Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19628/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2019	**On 15 November 2019**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

KALAVATHI RAMAN PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No representative
For the Respondent: Ms. J. Isherwood, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Cameron ('the Judge') sent to the parties on 15 May 2019 by which the appellant's appeal against a decision of the respondent to refuse to grant her leave to remain on human rights (article 3 and 8) grounds was dismissed.

2. Upper Tribunal Judge Kopieczek granted permission to appeal on 1 October 2019.

3. The appellant provided medical evidence confirming that she was too unwell to attend her appeal hearing before this Tribunal. Her granddaughter, Ms Zerana Patel, attended the hearing in the company of Mr. Farrouk Ahmed, who aided her as a McKenzie friend. Mr Ahmed was permitted to sit with Ms. Patel, though his assistance was limited to supporting Ms Patel as to papers and providing advice. He was not permitted to present representations on behalf of the appellant.

Anonymity

4. The Judge did not issue an anonymity direction. I am mindful of Guidance Note 2013, No. 1 concerned with anonymity directions and I observe that the starting point for consideration of such directions in this chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. I observe that the appellant places reliance upon evidence concerning her personal health. Careful consideration has been given to the appropriateness of issuing an anonymity direction in such circumstances. The principle of open justice is fundamental to the common law and the rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. The reporting of the identities of parties and witnesses is an important element of open justice. I observe that the appellant is not a child nor a protected person consequent to concerns as to competency. Even in cases involving exploration of intimate details of an appellant's private and family life, including serious medical conditions the full force of the open justice principle should not readily be denigrated from: ***Zeromska-Smith v. United Lincolnshire Hospitals NHS Trust*** **[2019] EWHC 552 (QB); [2019] Med LR 250**. Revelation of the identity of the parties is an important part of open justice: ***re: Guardian News and Media Limited*** **[2010] UKSC 1; [2010] 2 AC 697**. Though I have considerable sympathy for the appellant consequent to her present medical health, this is not a suitable matter for the issuing of an anonymity direction.

Background

5. The appellant is a national of India and is now aged 85. She has regularly been permitted to visit her family in this country since 1986. She secured a multiple entry visitor's visa valid from 28 February 2013 until 28 February 2018. Her last entry into this country was on 21 June 2017 and so she was required to leave this country by 20 December 2017. Whilst in this country she became unwell and was diagnosed in October 2017 with right breast cancer. The tumour was localised permitting her to be treated without surgery and by radiotherapy. She was prescribed Letrozole, a hormonal therapy drug that is used to treat breast cancer. She sought to extend her leave to remain and by means of a covering letter accompanying her application, dated 12 December 2017, she observed:

> *'I am responding well to the ongoing treatment, albeit not without side reactions of the drug I am taking. I have become very fragile and am barely able to walk or sit even for short durations. I am also suffering from persistent nausea and low-grade fever. My doctor is of the view that my condition is likely to persist for another three months followed by some time to recover fully. He has therefore requested that I am allowed to remain in the UK for another six months on medical grounds.*
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> *...*
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> *As is evident from my immigration history I am (sic) no intention to remain in the UK for an extended period of time and have been forced into an unfortunate situation due to my medical condition where my doctor believes that for [the] time being I am not in a situation to undertake an extended journey all the way back to India. I can assure you that I will return to India as soon as I have gained sufficient strength.'*

6. The appellant provided corroborative evidence that as at the date of the application her medical expenses had been paid privately and that her son and daughter-in-law were capable of continuing to meet her private medical fees.

7. The appellant submitted her application by means of Form FLR(HRO) which is the appropriate form to be used for extensions of stay in this country for human rights claims, leave outside the Immigration Rules and other routes not covered by other application forms. Upon receiving the application, the respondent treated it as an application for further leave to remain in this country on human rights (articles 3 and 8) grounds. The application was refused by way of a decision dated 10 September 2018. The respondent concluded that the appellant could not satisfy the relevant Immigration Rules concerned with both private and family life rights. As for exceptional circumstances it was not accepted that there would be very significant obstacles to the appellant's integration into India upon return and that she would receive financial assistance from her family present in this country. The decision concluded that sufficient treatment was available at specialised cancer treatment hospitals throughout India that could be accessed by the appellant. It was determined that the appellant's circumstances did not meet the high threshold for medical claims under article 3 as confirmed in the judgment of ***N v. Secretary of State for the Home Department*** **[2005] UKHL 31; [2005] 2 AC 296**.

8. During the course of her treatment and consequent to her application for leave to remain the appellant was further diagnosed with advanced heart failure with multiple episodes of decompensation requiring hospitalisation. In 2018 she was provided with vasodilators, to dilate her blood vessels, and antiarrhythmics to relieve cardiac arrhythmia. She was reduced to being breathless on undertaking only a few paces when walking and in 2018 was primarily chair or bedbound.

9. By way of letters dated 18 August 2018 and 25 August 2018 Mr Rajiv Vashisht, consultant surgeon and senior lecturer, Imperial College, London and Professor Jaspal Kooner, consultant cardiologist, Imperial College, London opined that the appellant was not fit to travel.

Hearing before the FtT

10. The appeal came before the Judge sitting at Taylor House on 26 March 2019. He heard evidence from the appellant's granddaughter, Miss Zerana Patel. The Judge observed at [26] - [27] and at [29]:

> *'The appellant is an 84-year-old lady who is clearly suffering severe medical issues in relation to her heart and also has breast cancer. It is however the case that she has spent essentially her whole life in India only coming to this country as a visitor in June 2017. The appellant has family in India including her daughter who she was living with prior to coming to this country.*
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> *It is clear from the evidence of Ms Patel that the appellant was supported prior to coming to this country by family members in the USA and also by her daughter in India. The family in this country have assisted her in relation to her medical costs while she has been here but there is no evidence that the previous assistance would not be available to the appellant were, she to return to India.*
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> *...*
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> *'Although it is stated that she is not fit to travel neither Professor Kooner nor Mr Vashisht have addressed the respondent's contention that suitable safeguards could be put in place to mitigate any risk during travel. The appellant does not appear to be on any treatments which could not be continued in India.'*

11. As to article 3 the Judge concluded, at [31]:

> *'The issue of article 3 was raised by the respondent in the reasons for refusal. It is clear that the appellant is suffering major medical issues and that she has a diagnosis of 12 to 18 months life. I do note however that facilities are available in India to treat both of the appellants conditions and that the medical evidence does not indicate that she would be significantly worse off in India. I am not satisfied that the appellants medical conditions are sufficient to reach the necessary threshold to engage article 3.'*

12. He further refused the article 8 appeal both under and outside of the Rules. As to the latter he determined, at [35] - [43]:

'In relation to article 8 outside of the rules in Razgar [2004] UKHL 17 Lord Bingham set out at paragraph 17 the five questions which should be asked. I also take into account that s.19 Immigration Act 2014 now applies where article 8(2) is engaged and that paragraph 117B now sets out the public interest requirements to be taken into account.

The public interest is in general in the removal of those here who have no lawful right to reside. The court in Agyarko [2017] UKSC 11 reiterated that the test was whether a fair balance had been struck. The public interest is clearly a relevant consideration. The appellant's status is relevant to the weight to be given as set out in section 117B.

The public interest clearly is in the removal of those in this country who have no right to be here however that is tempered by the fact that those who have established a family and private life here can make applications to remain.

The appellant came to this country with lawful leave however this was as a visitor.

I have had an opportunity to hear oral evidence from the appellant's granddaughter. I have no doubt that she has given credible and truthful evidence.

I accept the evidence that the appellant has received treatment in this country for both a heart condition and also for breast cancer and that she is currently still receiving treatment. Although I take note of the fact that both doctors say that she is not fit to travel they have not addressed facilities that could be put in place to ensure that she could return to India. Although she is receiving treatment and requires regular medical surveillance both the treatment and surveillance would be available in India which is of course her home country.

There is no doubt that the appellant's position was precarious and that in normal circumstances those who come here on a visit Visa would be expected to return and the public interest clearly would be in the maintenance of an effective immigration control.

The appellant applied for an extension of her Visa within time. I take note of the reasons for this in relation to her medical conditions however I am not satisfied that she could not receive adequate treatment in India. The appellant spent her formative years and in fact essentially her whole life apart from the last two years in India and has family support there who she could return to. She could maintain contact with her family in this country in the same way as previously.

After taking into account all of the evidence available and balancing the factors in favour of the appellant against the respondent's legitimate aim of the maintenance of immigration control I come to the conclusion that in the appellant's specific

circumstances the balance falls in favour of the respondent and I am not satisfied even taking into account the appellants medical conditions that there are exceptional circumstances in the appellant's case which would outweigh the public interest in the appellant's removal. I find that the decision of the respondent is therefore proportionate to the respondent's legitimate aim.'

Grounds of Appeal

13. The grounds of appeal were drafted by a member of the appellant's family. The core of the challenge is that the Judge failed to consider her appeal under the Immigration Rules, as detailed at [2] - [3] and [5] of the grounds:

> *'SSHD and the FtJ Cameron dealt [with] the Immigration matter of the appellant specifically under "Human Rights" and not on the "humanitarian" grounds. The appellant applied for [an] extension for her visitor's visa to receive private medical treatment in the UK on Form HR(O) and as such [she] did not make any claim on Human Rights grounds. Form HR(O) was the Application Form used for human rights claims, leave outside the rules and other routes not covered by other forms. At the time of appellant's application for extension of her visitor's visa there was no other specific form used for extensions of visitor's visa and hence she used the appropriate form for her application.*
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> *FtJ Robertson has made an incorrect reference to Paragraph V8 of Appendix V that the appellant must be in the UK as specifically [as] a "Visitor for Medical Purposes" to get an extension as a "Visitor for Medical Purposes". There are no requirements for a visitor to apply for an extension of their visitor's visa to receive private medical treatment in the UK only if they are in the UK as a visitor for private medical treatment. There has been an error of law in Judgement of FtJ Robertson …*
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> *…*
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> *The matter before SSHD, the FtJ Cameron and FtJ Robertson in its simplest form was [an] extension of a Visitor's Visa for receiving Private Medical Treatment in the UK and there was ample evidence before SSHD, the FtJ Cameron and FtJ Robertson that the appellant is critically ill and receiving Private Medical Treatment in the UK, which was ignored or overlooked. There are provisions in the law for an extension of Visitor's Visa which was denied to the appellant and hence the decision is unlawful.'*

14. In granting permission to appeal UTJ Kopieczek observed:

> *Whilst it is understandable that the First-tier Tribunal Judge ("FtJ") dealt with the appeal as a human rights appeal, I can see the argument advanced in the grounds to the effect that the*

respondent and the FtJ ought to have dealt with the matter as an application for an extension of stay as a visitor for the purpose of receiving medical treatment, under Appendix V 8.6.

Whereas it may be that the appellant needed to have had entry clearance as a visitor for medical treatment in the first place, it seems to me at this stage at least, that the Rules are not entirely clear on the point. Therefore, the grounds are arguable.

15. No Rule 24 response was filed by the respondent.

Decision on Error of Law

16. I am mindful that the appellant's grounds of appeal were drafted without the support and advice of a legal representative. However, their starting premise is erroneous. It is submitted that Form FLR(HRO) was used because at the time of the appellant's application for an extension of her visitor's visa there was no other specific form capable of being used to extend leave for a person enjoying leave to enter as a visitor. The true position is that Form FLR(IR) was, and remains, the correct form for extending leave to stay in this country and is to be used by visitors seeking such extension except for transit, Approved Destination Status and Permitted Paid Engagements visitors. The appellant does not fall into any of these restricted categories. This form was published in December 2016 and so was the correct form to be used by the appellant for an application for further leave to remain on medical grounds under part V8 of Appendix V of the Immigration Rules at the date of application. Paragraph 34(1) of the Rules sets out that an application must be made on a specified application form and there are specified forms for all types of applications for leave to remain. The respondent cannot therefore be criticised for having acted unlawfully by not considering the application under Part V8 of Appendix V of the Rules when the application made was for consideration on human rights grounds and not as a visitor under the Rules.

17. The Judge proceeded to consider the human rights appeal before him and as to Article 8 he lawfully adopted the approach identified in ***R (Razgar) v. Secretary of State for the Home Department*** **[2004] UKHL 27; [2004] 2 AC 368**, namely whether (I) the proposed removal would be an interference with the appellant's right to respect for private and family life; and if so whether such interference; (ii) would have consequences of such gravity as potentially to engage the operation of article 8; (iii) was in accordance with the law; (iv) was necessary in a democratic society; and (v) was proportionate to the legitimate public end sought to be achieved.

18. It is implicit that the Judge considered the underlying merits of the initial application, noting at [19]:

> *'It is relevant to note that in a letter from the appellant herself dated 11 December 2017 in support of the application she had indicated that with regard to the breast cancer she anticipated the condition persisting for a further three months and that she would then require time to recover. She was therefore asking to remain in the United Kingdom for a further six months on medical grounds.'*

19. The Judge was reasonably entitled to take into account that time had moved on since the application in December 2017 when the applicant was seeking further leave only until the summer of 2018 by the latest. The Judge was hearing the appeal a year after this time.

20. He was also reasonably entitled to take into account in his assessment that the appellant had taken no steps to secure further evidence as to her fitness to travel in circumstances where the respondent had observed that Mr Vashisht had failed to address by means of his letter as to whether she would be fit to fly in circumstances where the respondent would put in place suitable safeguards to mitigate any risk during travel.

21. Ultimately, whilst being sympathetic to the appellant's medical condition the Judge gave cogent and lawful reasons for refusing her appeal under article 3 and also under article 8 both within and outside of the Immigration Rules. I consider below as to whether the appellant would have enjoyed a meritorious application under Part V8 of Appendix V at the date of application but whether it may have been meritorious or not does not adversely impinge upon the Judge's consideration of matters as they stood at the date of his decision some eighteen months later. He lawfully took into account that the time sought by the appellant to remain in this country had long passed and his conclusions as to the proportionality of the proposed interference in the appellant's article 8 private and family life rights were cogent, reasonable and lawful in all the circumstances. Therefore, the appeal must fail.

Postscript

22. The appellant is now required to leave the country. It may be that she will seek to make further representations for the reasons I shall address below. There is a possibility that she may return to India and wish to reapply to visit her family in this country. Ultimately, these decisions are for the appellant and not the Tribunal. It is appropriate, however, that I observe the following. Until her application in December 2017 the appellant had not previously sought to remain in this country beyond her permitted leave and enjoyed until that date an unblemished immigration record. If the application for an extension of leave had been made by use of the correct application form, the respondent would have been required to consider the appellant's circumstances under Part V8 of Appendix V of the Immigration Rules. The appellant was in the country as a visitor and

continued to meet all the suitability and eligibility requirements for a visit visa. She was not in the country in breach of Immigration Rules as the application was made before the expiry of her permitted leave. The respondent therefore would have been required to consider the matter under Paragraph V8.6 which details:

> 'If the applicant is applying for an *extension of stay* as a visitor for the purpose of receiving *private medical treatment* they must also satisfy the *decision maker* they:
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> (a) have met the costs of any medical treatment received so far; and
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> (b) provide a letter from a registered medical practitioner at a private practice or NHS hospital, who holds an NHS consultant post or who appears in the Specialist Register of the General Medical Council, detailing the medical condition requiring further treatment.'

23. Paragraph V1.5 of Appendix V confirms that a visitor (standard) may be given up to eleven months initially if they come to this country for private medical treatment. This is a specific subcategory of visitors, as are academics and visitors under the Approved Destination Status Agreement. The wording of paragraph V8.6 appears to have misled the appellant and her family members into believing that she could extend her stay as a visitor so as to receive private medical treatment, such treatment not being the basis for her initial grant of entry clearance as a visitor. I am in agreement with UTJ Kopieczek that this paragraph of the Rules is difficult for a layperson to understand, being drafted in a manner that lacks the requisite clarity and permits at least two reasonable interpretations, one of which is that understood by the appellant and her family. However, paragraph V8.8 throws light upon the true position when addressing the length to be granted for such extension, as it details that a visitor (standard) who is <u>in</u> this country <u>for</u> private medical treatment may be granted an extension of stay as a visitor for a further six months, provided this is for private medical treatment. The requirement that the previous grant of leave to enter be as a visitor for private medical treatment is confirmed to be an express requirement. The appellant could not from the outset of her application satisfy this requirement. She was therefore required to make an application for leave to remain for a short period of time on human rights grounds.

24. I further observe that at the date of application in December 2017 the appellant was very unwell consequent to cancer and was suffering with an undiagnosed cardiac condition. She enjoyed limited mobility. I am satisfied that the respondent could have reasonably exercised discretion in her favour for a short variation of leave if the application had been considered expeditiously, rather than ten months later as proved to be the case. The appellant pursued the appeal having adopted a coherent though erroneous reading of paragraph V8.6 which is not a well drafted paragraph of the Rules and throughout such time the appellant and her family acted

without legal representation. The respondent has accepted that the appellant's immigration history over the course of some 30 years has been without blemish until she was overtaken by serious ill health whilst present in this country. Consequently, this Tribunal observes that both the application and the appeal were not abusive in nature.

25. I have addressed the appellant's understanding of her position under the Immigration Rules by way of this postscript because her medical position has deteriorated since the Judge heard her appeal in March 2019. I have been provided with a further letter from Professor Kooner, dated 13 October 2019, which post-dates the hearing before the FtT and so therefore is not a document I am permitted to consider in this appeal. It makes for very sad reading as it confirms an experienced medical professional's opinion that the appellant is terminally ill and is currently on palliative therapy. Professor Kooner has again identified the appellant as not being fit to travel and her overall survival is limited to some twelve months. Ms Isherwood, who represented the respondent with her usual care and sensitivity, acknowledged that the respondent may well have to consider the appellant's position in light of this unfortunate diagnosis if an appropriate application is made.

Notice of Decision

26. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. The decision of the First-tier Tribunal is upheld, and the appeal is dismissed.

27. No anonymity direction is made.

Signed: D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 11 November 2019

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: D O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 11 November 2019