Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08363/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
Remotely by Microsoft Teams	**Promulgated**
On 8 February 2022	**On 15 June 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Saraswathy Subramanian
(Anonymity Direction Not Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ruddy, Counsel instructed by Jain, Neil & Ruddy Solicitors
For the Respondents: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of First-tier Tribunal Judge Buchanan sent on 24 June 2021, dismissing the appellant's appeal on asylum, humanitarian protection and Article3 and 8 ECHR grounds. First-tier Tribunal Judge Adio granted permission on 17 September 2021.

2. The hearing was held remotely. Both parties requested an oral hearing and did not object to the hearing being held remotely. Both parties participated

by Microsoft Teams. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. There were no connectivity issues and neither party complained of any unfairness.

Background

3. The appellant is a citizen of Sri Lanka born on 4 March 1943. She entered the UK as a visitor on 22 April 2010 and she claimed asylum on 23 April 2010. Her appeal against the refusal of the claim on was dismissed in 2010 by Immigration Judge Morrison. The appellant had no further rights of appeal after 14 June 2011 and thereafter remained in the UK unlawfully. She made further submissions in 2013 and on 15 May 2018. On 5 June 2018 the respondent refused her asylum and human rights claim. This is the decision under appeal. The appeal was heard and dismissed by First-tier Tribunal Judge Montgomery on 12 February 2019. The Upper Tribunal refused permission, but permission was then granted by the Court of Session and the Upper Tribunal accordingly set aside the decision and remitted it to be heard de novo by the First-tier Tribunal which led to the hearing before First-tier Tribunal Judge Buchanan.

4. In the remitted appeal the appellant relied on an Article 3 medical claim and Article 8 ECHR grounds only. She did not seek to pursue an asylum or Article 3 protection claim.

5. The appellant's case is that she is elderly and unwell. Her health has deteriorated since the last appeal in 2010 and she is reliant on her family for activities of daily living. It is accepted that she cannot meet the immigration rules for dependent adult relatives because she is not applying from outside the UK. She asserts that she has established family life in the UK and that it would be a disproportionate breach of Article 8 ECHR to remove her to Sri Lanka because of her age and health conditions. It would also be a breach of Article 3 ECHR on medical grounds.

6. The respondent's view is that the appellant has not established family life with her daughter in the UK. There are no very significant obstacles to the appellant relocating to Sri Lanka notwithstanding her age because she spent the majority of her life in Sri Lanka. Her family can assist her on her return. Removal is proportionate given the appellant's immigration history and she does not reach the high threshold for an Article 3 ECHR medical claim because medical care is available in Sri Lanka for her medical conditions.

The decision of the First-tier Tribunal

7. At the hearing, the judge heard evidence from the appellant and her witnesses. The judge found that the appellant and her family have exaggerated the appellant's need for assistance with activities of daily living.

8. The judge concluded that although the appellant has family life with her daughter and her daughter's family, it would not be disproportionate to return her to Sri Lanka where she can access medical treatment, taking into account her attempt to circumvent immigration control and the fact that her private life was established when her immigration status was precarious.

9. The judge found that the appellant's Article 3 medical claim was not made out.

Appeal to the Upper Tribunal ('UT')

10. The written grounds of appeal were lengthy, rambling and I found it hard at time to discern the asserted errors, but I have summarised my understanding of them

    (1) *Failure to take into account the deterioration in the appellant's health*

    The medical evidence before the judge was that her health had deteriorated since 2010. The judge has erred by finding that there was little change since the last appeal in 2010.

    (2) *Having found that family life existed between the appellant and her daughter and other family members, the judge should have gone on to allow the appeal under Article 8 ECHR.*

    (3) *Failure to take into account material evidence*

    There was evidence before the Tribunal that the appellant's grandson was diagnosed with cancer in 2019, but the judge did not take this factor into account at all and it was relevant to the proportionality exercise.

    (4) *Taking into account an immaterial factor*

    The judge irrationally gives weight to the fact that there is no link between the appellant's diabetes and her need to be supported in her activities of daily living, when there is no suggestion in the medical evidence that diabetes is one of the main reasons she requires this support. The Tribunal has erred by placing a narrow focus on the diabetes, rather than the appellant's other conditions.

    (5) *The judge has not properly evaluated the medical evidence which demonstrates that there has been a deterioration in her health since 2010.*

    The judge refers to medical reports failing to provide a measured medical assessment of the progression and conditions from which the appellant suffers. The medical evidence referred to her conditions being "lifelong" and "deteriorating with her increasing age".

(6) *The judge makes generic comments on the type of medication that an elderly person might be receiving which imports his own views/knowledge and fails to focus on the individual and specific health needs of the appellant.*

(7) *The judge's finding that the appellant's memory loss has been manufactured by the appellant and her daughter is not in line with the medical evidence which indicates that she needs to be reminded to take her medication.*

(8) *The judge has placed too much weight on the fact that the appellant was able to access medication for high blood pressure in Sri Lanka prior to coming to the UK. This was 11 years ago. The judge should have considered the level of care which is provided now in the UK.*

(9) *The judge has given inadequate reasons for rejecting the expert reports of Frederica Jansz because no mention is made of the appellant receiving medical care in Sri Lanka before she left the country in 2010. However the expert was required to assess the appellant's conditions at the date of the reports.*

(10) *The judge erred by criticising the expert report for referring to Articles 3 and 8 of ECHR.*

(11) *The judge erred in placing little weight on the medical evidence because the expert was not qualified to assert that the "appellant is entirely reliant on her close family to assist her with tasks of daily living". The expert was able to make this statement in reliance on the GP evidence*

(12) *The judge failed to find that the expert was qualified to give evidence about the difficulties that the appellant would have accessing health treatment in Sri Lanka and erroneously failed to have regard to the contents of the expert report in respect of the availability of care in Sri Lanka*

(13) *The judge erred when finding that the expert was not qualified to comment on the likelihood of a rapid deterioration in the appellant's health.*

(14) *The judge has erred in her assessment of Article 3 ECHR because there was clear evidence that without treatment the appellant would be at a real risk of facing a serious rapid and irreversible decline in her health, resulting in intense suffering. The judge failed to take into account the evidence in the round.*

(15) *The judge found that the appellant has established private life in the UK and this should have been sufficient for the appeal to succeed.*

(16) *The judge failed to take into account that the appellant continues to have a relationship with her eldest granddaughter who has moved out of the family home but still visits regularly.*

(17) *The judge has misdirected himself in law by confusing Article 3 ECHR and Article 8 ECHR. To succeed under Article 8 ECHR the appellant does not need to show a medical need. The extent of the relationship whereby the appellant has been living with her daughter in a family unit for 11 years should have led to the appeal being upheld pursuant to Article 8 ECHR.*

(18) *When assessing proportionality, the judge failed to take into account that the appellant has been living with her daughter in a family unit from June 2011 and that she has a strong relationship with her grandchildren. The judge erred by failing to give weight to the relationship with the grandchildren in the Article 8 ECHR balancing exercise which is contrary to the earlier finding that it is in the best interests of the children for the appellant to remain in the UK.*

(19) *When assessing the public interest, the judge erred by finding that there was insufficient evidence that the appellant would be financially independent in the UK. The judge failed to take into account that the appellant is supported by her daughter and so -in-law when considering if she was financially independent and that they had provided evidence of their income. The appellant had not claimed any state support since 2010.*

(20) *The judge erred by considering all of the factors in the round when finding that there would not be unjustifiably harsh consequences to return the appellant to Sri Lanka.*

Permission to appeal

11. Permission was granted by First-tier Tribunal Judge Adio on the basis that "it is arguable that the judge's conclusion in respect of proportionality fails to properly consider the fact that the appellant is a 75-year-old woman who is receiving committed and effective support from family relatives".

12. He also stated that "It is arguable that the analysis of the judge does not factor in the deterioration based on a combination of age and medical ailments but concentrates on the fact that the appellant's medication is common for her age and that support is being given for reasons other than medical ailments" and that there is a gap in reasoning between the appellant being provided with committed and effective support by her family and the judge's conclusion.

13. Permission was also granted on the basis that the Article 3 ECHR grounds are arguable.

14. The grant of permission does not refer to the other pleaded ground of appeal but does not limit the grant of permission.

Rule 24 response

15. The rule 24 response focused on Article 3 ECHR and asserted briefly that the Article 8 ECHR assessment was lawful. At the outset of the hearing Ms Isherwood informed me that the Secretary of State intended to defend the decision in its entirety.

Submissions

16. Mr Ruddy made lengthy submissions repeating the grounds. Miss Isherwood took me through the decision paragraph by paragraph and essentially argued that the judge has considered all of the evidence, has made findings open to him which are adequately reasoned and has applied the law correctly. In her view the decision is sustainable and does not disclose a material error of law.

Discussion

General comments

17. At the outset of this discussion, I make various observations. Firstly, as I have said the grounds are difficult to understand. They are overly long, rambling and fail to particularise concrete errors of law. However, I also have concerns about the lack of concrete findings of fact in the decision which I will set out below.

18. I will deal swiftly with Grounds 2, 15 and 17. These all essentially assert that having found that the appellant has established private and family life in in the UK and that the nature of the family life is particularly strong, this should have been determinative of the appeal.

19. This is manifestly not the case, having found that Article 8(1) was engaged in respect of family and private life the judge was obliged to go on to consider Article 8(2) and carry out the proportionality balancing exercise – step 5 of R (Razgar v SSHD) [2004] UKHL 27. The mere fact that family and private life are engaged is not determinative of the appeal. These grounds are not made out.

20. There is no complaint in the grounds that the judge erred in the assessment of section 117B of the Nationality, Immigration and Asylum Act 2002. The judge was entitled to find that a previous judge had found that she entered the UK with the deliberate intention of evading immigration control because she wanted to live with her daughter, that her asylum claim was fabricated and that she had remained in the UK without leave. These are all factors relevant to the public interest. The judge correctly asserted that the fact that she cannot speak English weighs against her.

21. Ground 19 asserts that the judge has erroneously assessed the appellant's ability to support herself independently. The judge took into account that the appellant had been supported financially by her family in the UK. The judge may have erroneously concluded that there is no summary of the income and expenditure in evidence, however the judge did not err by

giving this factor little weight. At best financial dependency amounts to a neutral factor in the proportionality exercise. Even had the the judge failed to give adequate reasons for finding that the appellant would not be financially independent this error was not material.

22. I also deal swiftly with Ground 3. The family did not give oral and written evidence about the grandson's cancer diagnosis because it was said that they did not wish to rely on it. There was an appointment letter but no other evidence of the grandson's ongoing condition. The judge made clear findings that there was a close bond between the appellant and her grandchildren and that it was in their best interests for her to remain in the UK. In these circumstances, I am not satisfied that the failure to take the cancer diagnosis specifically into account in the proportionality assessment was an error because it has clearly been taken into account on the positive side of the balancing exercise at 30.1 when the judge speaks of the relationship with the grandchildren.

23. Ground 19 similarly asserts that the judge failed to take into account the strong relationship between the appellant and her family and grandchildren and the length of time they have lived together in the balancing exercise. The judge manifestly acknowledges throughout the decision that the appellant has lived with her family including her daughter, son-in-law and grandchild for a period of 11 years and that they are living in a shared family unit. The judge makes several references to the strength of the family bond and specifically mentions the close bond between the appellant and her daughter assessing the positive side of the balancing exercise and attributes weight to it. (Although the judge gives little weight to the bond between the appellant and her grandchildren in the same paragraph and does not weigh in the best interests in the balancing exercise). The judge manifestly took the strong family ties into account. This ground is no more than a disagreement with the decision and the weight that the judge accorded to these factors are entirely a matter for the judge.

Medical evidence and expert evidence

24. More significant are the asserted errors in respect of the medical evidence. Grounds 9,10, 11, 12 and 13 relate to the expert evidence in relation to the appellant's ability to access medical treatment and care abroad and grounds 1,4,5,6 and 7 relate to the GP medical evidence and the judge's assessment of the appellant's health and her need for support in her activities of daily living.

25. In essence grounds 1, 4, 5, 6 and 7 assert that the judge's findings in respect of the deterioration in the appellant's health and her increased need for support are either inadequately reasoned or irrational and are formed by the judge's own views of generic health problems suffered by the elderly and that this error is material to the outcome of the appeal. If the appellant is more frail and dependent than found to be by the judge this is directly relevant to the issue of proportionality of removal because it

is relevant to the level of care she requires and to her ability to cope on her own in Sri Lanka and will impact on the analysis of the expert evidence.

26. Similarly, if the judge has erred in respect of the assessment of the expert evidence this will also impact on the proportionality of removal because in the proportionality assessment the judge finds that there would not be very significant obstacles to removal and that she would be able to cope in Sri Lanka as she did before. (The evidence in the previous decision was that the appellant was living in a camp for displaced persons until 2009 when her husband died).

27. At the date of the appeal hearing the appellant was 78 years old and had been living in the UK for 11 years. The judge's starting point were the findings made by Judge Morrison in 2010. The judge referred to the refusal letter which states "Your medical conditions were considered by Judge Morrison in 2010. However, at that time the judge found no detailed medical evidence to accept and made no further comment in regard to your medical conditions". It is clear from this that there were few findings made by Judge Morrison in respect of the appellant's health in the previous appeal.

28. At [12] the judge sets out the basis of claim as being that although the appellant is "not dying of her ailments and they are not life-threatening" she is an elderly lady with a "multitude of health problems which without being controlled would deteriorate". "She contends that she needs assistance from her family and is reliant on them to cope with daily living. She does not have dementia but she is an old lady who forgets things".

29. The judge broke down his consideration of the appellant's medical conditions and level of support she requires into various subheadings. The judge sets out the evidence in detail and then makes criticisms of the evidence finding in broad terms that the medical evidence is not detailed and the witnesses' evidence is not reliable and has been exaggerated.

30. I take into account that the judge had the sea of evidence before him and that an appeal court should be slow to interfere with the findings of a specialist Tribunal.

31. However, my concern in this decision is that it is not clear what the judge's findings actually are. I am unable to discern from the decision what conditions the judge considers the appellant to have and whether he finds that there has been a deterioration in her health since 2010. Miss Isherwood submits that they can be inferred from the decision, but I am not in agreement with her. His finding at 19.6 states:

> "Although there is mention of the appellant's health deteriorating, there is no measured medical assessment of progression in the conditions from which she suffers"

32. And later at 19.8

> "The medication appeals to be the sort of medication which the elderly might routinely be prescribed by general practitioners in the UK for conditions commonly experienced by the older generation".

33. At [16] the judge states that the medical evidence in 2010 was that the appellant had stroke disease and diabetes and attends chronic disease management clinics for both these conditions.

34. The judge had before him 3 further letters from GPs from the same surgery dated 2013, 2017 and 2021. This evidence states that in 2017 that the appellant "had multiple small strokes over the last few years, that she is blind in one eye and has generalised osteo-arthritis as well as Type 2 diabetes". In 2021, another GP lists all of those conditions and adds anxiety and depression to the list of conditions.

35. At no point does the judge state what conditions the appellant has at the date of the hearing. Further to categorise these conditions as "commonly experienced by the older generation" is in my view an error. The older generation may experience a wide range of conditions which may affect them in different ways. There is no norm. The judge was obliged to set out what conditions the appellant has and has failed to do so. The judge also appears to have failed to take into account the medical evidence that the appellant's conditions are "lifelong" and that her conditions are "deteriorating with her increasing age". There is no acknowledgment that the appellant is ten years older than at the time of the decision in 2010 and the affect this may have on her.

36. It is difficult to see how the judge's findings on the needs of the appellant can be adequately reasoned when the judge has not made findings on what conditions the appellant specifically has without making generic references to the elderly.

37. This error is compounded by a further lack of findings on what assistance the appellant actually needs with regard to the appellant's activities of daily living.

38. Judge Morrison found in 2010 that "the appellant receives assistance from her daughter by the way of help with cleaning, washing and cooking and also to take her to medical appointments".

39. At [15] the judge finds that:

> "The care given to the appellant now appears to be given within a shared family home rather than to the appellant in her own separate accommodation. However, the evidence of care needs as stated in 2010 appears very similar to that presented to me in 2021 in that it remains broadly stated and is quite general in its vague terms."

40. The judge sets out the evidence from the appellant which is that she has osteo arthritis which affects her hands, her fingers, knees, shoulder and back and that she takes tablets for cholesterol, blood pressure, painkillers and tablets for anxiety and depression.

41. The judge then goes on to record the appellant's evidence in her witness statement that her daughter helps her to take a shower by washing and drying her, that she needs help with dressing and undressing, has her breakfast made for her, cannot stand for more than a few minutes, and cannot lift any heavy pots. In the judge's view this evidence is inconsistent with her oral evidence in which she stated that her daughter helps her take the right medication, sometimes her grandchildren help her to have a bath. Her daughter helps her to have a bath, gives her breakfast and helps her climb the stairs.

42. From 17 to 17.7 the judge sets out the GP evidence relating to how much assistance the appellant receives.

43. The judge refers to the medical evidence before the Tribunal in 2010, a letter from the same GP in 2013, a further letter from GP Dr Iain Brown dated 3 November 2017 and a final letter from Imran Ilyas dated 16 March 2021.

44. At 17.3 the judge sets out the contents of the letter from Dr Brown who states:

> "This lady has been registered with me since 2010. She has had multiple small strokes over the last few years...she is blind in one eye and has generalised arthritis and Type 2 diabetes".

45. The author goes on to say;

> "she misses her home country but is almost entirely reliant on her close family to assist her in her tasks of daily living. She goes out weekly to the temple and has no other outings. Her family collect her prescription and remind her of her medication times... I would support her continued family support and care; in my opinion she would not manage on her own".

46. The judge then turns to a letter from the same GP surgery but from a different doctor Imran Ilyas dated 16 March 20201 in which it is also said that the appellant "is entirely reliant on her close family for her activities of daily living and attends her with every hospital appointment she attends at. Her family collects her medications from the pharmacy and reminds her to take them".

47. At [19] the judge makes his primary finding on the support required by the appellant. He states:

> "In my judgement, however, I am not persuaded that the support arises because of the medical ailments from which the appellant suffers".

48. At no point does the judge make any findings on what support the appellant actually receives. It is not clear from the decision whether he accepts that she is accompanied to appointments, has her medication collected for her, is reminded to take medication, or whether she is assisted with bathing, dressing or cooking. Although at 18.1 the judge states that the appellant receives an "array of services from her family", I am not able to understand from the decision what these services are.

There is also a tension between the judge's statement that family life exists between the appellant and her family partly because of this array of services and the finding that the support does not arise because of the medical ailments. There is also no consideration as to whether this support could arise due to old age. It is a fundamental task of the judge to make factual findings.

49. I turn to the judge's reasoning in rejecting the GP evidence, particularly that of Dr Brown whose own opinion is that the appellant would not be able to cope on her own. His reasoning is that that medical evidence is very general in its terms, there is no explanation of the reasons for the conclusion that the appellant would not manage on her own from either doctor, and the letters do not go into any great detail about how the medical conditions listed by the doctors may have caused or might have contributed to ill-health which actually debilitates the appellant from performing day to day tasks.

50. Ms Isherwood's submission is that the judge has given adequate reasons for rejecting the assertions in the GP letters that the appellant is reliant on her family for care and could not cope on her own.

51. I am not in agreement. I find that the reasons given for rejecting the GP's evidence are flawed. There was clear evidence that the appellant had recently had several strokes. She has a series of serious medical conditions and is 78 years old. Read as a whole it is clear that the appellant has been visiting the same GP clinic for over ten years and the doctors have knowledge of both her and her conditions. It is not apparent why the judge would reject a GP's opinion that the appellant cannot manage on her own. He is a qualified GP, he has knowledge of the appellant's conditions and he has knowledge of her. The medical evidence shows a consistent picture of the appellant's health conditions which have deteriorated over ten years in conjunction with her advancing age. The GP letters are not detailed but there is no reason for them not to be reliable and there is a clear link in that evidence between the appellant's medical condition and her need for assistance with daily living.

52. I find that the judge's conclusion that the support provided by the appellant do not arise from her medical ailments is inadequately reasoned in the light of the GP letters.

53. It may be that the judge was entitled to reject the witnesses' oral evidence as being exaggerated because of the inconsistencies and the lack of transparency about the appellant living apart from her family for a period in 2010, but the judge needed to weigh that evidence together with the medical evidence.

54. I am in agreement that the judge's reasoning at 19.4 is an example of this flawed approach. The judge uses the diagnosis of diabetes as an example of "the disconnect between medical conditions and consequences arising from them". The judge gives an analysis about why the diabetes is not

relevant. He states that although the evidence states she has diabetes her daughter states that she does not take medication for diabetes. In my view this is an error by the judge. It is not at all clear why the judge's focus is on diabetes when the appellant and her daughter have not in their evidence stated that this is one of the major problems for the appellant in terms of activities of daily living and she has never asserted that she takes medication for diabetes. The judge did not consider the evidence from the GP that the appellant is blind in one eye, nor that she has osteoarthritis which is the condition which she states causes her problems nor that she has anxiety and depression. It may be that these conditions could have caused the appellant functional problems but there is no consideration of this by the judge. There is also no consideration of whether the appellant's evidence that she has difficulty bathing and cooking for instance is consistent with these medical conditions.

55. I am satisfied that the judge's reasoning is flawed in this respect in that the judge has taken into account an immaterial factor by using this as an example in the appellant's case rather than taking a holistic overall view of the evidence before him

56. If the judge's finding that the appellant's need for assistance does not arise from her medical conditions is materially flawed and there are no clear findings about what assistance she does need as a matter of fact and why, it is not possible for the judge to make findings on whether she can obtain the necessary assistance in Sri Lanka and whether there would be very significant obstacles to relocation to Sri Lanka. These findings will also impact on the Article 8 ECHR proportionality assessment. The judge does not appear to reject the appellant's evidence that she has no family members in Sri Lanka. The judge's primary contention is that the appellant can return and live there as before.

57. Further although there is some implication that the appellant previously received assistance from someone in the neighbourhood, without clear findings on what help she now needs ten years later when she is 78 rather than being 68 and with worsening health it is not possible to assess whether this assistance would be available, particularly as the background expert evidence speaks of a lack of facilities, Sri Lanka facing profound economic challenges and where culturally members of an extended family take care of older relatives.

58. In my view the judge's findings on the appellant's state of her health and need for care are flawed and this is sufficient to set aside the decision in its entirety.

59. It seems to me as it seemed to Judge Adio in granting permission that the Article 3 ECHR case is much weaker and that the evidence does not support the submission that the appellant will experience treatment contrary to Article 3 ECHR. Nevertheless no proper analysis can be made of Article 3 ECHR without proper findings of fact on the state of the appellant's health and her need for support.

60. Since I have set the decision aside for the above reasons, I do not go on to deal with the remaining grounds of appeal.

Disposal

61. I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal because of the extent of the findings that are required.

62. No doubt the next judge will make clear findings of fact on all material issues and give proper consideration to the expert evidence. It is for the appellant to produce further evidence if she so wishes of her inability to carry out activities of daily living for example in the form of an assessment by an Occupational Therapist and further evidence on her previous circumstances in Sri Lanka and the current situation there at any remitted appeal. She will no doubt be guided by her representatives.

Decision

1. The decision of the First-tier Tribunal contained the making of an error of law.

2. The decision is set aside in its entirety with no findings preserved.

63. The appeal is remitted to the First-tier Tribunal to be heard de novo by a judge other than Judge Buchanan, First-tier Tribunal Judge Montgomery and First-tier Tribunal Judge Morrison.

Signed R J Owens Date

Upper Tribunal Judge Owens **13 June 2022**