Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/04937/2015
IA/32622/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 June 2017	**On 21 February 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

BS (FIRST APPELLANT)
OS (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms R Popal, Counsel
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me after a hearing on 5 December 2016 whereby I set aside the decision of the First-tier Tribunal ("FtT") in respect of each appellant for error of law.

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2. The appeal was originally re-listed for hearing on 5 April 2017, but was not able to proceed on that day. After the hearing on 8 June 2017 I consented to the respondent's request for the opportunity to provide closing submissions in writing, after the oral submissions made on behalf of the appellants. Written submissions on behalf of the respondent were received but, through error, not provided to the appellants' representatives. I gave further directions in that respect on 25 October 2017, allowing a period of 21 days for any reply to the respondent's submissions. In the event, no reply was received on behalf of the appellants, but as I had made clear, such a reply was not mandatory because I had already heard oral submissions on behalf of the appellants at the hearing on 8 June 2017 and had been provided with a skeleton argument on their behalf.

3. In order to put my decision on these appeals into context, it is convenient to reproduce certain parts of the error of law decision (entitled Decision and Reasons) which followed from the hearing on 5 December 2016. In that decision I said as follows:

> "2. The first appellant arrived in the UK on 13 March 2011 with entry clearance as a Tier 4 student until 26 September 2014. During his period of leave he contracted Tuberculosis Meningoencephalitis on 26 June 2013. This has resulted, to summarise, in significant mental and physical disabilities.
>
> 3. The second appellant arrived in the UK on 20 August 2013 with entry clearance as a visitor, with leave until 16 February 2014. He was granted a period of further leave outside the Immigration Rules from 20 April 2014 until 8 May 2014.
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> 4. On 26 September 2014 the first appellant applied for indefinite leave to remain ("ILR") on the grounds of his medical condition. That application was refused in a decision dated 26 January 2015. The second appellant applied for further leave to remain on 7 May 2014, again outside the Rules, in order to care for the first appellant. His application was also refused, the decision being dated 24 July 2014, although there is another decision which is dated 25 May 2014. Nothing turns on the precise date and if there are two decisions in respect of the second appellant, the appeal to the FtT will have included both decisions, in the light of section 85(1) of the Nationality, Immigration and Asylum Act 2002. Neither party raised any issue before me, and none was raised before the FtT, in relation to the precise date of the decision.
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> 5. The appeals of both appellants came before First-tier Tribunal Judge Bart-Stewart ("the FtJ") at the same time on 10 June 2016. She allowed the appeal of the first appellant, seemingly with reference to Article 8 of the ECHR, and dismissed the appeal of the second appellant on the same basis.
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> 6. The Secretary of State has been granted permission to appeal against the FtJ's decision allowing the appeal of the first appellant, and the second appellant has been granted permission to appeal in respect of the FtJ's decision to dismiss his appeal.
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> …
>
> *The First-tier Tribunal's decision*

23. The FtJ heard evidence from the second appellant and from one Gareth Hankin of the Richardson Partnership for Care in relation to the assistance that the first appellant needs. The second appellant's evidence was that the family would not be able to care for the first appellant in India as they live in a village which is close to the border. There is no hospital in the vicinity. The only relation is an uncle, and their father had died. Their mother was old. The uncle had taken over their land by fraud. The second appellant also said that there was no toilet in the house and that they had to use the fields for that purpose. Their house had just two rooms. He gave evidence as to the difficulties that the family had in India in terms of the ill-health of their mother and their grandmother. There is a sister who helps but only supports their mother and the grandmother's necessities. He said that she would not be able to support the first appellant.

24. The second appellant said that he attends all meetings and tries to fulfil "all his requirements". He said that he supported the first appellant emotionally and stayed with him during the night to look after him.

25. His evidence was that the first appellant's flight to the UK and course fees (in computers) were paid for by their father. The first appellant was able to work and pay his rent. Their father had not needed to provide much by way of funds for maintenance. The flight to the UK was paid for by his sister and relatives. The second appellant himself does not pay anything towards utilities and he is given clothing and financial help.

26. The nearest hospital was 20 to 30 miles away from the local village. There are dispensaries two or three miles away. Although the care plan did not mention the second appellant's input, he gives additional family support to his brother. That could not be provided where they live in India because they needed money to live. Their father passed away on 24 November 2014.

27. His sister lives in the same state in India as their mother. She is a housewife and her husband is a farmer. She is aged 33 to 34 years old. Both his mother and grandmother live in the family home which is where he and the first appellant lived before they came to the UK. It is four or five kilometres from the nearest town.

28. Gareth Hankin said in evidence that if left without prompting the first appellant would spend all day in bed and not eat or drink for long periods. Because of his cognitive difficulties he needs prompting to shower, brush his teeth, change into clean, appropriate clothes and to leave his room to eat meals. He requires picture prompt cards as well as verbal prompts. He is not confident walking on his own and tends only to walk around the house with staff over any distance. It is further recorded that he said that due to communication difficulties and cognitive deficit there are many barriers to his being in a different environment. He had an unrealistic view of his condition and limitations and could become frustrated and aggressive when challenged over his opinions or welfare choices. He believed that the first appellant would struggle to integrate well with others due to his "low initiation" and fluctuating moods. He is stubborn and lacks the ability to reason. He had at times neglected his health and cleanliness, refusing to shower for more than two days in a row and without staff support would not take his medication.

29. In relation to the involvement of the second appellant, he said that the second appellant visited regularly and brought regional food, as the first appellant is rigid about the food he likes. He provided money for the first appellant when he went out, as well as a mobile phone and other belongings. On occasion he would stay overnight and assist with the morning routine, although does not do so regularly every week. He said that this happens multiple times a month. The first appellant speaks to his family in India using a mobile and laptop provided by his brother.

30. In her findings, at [17] the FtJ referred to what she described as a six-weekly review from East London NHS Foundation Trust. That is an assessment dated 13 April 2016, which is in effect a care plan. She summarised the evidence in that document to the effect that the appellant continued to demonstrate severe cognitive deficits, lack of insight into his abilities and care needs, very challenging behavioural difficulties and speech impairments. Those placed the first appellant at a high risk in a number of areas and he continued to require close supervision. He required 24 hour care to minimise risks associated with his current circumstances and is said to require long-term supervision. He required 24 hour support in a residential home for persons with a brain injury, and the weekly cost of the package was £2,783.

31. With reference to a report from a consultant psychiatrist, Mr Richard Seamark, dated 9 July 2015, he had stated that the first appellant's behaviour can escalate to the requirement of restraint or even police involvement. The report refers to the second appellant remaining supportive and states that the first appellant does not have capacity and the hospital was applying for him to be held under the Mental Capacity Act 2005, 'deprivation of liberty safeguards'.

32. Other reports are referred to, including a report which states that he is at high risk of injury and is vulnerable to the risk of exploitation, as well as social isolation.

33. At [21] the FtJ said that there was nothing in the background reports that suggests that the first appellant's condition is one that can be treated. The evidence was that he needed to be controlled or taught to control himself, and it was his total lack of insight into his condition and inability to care for himself that required him to live in a facility where care is available 24 hours a day.

34. The FtJ concluded that not only was the first appellant unable or unwilling to care for himself, he was also at risk due to his lack of awareness of danger, and because of his unpredictable, challenging behaviour. He also required a large amount of medication on a daily basis. She then stated at [22] that she was not satisfied on a balance of probabilities that the intense level of care required by the first appellant is available to him in his home country such as would allow him to reintegrate, which is the requirement that has to be met at paragraph 276ADE. She stated that he left his home country as a young man embarking on studies abroad and would be returning as a person effectively suffering from dementia with no suggestion of any cure.

35. As regards the second appellant, she noted that the first appellant required 24 hour care and that the oral and written evidence was to the effect that this was provided by paid carers. She concluded that there was little evidence of practical support provided by the second appellant, save for visits which Mr Hankin described as not consistent, not every day nor even once a week.

36. She found that there was little in the medical reports referring specifically to the second appellant, and there was nothing in the reports that suggested that his presence in the UK was necessary for the first appellant's long-term progress, or that his presence has any impact on the first appellant's care needs. She concluded that the second appellant was making no financial contribution, because he stated that he had not been working, and he himself relied on the generosity of others who provide him with money and free accommodation. She noted that the second appellant accepted that there was no reason that he would not be able to work if he returned to India.

37. She found that the first appellant could maintain contact with the second appellant in the same way in which he is in contact with the rest of the family, by telephone and Skype. She concluded therefore, that the condition of the first appellant does not require the presence of the second appellant in the UK.

38. At [24] she said that she did not accept that there was family life between the first and second appellant. Their relationship was not "over and above" the normal family ties that may be expected between adult siblings. The first appellant was already ill when the second appellant arrived. He was initially in hospital and then went into rehabilitation and specialised accommodation. There was no evidence of them living together in the UK. He did not even see the appellant every week, although he claimed not to be working, and so seeing the first appellant should have little call on his time.

39. She concluded that the second appellant had only established a limited form of private life in the UK since his arrival, and that such interference as there would be in his removal in terms of his private life was proportionate."

4. At the hearing before me on 8 June 2017 I heard further oral evidence of which the following is a summary.

The oral evidence

5. Ms Helen Petrie adopted in examination-in-chief her witness statement dated 6 June 2017. She said that she was the manager of the care home. She used to be a registered mental health nurse but her registration lapsed. She last worked as a nurse in 1986. She has NVQ's in Health and Social Care and Management.

6. In cross-examination she said that the first appellant had been known to have outbursts if he does not get his way and he previously had 1:1 24-hour care. His behaviour had however, calmed down quite a bit. He used to spend a lot of time in

bed but now is able to socialise if he feels like it. His English has improved and now he can communicate in English fairly fluently.

7. His engagement with therapies is inconsistent. He only engages if he wants to. Sometimes he has memory problems. That situation has not changed in the last twelve months and she could not predict what would happen in the future.

8. As to what she describes in her statement as the first appellant's 'perseveration', she said that that means he becomes obsessed, for example in relation to his mobile phone. He might smash his old one until he gets given a new one. At the multi-disciplinary team meeting the previous week (June 2017) they were unable to say what the future would hold. He had made very little progress in 12 months.

9. She works Monday to Friday and the second appellant visits at weekends. Today (at the hearing) is the first time that she had seen the second appellant. She knows that he came last weekend. Staff had told her that he has visited three or four times in the last four or five months. They speak daily on the phone. They had to request the second appellant to visit three weeks prior to last weekend as the first appellant needed money for toiletries and so forth. She had never spoken to the second appellant about his brother's care.

10. The duration of the second appellant's visits vary. For the last appearance before the Tribunal, the second appellant stayed overnight. Otherwise, as far as she is aware, he stays for a couple of hours during the day. Unbeknownst to them, the second appellant had stayed overnight in his brother's room. They told him that that was inappropriate and suggested that he stay in bed and breakfast.

11. In re-examination she said that she understood that he does not visit more often, because of financial restrictions.

12. In answer to my questions, she said that the first appellant is not sectioned under the Mental Health Act 1983. She believes his brother deals with his financial matters. She does not know whether the first appellant is provided with any state support, apart from his accommodation. She is not aware of whether the second appellant receives any on his behalf. It is the local authority that pays for his accommodation.

13. In examination-in-chief the second appellant adopted his witness statement dated 8 May 2017. In cross-examination he said that he visits sometimes two or three times a month and sometimes once a month, depending on his money. He visited last Sunday. In the last three or four months he visited on very few occasions because he did not have the money.

14. When he visits he would take his brother food that he had prepared at home, as well as other things that he might want. Sometimes the care home would want to give his brother a shower but he would refuse. He would then give him a shower himself. They also phone their mother and sister and talk about domestic things and old memories. His mother and sister do not live together.

15. The phone calls are free because they are made through the internet from the care home. Otherwise he would use his own money from some savings. Some friends give him money and another family supports him financially. They have to pay to phone their mother but phoning their sister is via the internet and is therefore free.

16. There is a lot of difference between when he first saw him when he visited for the first time and now. When he first saw him he was unable to speak and could not recognise him. He did not know he was in England. Two months later he started speaking. At first his left arm was not working and he was unable to stand. He did some exercises with the hospital, and he also did some with him, and used to take him for a walk. He is now much better than before. Physically, he is not much different but when he went to the care home he could not climb the stairs without support. Now he can climb four or five steps alone, going slowly.

17. As to his witness statement saying that the local hospital is 20 or 30 miles away from their village, whereas a letter from H & M's Solicitors dated 18 September 2014 refers to the hospital and doctors being up to two kilometres away, he said that the hospital that is two kilometres away is very small. They can help if someone gets a fever or a little sickness. The hospital that is 20 or 30 miles away can deal with more problems like those that his brother has, although he is not sure.

18. If, as has been suggested, his brother is not going to improve in the UK, he was asked why they could not return to India and his brother be looked after there. He said that the conditions in their house would not suit him and there would also be financial problems. His mother is also ill and is 60 years of age. She has a heart problem. He may have forgotten to say in his witness statement that their mother is ill.

19. Despite the fact that they spend time talking about the past, his brother would not improve if they returned to India simply by being with family members. He needs care and medical treatment. Their house has no toilets and where would he get the medicines that his brother needs. They only have a hand pump for a shower in an open place. They have to bring water from the pump to the house. Cleanliness is an issue but most importantly there is the financial issue. Their father used to arrange the financial matters but now he has passed away.

20. As to whether the family could share the care of his brother, and he himself could go to work, he said that he could not earn enough money there to support him and his brother.

21. In re-examination he said that he had not visited the hospital which is 30 kilometres away. He had only searched for it on the internet. He had no idea of the cost of treatment, even if the hospital could provide it.

22. His mother and their grandmother live in their house. As to his father's brother, they have no connection with him. He and his mother are not educated enough to be able to give the correct medicine to their brother. They only have electricity on a few occasions.

23. There are two bedrooms. The food is kept in one room and their grandmother stays in that room. His mother lives in the second room. At the front of the house is an open shed and in the afternoon they sit there and spend their time there.

24. He would only be able to earn 200 rupees a day.

25. Their mother and grandmother would not be able to look after the first appellant because it is very difficult for them to look after themselves.

26. He is not working in the UK as he is not allowed to.

27. In answer to my questions he said that he came to the UK as a visitor. His father paid for his brother's studies. His father did farming. As to what has happened to the farmland, he said that the land was in the name of his grandfather. Although his father's will said that the land should be divided between the three brothers, two of the brothers kept the land and put it in their name.

The oral and written submissions

28. Ms Popal adopted her skeleton argument dated 8 June 2017. The issue of what findings made by the First-tier Tribunal Judge ("the FtJ") could be preserved was canvassed and agreed between the parties.

29. It was submitted that returning the first appellant to India would amount to a breach of Article 3. The decision in *Paposhvili v Belgium* (Appeal No. 41738/2010) was relied on, amongst other decisions. The Article 3 assessment needs to be undertaken in terms of his situation whilst in the UK, and also when removed to India. The 'domestic' threshold for a breach of Article 3 is lower than in relation to foreign cases. Reliance was also placed on the decision in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 and the five-stage test in respect of which it was said that stages 1–3 all apply to the first appellant. It was submitted that there was no practical, or feasible way that he could be removed without a breach of Article 3. When he is told about his removal he would not understand. Reference was made to aspects of the evidence which suggested that he would be at risk and vulnerable and that therefore pre-removal detention would give a rise to a breach of Article 3.

30. It was contended that during transit to the receiving country, it comes within the domestic sphere. There was no evidence that he was fit to fly, and that is a finding that could be made. However, I indicated that I would not make a finding to the effect that the first appellant was unfit to fly or that he would not receive appropriate care during the removal process, given the lack of evidence to support those contentions.

31. It was submitted that policy guidance on vulnerable adults was relevant, although it was accepted that no copy of that guidance has been provided and there is no reference to it in the skeleton argument.

32. It was further contended that the Secretary of State's suggestion that treatment would be available for the first appellant in India was wrong.

33. In relation to paragraph 276ADE(1)(vi) and the issue of very significant obstacles to integration, it is not a case of whether the first appellant has the *ability* to integrate. Were it otherwise, that aspect of the Rules would be discriminatory in relation to any individual who was unable to integrate. The question is whether he could integrate on the basis of his medical condition. His inability to integrate, it was submitted, was therefore irrelevant.

34. In the respondent's written submissions (received post-hearing as indicated above) certain preserved findings made by the FtJ are referred to, and reference is made to aspects of my error of law decision.

35. The reasons for refusal letters in respect of both appellants are relied on on behalf of the respondent. In terms of very significant obstacles to integration, it is argued that the first appellant's ability to integrate is as much an issue in the UK as it would be in India. The first appellant can hardly be said to have integrated in the UK. None of the evidence suggested that his condition can be cured. However, there was some evidence to indicate that the first appellant may potentially be more capable of re-integration into Indian as opposed to English society. In that context, the 'record of activities' in the appellants' bundle is referred to in terms of the first appellant missing his mother's cooking, and enjoying Indian films and music. Reliance was also placed on the reference to his being very close to his family and the daily telephone calls he makes to his mother and the visits from his brother. The evidence at the hearing was to like effect, it is submitted.

36. Furthermore, the External Review Report refers to his speaking reasonably fluent English but also speaking Hindi and Punjabi. There was evidence that he did not go out unescorted in the community and that his cognitive and executive functioning difficulties and limited communication in English would place him at high risk of exploitation. His English language ability was also a factor in terms of his engagement with activities. Furthermore, there was evidence from the East London NHS at page 14 of the bundle before the FtT that he would benefit from contact with Punjabi speakers and with the local Sikh community.

37. In relation to Article 3, it is submitted that all the authorities relied on on behalf of the appellant indicate that his case could not succeed on Article 3 grounds.

38. It is argued that the decision in *Paposhvili* is not binding on the UK courts. It is the domestic authorities that apply. The threshold for an Article 3 case to succeed is very high. The first appellant is not suffering from a terminal illness but from an acquired brain injury, secondary to TB Meningitis. His condition is not comparable to that of the appellant in *Paposhvili*.

39. Even though the first appellant's mental health difficulties are serious, they could not be said to meet the very high threshold required for a breach of Article 3. Furthermore, there was no reason why he should experience a decline in his health

on return to India. It is even possible that he might experience an improvement in mental health since he will be restored to the family and country that he clearly loves and misses. That is so particularly if he were to return with the second appellant. Any suffering he might experience would be very much reduced, therefore.

40. It is also submitted that care is available for the first appellant in India. The respondent's submissions refer to background material in terms of the extent to which he would be able to obtain such treatment and appropriate medication.

41. In terms of the appellants' reliance on the decision in *J*, it is pointed out on behalf of the respondent that that was a suicide case and is therefore not applicable in the circumstances of the first appellant. Furthermore, it is submitted, to summarise, that adequate safeguards would be in place to prevent a breach of Article 3 on communication of the decision and during the removal process.

42. Notwithstanding that the first appellant is subject to the Deprivation of Liberty Safeguards (under the Mental Capacity Act 2005), that does not necessarily mean that he is a danger to himself or others. The evidence does not suggest as such.

43. In relation to Article 8 outside the Rules, the decision in *GS (India) V Secretary of State for the Home Department* [2015] EWCA Civ 40 is relied on to the effect that the absence of medical treatment in the country of return is insufficient by itself to engage Article 8.

44. Furthermore, the public interest considerations set out in s.117B of the Nationality, Immigration and Asylum Act 2002 are relied on, in terms of the first appellant's English language ability and his lack of financial independence. Furthermore, the cost of his care is highlighted.

45. In relation to the second appellant, it is contended that he does not meet the requirements of paragraph 276ADE and has been in the UK for a shorter time than the first appellant on whose claim he depends.

46. Even if the first appellant was to succeed in his appeal, any interference with their family life would be proportionate on the basis that they could maintain contact.

Assessment

47. Whilst self-evidently the appellants' cases are inextricably linked, the case for each appellant requires separate consideration. Having said that, it has not been suggested on behalf of the second appellant that in his own right, independent of the situation of the first appellant, he has any valid claim to entitlement to remain in the UK on any basis. In the circumstances, it makes good sense to consider the appeal of the first appellant first.

48. I have already referred to the fact that some findings of fact made by the FtJ can be preserved. They can be summarised as follows:

- There is nothing in the reports that suggests that the first appellant's condition is one that can be treated.
- The first appellant needs to be controlled or taught to control himself.
- His total lack of insight into his condition, and inability to care for himself, requires him to live in a facility where care is available 24 hours a day.
- The first appellant is unable or unwilling to care for himself. He is also at risk due to his lack of awareness of danger and his unpredictable, challenging behaviour.
- He requires a large quantity of medication on a daily basis.
- The second appellant has provided the first appellant with a mobile phone and laptop, and the first appellant speaks to his family in India regularly using Skype.
- The second appellant relies on the generosity of others who provide him with money and free accommodation in the UK. He would be able to work if he returns to India.
- The second appellant has established a limited private life in the UK.

49. The situation in relation to the first appellant, and indeed the second appellant, is very similar to, if not the same as, that which prevailed at the time of the hearing before the FtJ. There are more up-to-date reports but they simply confirm that the first appellant's cognitive function has not improved, that the prognosis is uncertain and that he continues to benefit from the relatively intense care and support that has been provided to date. There is a need for significant support in terms of his daily living needs, and he remains vulnerable. It is plain that left to his own devices in the community he would not be able to function, seek treatment independently or manage his own basic needs. He would be unable to manage or administer the medication that he needs.

50. It is also to be noted that he suffers from Type 2 diabetes for which he requires medication and management of his diet. He would be unable to manage that condition on his own, because of his lack of insight and cognitive deficits.

51. It is evident that the second appellant visits his brother frequently. I accept that his visits are necessarily limited in frequency as a result of financial constraints. I accept also that the second appellant is not working in the UK and relies on others, as indeed was found by the FtJ.

52. It is not necessary for me to make a precise finding as to how often the second appellant visits his brother, and indeed there was some inconsistency in the oral evidence before me on this issue. For example, Ms Petrie said that she was told that there had been three or four visits in the last four or five months (prior to the hearing), although the second appellant said that he sometimes visits two or three times a month and sometimes once a month. I am satisfied that he visits when he

can. In that context, I note that the first appellant lives in residential supported accommodation in Northampton and the second appellant lives in London.

53. There was no challenge to the second appellant's evidence that he prepares Indian food for his brother, brings him items that he wants or needs and sometimes attends to his personal care, such as helping him shower. He also facilitates the first appellant speaking to family members in India on the phone.

54. There was similarly no challenge to the second appellant's evidence in relation to his family's living arrangements in India, to the effect that his mother and grandmother live together in a house with two rooms and where the electricity supply is intermittent. He also said that there is no toilet or bathroom in the house. Again, that evidence was unchallenged and I accept it.

55. Although it was suggested in cross-examination that there was inconsistency in relation to the second appellant's claim that his mother, aged 60, was ill with a heart problem, because that is not a matter referred to in his witness statements, it is a matter that the appellants' former solicitors, H & M, referred to in their letter dated 18 September 2014 to the UKBA. There it is stated that the appellants' mother is a heart patient. Again, I accept what the second appellant says about his mother's health.

56. The background reports or information put before me by the parties in relation to the availability of treatment for the first appellant in India do not specifically address the question of whether the care and treatment that the appellant is receiving in his residential placement in the UK can be replicated, or near-replicated in India. However, I do not understand the respondent to be suggesting that it can, even if there is some place in India that, at no doubt significant cost, could provide the same level of care. The arguments on behalf of both parties are focused on the availability of at least some treatment in the appellants' home area. In that context, again the respondent does not suggest that there is any equivalent facility or placement available to the appellant in his home area.

57. That treatment is available for mental disorder in India is common ground between the parties. The appellants' case is that such treatment is limited and/or out of reach of the first appellant. The respondent's skeleton argument focuses on the issue of medication, which, with reference to background information provided by the Country Policy and Information Team, and a web link, suggests that psychiatric care and the medication that the first appellant is receiving, are available in India and indeed in Punjab in particular, from where the appellants come.

58. Of course, it is clear that medication is not the only issue to be considered. In his report dated 21 March 2017 Dr Pedro Grilo, a Consultant Clinical Psychologist in Adult Neuropsychology, states that the first appellant is diagnosed with an Acquired Brain Injury, second to TB Meningitis. In his 'Conclusion' paragraph he states that the matters he refers to "are suggestive of cognitive impairment, which is related with an organic condition".

59. The second appellant's evidence has been broadly consistent in terms of the availability of medical care in the family's locality in India. In his evidence before the FtJ he said there was no hospital around where they live, later stating that the hospital was 20-30 miles from the local village. He referred to there being "dispensaries" close to the area where they live, being about 2-3 miles away. In evidence before me he said that there is a very small hospital two kilometres away which, as I understood his evidence, was a place where minor ailments would be dealt with, but that the hospital itself was 20-30 miles away. He did in fact say that that hospital could deal with more problems like those that his brother has, although he did also say that he was not sure about that.

60. In the appellants' skeleton argument it asserts that the respondent's Country of Origin Information report of March 2012 in relation to medical facilities, referred to in the refusal letter of 26 January 2015, is out of date and therefore irrelevant. In relation to the web link provided in the refusal letter, it indicates that there are only three mental health hospitals available in Punjab and that none of them has any beds or a pharmacy. An appendix with details in relation to those hospitals is attached to the skeleton argument. Also provided is an extract from the WHO Mental Health Atlas, dated 2005, although no particular aspect of it is referred to on behalf of the appellants. The COI report for 2012 is also provided on behalf of the appellants, although again, no aspect of it is specifically referred to in support of the appellants' cases.

61. It is not entirely clear why the WHO extract from the Mental Health Atlas is provided on behalf of the appellants given its date of 2005 and the criticism made of the respondent's background information as being out of date, albeit that that COI report is dated 2012.

62. It seems reasonably clear that medication for mental health conditions is available in India. That has some limited relevance to this appellant in the sense that, for example, he is receiving an antipsychotic, Olanzapine, and Citalopram, an antidepressant. Both are referred to in the extract from the background information set out in the respondent's skeleton argument at [24]. Likewise, Metformin, prescribed for diabetes, is also available. General psychiatric care is evidently also available, although on behalf of the appellants it is not explained which, if any, of the three hospitals in Punjab dealing with mental health are in the vicinity of where the appellants live.

63. Nevertheless, as I have already suggested, it seems to be tolerably clear that the precise package of care that the first appellant is receiving would not be available to him on return to India. I am satisfied however, that some treatment would be available in the form of medication and general psychiatric care. I accept however, that such treatment is likely to be significantly inferior to that which he is receiving in the UK, at least in the area in which the appellants would be living.

64. As regards Article 3 in relation to the first appellant, the threshold is a high one (see *N v Secretary of State for the Home Department* [2005] UKHL 31).

65. On behalf of the first appellant the decision in *Paposhvili* is relied on. However, since the hearing before me the Upper Tribunal has considered the application of *Paposhvili* to Article 3 cases in the UK, in *EA & Ors (Article 3 medical cases – Paposhvili not applicable)* [2017] UKUT 00445 (IAC). After careful analysis the Tribunal said this:

> "31. It is not permissible for the Tribunal to depart from this authority and, in particular, cannot do so by reliance upon the *Paposhvili* enlargement set out in paragraph 183 of the ECtHR's judgment (see paragraph 6 above). Hence, the recasting of Article 3 to include '*situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy*' is not part of United Kingdom domestic law".

66. It also went on to state at [32] as follows:

> "32. Furthermore, there is an internal logic in setting the threshold very high. Ms Chapman took forensic offence to the emotive language contained in paragraph 20 of Mr Hansen's skeleton argument in which he quoted the expression that the parties to the Convention, including the United Kingdom, cannot be turned into '*hospitals for the world*'. However, avoiding any emotive language, if the effect of a lowered threshold is to impose a burden that is disproportionate upon the receiving state such that it damages its own efforts to provide healthcare, accommodation and services then that disproportionate effect can properly be taken into account in construing what is meant by the humanitarian obligation not to cause suffering. Ms Chapman submitted that if this is what is the nature of the obligation imposed by Article 3, then it matters not whether the effect is a burden too great to bear. We agree. But this begs the question as to what *is* the nature of the obligation. If the invaluable scheme of humanitarian protection is to operate, it must be made to *work*. It can and does work if a high threshold is maintained. Conversely, if the demands upon it cannot be met, it will not work. Further, it runs the risk of becoming arbitrary if the threshold is over-elastic and ill-defined. That is precisely why the Supreme Court and the Court of Appeal set the threshold at a level which is both high, intelligible and ascertainable, thereby avoiding the injustice of a test which is as long as the judge's sleeve".

67. I respectfully agree with and adopt the reasoning in *EA & Ors.* I reject the argument advanced on behalf of the appellant in reliance on the decision in *Paposhvili*. In any event, I cannot see that even applying the decision in *Paposhvili* the first appellant comes within its terms as set out at [183] of that decision (and now see also the decision of the Court of Appeal in *AM (Zimbabwe) & Anor v The Secretary of State for the Home Department* [2018] EWCA Civ 6).

68. It is clear that the first appellant's circumstances do not come close to establishing that his return to India would amount to a breach of his Article 3 rights on the basis that he would be exposed to inhuman or degrading treatment. He is unlikely to get the treatment that he is receiving in the UK, but by no means could it be said that he

would be left to his own devices, to manage on his own with all that that would entail for his mental and physical health. If his brother returns with him he will have the support of a young, able-bodied family member to assist him, quite apart from what other assistance can be provided by the appellants' mother and grandmother, even if only limited to emotional support and encouragement.

69. In this I have not overlooked the age of the appellants' grandmother or the fact that the appellants' mother is not in the best of health herself. There will undoubtedly be significant challenges to be overcome, or at least managed. However, it is plain that a differential in treatment, care or rehabilitation cannot of itself establish a viable Article 3 case. Neither that differential, alone or in combination with the first appellant's other circumstances, establish that the first appellant's return would amount to a breach of Article 3.

70. The reliance on behalf of the appellants' on the decision in *J* is misconceived. That was a case dealing with a potential violation of Articles 3 and 8 of the ECHR in terms of the risk of suicide. No such feature is present in the circumstances of this appeal. The distinction between 'domestic' and 'foreign' cases in terms of Article 3 have little, if any, bearing on the circumstances of these appeals. Apart from anything else, the evidence does not suggest that the first appellant has, or would have, the capacity to understand, or react to, information provided to him to the effect that he was to be removed to India.

71. For the avoidance of any doubt, there is no basis from which to conclude that the first appellant is unfit to fly, or would not be provided with appropriate support during the course of the journey to India. Furthermore, if the second appellant was also removed, he would return with the first appellant.

72. So far as Article 8 is concerned, the central argument under the Rules is to the effect that there are very significant obstacles to the first appellant's integration in India (paragraph 276ADE(1)(vi)). At [42] of my error of law decision I said as follows:

> "42. As the grounds point out, there was no evidence that he was able to integrate into the United Kingdom. In the context of what the very significant obstacles to his integration in India would be, the FtJ did not consider the extent to which the first appellant would be desirous of, or have the ability to, integrate anywhere. On one view, it could not be said that there are very significant obstacles to integration if a person is unable to integrate. There are, in fact, no obstacles that need to be overcome or circumvented to allow for integration. Likewise, if the extent of integration is likely to be minimal, the obstacles to that integration are going to be correspondingly small."

73. It is evident that the first appellant's integration in the UK is very limited indeed, and is confined to his relationships with the professionals that provide him with care and treatment. That care and treatment is of course very significant in terms of his wellbeing, but it has little purchase on the question of integration in the UK.

74. The issue of integration as expressed in the Rules in paragraph 276ADE(1)(vi) is plainly directed toward the assessment of the extent to which an individual is able to establish, or re-establish, a private life in the country of return. Thus, a person who is substantially, significantly or completely integrated into UK society, but correspondingly establishes that there are very significant obstacles to integration in the country of return will, under the Rules, subject to other qualifications, be able to establish a breach of his Article 8 rights. That person's private life would suffer such disruption on removal as to make that disruption disproportionate. Article 8 in terms of private life, and its expression under the Article 8 Rules, is designed to protect, foster or promote an individual's rights in this respect.

75. In terms of his private life, the evidence simply does not establish that such a private life as he is able to develop is such as to mean that there would be very significant obstacles to his integration in India. He does not have the capacity to be desirous of integrating, and from a cognitive perspective his limited ability to establish any form of private life is unlikely to have any impact on his view of himself, his surroundings or his place in society.

76. Furthermore, there is merit in what is said on behalf of the respondent in the written submissions on this issue. There is evidence to suggest that the first appellant may be better able to integrate into Indian society, within his close family network, than he is able to in the UK. Thus, the record of his daily activities (starting at page 63 of the appellants' bundle) refers to his having stated that his favourite activity is listening to Indian music, and watching cricket, especially when India are playing. It also refers to his liking to watch Indian films on his laptop. There is reference to his missing his mother's cooking. In the External Review Report dated 2 May 2017 it states on page 5 that the first appellant had spoken of wanting to return to India, stating that he missed his mother, although also stating that he wanted to return to East London. The Occupational Therapy Report dated 10 May 2017 on page 2 refers to him perseverating on the topic of wanting to call his mother. At page 65 of the activities report it refers to his daily telephone calls to his mother. This is all consistent with the evidence before me in terms of the second appellant preparing Indian food for his brother and the phone calls that they make to their family and discussions about their past.

77. The evidence in relation to the first appellant's ability to speak English is to some extent inconsistent. The External Review Report refers to his limited communication ability in English, as does the Occupational Therapy Report. At page 4 of that report it refers to his limited English and states that he struggles to communicate with the staff. He does however, speak Hindi and Punjabi, and presumably he speaks to his mother in either one or both of those languages. Having said that, the evidence before me from Helen Petrie was that the first appellant's English has improved and now he can communicate in English fairly fluently.

78. The facts of this case are outside the usual paradigm of an assessment of the issue of very significant obstacles to integration. However, having considered the matter conceptually, and assessing the facts of this appeal, I am not satisfied that it is

established that there would be very significant obstacles to the first appellant's integration in India. I note that Dr Grilo states on page 4 under the heading 'Conclusion' that:

> "Mr Singh seems to benefit from the relational, environmental and procedural support offered by the unit. It is my opinion that if plans are going to be discussed in order for Mr Singh to move on they would be detrimental for him and would impact on risk to himself (vulnerability) and risk to others".

79. However, that conclusion does not mean that there would be very significant obstacles to his integration in India, where he would have the close support of his family, and whatever treatment can be obtained for him.

80. I accept that the unusual circumstances of this case indicate a need for an assessment of Article 8 outside the confines of the Rules. Thus, the issue of physical and moral integrity requires consideration. However, in *GS and EO (Article 3 – health cases) India* [2012] UKUT 397 (IAC) it was said at [85(8)] that where an individual has no right to remain in Article 3 terms it would be a very rare case indeed where a claim could succeed under Article 8. The Tribunal did nevertheless say that an Article 8 proportionality analysis might yield a different outcome in other cases, "possibly where the claimant had a lawful permission to reside in the host state before the disease was diagnosed".

81. More significantly, in *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279 at [20] the Court referred to dicta from *R (Razgar) v Home Secretary* [2004] 2 AC 368 to the effect that it was not easy to think of a foreign healthcare case which would fail under Article 3 but succeed under Article 8. At [23] the Court said as follows:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported".

82. In terms of the first appellant's physical and moral integrity, I cannot see that the outcome in relation to a proportionality assessment under Article 8, assuming one reaches the point of assessing proportionality, demands an outcome in his favour, either alone or in combination with the other factors pertinent in his case.

83. As was said in *Akhalu (health claim: ECHR Article 8)* [2013] UKUT 00400 (IAC), all material considerations need to be taken into account but that one has to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the individual in terms of a disparity of healthcare facilities, in all but a

very few rare cases. The public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended speak cogently in support of the public interest in removal.

84. In the wider Article 8 assessment, one has to consider the very limited private life, if it exists at all, that the first appellant has established in the UK. The countervailing public interest considerations include the cost of his care which, according to the External Review report dated 2 May 2017, amounts to approximately £2,531 per week. That is plainly a weighty factor to be taken into account.

85. I bear in mind that the first appellant came to the UK lawfully, but that hardly diminishes the weight of the public interest in his return in the particular circumstances of this case where, aside from the arguments advanced in relation to his health, he has no basis of stay in the UK.

86. Whilst Dr Grilo suggests that it would be detrimental to the first appellant for him to be removed, if the paragraph that I have quoted at [78] above is understood to be to that effect, Dr Grilo has not had the benefit of hearing and examining evidence in relation to the extent to which the first appellant would be able to benefit from the emotional support of his family in India, and from the practical support of his brother, even accepting that his living circumstances would be far from ideal. The first appellant has demonstrated challenging behaviour when frustrated or unable to achieve his relatively simplistic demands. However, Ms Petrie said in evidence before me that his behaviour has calmed down quite a bit. No doubt this is in part because of the skill of those caring for him, but it is evident that the second appellant has a close connection with his brother, that they understand each other and that the second appellant is able to manage his day-to-day care.

87. Considering all the circumstances, I am not satisfied that the first appellant's removal would amount to a disproportionate interference with his private life.

88. It is not argued, nor could it be, that the respondent's decision amounts to a disproportionate interference with his family life. Such family life as he has in the UK is with his brother and that would be able to continue on return to India. Indeed, it may even become stronger the more closely the second appellant becomes involved in his care. The first appellant would also, of course, be able to re-establish his relationships with his family in India.

89. There also remains the possibility that the appellants' sister may be able to provide accommodation or some assistance for the first appellant. It has not been suggested on behalf of the appellants that this would not be possible. It appears from the evidence before the FtJ that she lives in the same state in India as their mother and the first appellant's flight to the UK was paid for by his sister and other relatives. No doubt, as it would be if the first appellant were living with his mother and grandmother, accommodating him and providing for his needs would present considerable challenges to all family members. That however, is not a basis from which to conclude that he could not receive care and support on return to India.

90. Accordingly, I am not satisfied that the respondent's decision amounts to a breach of the first appellant's Article 3 rights or his Article 8 rights in any respect. That being the case, his appeal must be dismissed both in relation to Article 3 and Article 8.

91. The second appellant has no claim to remain in the UK except in relation to his brother. With the first appellant's removal, there is no arguable case on behalf of the second appellant which could lead to his appeal being allowed on Article 8 grounds.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside in respect of both appellants. The decision is re-made, dismissing the appeal of the first appellant and of the second appellant.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 16/02/18