



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2021-
001874 HU/01968/2021

THE IMMIGRATION ACTS

Heard at Field House

On 7 July 2023

**Decision & Reasons
Promulgated
On 24 July 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MS URVASHI GOVIND KARA
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J. Patel, counsel instructed on a direct access basis
For the Respondent: Ms A. Everett, senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of India, born on 7.8.99. She appealed a decision dated 17 March 2021 refusing to grant leave as the adult dependent relative of her father, Govind Khata Kara, a British citizen who has lived in the UK since August 2018, having obtained British nationality through his father who registered as a Citizen of the United Kingdom and Colonies on 27 April 1953 in Nairobi, Kenya. The Appellant's mother and brother, DOB 4.11.05 were granted

entry clearance in May 2021 albeit the Appellant's mother returned to India to reside with her. The Appellant has two older married daughters: Vijya DOB 25.1.91 who lives in Uganda and Harsha DOB 3.9.94 who also lives in India.

2. The appeal came before FtTJ O'Garro for hearing on 18 October 2021. In a decision and reasons promulgated on 5 November 2021, the Judge accepted the Sponsor's credibility [30] which includes the fact that he financially maintains the Appellant who is studying nursing and not working and the evidence of ongoing regular contact and financial support which she found indicated the existence of a family life between the Appellant, her parents and her brother. The Judge found that family life was established and continuing but at [33]-[34] there were other options open to the Appellant and her parents and brother, who could all return to India as a family unit and continue family life there and no evidence has been provided as to why they cannot: Ribeli [2018] EWCA Civ 611. Alternatively, the Judge found at [36] in reliance on the psychological report that the Appellant could live with her grandmother or other extended family members or at [38] that the Appellant could apply to study in the UK.
3. An application for permission to appeal was made, in time, which asserted that:
 - 3.1. at Ground 1 that there had been no concession regarding the application of Appendix FM, only with regard to EC-DR: see [9] and this was supported by a witness statement from counsel instructed at that time on behalf of the Appellant.
 - 3.2. at Ground 2, that there were factual errors and/or unsupported findings regarding extended family members in that it was clear from the psychological report that the extended family live in Kenya, Uganda or the UK. The Appellant has one sister, Harsha, in India but she provided an affidavit as to why the Appellant cannot live with her.
 - 3.3. at Ground 3, the Judge failed to take account of relevant evidence in finding that the UK based family could return to India, given that the Appellant's father has established a business in UK and owns 40% of it and the Appellant's brother is settled at school. It was further asserted that the Judge failed to make a finding as to the safety of the Appellant in India on her own and that she had failed to take account of section 55 and the best interests of the Appellant's brother.
4. Permission to appeal was granted by FtTJ Dempster in a decision dated 29 December 2021 in relation to ground 2, although permission was not restricted.

5. Regrettably the Appellant's bundle before the First tier Tribunal [up to page 542] had not been uploaded to the digital system due to the age of the case but Mr Patel helpfully provided a hard copy and then subsequently sent a virtual copy by email.

Hearing

6. Mr Patel proceeded to make his submissions based on the grounds of appeal. He clarified with regard to Ground 1 that the Appellant had also been seeking to argue that GEN 3.2. of Appendix FM of the Immigration Rules was applicable, albeit he accepted that it imposed a very high threshold. As to Ground 2, Mr Patel submitted that the Judge had failed to take account of the fact that the relative in the village, the Appellant's sister, Harsha submitted an affidavit [AB 107-109] as nowhere is that mentioned in the determination at all. Harsha is the only family member in India but her evidence is not considered as to why the Appellant cannot live with her sister and the reasons why she cannot live with her.
7. With regard to the other family members, the psychological report at AB 399 4.1. sets out the family background and further evidence was provided to confirm those facts. Mr Patel submitted that the finding itself that there are extended family members in India is an error. He further submitted that no consideration had been given to the fact that the Appellant cannot live alone and there was a letter from the village head at AB 134 and 488 which stated that she cannot live alone as a young unmarried girl.
8. As to Ground 3, Mr Patel submitted that one has to assess the impact of a young unmarried dependent adult girl living at home in the village and the cultural and safety concerns where her mother and brother have been granted a visa and migrated to the UK to join her father here. He submitted that there were ramifications to leaving behind a 21 year old and that this is an uncontroverted fact on the facts of this case, in the village in this location and in surrounding villages there are no girls living alone and there are safety issues. Mr Patel stated that the Appellant's mother has had to return back to the village in India to support the Appellant and she continues to live there and has been living there for the past couple of years.
9. Mr Patel submitted that the Judge implicitly accepted that living alone is an issue for the Appellant when she says she could live with extended family members. As to the issue of choice, he submitted that the family could return back and continue with family life in India but we have a father who migrated at a certain point in time and set up a business and is a salaried director: AB 149, 150, 255,

316 and 318 of the bundle. Also relevant is the development of Nayan, the Appellant's brother who has been allowed to migrate and is settled in school and being asked to continue family life in India. He submitted that this was not an effective choice and rendered the whole purpose of migration pointless. Mr Patel further submitted that the Appellant's mother had to sit the English language test on 5 occasions before she passed and this meant that by that time the Appellant was over 18.

10. In her submissions, Ms Everett accepted that the First tier Tribunal Judge had made factual errors about which family members were living where and in terms of who the Appellant could live with in India. She accepted the Judge may have misunderstood who might be available, but that this was not a material error. The Judge finds it is a choice and the mother has decided to live in India with the Appellant. When the Appellant's father migrated to the UK in August 2018 the Appellant was already 19 and she could not meet the requirements of the Rules. Her father has been in the UK for a relatively brief time and the Judge has found there are choices and has found against the Appellant. Ms Everett submitted that the grounds of appeal provided no leeway to depart from that finding and that the issue was quite narrow with a large import.
11. In reply, Mr Patel drew attention to [34] of the Judge's decision and reasons and that there was evidence before her certainly in terms of the father's business as to why they cannot return to India and the Judge erred in finding there is no evidence on this issue.

Decision and reasons

12. At [36] of her decision and reasons, Judge O'Garro held as follows:

"36. In essence this appeal (sic) concern choices. Alternatively, if the appellant's parents choose not to return to India, I am sure there are extended family members with whom the appellant can live in India. I noted in the psychological report prepared by Lilian Onoriode dated 8 September 2020, reference is made to the appellant's grandmother and other extended family members. I see no reason why the appellant cannot live with one of her extended family members ..."
13. I find that, whilst First tier Tribunal Judge O'Garro referred to the psychological report of Lilian Onoriode dated 8 September 2020, it is clear that she did not properly take into consideration the contents of the report, which sets out the whereabouts of the Appellant's family members at AB 404-405. This provides that the Appellant's eldest sister lives in Kampala, Uganda; another sister Harshaben lives in India and the Appellant's maternal grandmother lives in Kenya with her sibling. The Appellant's mother has 3 sisters who live

in the UK, 1 brother is in the UK and two are in Kenya. In particular, the report records that the Appellant's grandmother lives in Kenya. There are no other extended family members referred to and the only family member living in India is the Appellant's sister Harshaben.

14. There is an affidavit from Harshaben in the Respondent's bundle at F5-F8, where she states that she would be unable to take responsibility for providing protection, care, economic support and shelter to the Appellant because her husband and his parents are not willing to accept responsibility for looking after any unmarried girls from any family and their home is limited in size and they would not be able to accommodate her.
15. However, whilst I find the Judge erred in failing to properly take this evidence into consideration, I have concluded that ultimately the error is not material to the outcome of the appeal. This is because it would not have been possible for the Appellant to succeed under the Immigration Rules, either EC-DR, which was conceded, or GEN 3.2. given that the test set out therein is a high one *viz* whether there are "*exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant or another family member.*"
16. There was no evidence before the First tier Tribunal as to the existence of exceptional circumstances on the particular facts of this case. Whilst it was argued that it would not be appropriate or safe for the Appellant to remain alone in her family home as a young unmarried woman, this does not render her circumstances exceptional without more. I find that the Judge was entitled to summarise the basis of the appeal at [36] as being about choices and to indicate what some of that choices might be, so that the Appellant was not obliged to live alone.
17. The Appellant's father is not a refugee but is living and working in the UK by choice and can choose to return to India if he so wishes. Whilst Mr Patel submitted that there was evidence before the First tier Tribunal Judge as to the Appellant's father's business, this evidence would not meet the exceptional circumstances or unjustifiably harsh consequences tests without more. Similarly, as Ms Everett submitted, the Appellant's brother has only resided in the UK since May 2021 and even if he has settled in school, he has only been settled for a brief period of time. Mr Patel stated that the Appellant's mother has returned to India to reside with her and there is no evidence that it would be unjustifiably harsh for the *status quo* to continue for the time being.

18. I remind myself of the judgment of Lord Hamblen in *HA (Iraq)* [2022] UKSC 22:

“72. It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:

*(i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.*

*(ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.*

*(iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope”.*

19. For the reasons set out above, whilst I find the First tier Tribunal Judge made errors in failing to take account of all the evidence before her in her determination of the appeal, ultimately these errors were not material to the outcome of the appeal. Thus I find no material error of law in the decision.

Notice of decision

20. The decision of the First tier Tribunal is upheld.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

13 July 2023