Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01580/2020

THE IMMIGRATION ACTS

Heard at : Field House	**Decision Promulgated**
On : 23 June 2021	**On 02 July 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

THAVAPRAGASM ROSALINE MATHURANAYAKI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr J Martin, instructed by Indra Sebastian Solicitors
For the Respondent:	Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Australia, originally from Sri Lanka, born on 31 May 1942. She entered the UK on 18 March 2017 together with her husband, to visit their daughter, with a visit visa valid until 18 September 2017. On 15 September 2017 they both applied for leave to remain in the UK on family and private life grounds. Whilst the application was pending, her husband suffered a fatal heart attack in October 2017 and passed away on 16 December 2017. The application for leave to remain was refused on 27 March 2018.

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2. The appellant appealed against the refusal decision, relying in her grounds of appeal on her compelling and exceptional circumstances following the death of her husband and the fact that she would have no support on return to Australia given the strained relationship with her two children who lived there. Her appeal was heard on 17 September 2018 by First-tier Tribunal Judge Robertson, who rejected her claim to be estranged from her son in Brisbane and concluded that the claim had been made solely to bolster her application to stay in the UK and that she would have the support of her family in Australia as she had had previously. The appellant's appeal was dismissed in a decision promulgated on 12 December 2018 and permission to appeal to the Upper Tribunal was refused. The appellant became appeal rights exhausted on 2 May 2019.

3. The appellant then made a further application for leave to remain on 12 September 2019, supported by additional medical reports, letters and appointments and letters of support from family members in the UK. She relied upon the same issues as previously, claiming that she had never travelled or lived alone, having lived in Australia with her husband from December 1995 when they had migrated there from Sri Lanka, that she had never worked in Australia or owned any assets and had always been with her husband and that she could not take care of herself and feared loneliness if she had to return there. She claimed that her children in Australia would not take care of her and she feared returning there as a single woman. She stated that her family ties were in the UK and that her husband was buried here, with a place for her next to him. She said that she was emotionally and financially supported by her daughter and family and she had a strong bond with her grandchildren.

4. In addition to those previously stated issues, the appellant relied upon further medical issues and disabilities arising from an accident post-dating the previous appeal, whereby she fell down the stairs in her daughter's house in November 2018, and she claimed that she could not cope without her daughter. In that respect the appellant's application was supported by an occupational therapy assessment report and a psychiatric report.

5. The appellant's application was treated as a fresh human rights claim and was refused on 13 January 2020, with a right of appeal. The respondent considered that the appellant could not meet the family and private life requirements in Appendix FM of the immigration rules and that her circumstances were not such as to justify a grant of leave outside the immigration rules. The respondent had regard to the findings of the First-tier Tribunal in the appellant's previous appeal and noted that her claim that she was estranged from her two children in Australia and that they had withdrawn their support from her had not been found to be credible. The respondent therefore did not accept that the appellant would have no one to care for her in Australia. The respondent, further, did not accept that the appellant would be unable to continue, in Australia, the therapy and medical treatment she was receiving in the UK following her husband's death.

6. The appellant's appeal against that decision was heard by First tier Tribunal Judge Hatton on 18 March 2020. The judge heard from the appellant and from her daughter and also had before him the medical reports and letters provided with the appellant's application. The judge considered that the appellant had fabricated her account of having

hostile relations with her son and daughter-in-law in Australia and her claim that her son had sold the bungalow where she and her husband had lived in Australia. The judge accorded little weight to the medical evidence and rejected the account of the appellant's health having significantly deteriorated as a result of her involvement in a road accident on 31 December 2019. The judge found further that the appellant continued to receive a pension in Australia and Sri Lanka. He considered that there was insufficient justification to depart from the findings of the Tribunal in the appellant's previous appeal and he concluded that the appellant could return to Australia where she would be adequately supported and cared for. The judge accordingly dismissed the appellant's appeal on human rights grounds.

7. The appellant sought, and was granted, permission to appeal to the Upper Tribunal on the basis that the judge had arguably erred in his approach to the medical evidence.

8. The matter came before me on 20 November 2020 and I heard submissions from both parties on the error of law question. In a decision promulgated on 10 December 2020, I found that Judge Hatton had materially erred in law and I set aside the decision on the following basis:

> "13. It is argued on behalf of the appellant that her circumstances at the time of the appeal before Judge Hatton were not the same as those considered by Judge Robertson 18 months previously, in September 2018, as her care needs and dependency upon her daughter for her care had increased to an extent that it was not sufficient to say that those needs would be adequately met by the support available from her son in Australia. As such, it is argued that Judge Hatton erred in law by treating Judge Robertson's findings on the appellant's relationship with her son in Australia and the support and accommodation available to the appellant in that country as dispositive of the appeal before him and that he had failed to give proper consideration to the fresh evidence.
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> 14. Whilst at first glance this argument appeared to be a criticism of Judge Hatton for effectively following the principles set out in Devaseelan, a closer consideration of the evidence shows that there is indeed merit in the grounds and that the judge focussed on the previous findings on the care available to the appellant in Australia and failed to engage with the fresh evidence and to understand the nature of the issues raised in that evidence in terms of what she would be deprived of by leaving the UK. That evidence, in the form of the occupational therapist report and the psychiatrist report, provided a detailed account of the impact on the appellant's physical and mental health of an incident in November 2018 when she fell on the stairs. The incident is described in the occupational therapist's report at page 26 of the respondent's appeal bundle and the subsequent information provided up to page 37 provides details of the deterioration in the appellant's mobility and her increased dependency upon her daughter for her needs including the assistance she received from her daughter to wash and get dressed. As Mr Martin submitted, Judge Hatton appeared to have completely ignored that evidence, as is apparent from his limited consideration of the care available to the appellant in the UK, at [54], and instead went on to make adverse findings against the appellant on the understanding that the deterioration in her health was claimed to have arisen from a road traffic incident in December 2019. His adverse finding at [64] clearly illustrates his misunderstanding of the evidence in that regard.

> 15. Accordingly I am entirely in agreement with Mr Martin, that Judge Hatton was side-tracked by the question of the appellant's family ties in Australia which, albeit not immaterial, was not the focus of the argument being made before him on the fresh evidence. He clearly failed to appreciate the matters which had arisen since the decision made by Judge Robertson and the impact of that change in circumstances on the question of the appellant's ability to return to Australia. As such his decision is unsustainable and has to be set aside.
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> 16. Both parties were in agreement that if Judge Hatton's decision was set aside, the re-making of the decision could be undertaken in the Upper Tribunal. I agree with Mr Clarke that the findings made by Judge Hatton in regard to the appellant's circumstances in Australia are entirely separate to the error of law and can be preserved, although there is merit in the point made in the grounds at [11] that the judge failed to take into account the fact that the appellant had the support of her husband when she was living in Australia. Other than that, the judge's adverse findings on the appellant's family and other ties in Australia can and should be preserved.
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> 17. The matter will be retained in the Upper Tribunal for the decision to be re-made on that basis and will be listed for a resumed hearing."

Hearing and Submissions

9. The matter then came before me for the decision to be re-made.

10. The appellant was present at the hearing but did not give oral evidence before me. However the sponsor, her daughter Antonette Rajakumar, adopted her witness statements and was cross-examined by Ms Isherwood.

11. Ms Rajakumar said that her parents used to come to the UK to visit every year and on the last occasion, in July 2017, her brother in Australia told them that he was going to rent out the house where they had been living. They did not know what to do at first and then they decided to apply to extend their stay before their visa expired. Their son then rented out the house and subsequently sold the house. When asked why the appellant could not use the funds from the sale to purchase another property in Australia, Ms Rajakumar said that the property was her brother's and they were no longer in contact with him. She had tried to persuade him to wait before selling the house, but he had gone ahead and sold it and, when she tried to contact him later after their father died, he ignored her calls. Ms Rajakumar said that her parents had not applied for leave under the adult dependent relative rules as they did not know about that at the time and they chose the route they considered to be the best. Ms Isherwood asked the sponsor about the payment of medical bills in the UK and she replied that her mother's medical treatment was through the NHS. When asked to confirm her mother's entitlement to a pension and state benefits in Australia, Ms Rajakumar said that she was entitled but that it was not about the money. The issue was that her mother could not go there alone. Although her brother and sister were living in Australia they were not on good terms with her mother and they would not look after her. Ms Rajakumar said that she had not considered a care home because her mother was supported by her family in the UK and was not mentally fit to return to Australia alone and could not survive there without her family. Ms Rajakumar said that she was an Australian citizen but she could not return there with her mother

because she had her own family here as well as the family business, a restaurant. Her brother Jude was a British citizen and did not have Australian citizenship, but he could not go to Australia with their mother in any event as he had his own family and work commitments here.

12. Ms Rajakumar said that her mother was never left alone in the house here and when she was at work her aunt would come to look after her. She worked three days a week, from 9am to 1pm or 2pm and sometimes with overtime as well but never beyond 4pm. Her husband worked as an accountant five days a week and looked after the restaurant business in the evenings and weekends. The restaurant had just re-opened after lockdown. With regard to the road traffic accident, her mother never fully recovered from that despite the consultant considering that she may recover within seven months. Her mother had contracted covid 19 in January 2021 and now suffered from long-covid and could not catch her breath. She had had an X-ray recently but had not yet received the results from the GP. Her memory had also been affected and for a week she could not remember anything, although it was improving. She was still on the waiting list for Talking Therapies, to receive bereavement counselling. Ms Rajakumar said that her mother had always been completely dependent upon her father when they were in Australia and she had had no friends there and rarely went out.

13. When re-examined by Mr Martin, Ms Rajakumar said that she had never been asked to pay for her mother's NHS treatment, but she would do so if asked. She had paid for some medical reports herself. Her mother was able to manage on her own in the UK at first, after her father died, but since she contracted covid-19 in January 2021 and had her memory loss she could no longer be left alone.

14. Both parties then made submissions before me.

15. Ms Isherwood submitted that the findings of the First-tier Tribunal in the appellant's previous appeal were the starting point, in accordance with the principles in Devaseelan. The account of the appellant's relationship with her son in Australia had been rejected as lacking in credibility. The family's approach to the immigration system in the UK undermined their credibility. They had completely ignored the adult dependent relative rules and had simply stated that they refused to return to Australia without making any enquiries as to the health care and social housing available there and the possibility of a care home. Ms Isherwood submitted that the appellant was a burden on the public purse here. It was her family's responsibility to inform the NHS that she was not entitled to medical care. Had leave been granted under the adult dependent relative rules the family would have had to give an undertaking not to use public funding. Ms Isherwood relied upon the cases of Ribeli v Entry Clearance Officer, Pretoria [2018] EWCA Civ 611 and Mobeen v Secretary of State for the Home Department [2021] EWCA Civ 886 which involved similar considerations and where, in the first case, the Court considered the possibility of the sponsor moving back to her home country to provide support for the appellant and to the fact that it was not a matter of choice. Ms Isherwood submitted further that the medical evidence was contradictory in relation to the appellant's ability to be left alone. There was no evidence of her current condition relating to covid-19 and the evidence indicated that she had improved and could do things for herself. There was no

live evidence from the sponsor's brother and the appellant's sister-in-law to confirm the claim that she could not be left alone. The appellant's grandson's witness statement made it clear that he and his sister were alone with the appellant after they returned from school and before the sponsor came home from work and that the appellant helped them with their homework. Ms Isherwood submitted that there was no evidence showing that the appellant was emotionally dependent upon the sponsor such that there were compelling circumstances outside the immigration rules. The appellant was capable of managing without her family and it was proportionate for her to return to Australia.

16. Mr Martin submitted that the two authorities relied upon by Ms Isherwood were distinguishable from the appellant's circumstances. It was not the case that the appellant was attempting to circumvent the immigration rules. On the contrary she had always tried to regularise her position. The respondent, by treating the appellant's further submissions as a fresh claim, had accepted that there was a material change in her circumstances. It was not reasonable to expect the appellant to return to Australia to make an application under the adult dependent relative rules. With regard to those rules, the appellant could meet the requirements of E-ECDR.2.4 and 2.5 in any event, as she did require long-term personal care to perform everyday tasks and the quality of the care she required was not available in Australia. She required more and more assistance of the kind she received from her daughter and son and her late husband's relations. She would not have that in Australia and would have to resort to social care, which would have a significant impact upon her mental health. Mr Martin submitted that there were no contradictions in the medical evidence as suggested by Ms Isherwood. The letter from the appellant's grandson was written at a time when the appellant could be left alone. The statements from the appellant's son and sister-in-law explained the support they gave her. The medical evidence showed a clear deterioration in the appellant's health. Even in 2019 she needed help with most daily tasks, but since then she had deteriorated further and currently required almost total assistance. The medical evidence confirmed that she was suffering from the prolonged effects of covid and that it had affected her breathing and her memory. Even if it was not considered that the requirements of paragraph E-ECDR.2.5 were met, it was still the case that the removal of the appellant to Australia would shorten her life and would be disproportionate.

Discussion and Findings

17. It is not in dispute that this is a case which falls for consideration outside the immigration rules, the appellant having been granted no previous leave to enter or remain other than as a visitor. I therefore give consideration to Article 8 outside the rules.

18. I did not understand there to be any real challenge by Ms Isherwood to the question of family life having been established for the purposes of Article 8(1) and I note that that was accepted by First-tier Tribunal Robertson in the appellant's appeal in 2018 (see [9(ii)], [11] and [15]. As Ms Isherwood submitted, that decision is the starting point in the consideration of this appeal. In any event I have no hesitation in accepting myself that there is an established family life between the appellant and her family in the UK, in particular her daughter, Ms Rajakumar. Ms Isherwood referred to a lack of evidence of emotional dependency between the appellant and her family in the UK, but it seems to me

that, on the contrary, the evidence clearly points to there being such a dependency. Aside from the evidence of the family members themselves I have regard to the psychiatric report from Dr Lawrence at page 42 of the respondent's appeal bundle where reference is made at page 81, paragraphs 73 and 73, to the close emotional bond between the appellant and Ms Rajakumar.

19. The real question is, therefore, whether the appellant's circumstances are sufficiently compelling so as to render her removal to Australia disproportionate and thus to justify a grant of leave outside the immigration rules.

20. Ms Isherwood made forceful submissions to the effect that the appellant was a drain on public resources, given her use of the NHS, and that she had sought to circumvent the requirements of the immigration rules by coming to the UK as a visitor and then seeking to remain here with her family. She relied upon the findings of the previous Tribunal and the preserved findings of Judge Hatton in rejecting the appellant's claim to have become estranged from her son in Australia and to have lost her accommodation there, and submitted that there would in any event be social care and housing, medical treatment and support available to her in Australia together with financial support through her Sri Lankan and Australian pensions.

21. Whilst there may have been some force in such submissions previously – and indeed Judge Robertson's findings to a similar effect were upheld by the Upper Tribunal – the situation has undoubtedly changed since then and the focus has now shifted from the situation in Australia to the impact upon a vulnerable, elderly woman of removal from her strong and loving family support network. As Mr Martin submitted, that shift in focus was acknowledged by the respondent to the extent that the further submissions made after the appellant's appeal was dismissed by Judge Robertson were treated as a fresh claim and thus considered to have some prospect of success before a different Tribunal. It also formed the basis of the decision that Judge Hatton had materially erred in law in his determination of the appellant's appeal.

22. As I found in my error of law decision, Judge Hatton failed to appreciate the evidence of the impact upon the appellant of a fall in November 2018 and conflated the evidence of her injuries from that incident with those of a road traffic accident a year later, believing as a result that there were inconsistencies in her account and in the medical evidence which did not, in fact, exist. He also failed, as a result, to give due weight to the report of an occupational therapist who assessed the appellant on 25 September 2019, prior to the road traffic accident, which referred to her restricted mobility, her significant dependence upon her daughter for personal and domestic activities such as washing and getting dressed (section 12) and kitchen tasks (sections 13 and 16) and her anticipated deterioration without the support of her daughter. The psychiatric report from Dr Lawrence, dated 10 July 2019, also in the respondent's appeal bundle, provided further support to the claim about the appellant's deterioration, both mental and physical, and her dependence upon her daughter, as well as her mental decline since the death of her husband. Also before the judge was a letter dated 25 November 2019 from the appellant's GP, Dr Almona Musa of the Shaftesbury Medical Centre, confirming that she was not fit to

travel at that time, owing to chest pains, and that she had "chronic disabling medical conditions."

23. Ms Isherwood relied upon a report from Dr Chanpreet Nayyar, dated 8 May 2020, in the appellant's supplementary bundle, which followed an examination as a result of the road traffic accident in December 2019 and which anticipated that the impact of the accident was only temporary and that the appellant was expected to recover after seven months. However, Ms Rajakumar submitted that the anticipated recovery did not happen, in particular because her mother contracted covid 19 in January 2021. That is indeed confirmed in the report from Dr Almona Musa of Shaftesbury Medical Centre, dated 16 June 2021, as is Ms Rajakumar's evidence that her mother still suffered from long-covid and that she developed memory problems and confusion, which was particularly evident for a week. Ms Rajakumar said that her mother continued to be breathless. Support for that claim can be found in the NHS Mental Health Assessment (MH3) form at pages 14, 21 and 22 of the appellant's supplementary bundle of documents. That assessment was made at an appointment on 25 March 2021 which followed a referral from Northwick Park Hospital where the appellant was admitted for an overnight stay on 19 February 2021.

24. The totality of the medical evidence provides support for Ms Rajakumar's claim that her mother has become more and more dependant upon her, to the extent that she cannot be left alone. Having heard from Ms Rajakumar, I have no reason to disbelieve her evidence in that regard. She presented as an entirely credible witness who was very anxious about her mother and extremely distressed at the impact upon her mother if she had to leave the support of her family in the UK. Whilst it may be, giving due consideration to the findings of Judge Robertson, that there was some exaggeration of the extent of the deterioration in family relationships in Australia, I found Ms Rajakumar to be credible in her evidence before me of those relationships being strained and the contact limited. I accept her claim as to her mother's vulnerability and dependence upon her and other family members. Ms Isherwood's submission, that the evidence in that regard was contradictory, failed to take account of the passage of time since the letter from the appellant's grandson and failed to have regard to the clear deterioration in the appellant's condition, in particular in the last few months.

25. Turning to the requirements of the adult dependent relative rules, as referred to by Mr Martin, I accept from the evidence presented that the requirements of paragraph E-ECDR.2.4 are met, namely that the appellant, as a result of her age and disability, requires long-term personal care to perform everyday tasks. With regard to paragraph E-ECDR.2.5, it cannot be said that in a country such as Australia appropriate care would not be available to the appellant. However, as Mr Martin submitted, it is the quality of the care that is relevant in this case, namely the care of loving family members and in particular of a daughter who is able to assist with intimate tasks such as washing and dressing. That level of care could not be replicated in Australia. It is no doubt for that reason that there was an absence of evidence of in-depth research by the sponsor into care homes and access to care in Australia, a matter upon which Ms Isherwood relied. The appellant's ability to meet the requirements of the rules to that extent is of course a matter of some weight.

26. As for Ms Isherwood's robust submission on the appellant's deliberate intention to circumvent the immigration rules, I found Mr Rajakumar's evidence in that regard to be persuasive, namely that there had been no such intention. As Mr Martin submitted, the appellant had not simply overstayed her visa and then decided several months or years later to make a human rights claim, but there had been continuous attempts to regularise her stay and, aside from the short period of time between the dismissal of the appeal before Judge Robertson and the further submissions in September 2019, the appellant's applications had been made timeously and during periods of extant leave. Although the first application was made by the appellant and her husband together, her subsequent applications to remain in the UK, albeit outside the remit of the immigration rules, were nevertheless with some understandable basis, following the loss of her husband and the ensuing deterioration in her mental health and given her reluctance to leave behind her close family ties in this country and return to a country where she had never lived without her husband and had never lived independently.

27. Finally, I turn to the two authorities relied upon by Ms Isherwood. I agree with Mr Martin that neither add to Ms Isherwood's case. As Mr Martin submitted, the case of Ribeli is distinguishable as an entry clearance case as opposed to a case which is based upon the impact of removal from a close family support network. Of relevance too is the fact that the sponsor in that case was not unwilling to travel to South Africa to care for her mother, whereas Ms Rajakumar provided a proper basis for concluding that it would be unreasonable to expect her to return to Australia, in light of her family and business commitments in the UK. As for Mobeen, the appellant in that case did not have any significant health issues and was considered able to live an independent life in Pakistan, unlike the appellant before me. Furthermore, unlike this appellant, Mobeen involved a person who had overstayed her visa for some two years before making her application. In the circumstances it seems to me that neither of the authorities detracts from the appellant's case being considered as an exceptional and compelling one.

28. For all of these reasons, having regard to the particular circumstances in this case, namely the appellant's vulnerability in terms of her age and her mental and physical health, the circumstances of the loss of her husband and her need to visit his grave, the resultant dependence upon her daughter and other family members in the UK, and her current presentation as a result of long covid, I conclude that the proportionality balance falls in her favour. I take account of the public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002, including her lack of English and her use of public resources through the NHS, and I give weight of course to the fact that the appellant is not able to meet the requirements of the relevant rules, albeit to the extent stated above. I have not been provided with evidence of the sponsor's finances but there has been no suggestion of an inability by the sponsor to support her mother. I note that she and her husband are employed and they have their own restaurant business and that the appellant's son Jude is in full-time employment as a software engineer. The sponsor expressed a willingness and ability to reimburse the NHS for her mother's medical treatment and to sign an undertaking should she be asked to do so. In all of these circumstances taken cumulatively, and on the particular facts of this case, I conclude that there are particularly compelling circumstances and that requiring the appellant to return

to Australia would be disproportionate and in breach of Article 8. Accordingly I allow the appellant's appeal on Article 8 human rights grounds.

DECISION

29. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by allowing the appellant's appeal.

Signed *S Kebede*
Upper Tribunal Judge Kebede   Dated: 25 June 2021