed his phone number so there was no contact, but had then corrected his evidence to say that this number was available to them as it had been provided to the independent social worker. It is not believable, particularly absent a statement from him, that his son would not care for the appellant given that the appellant has given him his shop, and even if there is a dispute with the appellant's daughter-in-law about him being in the house the son could arrange some sort of other care for his father in a home or other accommodation with carers. Even if it was believed that the appellant would have no support from his son his carer in the UK, Mr Kapoor, had agreed that he could send money for him to be cared for in India so this would suffice in terms of showing no very significant obstacles to integration in India.

12. It is not accepted there are any exceptional circumstances so it would not be a breach of Article 8 ECHR looked at more broadly. Consideration is given to the medical evidence but it is not accepted that the appellant would suffer an early death without dignity if returned to India, nor that he would experience intense suffering or a foreshortened life. This is because it is argued that all of the appellant's conditions can be treated in India as India has a functioning health system, and there is no evidence that he cannot access his medication and any necessary palliative or medical care. It is not accepted that there is sufficiently precise or detailed information showing that the appellant is not well enough to travel.

13. It is submitted for the appellant in the skeleton argument of Mr M Mavrantonis and in his oral submissions, in summary, as follows. The appellant does not argue an Article 3 ECHR medical claim in this appeal. He argues that he is entitled to succeed on two grounds. Firstly, it is argued that the appellant is not, on the balance of probabilities, removable due to being unfit to fly. Secondly, it is argued, that the removal of the appellant would be a breach of Article 8 ECHR because he can show very significant obstacles to integration if removed, and therefore that he meets the Immigration Rules at paragraph 276ADE(1)(vi) and also because his removal is not proportionate when looked at more widely in Article 8 ECHR terms.

14. In relation to the issue of removability and "actual limbo" the appellant relies upon the four stage test in RA (Iraq) v SSHD [2019] EWCA Civ 850. The first stage requires a distinction between actual and prospective limbo, limbo meaning a person for whom there is limited prospect of his or her ever being removed/deported from the UK despite this being the wish of the respondent. Actual limbo being where the individual has no leave and cannot work or get benefits or services; and prospective limbo being where currently he or she currently has these things but in the future there is a threat that they will be withdrawn. The second stage is that of assessing the remoteness of the deportation/removal. It must be apparent that the appellant cannot be removed/deported in the immediate or foreseeable future; then there must be no steps that can be taken to facilitate the removal/ deportation; and, finally, there must be no reason to anticipate that there will be a change in the situation. Overall, it must be the case that the prospects of removal are remote. The third stage is that there must be a fact sensitive analysis of the time spent in the UK, immigration history and family circumstances; the nature of any offending; the prospects of removal; and whether the individual is obstructing the removal/deportation. Fourthly a balancing exercise must be conducted weighing the public interest in maintaining immigration control against the appellant's Article 8 ECHR rights. The case of R (oao AM) v SSHD (legal 'limbo')[2021] UKUT 62 IAC holds that a truly exceptional legal limbo case may succeed on human rights grounds.

15. This appellant suffers from: diabetic mellitus; diabetic nephropathy; hypertension; ischaemic heart disease; acute coronary syndrome; maculopathy; memory concerns; upper gastro-intestinal bleed; urosepsis, stage 3 AKI, normocytic anaemia and intravitreal haemorrhage. The appellant is not fit to fly according to the evidence of Dr Sethi of April 2021, and his evidence in May 2020. Dr Bonsu says in her medical opinion of June 2021 that the appellant is an increased cardiac arrest and thrombosis risk if he were to fly and should not travel at all unless it is necessary such as to hospital appointments. She says that flying places him at risk of dehydration and therefore acute renal failure on the flight: being unable to maintain his blood sugars he would be likely to develop hyperglycaemia which could result in collapse and cardiac arrest.

16. It is argued that the four stage test in RA (Iraq) is relevant and is met. Mr Mavrantonis argued that although RA (Iraq) and R (oao AM) v SSHD (legal 'limbo') are judicial review decisions that this is an appeal against a refusal of a human rights decision, and the ground of appeal is simply that the decision to refuse his human rights application made by the Secretary of State is unlawful under s.6 of the Human Rights Act 1998, applying s.82(1)(b) and s.84(2) of the Nationality, Immigration and Asylum Act 2002. He argues therefore that a freestanding 'limbo' argument could succeed however he also argues that it does not matter if this is not the case as all the same factors come into play when looking at the appeal in the 'normal' Article 8 ECHR ways with reference to the Immigration Rules at paragraph 276ADE (1)(vi) and outside of those Rules.

17. It is argued that the limbo argument succeeds because, firstly, he is in prospective limbo because there is a threat that he would lose the services he currently receives due to s.3C leave. Secondly there is a settle situation with respect to the appellant's health which means he cannot be removed in the immediate or foreseeable future, as this is the opinion of the two medical experts. Thirdly when the fact sensitive analysis is conducted the appellant is not an overstayer and has no criminal record, is paying privately for his medical treatment and has not deliberately caused his health to decline so he can remain in the UK, and thus his removal can properly be said to be remote. As a result it would be a breach of Article 8 ECHR to remove him as the public interest does not weigh as heavily as the interference with the appellant's Article 8 ECHR rights for these reasons and those set out below.

18. In relation to paragraph 276ADE(1)(vi), it is accepted that this is an elevated threshold and will not be satisfied by mere inconvenience or upheaval. In the UK the appellant is cared for by Mr Kapoor and his wife, who are his family friends. In India he has had no help from his son from whom he is estranged. The appellant needs help with personal care, cooking, medication, washing and bathing. He is a diabetic who needs to inject insulin, but he cannot do this himself because he is visually impaired, frail and has memory issues. Without the help the appellant receives in the UK the independent social worker, Ms S Deacon, in her report of 28th June 2021 concludes that his physical safety and mental health would be likely to be detrimentally affected. Even if Mr Kapoor or perhaps the appellant's son might be able to pay for care in India, which was not an issue raised in the reasons for refusal letter, he would not be integrated there being cared for by strangers. His private life world consists of his home and family life type relationships with Mr & Mrs Kapoor, where he is treated with respect as a grandfather: this is his societal integration since his medical decline. He would be deprived any sort of private life if sent back to an existence only with strangers in India. It is argued therefore that the appellant would have very significant obstacles to integration and is entitled to succeed in his Article 8 ECHR appeal as a result.

19. If looked at on wider Article 8 ECHR grounds outside of the Immigration Rules then all of the factors, with the risks of travel and the remoteness of removal,

must be weighed, along with the lack of any private/family life if the appellant were to be returned to India, if this were possible, and his probable isolation there and how this would impact detrimentally on his mental health.

Conclusions – Remaking

20. I find that it is not open to the appellant to argue that he is entitled to succeed in this appeal by virtue of the 'limbo' argument as set out in RA (Iraq) alone, as opposed to some elements of that argument and the associated factual considerations coming into play within the consideration of the Article 8 ECHR appeal by reference to the Immigration Rules at paragraph 276ADE(1)(vi) and more widely on Article 8 ECHR grounds. This is because a human rights claim is defined at s.113 of the Nationality, Immigration and Asylum Act 2002 as: "a claim made by a person that to remove him from or require him to leave the United Kingdom or refuse him entry to the United Kingdom would be unlawful under s.6 o the Human Rights Act". It is refusal of an application asserting that removal from or a requirement to leave the UK would breach the appellant's human rights that gives the statutory right to appeal to the Upper Tribunal as per s.82(1)(b) of the 2002 Act. An appeal to the Upper Tribunal cannot therefore determine wider breaches of Article 8 ECHR in relation to this appellant beyond those relating to his removal and/or a refusal of a right to stay. This position is, I find, consistent with what is said by the Court of Appeal in R (on the application of) Muhammad Aleem Mujahid v SSHD [2021] EWCA Civ 449.

21. I turn therefore to consider the appeal by reference firstly to the Immigration Rules at paragraph 276ADE(1)(vi), and whether the appellant would have very significant obstacles to integration in India. The idea of "integration" calls for a broad evaluative judgment to be made as to 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' Secretary of State for the Home Department v. Kamara [2016] EWCA Civ 813.

22. I have outlined the medical and social work evidence above and I find that weight can be given to all of that evidence as it is supplied by appropriate experts who are aware of their obligations to the Upper Tribunal. I also find that the evidence of the appellant and Mr Kapoor is credible, and reliance can be placed upon it. I accept that Mr Kapoor did have to clarify his evidence with respect to the telephone number of the appellant's son, but he was ultimately clear that it was available to him and the appellant although they were not in touch. I found Mr Kapoor to be candid about the fact that he could and would financially support the appellant in India, at the current time at least, despite this costing more than providing for him in his own home. Whilst Mr Tufan submitted that it was strange that the appellant's son was not willing to care for him given the appellant had gifted him his shop it was clear that it was put forward that this

was not happening due to pressure from his son's wife. The evidence of the witnesses was consistent with what had previously been said in statements and with each other. Ultimately, I find that there was nothing implausible about it.

23. On the facts of this case it is contended, based on the opinion of Dr Bonsu, that the appellant would firstly have very significant obstacles to integration in India as he would be at "high risk of harm and death" on the long haul flight back to India due to his risk of hyperglycaemia from the appellant's diabetes causing collapse or cardiac arrest; due to a risk of kidney failure due to becoming dehydrated on the plane given his deteriorating chronic kidney disease and likely end stage renal failure; and due either thrombosis or cardiac arrest on the flight due to his heart disease. Her opinion is that she would not recommend that the appellant fly at all. In light of this medical evidence I find that on the balance of probabilities that an airline would not agree to fly the appellant to India and that this fact and/or the fact that he would be likely to arrive at the very least having suffered severe harm to his physical health would mean that he would have very significant obstacles in integrating in his home country due to the potentially fatal impact on his physical health.

24. Secondly, it is contended that the appellant would have very significant obstacles to integration because on arrival he would have no appropriate care in the context where he is heavily dependent on others (at present his friends the Kapoors) for all his needs: namely well-being, accommodation, food, heating, personal care, cooking administration of medicine, washing and bathing. I accept the submission of Mr Tufan that the evidence of Mr Kapoor, that he could currently pay for a care package in India of some type, whether in private accommodation or in a care home, and would be willing to do so due to his commitment to the appellant, means that some of these obstacles fall away. I find however that what money could potentially buy would not be sufficient to give substance to his private life for the following reasons.

25. The appellant is an extremely unwell, fragile and exhausted man suffering from serious heart disease, renal disease and diabetes. He presented to Dr Bonsu as frail, elderly walking slowly with a stick and needing a wheelchair should he need to leave the home for hospital appointments, with significantly swollen legs, shortness of breath and extremely fatigued. His level of fatigue was also clear from his attendance at the Upper Tribunal. He has known the Kapoors for many years and in the UK he is integrated into their family, and has been since the dramatic decline in his health since his heath attack in October 2018. They provide for all of his physical and medical needs but also provide him with a family, and he feels safe and secure with them. It is the conclusion of the independent social worker, Ms Deacon, having talked directly to the appellant's son as well as having interviewed the entire Kapoor family that the appellant lacks alternative familial relationships in India, and that his return there would leave him isolated whereas in the UK he has "love, comfort and on-going companionship of a physically and emotionally available surrogate family,". It is the opinion of the social worker that the isolation the appellant would have

without a biological or surrogate family would "have a catastrophic effect on his ability to survive". I find that given the appellant's level of physical ill-health caused by multiple serious health conditions and his lack of potential family to turn to in India that he would not be able to build, within a reasonable time, a variety of human relationships to give substance to his private/ family life. As a result I find for this reason too that he is entitled to succeed in this appeal by reference to paragraph 276ADE(1)(vi) of the Immigration Rules.

26. In case I am wrong I go on to consider the appeal more widely under Article 8 ECHR. If the appellant cannot show compliance with the Immigration Rules then his private life ties with the UK must be balanced against the public interest in the maintenance of immigration control and the removal of those who cannot show compliance with the Immigration Rules. Applying s.117B of the Nationality, Immigration and Asylum Act 2002 weight must be given against him to the fact that he cannot speak English, but it is neutral matter that he is financially independent, as he is entirely financially support by the Kapoors. Only little weight can be given to his private life ties which have been made during his period of precarious residence. Little weight is not no weight however and I do accord some weight in his favour as I find that his private life ties with the Kapoors are akin to family life ties: I find that the appellant is in the position of an adopted father/grandfather in their family and is treated in all respects as such with the same love and life-long commitment that a biological father/grandfather would receive, as is evidenced by the witnesses and from the social work report. Also in the appellant's favour is the fact that the process of removal, if it were to take place, via a long-haul flight would be likely to cause him serious harm due to his extremely fragile health for the reasons outlined above in my discussion under paragraph 276ADE(1)(vi) of the Immigration Rules and based on the opinion of Dr Bonsu. Ultimately, I find that the risk of serious harm/ or fatality being the impact on the appellant's health of removal combined with the limited weight I can given to his private life ties to the UK are sufficient to outweigh the public interest factors outlined above. The appeal therefore succeeds on this basis too.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal and all of the findings.

3. I remake the appeal by allowing it under Article 8 ECHR.

Signed *Fiona Lindsley* 18th August 2021
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision:

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India born in 1957. He arrived in the UK in August 2018 as a visitor with leave to enter until 4th February 2019. On the 4th February 2019 he applied for leave to remain on Article 8 ECHR private life grounds. His application was refused on 2nd May 2019. His appeal against that decision was dismissed on human rights grounds by First-tier Tribunal Judge Obhi in a determination promulgated on the 17th October 2019.

2. Permission to appeal was granted by First-tier Tribunal Judge Appleyard on 28th February 2020 on all grounds on the basis that it is arguable that the First-tier Tribunal erred in law in the medical assessment and in concluding that the appellant could be removed, and by failing to look at relevant case law, namely RA(Iraq) v SSHD [2019] EWCA Civ 850.

3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by email on 20th April 2020 seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were received from both parties in response to these directions.

4. The matter came before me to determine whether it is in the interests of justice to decide this matter without a hearing and if so to determine whether the First-tier Tribunal has erred in law, and in turn if that was the case whether the decision of the First-tier Tribunal should be set aside.

5. The respondent, in the submissions of Ms S Jones, Senior Presenting Officer dated 30th April 2020, does not seek to argue that the issue of whether the First-tier Tribunal erred in law and whether the decision should be set aside could not be dealt with on the papers. Counsel for the appellant, Ms M Gherman, argues in her submissions of 27th April 2020 that it would be appropriate to have an oral hearing as, on the basis of general arguments about the superior nature of an oral hearing to a process of written submissions, the appellant would be denied procedural fairness on an issue of key importance in his life if a paper decision were made. I am satisfied that it is possible to deal with this matter fairly on the papers, and proceed in this way on the basis that no reasons relating to this appellant's particular appeal are identified as making a paper determination of this matter fair and just and as I do not accept that paper decisions on these issues are universally unfair.

Submissions – Error of Law

6. The appellant entered the UK as a visitor and then had a serious cardiac arrest: he is diagnosed as having ischaemic heart disease, acute kidney injury, type 2 diabetes, chronic kidney disease and an intravitreal haemorrhage of his right eye.

7. In the grounds of appeal it is argued in summary as follows. Firstly, that the First-tier Tribunal erred in law because there is a failure to apply relevant legal authority, as set out in RA(Iraq) v SSHD [2019] EWCA Civ 850, and recognise that this appellant is in a state of limbo as the medical evidence is that he is not capable of being removed presently and there is no prospect of him being removed in the foreseeable future. As he is not removable for reasons outside of his control; as he has an unblemished immigration history and has committed no criminal offences; and as there is no prospect of his imminent removal and he is paying privately for his medical care he should have been found to succeed in an Article 8 ECHR balancing exercise.

8. Secondly, it is argued for the appellant that the First-tier Tribunal unlawfully refused to adjourn the hearing which was procedurally unfair. Two applications were made on the basis of the appellant's confused mental state at the hearing. An adjournment should have been granted so that expert medical evidence could be obtained to see if the appellant suffered from a condition such as dementia.

9. Thirdly, it is argued that there was a failure to give reasons for material findings of fact with respect to the relationship with the appellant's three children and his relationship with UK friends which were vital to the determination of the appeal given his need for extensive day to day care.

10. In the submissions of Ms S Jones, Senior Presenting Officer dated 30th April 2020 it is argued, in short summary, applying RA(Iraq) that there has been no impact on the appellant's private life of not granting leave to remain on Article 8 ECHR grounds as he doesn't claim benefits and can obtain his private health care. It is also not accepted that the prospect of removing the appellant is remote for the reasons given by the First-tier Tribunal at paragraph 44 of the decision. There is a proper balancing exercise conducted at paragraph 48 of the decision, and so the approach of the First-tier Tribunal accords with a lawful Article 8 ECHR proportionality exercise. It is argued for the respondent that the adjournments were fairly refused on the basis of the medical evidence by the First-tier Tribunal. It is also argued that sufficient reasons are given by the First-tier Tribunal for the findings made.

Conclusions – Error of Law

11. I do not find that the appellant has shown that the refusal of the adjournment was materially unfair as there is no evidence that the appellant was and is suffering from dementia. I would have expected evidence from a suitably qualified medical expert to have been filed with the Upper Tribunal and served on the respondent with the grounds of appeal or shortly thereafter, and as there has been more than

sufficient elapse of time for this to happen I find that the appellant has failed to show that the refusal of the adjournment was a material error by the First-tier Tribunal.

12. The hearing before the First-tier Tribunal was in September 2019, and the appeal was lodged in October 2019, and permission to appeal was granted on 28th February 2020. Whilst I accept that on the face of the answers and the evidence of the friends on balance at the hearing fairness required an adjournment, given the applications by counsel for this, so as to give the appellant the opportunity to obtain medical evidence, the failure to follow this up until a letter was obtained from the GP Dr Sethi in May 2020 saying only that the issue of potential memory loss and dementia had been brought to his notice, and will require further assessment and might require referral to a memory clinic does not suffice to show any material error by the First-tier Tribunal at the time of the hearing. If the memory loss issue was a real one for the appellant and his interactions with others at the time of the hearing before the First-tier Tribunal, I find, that given his extensive interaction with medical professionals, this would have been investigated in the autumn of 2019 and a referral to obtain expert evidence made at that time.

13. I find however that the First-tier Tribunal did err in law in the consideration of whether the appellant is in limbo due to his being unfit to travel in the context of his extensive medical problems. The opinion of Dr Sethi, the appellant's GP, which was before the First-tier Tribunal, was that the appellant was not currently fit to travel due to his deteriorating chronic kidney disease which needed to be reviewed by a specialist in the context of his having acute kidney injury and chronic kidney disease. The First-tier Tribunal dismisses this evidence on the basis that Dr Sethi fails to "state why or how he could travel with safeguards put in". On the face of the evidence Dr Sethi did not believe that travel could be made safe at that time, so I find that this evidence is discounted with insufficient reasoning.

14. An updating report from Dr Sethi dated 4th May 2020, lodged with the submissions of Ms Gherman, which I admit as it is relevant to the issue of the materiality of any error on this issue, indicates that the appellant's renal function has deteriorated since October 2019, and that when considered in relation to all the appellant's medical conditions: "His condition continues to stay unstable and is vulnerable and therefore not fit to travel."

15. I therefore find that the First-tier Tribunal erred in law in failing to given reasoned consideration to a material issue, namely, whether the appellant's case could succeed on Article 8 ECHR grounds given that there was evidence he was unable to fly at that time and therefore there was evidence that he was arguably in actual limbo, and thus that the Article 8 ECHR appeal ought to have been considered with reference to RA (Iraq), in the context of my also finding that any such appeal could not be said to be bound to fail.

16. I also find that the findings that the appellant's son in India would continue to assist him, and had not abandon him if he were to return and that he does not have a family life relationship with the UK family who care for him are insufficiently reasoned at paragraphs 40 and 43 of the decision. In this context I decide that the decision of the First-tier Tribunal and all findings should be set aside, and that matter should be reheard de novo in the Upper Tribunal with no findings preserved.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal and all of the findings.

3. I adjourn the remaking of the appeal.

Directions - Remaking

1. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal might properly be held remotely, by Skype for Business, on a date to be fixed within the period **July to October 2020**.

2. **No later than 14 days** after these directions are sent by the Upper Tribunal (the date of sending is on the covering letter or covering email):

   (a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and

   (b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

      (i) Skype contact details and a contact telephone number for any person who wishes to attend the hearing remotely, which might include the advocates, the original appellant or an instructing solicitor; and

      (ii) dates to avoid in the period specified.

3. **If there is an objection to a remote hearing**, the Upper Tribunal will consider the submissions and will make any further directions considered necessary.

4. **If there is no objection to a remote hearing**, the following directions supersede any previous case management directions and shall apply.

   i. The parties shall have regard to the Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic when complying with these directions.

ii. The parties shall file with the Upper Tribunal and serve on each other (a) an electronic skeleton argument and (b) any rule 15(2A) notice to be relied upon within **28 days** of the date this notice is sent.

iii. The appellant shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23-26] at least **7 days before the hearing**.

5. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

6. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

7. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address

Signed *Fiona Lindsley* 16th June 2020
Upper Tribunal Judge Lindsley