IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002277
First-tier Tribunal No: HU/50426/2021
IA/02210/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SURINDER KAUR
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M West, Counsel instructed by FR Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 20 January 2023

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Aldridge promulgated on 22 March 2022 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 2 February 2021, refusing her human rights claim.

2. The Appellant is a citizen of India. She is a widow. She last entered the UK on 13 January 2020 with entry clearance as a visitor valid until the 31 July 2020. On 27 July 2020 she applied to remain in the UK based on her family and private life. Her two sons and their respective families are settled in the UK. That application was refused on 2 February 2021 with a right of appeal.

3. The appeal came before Judge Aldridge on 4 March 2022. The parties were represented, the Appellant by Mr West, who appears on her behalf before us. The Judge did not hear evidence from the Appellant in view of her diagnosis of anxiety and depression, but heard evidence from her son Mr Harpreet Sandhu, (hereinafter "the Sponsor").

4. The Judge did not accept the Appellant qualified for leave to remain under the Immigration Rules (the Rules") on private life grounds pursuant to paragraph 276ADE(1)(vi) because there would not be very significant obstacles to her integration into India. He did not accept the Appellant had lost all family or social ties to India and observed that she was familiar with the lifestyle and culture of her country of nationality. She could access healthcare in India, she had her own independent source of rental income, her late husband's family in India could provide assistance, her children could continue to provide financial support and the family could maintain contact with her either through visits or "modern methods of communication". The claim therefore failed under the Rules. Outside the Rules, balancing the interference with the rights of the Appellant against the public interest, the Judge concluded that the Respondent's decision was not disproportionate. Accordingly, the appeal also failed outside the Rules.

5. The Appellant appealed on three grounds as follows:

   Ground one: The Judge erred in concluding it would not constitute a disproportionate interference with the Appellant's human rights in accordance with Article 8(2) of the ECHR, to require her to return to India, primarily because the Judge applied the wrong test of "unduly harsh" to the assessment of proportionality.

   Ground two: The Judge failed to consider the Appellant's mental health issues in his assessment of proportionality.

   Ground three: The Judge erred in his consideration of the best interests of the Appellant's grandchildren, in that, he applied an irrelevant test and the suggestion that the family could maintain contact through modern means of communication "was a 'wholly unrealistic' suggestion".

6. Permission to appeal was granted by First-tier Tribunal Judge Hatton on 11 May 2022. The grant of permission deals in substance with ground one only, however, permission was granted on all grounds.

7. Mr Avery, on behalf of the Respondent filed a Rule 24 reply on 31 May 2022. Whilst it was accepted the Judge misquoted the law with reference to *R (on the application of Agyarko) v SSHD* [2017] UKSC 11, the Judge applied the correct test, his findings of fact were properly reasoned and the 'exceptionality test' could not be met.

8. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties as above. Both representatives made submissions and our conclusions below reflect those submissions where necessary. We had before us a court bundle containing inter alia the core documents in the appeal, including the Appellant's bundle before the First-tier Tribunal and the Respondent's bundle.

Discussion

9. Before us Mr West initially relied on his grounds of appeal. During the course of his oral submissions, and following interventions from the panel for the purposes of clarification, Mr West conceded that ground two was not made out. We are satisfied this concession was properly made. It is appreciably clear that the Judge considered the issues appertaining to the Appellant's mental health issues at [24] and [26] and, at [34]-[35], gave adequate reasons for concluding that on removal any consequent risk of deterioration in the Appellant's mental health would not be disproportionate. These findings are unimpeachable.

10. We therefore deal only with grounds one and three. However, we deal with those grounds compositely because Mr West accepts they overlap and essentially make the point that the Judge applied an elevated threshold in his assessment of proportionality outside the Rules and failed to factor into that assessment relevant considerations.

11. A significant aspect of the Appellant's appeal against the refusal of her human rights claim centred around her relationship with her sons and their respective families including four grandchildren and also her three siblings in the UK. It was claimed that she is a vulnerable adult, requires daily care, is financially dependent on the Sponsor and emotionally dependent on her UK family, so much so, that the Sponsor left gainful employment to work night shifts to enable him to provide daily care. It was also claimed that she was especially close to her grandchildren. Detailed witness statements were filed on behalf of close family members including letters from two grandchildren attesting to their close relationship with the Appellant and supporting medical evidence.

12. We begin with the Judge's findings of fact. The Judge accepted the Appellant had mental health issues and treated her as a vulnerable adult. There was psychiatric evidence before the Judge confirming a diagnosis of depression and anxiety [24]. The Judge reasoned, however, that this

would not present a difficulty for the Appellant on return to India as she could access healthcare, had available accommodation and family in India who could assist with care, or the Appellant could obtain private care through an agency if required. In turn, the Judge did not accept that the Appellant would face discrimination and had lost all ties to her country of nationality [27]-[28]. In view of these factual findings the Judge's conclusion that the Appellant would not face very significant obstacles to integration on return to India was inevitable.

13. The Judge then turned to consider Article 8 outside the Rules. Before we consider the Judge's analysis, in order to provide some context, it is necessary to consider his initial direction in law. At [15]-[23] the Judge set out the law. He first referred inter alia to the ratio in *Agyarko* (supra.) and *Razgar v SSHD* [2004] UKHL 27 at [17]-[18]. It is not disputed that the Judge therein set out the correct test of "exceptional circumstances". The Judge then turned to address the law in relation to the "very significant obstacles" test in paragraph 276ADE(1)(vi) of the Rules. In so doing, he made reference to similar provisions found in paragraph 339A of the Rules and section 117C(4) of the Nationality, Immigration and Asylum Act 2002 and to case law (two concerned deportation appeals) which considered the interpretation of that phrase.

14. The question for us, in the first instance, is to decide whether the Judge applied the law correctly in his assessment of proportionality. Having carefully considered the competing arguments of the parties we are persuaded that the Judge's reasoning demonstrates that he inadvertently applied an elevated threshold in his assessment of proportionality by his preponderance to the language used in deportation appeals. This we consider is demonstrated by the Judge's use of the phrase "disproportionately severe" at [38]: See *HA (Iraq) v SSHD* [2020] EWCA Civ 1176; 'unduly harsh' at [45], it being trite this is the test applicable in deportation appeals contrary to section 117C(5) of the 2002 Act, and is compounded by the Judge's direction that following *Agyarko* "…decisions must be "unduly" harsh in order to breach Article 8 rights"; and at [48], where the Judge referred to the "very significant public interest…" in removal of persons such as the Appellant (our emphasis).

15. We have borne in mind that we should consider the Judge's use of these phrases in context and we recognise, as Mr Avery pointed out, that the Judge referred to the test of "exceptional circumstances" and, we note ourselves, "unjustifiably harsh consequences" at [31], [38] and [45]. Notwithstanding, we consider that the phrases identified above, the use of which are employed at material junctures of the Judge's reasoning, when considered cumulatively, do not indicate to us that the errors can be categorised as an isolated slip.

16. Whilst Mr Avery ably said all that he could in defence of this decision, which is otherwise detailed, he properly accepted in his Rule 24 reply that the Judge misquoted *Agyarko* at [45] and, in his oral submissions, acknowledged that the Judge's reasoning was confused. We

agree, and consider within the context of the reasoning as a whole, that the interplay between the test applicable in human rights appeals to that applicable in deportation appeals in this case, is such that it is not clear what threshold the Judge actually applied.

17. In the circumstances, we are satisfied, that the Judge's decision indicates that he inadvertently applied a higher than applicable threshold in his consideration of proportionality.

18. Mr West took issue with the Judge's consideration of the Appellant's Article 8 claim in other respects in ground one and three, however, we consider that it is not necessary to traverse them all as we are satisfied that the errors we have identified above are material and sufficient to render the decision unsafe. However, for the sake of completeness we shall deal with what we consider were his best points.

19. We agree with Mr West that there is a further confusion in the Judge's reasoning at [32], [33] and [38]. At [32], the Judge found that Article 8 (1) was engaged "because it will cause significant disruption to the appellant's current family and private life", and "there would plainly be an interference with the appellant's enjoyment of her Article 8 rights which would reach the threshold of severity to call for justification". The Judge reached these conclusions by reference to the severance of ties between the Appellant, her children, her grandchildren and other family members. Whilst the Judge did not expressly find that the Appellant has an established family life in the UK, it is clear that the Judge was answering that question in the affirmative by reference to the first two questions in *Razgar*.

20. We accept that there is a significant tension between these findings and what the Judge said next at [33] in stating that he did not find "that there is any relationship that is over and above the normal ties between adult relatives" (the *Kugathas* test) and at [38] found that the "claimed" dependency was one of choice. We agree with Mr West that these competing conclusions are difficult to reconcile. We are satisfied that this in turn infects the Judge's assessment of proportionality, in that it is not clear to us what weight if any was given to the various familial relationships that would be affected by the Appellant's removal.

21. Whilst we note the Judge made reference to "family and private life" at [48] the focus of his proportionality assessment that preceded this comment from [39]-[47] focused primarily on private life. This further indicates that the Judge was not satisfied that there was family life between the Appellant and her UK family, which in addition to being in direct contradiction to his earlier finding at [32], goes against the weight of the evidence demonstrative of family life, identified at paragraph 18 of Mr West's skeleton argument which we summarised earlier.

22. For all these reasons, we are satisfied that the decision of the First-tier Tribunal involved the making of an error on a point of law and the

decision of the First-tier Tribunal is set aside. We must then consider whether to remit the case to the First-tier Tribunal, or to re-make the decision ourselves. We consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the Appellant's right to a fair hearing, as contended by Mr West, the appropriate course will be to remit the matter to a newly constituted First-tier Tribunal for a fresh hearing. In reaching our decision, we have also taken into account paragraph 7.2 of the Senior President's Practice Statement of 25 September 2012.

Notice of Decision

The Decision of First-tier Tribunal Judge Aldridge does involve the making of an error on a point of law. The Appellant's appeal is allowed and is remitted to the First-tier Tribunal for a rehearing on all issues.

R.Bagral

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 3 February 2023