Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001182
[HU/51260/2020] [IA/00831/2021]

THE IMMIGRATION ACTS

Heard at Birmingham
On 27 September 2022

Decision & Reasons Promulgated
On 13 November 2022

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

KASHMIR KAUR
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Martin instructed by UK Immigration Lawyers
For the Respondent: Mr Williams, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a citizen of India born on 10 July 1954, appealed the decision dated 22 December 2020 to refuse her application for leave to remain in the United Kingdom.
2. The appeal was dismissed by First-tier Tribunal Borsada following a hearing at Birmingham on 25 June 2021. The appellant appealed that decision, was granted permission to appeal to the Upper Tribunal, and

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in a decision promulgated on 20 May 2022 Upper Tribunal Judge O'Callaghan set Judge Borsada's decision aside albeit with the factual findings preserved with the exception of [8] and [18] (see [55] of Judge O'Callaghan's decision).

3. The preserved findings, which form our starting point, relate to the appellant's age, date of birth, ethnicity and family in the United Kingdom and in Australia, which is not disputed, and the following findings made by Judge Borsada:

> 9 The appellant had clearly managed to live in India on her own for many years and the evidence that she was or needed to be 'looked after/cared for' prior to 2019 was very patchy. There was some evidence that a cousin helped the appellant whilst she was living with the appellant during the cousin's University years but it was not clear when and for how long. There was also some evidence that the sponsor and her brother had taken turns to have their mother come and stay with them and that the sponsor had even spent time in India prior to 2019 but again, it was not clear that this was for the purpose caring for their mother or whether it was primarily for the purpose of contact. I was certainly not satisfied that there was sufficiently clear evidence that the appellant was being 'looked after/cared for' as of necessity prior to December 2019. Indeed, the fact that the appellant came to the UK in 2019 as a visitor was also an indication that it had been thought that she would be able to return home at the end of that visit i.e. There was no application for entry clearance as an adult dependent relative made in 2019 or prior to that which again appears to indicate that this was not a perceived problem before 2020.
>
> 10. On one particular matter, I note that the appellant does require knee surgery and I do not doubt that she would need looking after following surgery but it was not clear to me why the sponsor could not make care arrangements for her mother for that period of weeks after surgery for instance by going to India herself. Whilst I understand why the sponsor has indicated that she could not go to India permanently, it is not clear that she could not do this on a temporary basis. It is also not clear why prior to such knee surgery, help with her domestic chores (shopping, cleaning and cooking) could not be provided. Finances were not mentioned by the sponsor as a barrier but instead the lack of availability of such a home help. The sponsor has asserted that such help is simply not available in India but I have seen no evidence for this and the appellant in this regard has simply not proven her case.
>
> 11. Dealing with the appellant's mental health issues: again, as far as the appellant's anxiety and depression are concerned, these were matters that were known about prior to 2019 i.e. they are not in themselves matters that are new and their existence as such does not in and of itself provide the appellant with cogent reasons for why she cannot return to India or look after herself at the current time (there maybe other reasons which I shall explore subsequently). Many individuals manage with mental health problems on their own on a 'day to day' basis and whilst I note that the sponsor's is concerned about the possibility her mother might try and take her own life, there is no medical evidence that this is likely and this is in circumstances in which a psychiatric report has been made available to me and in which report there is no mention of such a risk.
>
> 12. The new circumstances which the appellant's appeal turns on are therefore the Covid 19 Pandemic and the appellant's claimed cognitive impairment. As to the Pandemic: I agree with the arguments put forward by Ms Edwards about this i.e. that by its very nature, the risks of catching this virus are ones that exist in every country and are not specific to India. It is not clear that a doubly vaccinated individual such as the appellant is at a particularly high risk of becoming seriously ill either here in the UK or on her return to India and whilst

there is clearly a public health crisis in both countries, the risk of serious illness to any one individual is not high.

13. Turning to the evidence of cognitive impairment: I note the sponsor's anecdotal evidence of her mother's declining mental acuity, but I am reluctant to place too much reliance on this given that an assessment of mental acuity and cognitive impairment is necessarily a matter that needs proper expert examination particularly with regard to the possibility of dementia. The psychiatrist did carry out some tests which did have some worrying indicators but there was no actual diagnosis (the expert indicated that a dementia assessment should be carried out) – the expert's caution is understandable given the circumstances of his initial assessment over a 'zoom' link. It is also true as Ms Edwards has pointed out, that, to an extent, the expert did rely on what the sponsor told him which information was by its very nature subjective. The sponsor, as any good daughter, is concerned about her mother's well-being and therefore may in her anxiety have read the signs incorrectly. The sponsor has admitted to suffering from a form a post-natal depression and is clearly worried about her mother such that she may too readily have reached an incorrect conclusion. I am therefore not satisfied that there is sufficient to conclude that the appellant is suffering from dementia and/or is incapable of looking after herself. I am certainly not satisfied that the appellant has demonstrated that she can properly be considered an adult dependent relative within the meaning of the Immigration Rules.

14. Turning to the various legal tests: firstly, with regard to article 276 ADE of the Immigration Rules. I do not find that there are very significant obstacles to the appellant returning to India and agree with all that the respondent has said about this as set out elsewhere in this decision. It is not clear to me that the appellant is incapable of living on her own or that any cognitive impairments, would prevent her coping with 'day to day' tasks.

15. As to the appellant's finances: there was simply insufficient evidence that the appellant could not cope financially – the sponsor has indicated that her mother would have no idea how to cope financially (access a bank account etc.) but I am not satisfied that there is sufficient evidence to reach this conclusion and I would not wish to rely on the sponsor's subjective judgment about this. The sponsor says that she only coped in the past because a cousin undertook these tasks for her but the evidence about this (when and for how long) is not very clear and insufficient for me to find in the appellant's favour on this issue.

16. As to the need for the appellant to have help with her domestic chores – this was not evidence of very significant obstacles in circumstances in which neither the appellant nor the sponsor have investigated the possibility of getting home help on her return to India. Whilst I note that cultural differences were given as the part of the reason for not investigating this possibility (children look after their elderly parents in India), this was not evidence of very significant obstacles but of a cultural preference. The appellant's family have in any event already gone against 'cultural preferences' by ruling out the possibility of the oldest son and his wife taking on this responsibility i.e. it is not clear that this is a governing principle in this particular family.

17. As to GEN 3.2 under Appendix FM of the Immigration Rules: I do not find that there are unjustifiably harsh consequence rendering the refusal of the application a breach of article 8 of the ECHR. I rely on the same reasoning mentioned in relation to the very significant obstacles test under paragraph 276 ADE of the Immigration Rules but adding that I was not satisfied that the appellant has demonstrated that she was not able to look after herself or was someone who could properly be classed as an adult dependent relative. I am not satisfied that the appellant has established that she is either emotionally or physically dependent on her daughter by necessity rather than choice and that she could not cope on her own on her return to India.

18. (set aside by Upper Tribunal Judge O'Callaghan)

19. As to article 3 of the ECHR: I note the test mentioned in AM (Zimbabwe) but I am not satisfied that that test is made out having regard to my findings of fact. I note the appellant fears that she would be vulnerable as a lone individual who is not in the best of health and that she may the victim of crime but I am not satisfied that this subjective fear has been properly evidenced and therefore that this is not a factor in the consideration of allowing the appeal or not on article 8 grounds or article 3.

4. Judge O'Callaghan raised a number of concerns regarding the evidence that was before Judge Borsada and directed that the appellant was to file and serve any further evidence to be relied upon by means of Rule 15(2A) application no later than 14 days from the resumed hearing, a time limit which expired on 12 September 2022. The further evidence was not however filed until 23 September 2022. Mr Williams was able to confirm that he had received the appellant's appeal bundle, had time to consider the content of the same, and was not prejudiced by late service. The evidence was therefore admitted by us.

Updated evidence

Medical evidence

5. Judge Borsada at [8] of his decision found that there was no real challenge by the Secretary of State to the evidence concerning the appellant's physical health, which remains the position before us today. The error in this paragraph was said to have arisen in that Judge Borsada found that although accepting the appellant's health was declining there was nothing new in that evidence and that all of the conditions mentioned by the appellant, including a high blood pressure, thyroidism, and knee pain, were medical problems that existed prior to 2020.

6. Judge O'Callaghan in his error of law finding made reference to a letter written by Mr Prakash, a Consultant Orthopaedic Surgeon, to the appellant's GP dated 10 March 2021 in which he writes "*her symptoms have deteriorated very rapidly and she now struggles to walk even a few steps because she is in so much pain. In the clinic today she was in tears. Clearly her quality-of-life is quite badly affected."* There is support in the evidence for the appellant's argument that although the medical conditions did exist in India, to which we shall refer in further detail below, some of her medical complaints have deteriorated since she arrived in the United Kingdom, indeed, a further letter from Mr Prakash to the appellant's representatives dated 25 June 2021 confirmed the appellant had been listed for a right knee replacement and that if she did not get the operation her symptoms would keep deteriorating.

7. We have also seen within the updated bundle a further document confirming the appellant's admission on 8 October 2021 to the Spire Little Aston Hospital and discharge on 11 October 2021 following a

right knee replacement which appears to have proceeded without complication.

8. The appellant's medical records indicate that she has received a number of prescriptions for medication, the record indicating repeat prescriptions for:

Raberprazole	prescribed for gastric disorders.
Evolve HA eye drops	soothing eye drops intended for use in the relief of discomfort that arises from dry eye sensations.
Levothyroxine sodium	used to treat an under active thyroid gland.
Paracetamol	pain relief.
Aspirin	pain relief plus to prevent heart attack/stroke.
Telmisartan	treatment of high blood pressure/hypertension.
Epaderm ointment	treatment of dry skin condition.
Sertraline	treatment of depression/anxiety.

9. There is also an entry for what is described as 'acute' medication, acute being a medical term which we understand referred to injury or pain that occurs suddenly and generally lasts for a short period of time. The medication provided under this heading includes:

Ferrous sulphate	prescribed to treat anaemia.
Naproxen	treatment of pain/inflammation.
Voltarol gel	pain relief.
Menthol aqueous cream	to soothe irritated skin.

10. In the refusal letter dated 22 December 2020 it is written:

> We note you have submitted evidence of having high blood pressure, hypothyroidism and osteoarthritis of the knees since at least 2013. Therefore the conditions detailed were already established prior to you entering the UK and you have not shown you have been denied treatment for them in India. You have not demonstrated any deterioration since entering the UK.
>
> We note that whilst Dr Chan has sent a detailed letter of your conditions in his letter 20 May 2020, he refers to what he has been told by you and your daughter only. There of no evidence of the issues you raised and no medical evidence you cannot care for yourself.
>
> In addition you have not shown that there are not any facilities in India to enable you to care for yourself or assist in your care. You have not shown why you cannot access private facilities in India to help with any care issues you have nor is there any evidence that any care that you need has to be exclusively be provided by your daughter in the UK.
>
> Medical treatment is therefore available for your conditions in India and you have not supplied any evidence that you would be denied medical treatment or medications there.
>
> Consideration has been given to the difference in the standard of medical facilities compared with that available here. Whereas it is accepted that the health care systems are unlikely to be equivalent, this does not entitle you to remain here.

11. It was not argued before us that this is an unreasonable assessment or one contrary to the facts or available evidence.

12. In relation to the appellant's mental health, two documents appear in the supplementary bundle the first being a letter from a Dr Kamal, a Senior Clinical Fellow based at the Bushy Fields Hospital in the West Midlands who reports on a home visit carried out to the appellant on 14 April 2022.

13. The diagnosis is that the appellant suffers from a depressive disorder – moderate to severe, ICD – 10 F33. There is said to be a risk of self neglect and a recommendation of an increase of the appellant's Sertraline prescription from 100mg to 150 mg.

14. The appellant is recorded as having self reported that she is still depressed with the persistently low mood with frequent crying spells, reminded of her late husband, but for most of the time not being able to pinpoint what was really bothering her. It is recorded that family members take the appellant out for walks in the garden or around the block and that her mobility and energy level is improving. It also recorded that the appellant stated that her family occasionally bring her to a nearby gurdwara temple for congregational worship and she enjoys meeting people of similar belief and culture and would love to go there more often but her family are concerned about doing so due to the pandemic. The letter records the appellant sharing that her husband was murdered many years ago in India, and claiming that besides her two children, her son residing in Australia her daughter in the UK, she has no regular contact with family members, that not many are in India and that most are in Canada and Saudi Arabia. The letter indicates that it seems that one of the perpetuating factors for the appellant's depression is a lack of sense of belonging in the UK, loneliness and social isolation. The letter records a willingness for the appellant to increase the Sertraline dosage and the appellant's daughter planning to take steps to enable the appellant to engage socially probably by joining a day-care centre for the elderly.

15. The second document we have is an amended psychiatric report dated 19 June 2022. This amended the original report dated 27 March 2021 which was the subject of concerns raised by Judge O'Callaghan in his error of law finding in the following terms:

> 37. At para. 19 the consultant psychiatrist details the results of an Addenbrooke's Cognitive Examination (ACE III), a neuropsychological test used to identify cognitive impairment in conditions such as dementia. There are nineteen activities, testing five cognitive domains: attention, memory, fluency, language and visuospatial. Memory is tested by asking the patient to recall three simple words repeated in the earlier attention test; memorising and recalling a fictional name and address; and recalling widely known historical facts. The memory tests are split and conducted throughout the other four tests. The appellant scored 27 out of a possible 100, with a score of 0 out of 26 in respect of the memory test. The consultant psychiatrist observed that a score of less than 82 indicates likely dementia.
>
> 38. A Mini-Mental State Examination was undertaken. It is a 30-point examination and may be used to estimate the severity and progression of cognitive impairment and to follow the course of cognitive changes in an individual over time. It is also used to screen for dementia. At para. 20 the consultant

psychologist observed that any score of 24 or more out of 30 indicates normal cognition. The appellant scored 8 out of 30, indicating severe cognitive impairment. It was observed that the appellant was disorientated in time, she could not remember the date, day or season and she was orientated in place.

39. The consultant psychologist interviewed the appellant on one occasion on 12 March 2021 via a remote online video assessment. The appellant's daughter acted as an interpreter, as well as providing her own personal observations. The following information was provided in interview:

> '6.3 Mrs Sandhu reported that her mother has been suffering from memory loss which is gradually getting worse. She noticed that her mother cannot differentiate between shampoo and shower gel. She needs help with the bath. She also noticed that her mother uses a toothbrush without toothpaste. She has to repeat conversations frequently. Her mother complains that she has not combed her hair and fears that her daughter does not want to look after her. Her mother is concerned about the bill and insists to avoid using the cooker.
>
> 6.4 Mrs Sandhu reported that her mother even forgets her date of birth. At times, her mother thinks that she is in India. She thought her husband was alive after she saw an online tool from her grandchildren which brings portraits of dead relatives to life. She then refused to eat food and she wanted to invite her husband. She also reported hearing her parents and husband who passed away. She gets anxious and tearful while thinking about her husband. She forgets the names of her grandchildren.'

40. The consultant psychiatrist was also informed by the appellant's daughter that the appellant's sleep was interrupted and that she screamed at night.

41. The conclusion as to dementia and memory loss is striking. However, the appellant's GP records from 2013 have been provided to the Tribunal and there are no references at all to the appellant making any complaint as to memory loss, despite numerous visits to the medical practice, nor detailing that she screams at night. No great concern was raised as to the appellant's sleep. This information was before the consultant psychiatrist but appears to have been entirely overlooked. The Tribunal is concerned that two possible reasons for such failure are either that it was deliberately overlooked, or the failure flowed from a lack of professional care. There may be other reasons.

42. A Presidential panel of the Upper Tribunal has recently issued a decision in HA (expert evidence: mental health) Sri Lanka [2022] UKUT 00111 (IAC) in which the approach to be taken by an expert, including a medical expert, as to the preparation of a report is addressed. The panel observed that it is trite that a psychiatrist possesses expertise that a general practitioner may not have. A psychiatrist may well be able to diagnose a variety of mental illnesses following face-to-face consultation with the individual concerned. In the case of human rights and protection appeals, however, it would be naive to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the respondent's attempts at removal. A meeting between a psychiatrist, who is to be an expert witness, and the individual who is appealing an adverse decision of the respondent in the immigration field will necessarily be directly concerned with the individual's attempt to remain in the United Kingdom on human rights grounds.

43. Notwithstanding their limitations, GP records concerning an individual detail a specific record of presentation and may paint a broader picture of their mental health than is available to the expert psychiatrist, particularly where the individual and the GP (and any associated health care professionals) have interacted over a significant period, during some of which the individual may

not have perceived themselves as being at risk of removal. Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual's mental health and should be engaged with by the expert in their report. Where the expert's opinion differs from (or might appear, to a layperson, to differ from) the GP records, the expert will be expected to say so in the report, as part of their obligations as an expert witness. The Tribunal is unlikely to be satisfied by a report which merely attempts to brush aside the GP records.

44. Where an expert report concerns the mental health of an individual, the Tribunal will be particularly reliant upon the author fully complying with their obligations as an expert, as well as upon their adherence to the standards and principles of the expert's professional regulator. When doctors are acting as witnesses in legal proceedings they should adhere to the relevant GMC Guidance.

45. The panel confirmed that in all cases in which expert evidence is adduced, the Tribunal should be scrupulous in ensuring that the expert has not merely recited their obligations, at the beginning or end of their report, but has complied with them in substance. Where there has been significant non-compliance, the Tribunal should say so in terms, in its decision. Furthermore, the panel confirmed that those giving expert evidence should be aware that the Tribunal is likely to pursue the matter with the relevant regulatory body, in the absence of a satisfactory explanation for the failure.

46. I am satisfied that the consultant psychiatrist failed to adequately consider the GP records provided to them and consequently failed to detail any explanation as to why they were satisfied in their professional opinion as to the tests undertaken, when complaints of cognitive impairment, including memory loss, were not raised by the appellant with a GP during several years of attendance. The result of such failure results in that no proper weight can be placed on the consultant psychiatrist's opinion in relation to the results of these tests, and such general failure in approach can properly be considered when assessing reliance on other aspects of the opinion provided within the report.

47. It would be appropriate for the appellant's legal representatives to forward a copy of this decision onto the consultant psychiatrist, along with a copy of the decision in HA (Sri Lanka).

48. In addition, the report has failings as to its drafting. An important section for a tribunal, confirming the sources of information provided to the report writer, details at para. 4 what is understood to be the entirety of the documents placed before the consultant psychiatrist. However elsewhere in the body of the report are references to other documents, including important GP records, strongly indicating that para. 4 is inaccurate. It should not be for a tribunal to have to trawl through a report to ensure that basic requirements are accurate.

16. The psychiatrist, Dr Ahmed, refers to having undertaken the assessment with the appellant on 12 March 2021 via a remote online video assessment in which the appellant was accompanied by her daughter who acted as an interpreter. It is recorded that it was difficult to obtain a history from the appellant as she was minimally responding and that it was her daughter who spoke on her behalf.

17. Dr Ahmed writes that it was the appellant's daughter who reported that her mother had been suffering from memory loss which was gradually getting worse, that her mother cannot differentiate between shampoo and shower gel, that she needs help with the bath, that her mother uses a toothbrush without toothpaste, that she has to repeat conversations frequently, that she is not combing her hair, that she fears her daughter does not want to look after her, and that as a result

of energy costs insists avoiding using the cooker. It is also recorded the appellant's daughter stated that her mother forgets her date of birth, at times thinks she is in India, thought her husband was alive after seeing an online tool from the grandchildren which brings portraits of dead relatives to life, gets anxious and tearful while talking about her husband, forgets the names of the grandchildren, that she is on medication for stress related to her family, and talks constantly about the past including bad experiences.

18. The appellant's daughter reported her mother had been in low mood since 2016 following the death of her grandmother which got worse in 2017 when she was diagnosed with depression. It is clamed her sleep is interrupted, she is screaming at night, and the appellant suffers from physical symptoms of anxiety such as dry mouth, sweating and shortness of breath.

19. In relation to the appellant's psychiatric history, Dr Ahmed again reports that the appellant was struggling to communicate and that her daughter provided the history on her behalf in which she stated her mother was diagnosed with depression in India and had had follow-up appointments with her doctor in India and also follow-up in the UK.

20. At [9.1] Dr Ahmed records the appellant's daughter reporting that her grandmother had suffered from dementia and that her mother's older sister suffers from dementia and depression.

21. Dr Ahmed's mental state examination is set out at [16].

22. At [21] Dr Ahmed confirms he has reviewed the appellant's GP records from November 2013 to February 2021, noting the evidence of damage to the appellant's knee which has limited her mobility and caused her pains, the diagnosis of hypertension, hyperthyroidism and osteoarthritis of the knee, and her prescribed medication. There is reference at [21.7] to a letter from a Dr Gupta from India dated 23 March 2021 confirming that the appellant was diagnosed with psychotic depression on 5 January 2017, having presented with agitation, anxiety, constipation, hypochondria, insomnia, loss of appetite, intellectual impairment, physical immobility, delusions/hallucination, for which she was given an antipsychotic medication along with antidepressants, antihypertensive medication and thyroid supplement along with multiple sessions of psychotherapy. Dr Gupta stated that beside medication and regular follow-ups the appellant requires support from close family members and that if she is left alone it will be detrimental to her welfare.

23. Dr Ahmed undertook a risk assessment which is reported at [17] in the following terms:

> 17.1 Fire risk – nowadays Mrs Kaur hardly cooks by herself. Mrs Sandhu is concerned about the risk of fire as her mother has left the gas cylinder on in India and the neighbour had to remind her.
>
> 17.2 She has never self harmed in the past. If she is left to her own devices, there is a potential risk of being vulnerable and self neglect due to her current mental health and memory difficulties.
>
> 17.3 Risk of self neglect - she gets forgetful and needs prompting or basic needs from her family. After she returned to India from Australia she was suffering from vomiting after drinking tap water.

17.4 Risk of falls - she is awaiting knee replacement on both her knees. She is using a wheelchair and has been using a walker for the past 4-5 years.

17.5 Risk of wandering - Mrs Kaur does not leave the house by herself.

17.6 Risk of self-harm - she reported fleeting thoughts of self-harm.

17.7 Risk of non-compliance – Mrs Kaur forgets to take her medication and her family reminds her on a daily basis.

17.8 Risk of financial abuse – her children help with managing finances.

17.9 Risk of aggression - she gets irritable and annoyed easily.

17.10 Risk of driving – Mrs Kaur does not drive.

24. In Section 22.15, entitled 'Diagnosis', it is written:

22.15.1 Based on the information available, psychometric tests and clinical examination, Mrs Kaur is suffering from **Moderate depressive episode (F32.1) and Generalised anxiety disorder (F41.1).** She meets the diagnostic criteria set out in the ICD – 10.

22.15.2 Based on the clinical findings and collated history, Mrs Kaur is presenting with cognitive impairment. The cognitive tests such as **Addenbrooke's Cognitive Examination 111** and **Mini-Mental State Examination** scores are consistent with severe cognitive impairment.

22.15.3 The possibilities are that Mrs Kaur is not making significant efforts to engage in the test may be related to Depression. I am aware that the score of cognitive test are not entirely reliable for those suffering from depressive episode. I would recommend that her cognition is reassessed once she does not have significant depressive symptoms. Mental illness such as depression can cause memory lapse, affect concentration and in turn, it can affect the judgement, organising and planning skills of an individual.

25.15.4 The other possibility is that Mrs Kaur is exaggerating the symptoms. I have taken into consideration the possibility of fabricating or exaggerating the symptoms due to the concern of removal from the UK. During my assessment, I had no concern that Mrs Kaur was exaggerating her symptoms. Therefore, she requires further investigation to rule out a diagnosis of Dementia. At this stage, I am unable to confirm the diagnosis of Dementia or severe cognitive impairment.

25.15.5 Mrs Kaur is presenting with the following symptoms -

25.15.6 **Cognitive changes** - forgetful, reduced attention and concentration, difficulty finding words, difficulty in planning, performing tasks, disoriented in time.

25.15.7 **Psychiatric symptoms** - presenting with low mood and anxiety symptoms.

25.15.8 **Personality changes** - she does not want to sit with the family members any longer, gets irritable and agitated.

25.15.9 **Changes in day-to-day functioning** - needs help with household chores, self-care, shopping, taking medication and handling money.

25.15.10 Mrs Kaur scored 27/100 on **Addenbrooke's Cognitive Examination 111** (a score of less than 82 indicates likely Dementia). ACE-111 is a screening test for cognitive impairment and not a diagnostic test. She scored 8/30 in the **Mini-Mental State Examination** which is suggestive of severe cognitive impairment.

25.15.11 To confirm the diagnosis of Dementia she would require further investigations such as a workup for dementia such as complete blood

cell count (to exclude anaemia and infection), or urinalysis (to exclude infection), serum electrolyte, glucose and calcium levels, blood urea nitrogen, serum creatinine level and liver function tests (to investigate metabolic disease), erythrocyte sedimentation rate and serum folate level. MRI head, electrocardiograph and chest x-ray to rule out other treatable systemic diseases.

25.15.12 Mrs Kaur is presenting with symptoms of depression such as low mood, reduced sleep and anhedonia (inability to feel pleasure from activities). These symptoms are due to the distress directly related to her current social circumstances. Her mood got worse after Mrs Kaur’s daughter-in-law in Australia refused to care for her. During the assessment, she was struggling to communicate with me. Some of the patients suffering from depressive illness, finds it difficult to discuss their symptoms.

25.15.13 Mrs Kaur reported fleeting thoughts of self-harm. If she is left to her own devices, there is a potential risk of being vulnerable and self neglect due to her current mental health and memory difficulties. She needs prompting from her family with medication and personal care.

25.15.14 In my opinion, Mrs Kaur does not currently suffer from a mental disorder within the meaning of the Mental Health Act 1983 that is of nature or degree that makes it appropriate for her to be detained in hospital.

25. It is Dr Ahmed’s opinion that the appellant’s prognosis depends on the outcome of the Home Office decision/these proceedings as there is a likelihood that the symptoms of depression and anxiety would worsen if the decision went against her. It is Dr Ahmed’s opinion that if the appellant returns to India stress related to her social circumstances and lack of adequate support from her family is likely to have a significant impact on her mental health. However, if she is treated with medication and psychological support she is likely to show some positive response in 12 months provided the stress of immigration is eliminated.

26. As noted above, it is a preserved finding from the decision of Judge Borsada that the appellant cannot succeed on article 3 grounds, medical or otherwise, by reference to the decision of the Supreme Court in AM (Zimbabwe) [2020] UKSC 17, with which we agree.

27. We find there is insufficient evidence to show that suitable, adequate, and accessible mental health assistance would not be available for the appellant in India as it has in the past as evidenced by the letter received from Dr Gupta in India. It has not been shown this will not include facilities to assist with the impact of removal identified by Dr Ahmed.

Discussion

28. Mr Williams in his submissions raised a number of concerns regarding Dr Ahmed’s report including the fact that the information on which the report is based was provided by the appellant’s daughter in the face of minimal response from the appellant and limited engagement, and therefore there was no evidence of a proper examination of the appellant. It was suggested the report did not recall the dates of the various events referred to and did not establish how Dr Ahmed was able to reach the conclusion that he did. Mr Williams was critical of the

finding at paragraph 21.1 where there is a brief reference to a list of relevant documents, but none are set out or show how they support the claim.

29. Mr Williams raises specific criticism in that as the report is based upon the information provided by the appellant's daughter who wants her mother to remain in the United Kingdom little weight should be put upon the claims made.

30. It is understandable that if Dr Ahmed tried to ask questions of the appellant to which he received little or no response that he would turn to the person accompanying the appellant, on this occasion her daughter, to try and obtain the relevant history. In the absence of any assistance from the appellant Dr Ahmed appears to have had little option other than to undertake an assessment based upon what he was being told.

31. As noted above, concerns were recorded by Judge O'Callaghan about this medical report. What is different, which enables us to assess the mental health presentation is that not only do we have Dr Ahmed's report but we also have the later letter written by Dr Kamal following his examination of the appellant at home assisted by an independent interpreter. Dr Kamal's diagnosis is that the appellant suffers from a depressive disorder for which she receives prescribed medication. We accept that diagnosis.

32. We do not accept that the appellant is suffering from dementia as we do not have sufficient medical evidence to allow us to make such a finding and helpful comments by Dr Ahmed of the work that will be required before such a diagnosis could be made is of interest as a number of matters referred to which would have to be ruled out reflect some of the issues for which the appellant has already been diagnosed, including anaemia and other related conditions.

33. We accept the comment made by Dr Ahmed that the stress of the ongoing proceedings and the uncertainty regarding the appellant's future is also likely to be contributing to any psychological presentation.

34. The witness statements from the appellant, her daughter, son-in-law, and other evidence produced is in line with the belief of the appellant and her family that it would be disproportionate to return the appellant to India. The most recent witness statement dated 21 September 2022 of Sandeep Sandhu, the appellant's daughter, provides further clarification which was not available to Judge Borsada, relating to who the appellant was living with from mid-2018 until she came to the UK.

35. It is said that in February 2018 the appellant visited her daughter in the United Kingdom before returning to India in July of that year. The appellant's daughter's cousin then stayed with her until January 2019. The appellant's son visited her in India in October 2018, remained for one month before returning to Australia, with his wife and children remaining in India "a while longer". It is said that the brother's wife had just had a baby and wanted to spend time with her parents and moved between her parents and the appellant's family home.

36. In 2018 the appellant's daughter decided to return to India to be with her mother. In November 2018 she arrived with the children to enquire about suitable schooling to make sure everything was in order. The appellant's daughter returned to India with her family in January 2019 with the intention to remain for six months but states the move did not go to plan and therefore they returned in March 2019 as her children became unsettled and unwell. It was decided the appellant would go to visit her son in Australia.

37. In March 2019 the appellant was collected by her son and returned with him to Australia although it is said the living arrangements did not work out and so the appellant returned to India on 9 November 2019. From 9 November 2019 until 12 December 2019 the appellant stayed with her sister, an Indian national normally resident in Australia, who left India on 16 March 2020 after the appellant had entered the United Kingdom as a visitor; and has decided not to return to India since that time. The appellant's daughter claims the aunt is widowed, has one daughter who she lives with in Australia, and that an application for permanent residence has been made on her behalf so she can live there permanently.

38. The purpose of the statement is to show that the appellant was never left alone at any point as it was the view of the family that she needed somebody to be with her at all times.

39. The appellant entered the United Kingdom lawfully as a visitor intending to return to India on 13 May 2020 for which a flight ticket had been booked. We have nothing before us to show that what was intended at that time was anything other than a genuine visit to her family in the UK.

40. We accept as plausible the appellant's claim that as a result of the Covid-19 pandemic her flight was cancelled meaning she had no choice other than to remain in the United Kingdom. The appellant's daughter records concerns with people dying and the elderly being particularly vulnerable at that time, as it was in the UK. Notwithstanding, insufficient evidence has been provided at the date of this appeal hearing to show that situation that prevailed in May 2020 is still applicable today either in the UK or in India; notwithstanding it being accepted the appellant's date of birth shows that she will be classed as senior citizen and in relation to general vulnerability concerns that are in the public domain in addition to any issues arising from her overall health. It is also the case the appellant is double vaccinated as noted by Judge Borsada.

41. In relation to the appellant's case as to why she could not be cared for adequately in India, set out at [20 – 21] of her daughters witness statement, it is written:

> 20. The concept of care homes for the elderly in India goes against our cultural norms. Adult children by law must look after parents as stipulated by the Maintenance of Welfare of Parents and Senior Citizens Act 2007 in India. There are a select number of homes for those who are disabled, homeless or for those who have no family members. They do not accept people who have family and a police case can be lodged against them in this scenario i.e. if a child tries to put their parent in the home forcefully or without consent, the

centre reports such cases to the police. Such cases are also reported to the media.

21. Home help is used by people in India but only for those who have long-standing relations with these people as they can trust this person. My mother is a widow. As a lone woman with no other familial support it would be unsafe for her to just let a stranger into her home. I will be scared for her safety if she cannot fend for herself or fight off someone given her knee issues. I have provided articles which substantiate my claims.

42. The articles referred to including an extract from the respondent's Country Policy and Information Note India: Women fearing gender-based violence, Version 2.0, July 2018, which reads:

4.8.1 Widows comprised the largest category of single women and faced high levels of deprivation, social taboos, limited freedom to remarry, insecure property rights, social restrictions on living arrangements, restricted employment opportunities, emotional and other forms of violence, and a lack of social support. Widows frequently experienced tensions with their families for economic reasons, as they were another mouth to feed and could lay claim to a portion of the family property. They were also often denied or dispossessed of property by their in-laws after the death of their spouse.

4.8.2 Relocation within India of single women, women with children or victims of familial crime was reported to be difficult because of the need to provide details of their husband's or father's name to access government services and accommodation42 . Single women faced difficulties in accessing housing.

43. The comment upon problems as a result of economic difficulties created by widows being present within families in India is not relevant as there is no evidence to support the same in this case. It was accepted before us that the appellant's family in the United Kingdom have the economic resources and willingness to provide for the appellant and it was not made out that she would be effectively abandoned by what is clearly a loving and supportive family if she was returned to India. It was also not made out that the family in the UK could not maintain contact with the appellant on a daily basis enabling the daughter to remind the appellant of the need to take her medication, even if support was provided within India. It is also not made out that the arrangement that previously existed for family members travelling to India or the appellant visiting the UK and Australia, hence maintaining direct family contact, could not continue.

44. There was nothing in this case by reference to the best interests of any children to show that the appellant's removal from the United Kingdom would have such adverse consequences so as to make return disproportionate for this reason alone.

45. A second document is a BBC article headed "India's invisible widows, divorcees and single women, dated 7 March 2014 which substantially predates the CIPU and we question why this was provided when it is a publication specifically referred to in the later document at footnote 40 in paragraph 4.8.1 in support of that sentence. The publication of the actual article adds little to what is already before us.

46. A further article published by the Gender Security Project on 11 March 2021 refers to violence against widows in India and refers to there being 55 million widows in India today. The report refers to Indian society embracing a patriarchal sociocultural norm for widows with

many families continuing to hold myths and stigma against widows. The report refers to widows losing their inheritance rights and experiencing property disputes leading them to be driven away from their unsupportive families and those belonging to socio-economic marginalised communities struggling to meet financial requirements to support themselves. We do not find it has been made out on the evidence before us that any such hostility towards the appellant exists from any member of her family, or that she would be economically prejudiced within the concept of life and society within India, in light of the willing support that will be provided from family members in the UK and also possibly Australia.

47. The report refers to government policies for widows to eliminate inequality faced by widows and to increase the quality for that group. Although the appellant’s daughter expresses concern for her mother’s well-being and treatment within India it is not made out on the specific facts of this appeal that a generalised reference to the experience of some within the population of 55 million widows supports the claim the appellant will experience such treatment. Considering the evidence holistically we find it more likely the appellant will, in light of the family support she has (both economic and emotional) and the fact that any care provision that would be made for the appellant will be one that the family ensures meets the appellant’s needs, not experience the problems identified in these articles.

48. The appellant made the application for leave to remain in the UK according to her daughter because that was the advice that was received when she contacted the Home Office to enquire what needed to be done as a result of the return flight to India being cancelled. The fact the application was made entitled her to remain in the United Kingdom whilst it was determined and any appeal process is pending, which is why since the making of the application the appellant has remained in the United Kingdom albeit that her status has always been precarious. We make this finding for although the appellant initially entered lawfully as a visitor she has never had a right to settle or remain in the United Kingdom and the expectation has always been, as evidenced by the fact she purchased a return ticket to India, that she will return there when her visit visa expired.

49. The respondent’s representative considered the application by reference to the immigration rules but noted the appellant had not referred to a partner, parent or dependent child in the United Kingdom which meant the application could not be considered under Appendix FM. Consideration was given to whether the appellant could succeed under the private life rules by reference to paragraph 276ADE(1), but it was found the appellant did not qualify for leave on this basis. Although the appellant did not fall for refusal on grounds of suitability the appellant had not lived in the United Kingdom for at least 20 years, having only been present in the UK for five months at the date of application, was over the age of 25, and had not shown there were very significant obstacles to her integration into India if required to leave the UK. This is because it was said the appellant had spent the

majority of her life in India including her formative years, spoke the language, would have retained knowledge of the life language and culture of India, and would not face significant obstacles to reintegrating into life in India once more.

50. There is provision within the Immigration Rules for a person claiming to be an adult dependent relative to apply for leave to remain on that basis. To succeed an applicant must be outside the UK and need long-term care from a parent, grandchild, brother, sister, son or daughter who is living permanently in the UK. The appellant at the date of application was, however, in the UK and could not satisfy this requirement. It is not disputed that her daughter is settled in the UK – she is now a British citizen. The appellant was also required to prove she needed long-term care to do everyday personal and household tasks because of illness, disability or age, that the care that she needed is not available or affordable in India, that the person she would be joining in the UK will be able to support accommodated care for her without claiming public funds for at least five years, and that the appellant is 18 or over. We do not dispute that the last two of these criteria have been established on the evidence. It is not disputed before us that the appellant needs some assistance with some everyday personal and household tasks. The issue in this appeal is therefore whether the care she needs is available or affordable in India.

51. We comment at this stage upon the comment made by the appellant’s daughter that the family will somehow face action by the government of India if the appellant was returned by reference to the Maintenance and Welfare of Senior Citizens Act 2007. We find no merit in that submission. The purpose of the Act was to provide for more effective provisions for the maintenance and welfare of parents and senior citizens which was guaranteed and recognised under the Constitution. In addition to creating an obligation upon family to support a person protected by the Act it also made provision for establishing care homes for elderly persons requiring the same.

52. The Act provides power for a senior citizen, including a parent who is unable to maintain themselves from their own earnings or property they own, to make an application under section 5 in the case of a parent or grandparent against one or more of his children not being a minor. The obligation of the children or relative to maintain a senior citizen is said to extend to the needs of such citizen so that senior citizen may lead a normal life – see section 4(2).

53. The first point of note is that the application for maintenance or provision is not made by the State but by the senior citizen parent if they have capacity or any other person or organisation authorised by them or an appointed Tribunal. In this appeal there is clear evidence family will voluntarily support the appellant if she is returned as they do now and will continue to do if she is permitted to remain in the United Kingdom.

54. Even if such a need arose it is important to consider section 1(2) which states that the Act extends the whole of India and applies also

to citizens of India outside India. The appellant's daughter is no longer a citizen of India as she is a British citizen. Although she remains the daughter of the appellant it was not made out that the provisions of the act have any application to her while she remains in the United Kingdom. There is also the point that even if an identified need arose not currently being met by family members in the United Kingdom or Australia it was not made out such additional resources would not be provided voluntarily to meet such a need.

55. A further fear expressed by the appellant's daughter is that there will be no suitable care for her mother in India and that she will be at risk of harm as other single women are, especially in light of her age and vulnerability. We do not find such subjective fear to be objectively made out on the basis of the evidence before us.

56. We accept that in more rural areas where traditional values still hold sway there may be concerns about whether suitable care can be arranged. What the appellant's daughter's submissions do not recognise is the effect of rapid urbanisation priorities within India with traditional family structures and values changing. It was not made out on the evidence before us that the appellant will not have access to suitable affordable geriatric or other services required to meet her physical, mental, or age-related needs. This is not a case of the appellant having to rely solely on her old age pension provided by the government.

57. Organisations such as the Charities Aid Foundation (CAF), a leading not-for-profit organisation, endeavour to fill gaps in elderly care by providing much-needed services and support to the aged, working with partner organisations to provide medical counselling and services, livelihood options, and facilities for yoga and recreational entertainment. They further state that some of their partners are setting up old-age homes and that while understanding their emotional and psychological needs, the elderly are being allotted to different homes and economic project areas where they can benefit to the maximum interact with each other to live a happier life.

58. The appellant's daughter makes comment in her witness statement of the intention to enable her mother to get out more often, both by way of walks within the family but also the proposal to take her to a day centre for the elderly. It is recognised that such interaction has a positive impact upon the elderly.

59. There are also commercial organisations such as EMOHA who describe themselves as India's most trusted senior care brand providing the care required by senior citizens in the comfort of their own home. We say at this stage it was not made out before us that the appellant would not have a home of her own to be able to return to. The organisation is said to provide emergency support, experience day care, access to emergency responders, healthcare, convenience, engagement, safety, critical care, doctors home visit, physiotherapy, post-operative care, respite care and to meet the needs of the elderly. Whilst it is not suggested the appellant would have to use this organisation what this shows is that there are organisations within

India who do provide quality care to those who need it sufficient to meet their needs either within a residential environment or within their own home.

60. The specific finding we make on this issue is that it has not been made out before us that any care that the appellant requires is not available or affordable within India. For that reason also any application under the Adult Dependent Relative provisions would fail. That is a finding relevant to the weight given to the proportionality exercise outside the Immigration Rules when the purpose of these provisions relating to adult dependent relatives is to set out the criteria the Secretary of State and Parliament have found to be appropriate when assessing whether a person should be granted leave to enter the United Kingdom on that basis - see further below on the issue of the interaction between the immigration rules and article 8 ECHR.

61. As noted, however, it was accepted that this is an application outside the Immigration Rules. It is therefore necessary for us to adopt a structured approach to assessing whether the appellant is able to succeed by reference to article 8 ECHR.

62. Article 8 of the ECHR is in the following terms:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

63. It is important for the appellant and her family to note that there is no provision within article 8, or elsewhere, to show that article 8 permits a person to choose where they wish to live. It is settled case law that it does not. Therefore the fact the appellant and her family wanted to be able to remain together in the United Kingdom is not the determinative issue. Article 8 ECHR is about preventing a Higher Contracting State from interfering in a protected right without good reason, i.e. that any interference is proportionate to the consequences of such interference.

64. We refer to the five stage test set out by Law Bingham of Cornhill in R (Razgar) v Secretary of State the Home Department [2004] UKHL 27 which is in the following terms:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

65. At [18] of Judge Borsada's decision it was found that there was no family life recognised by article 8. Having considered the evidence as a whole it is our finding that family life recognised by article 8 does exist between the appellant and her family in the United Kingdom, particularly with her daughter. We make this finding based upon the fact the appellant cohabits in the United Kingdom with her family, the provision of practical financial and emotional support, demonstrating that cumulatively the ties that exist go beyond normal emotional ties. It is, we find, a dependency of necessity as the appellant has no home in the UK and there is no evidence of her having sufficient resources to support her life here financially.

66. No issue was raised before us in relation to questions 2, 3 or 4 and the advocates accepted the real issue was that in question 5, whether any interference in the appellant's family and private life in the UK was proportionate.

67. It is necessary for us to consider section 117 of the Nationality Immigration Asylum Act 2002 which reads:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

68. We do not need to refer to section 117C as this is not a deportation appeal and we make no reference to section 117D, the definition section, as no such issues arose.

69. Section 117A requires us to consider these provisions, which set out Secretary of State and Parliament's view of the weight to be given to the public interest where it is alleged a decision will breach a person's right to respect for private and family life as a result of which it will be unlawful under section 6 of the Human Rights Act 1998. We are obliged to consider section 117B by virtue of section 117A(2)(a).

70. In relation to section 117B, we note effective immigration control is in the public interest and find there is a strong public interest factor in this appeal especially given the number of widows and elderly relatives in India who have relatives who have settled in the UK.

71. We find this is not a case in which the appellant is likely to become a burden on the taxpayer in the short term as her family in the UK clearly have sufficient resources which have enabled them to meet the cost of her private healthcare, maintenance and provide accommodation for her in the short-term, although there was insufficient evidence before us to enable us to find that such resources will be sufficient and available to provide long-term care in light of the identified needs of the appellant to which reference is made above. The issue of the public interest and access to the NHS was a matter specifically referred to by Judge O'Callaghan. We appreciate the appellant has done her best to obtain evidence proving payments to her GP and do not dispute the claims in relation to the funding of her medical treatment to date.

72. In relation to the ability to integrate into society, there is no evidence before us to show that the appellant has integrated to date. Whilst this may be as a result of covid and her general medical condition, her existence is focused to a considerable extent upon the family rather than society as a whole. We do, however, treat this as a neutral factor in light of the impact of the pandemic and the appellant's precarious immigration status which may have prohibited her from expanding her interests within the UK.

73. We do not find it made out that the appellant is able to speak English which is relevant to an ability to integrate. It is noted that in

discussions with medical professionals an interpreter has been provided, either an independent interpreter or by her daughter providing an understanding through her own language skills.

74. In relation to section 117B(4) we find the issue is that recognised by subsection (a) relating to the appellant's private life. In that regard we note that the appellant's status in the United Kingdom has always been precarious and remains so to this day. We accept the nature of that private life is the connection to the family in the UK and attendance at the temple, some of which also forms the main element of the appellant's family life. It has not been made out that if one looks at private life in isolation the appellant would not be able to re-establish the private life she previously enjoyed in India or develop a private life elsewhere with the support that is likely to be available to her, from the United Kingdom and within India itself.

75. This is not a case in which the appellant has formed a relationship with a qualifying partner or in which there is a qualifying child.

76. On the appellant's side of the scales in the balancing act is a close and loving family, sufficient resources and accommodation to meet the appellant's day-to-day needs, the provision of medical services not at a cost to the public purse to date, no indication of a breach of immigration laws other than as a result of matters outside the appellant's influence as a result of the Covid -19 pandemic, her medical issues, and no indication of anything within the appellant's character which suggests that she should be excluded on that basis.

77. On the Secretary of State's side of the balancing exercise is a strong public interest in maintaining immigration control in such circumstances, the fact the appellant intended to return to India at the end of her visit which indicates there was nothing at that time that would make it unreasonable to expect her to do so, the fact the appellant has not demonstrated an ability to speak English which is relevant to her ability to integrate into society in the UK, the lack of evidence the resources of the family are sufficient to ensure no reliance upon the NHS in the long term as her medical needs become more expensive to treat, the lack of evidence of any enquiries having been made of the availability of suitable care facilities being available to help the appellant in India, specifically no evidence that such resources would not be available despite this being an issue that it would have been clearly known required proper examination, the availability of medical care within India to meet the appellant's physical and mental health needs, the little weight that we apply to her private life in the UK.

78. We recognise that the appellant and her family want her to remain in the United Kingdom but, as noted above, that is not the determinative issue.

79. We also do not find it made out, when considering the position of other family members in accordance with Beoku-Betts v Secretary States the Home Department [2008] UKHL 39 which requires us to consider the impact the decision upon all family members, that it has been established that the consequence of removing the appellant on

the family members, even if it will be upsetting or distressing to the appellant's daughter, is sufficient individually or cumulatively to make the decision disproportionate.

80. A case similar to this one on the facts of the decision is R (on the application of Kaur) [2014] EWHC Civ 3075 which involved a 75-year-old Indian overstayer living with her daughter and grandson. That appellant also suffered from heart disease, hypertension, depression and had ties to India. The High Court found there was insufficient evidence that that appellant was unable to meet her daily needs without essential support from her daughter as it appeared that she was to some extent able-bodied and there was no evidence that she would be unable to receive appropriate treatment in India and no evidence she would be unable to obtain appropriate financial support on return. The High Court found there was no breach of article 8 even though it had been found that family life recognised by article 8 existed between the appellant and her family in United Kingdom.

81. It is accepted High Court decisions are not binding and are only persuasive authority and that human rights article 8 issues are intently fact specific, but in this appeal it has also not been made out before us that the appellant will be unable to meet her daily needs with assistance that it has not been shown will not be available to her in India, and which the information available shows on the balance of probabilities is likely to be available either within a residential setting or within the appellant's own home. It has also not been shown there will not be sufficient financial support available to her on return.

82. Mr Williams referred us to the case of Mobeen v Secretary State for Home Department [2021] EWCA Civ 886 in which the Court of Appeal considered Article 8 ECHR family life and Adult Dependent Relatives in the context of an aged, widowed mother who had resided with her family in the United Kingdom since 2014. A judge of the First-tier Tribunal dismissed the appeal finding that family life was not established, relying on the provision that could be made for the appellant if she returned to Pakistan, and finding the decision to be proportionate. The Upper Tribunal upheld that decision. The Court of Appeal reviewed the Adult Dependent Relative entry clearance rules, the interplay between Article 8 and the Rules and the consideration of Article 8 outside the Rules. The Court confirmed that whether family life existed with adult relatives was a fact sensitive enquiry requiring assessment of all the relevant facts, which we have undertaken in this case.

83. At [48 – 50], to which Mr Williams made specific reference, the Court found:

> 48. Assuming that family life is established and Article 8 thus engaged, the relevant question (when dealing with the application of Article 8 to the removal of non-settled migrants who have developed a family life with someone while residing unlawfully in the host state) can be put in one of two ways, one positive and one negative:
>
> i) Whether or not the applicant's right to respect for his/her family life under Article 8 imposes on the host country an obligation to permit him/her to continue to reside there (a positive obligation); or

ii) Whether or not removal would be a disproportionate interference (a negative obligation).

As was remarked in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 (by Lord Reed at [32]), however, the mode of analysis is unlikely in practice to make any difference to the outcome. One is essentially asking the same question and considerations of onus of proof are unlikely to be important where the relevant facts have been established. Ultimately, whether the case is considered to concern a positive or negative obligation, the question is whether a fair balance between the relevant competing interests has been struck.

49. A central consideration when assessing the proportionality of the removal of non-settled migrants from a contracting state in which they have family life is whether the family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be "precarious". In such cases, it is likely only to be in exceptional circumstances the removal of the non-national family member will constitute a violation of Article 8 (see *Agyarko* at [49] approving *Jeunesse* (at [108])).

50. What was meant by "exceptional circumstances" was made clear at [54] to [60] in *Agyarko*, namely circumstances in which a refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate. This is to be assessed in the context of a proportionality exercise which gives appropriate weight to the policy in the Immigration Rules, considers all factors relevant to the specific case in question, and ultimately assesses whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

84. The question of whether unjustifiably harsh consequences will arise from the decision, such that the appellant's removal will not be proportionate has been the focus of this hearing and our decision. It is also relevant to the question of whether there are insurmountable obstacles to the appellant's return and reintegration into India which was not made out.

85. In relation to the interplay between the Adult Dependant Relative Rules, which this appellant cannot meet, and Article 8 the Court found:

51. The interplay between the Immigration Rules and Article 8 has been considered in a number of authorities, including *R (MM) Lebanon v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771 and *Agyarko*. In *Agyarko* Lord Reed stated:

"46…it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8…they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules….Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the

national margin of appreciation, are the Secretary of State and Parliament.

47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case..."

52. Thus, in considering the question of proportionality, the courts must, albeit at a general level, take the SSHD's policy (as reflected in the Immigration Rules) into account and give it considerable weight, alongside a consideration of the relevant facts of the case in question.

86. Mr Martin in his submission referred to the psychiatric report which we have considered with great care. We set out our findings in relation to diagnosis considering both that report and the hospital letter of 11 April 2022 above, but also the provision of care to meet the appellant's needs in India on which we have made specific findings above.

87. It was not disputed that the appellant's status in the United Kingdom is precarious. Mr Martin urged us to consider the narrative in which she had remained which we have commented upon above, accepting that the appellant could not travel as a result of the pandemic; although international travel has been reinstated for some time, yet the appellant chose to remain in the United Kingdom. India's Director General for Aviation announced the resumption of regular international flights to and from India from 27 March 2022 in light of decreasing cases of Covid-19. We also do not find it made out that the appellant, despite her age and vulnerability, faces any specific risk from Covid at this time as no such risk was made out.

88. Mr Martin's submission that there was no kind of suitable help in India by reference to people who could meet the appellant's needs has not been made out before us, as noted above, and the submission that if she was required to do things for herself that could result in an adverse impact upon the appellant, fails to take account the fact that it has not been established that the appellant will be required to do things for herself.

89. As stated, there is insufficient evidence of an adverse impact upon any family member if the appellant is returned that is determinative. The grandchildren will remain within the family home supported within a very close and loving family.

90. Whilst we accept there is evidence of some women India being harmed it has not been made out that the appellant, on the particular facts, with appropriate support, will be as vulnerable as her daughter

suggested. We accept, for understandable reasons, that this family is doing everything they can to try and prevent the appellant’s removal from the UK but we do not find some of the subjective fears expressed are objectively well-founded for the reasons stated above.

91. There is adequate financial support for the appellant on return and this was not disputed by Mr Martin.

92. It was not made out that if the appellant was dependent upon a professional carer she was likely on the balance of probabilities to come to harm. The family can, with the assistance of professional assistance if required, select an appropriate carer. Whilst they would be a stranger initially such a person will become familiar to the appellant. This is exactly the same situation of any elderly person requiring care either through home help or in a residential setting in the UK or otherwise. Although Mr Martin submitted the need for 24-hour care it was not made out that could not be provided in a residential setting or with alternative arrangements.

93. Having weighed the competing arguments in light of the evidence before us, and in some respects lack of appropriate evidence, we concluded that the outcome of the balancing exercise favours the case put by the respondent. Whilst there is sympathy for the appellant in MG (Serbia and Montenegro) 2005 UKAIT 00113 the tribunal stated that sympathy for an individual did not enhance a person's rights under Article 8.

Decision

94. We dismiss the appeal.

Anonymity.

95. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated 3 October 2022