IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000363
UI-2024-000364
UI-2024-000365
UI-2024-000366
UI-2024-000367
FtT Nos: HU/56075/2022
HU/59139/2022
HU/59141/2022
HU/59143/2022
HU/59144/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 March 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NB
PA
AN
UF
ANN
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Secretary of State: Mrs A Nolan, Senior Presenting Officer
For NB and Others: Mr T Corben , Counsel, instructed by Sublime Solicitors

Heard at Field House on 18 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, NB, PA, AN, UF, and ANN are granted anonymity.

No-one shall publish or reveal any information, including the name or address of NB, PA, AN, UF, and ANN, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. For the sake of continuity I shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Secretary of State is once again "the respondent" and NB, PA, AN, UF, and ANN are collectively "the appellants" (when referred to individually I shall describe them by their place in the list; i.e. NB is "the first appellant" and so on).

2. The respondent appeals with permission against the decision of First-tier Tribunal Judge Khan ("the judge"), promulgated on 26 July 2023 following a hearing on 4 July of that year. By that decision, the judge allowed the appellants' appeals against the respondent's refusal of their human rights claims. Those claims were made on 1 November 2022 and the refusal decisions on 24 August 2022.

3. The appellants are all citizens of India. The first appellant is the wife of the second and the third, fourth and fifth appellants are the couple's minor children. The first, second, third, and fourth appellants came to United Kingdom in early 2019. The first appellant entered as a student, with her family members as her dependents. The first appellant's leave was curtailed in July 2019 so that it expired in February 2020. The fifth appellant was born in April 2020. He has a serious medical condition, Congenital Adrenal Hyperplasia ("CAH") and it is that condition which formed the basis of the human rights claims made to the respondent. In essence, it was claimed that appropriate treatment would either not be available at all in India, or that even if it were, it would be practically inaccessible due to prohibitive costs.

4. In refusing the claims, the respondent asserted that there would be appropriate treatment for the fifth appellant's medical condition, whether through public or private healthcare facilities. It was concluded that the appellants had failed to meet the high threshold for Article 3 medical claims. Article 8 was also considered, with it being concluded that the children could adapt to life in India and that the for the appellant could obtain appropriate medical treatment.

The judge's decision

5. The judge identified the two issues in the appeals as being whether the appellant's could succeed under Articles 3 and/or 8: [23]-[24]. He recorded the respondent's acceptance of the fifth appellant's medical condition and the underlying expert evidence relating to the type of treatment required (provided by the relevant Consultant, Dr Rangasami). The treatment would be required for life and involved multi-disciplinary specialists and regular checks. The costs of the treatment regime in the United Kingdom would "run to thousands of pounds every year". The Consultant described the condition as "very serious and complex": [26]. Later, the judge summarised her findings on the nature of the fifth appellant's medical circumstances, stating that the condition could be fatal if not properly treated. Although appropriate management was currently in place, this required "significant medical intervention from a number of different practitioners": [29].

6. The first appellant gave evidence, which went unchallenged by the Presenting Officer and was found to be credible by the judge. That evidence covered the following points: the poor state of government-run hospitals; the expensive nature of private facilities; the inability of the family (including extended family members residing in India) to pay for appropriate treatment on return; her inability to work due to her childcare responsibilities: [27].

7. The second appellant also gave evidence. The judge did not accept the assertion that he would be unable to work at all, but did find that any employment would only generate "a low income", that the family unit were struggling to support themselves even now, and that debts were still being repaid: [28].

8. At [30], the judge referred to AM (Article 3; health cases) Zimbabwe [2022] UKUT 131 (IAC) and set out the threshold test in Article 3 medical cases:

> *"(1) Has the person (P) discharged the burden of establishing that he or she is "a seriously ill person"?*
>
> *(2) Has P adduced evidence "capable of demonstrating" that "substantial grounds have been shown for believing" that as "a seriously ill person", he or she "would face a real risk":*
>
> *[i] "on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,*
>
> *[ii] of being exposed*
>
> *[a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or*
>
> *[b] to a significant reduction in life expectancy"?"*

9. At [31], the judge concluded that the fifth appellant was "a seriously ill person" and so the first question was answered in his favour. The judge then turned to the second question and, in summary, concluded that: first, the only possibility of appropriate treatment for the fifth appellant's condition in India was to be found at private hospitals [33]-[34]; and secondly, the family could not afford the necessary private treatment, even taking into account the presence of extended family members in India [35]-[37]. The second question was also answered in the fifth

appellant's favour. As the absence of specialist treatment would be fatal to the fifth appellant, the judge concluded that the test under AM (Zimbabwe) had been satisfied and the appellants' appeals all fell to be allowed: [38]-[39]. The judge did not consider it necessary to address Article 8: [40].

The grounds of appeal

10. The respondent put forward three grounds of appeal, which have remained unamended.

11. By ground 1, it is said that the judge made a "mistake as to a material fact" by assessing the affordability of treatment for the fifth appellant's medical condition with reference to the costs of such treatment in the United Kingdom. It is asserted that the reasons for refusal letter indicated that "the cost of medications and inpatient treatment in India is a fraction of the cost of anything comparable in the UK…"

12. By ground 2, it is said that the judge failed to give "adequate reasons" for the conclusion that the first appellant would be unable to work on return to India. This error went to the question of whether relevant treatment would be affordable.

13. By ground 3, it is said that the judge failed to give "adequate reasons" for the conclusion that relevant treatment for the fifth appellant would not be available through government-run hospitals in India. Further, it is said that the judge failed to "adequately consider" why health insurance could not be taken out in order to make relevant treatment affordable.

14. Permission was granted by the First-tier Tribunal on all grounds.

The appellants' skeleton argument/rule 24 response

15. Mr Corben (who appeared before the judge) provided a skeleton argument in advance of the error of law hearing. The written arguments took issue with each of the respondent's grounds of appeal. The points raised are subsumed within my conclusions and reasons, below.

The hearing

16. I express my gratitude to both representatives for their clear and concise submissions. These essentially followed the grounds of appeal. The arguments put forward have been subsumed within my conclusions and reasons, below.

17. At the end of the hearing I reserved my decision.

Conclusions and reasons

18. Before turning to the substance of the respondent's challenges, I remind myself of the importance of exercising appropriate judicial restraint before interfering with the decision of the First-tier Tribunal. Numerous pronouncements to this effect have been made by the Court of Appeal over recent years, most recently in Ullah v SSHD [2024] EWCA Civ 201, at [26]:

> "26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:
>
> (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it 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] 1 AC 678 at paragraph [30];
>
> (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA*

(Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at paragraph [45];

(iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 at paragraph [25];

(iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph [27];

(v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at paragraph [34];

(vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph [107].”

19. In the present case it is to be noted that the judge had a good deal of documentary evidence before him, heard oral evidence, and received submissions from the parties. In deciding the appeals he had to make findings of fact on the evidence and carry out an evaluative assessment.

20. It is also the case that there is no suggestion that the judge misdirected himself as to the appropriate legal framework, namely that set out in AM (Zimbabwe).

21. In light of the above, I must be appropriately cautious before stepping in to find that material errors of law have been committed.

Ground 1

22. A challenge based on mistake of fact has a particular meaning within the appellate jurisdiction. Strictly speaking, it relates to the ability to demonstrate that a mistake as to the facts was made, with reference to the well-known criteria set out by the Court of Appeal in E and R [2004] EWCA Civ 49. I am not convinced at all that the respondent's grounds of appeal is actually intended to assert the mistake of fact jurisdiction, as opposed to simply asserting that the judge took an irrelevant consideration into account (namely the cost of treatment in the United Kingdom).

23. In any event, for the following reasons I conclude that ground 1 has not been made out.

24. First, with reference to E and R, the cost of appropriate treatment in India was not, and is not, uncontroversial and objectively verifiable. There was no definitive cost assessment before the judge and the respondent has not provided one on appeal.

25. The test in E and R is therefore not met. The remaining reasons address the respondent's first ground of appeal on the basis that an E and R challenge was not intended.

26. Secondly, I am satisfied that the judge had the respondent's reasons for refusal letter well in mind when considering the appeals before him. He also expressly stated that he had taken the relevant country information into account: [33]. Contrary to the assertion in ground 1 that the reasons for refusal letter "indicated" that the cost of

medicines and other treatment would be a "fraction of the cost of anything comparable in the UK", I have been unable to discern any such passage in that letter. Further, Mr Corben was correct point out that the country information contained within the reasons for refusal letter confirmed that the costs of private health treatment were "not officially regulated", which in turn suggested that the cost of treatment may very well not be at a "fraction" of the costs applicable in United Kingdom. Overall, I conclude that the judge did not fail to take relevant evidence into account.

27. Thirdly, it is right that at [35] the judge referred to the letter from Dr Rangasami, who had estimated that the annual costs of treatment for the fifth appellant would run into the thousands of pounds. On one view I can appreciate that it might appear as though the judge was simply transposing the costs of treatment in the United Kingdom across to the costs in India, without any contextual adjustment or consideration. However, that would entail a failure to read the judge's decision holistically and without the appropriate judicial restraint urged upon those determining appeals against decisions of the First-tier Tribunal.

28. The judge was obviously well-aware that the question of affordability of appropriate treatment was to be considered in the context of the family unit returning to India. The judge received what he deemed to be credible evidence as to the unaffordability of relevant treatment, having regard to the wider family's means. That finding on credibility was plainly open to the judge, particularly given that there had been no challenge to the evidence from the Presenting Officer. One aspect of that credible evidence was the first appellant's recounting of her brother's view that the treatment would not be affordable in India. The brother was a doctor. The clear implication was that a person in his position believe that treatment would be prohibitively expensive and that the judge had regarded that second-hand evidence as reliable.

29. In my judgment, reading the judge's decision holistically and in its proper context, the judge was not simply transposing the estimated costs of treatment applicable in United Kingdom across to India. At most, he was in reality only saying that the costs of the specialist lifelong treatment would be expensive, particularly in the context of the provision by private hospitals (his finding on the question of public/private provision is addressed, below). The judge was rationally entitled to proceed on the basis that the treatment would be expensive. What the judge said at [35] must be viewed in the context of [27], [33]-[34], and [36]-[37]. In so doing, and in light of the foregoing, there was no mistake of fact, however one may wish to approach the categorisation of the alleged error of law.

30. For the avoidance of any doubt, I reject Mr Corben's submission that the burden of addressing the question of the costs of treatment fell on the respondent. The judge was rightly concerned with the threshold issue, at which stage the burden rested with the appellants.

Ground 2

31. I conclude that the judge did not fail to provide adequate reasons for his conclusion that the first appellant would be unable to work on return to India. This conclusion is based on the following.

32. First, the reasons provided need only be legally adequate. There is no requirement for particularly detailed reasons, nor reasons for reasons.

33. Secondly, the reasoning set out at [36] was legally adequate. The judge had found the first appellant's evidence to be credible, a fact which the grounds appear to overlook. The judge was entitled to make that positive credibility finding. On that basis, the judge was also entitled to conclude that, in the particular circumstances of the case, the first

appellant's childcare responsibilities were such that she would, as a matter of practicality, not be able to find appropriate employment in India. The judge was addressing the question of childcare and employment in the context of return to India: a materially different situation from that which had existed whilst the first appellant had started her studies in the United Kingdom. It is to be recalled that the fifth appellant (who of course has the serious medical condition) was born in April 2020. There was no evidence to show that the first appellant had been able to study and/or work after that event.

34. Thirdly, ground 2 suggests that the first appellant could work whilst the fifth appellant was "well". Leaving aside what I consider to be an inapt description of the young child's situation (he is not and will not be "well"; his condition is dependent upon careful management, as established by the evidence accepted by the judge), the judge was not obliged to specifically address a hypothetical scenario whereby the first appellant might find some form of temporary/flexible work which would allow her to look after (at least) the fifth appellant and take time off for medical appointments and/or periods of worsening health, and suchlike, whenever they would arise. This aspect of ground 2 reads to me as something of an afterthought. In any event, the judge took a holistic view based on the credible evidence and his conclusion was open to him.

35. Ground 2 is not made out.

Ground 3

36. I conclude that ground 3 is not made out. Like the previous ground, this is based on an alleged failure to provide legally adequate reasons. For the following reasons, that contention does not stand up to scrutiny.

37. First, the judge was well-aware of the nature of the fifth appellant's condition and the type of treatment required. The first part of ground 3 reads rather like a generalised assessment made by the respondent himself, or a submission which might have been made to the judge. In any event, the judge made clear findings based on the evidence before him. Those primary findings are unimpeachable.

38. Secondly, the accepted evidence at [27] and what is said at [33] must be read together. As with certain aspects of ground 2, the respondent appears to have overlooked the positive credibility findings made by the judge. Further, the judge expressly stated that the relevant country information had been taken into account. That information (including passages from a previous CPIN from 2020) dealt with healthcare provision by both government and private hospitals. I am satisfied that the judge had regard to all relevant aspects of the country information which had been relied on by the respondent. On the facts of these appeals, the judge was entitled to conclude that the very specific treatment regime required by the fifth appellant would not be available in government-run hospitals.

39. Thirdly, I am prepared to accept Mr Corben's word from the bar that he could not recall there being any cross-examination as to the availability of public healthcare provision for the fifth appellant at the hearing before the judge. That recollection would appear to be supported by what is said at [34]; the respondent had relied on evidence of relevant medical provision at private hospitals and the appellants had accepted the fact of the provision, but had contended that they simply could not afford it.

40. Fourthly, the contention that the judge failed to consider the possibility of private health insurance in order to obtain relevant treatment for the fifth appellant is flawed. I conclude that the judge was

aware of the possibility of health insurance when considering the affordability of provision; it was referred to in the country information quoted in the reasons for refusal letter and contained in the 2023 CPIN and, importantly, the judge himself referred to health insurance at [33]. It cannot properly be said that he overlooked this factor. As mentioned previously, the judge made unimpeachable findings of fact as to the financial circumstances of the family, including extended members. He gave adequate reasons for concluding that private healthcare provision was simply not possible. Implicit within that was, in my judgment, consideration of the possibility of health insurance.

41. There is a further point here. Mr Corben was adamant that there had been no cross-examination on the particular issue of health insurance, nor any specific submissions made to the judge. There is no evidence from the respondent to call this into question and I am prepared to accept his word from the bar on this matter. I remind myself that a hearing before the First-tier Tribunal is not a dress rehearsal and it is normally inappropriate for a point to be taken on appeal which was not properly canvassed below: for a recent example of this, see Ullah v SSHD.

Summary

42. The respondent has been unable to identify any material errors of law in the judge's decision as it relates to Article 3 and the fifth appellant. There has been no challenge to the judge's conclusion that the appeals of the other appellant's fell to be allowed in light of the outcome in the fifth appellant's appeal.

Anonymity

43. The judge made an anonymity direction in the First-tier Tribunal on the basis of the fifth appellant's serious medical condition and the importance of protecting his privacy. Although I had some doubts as to the appropriateness of maintaining that direction, neither party

suggested that I should vary it at this stage. In all the circumstances, I am prepared to maintain the direction on the same basis relied on by the judge.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision stands.

The appeal to the Upper Tribunal is dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 19 March 2024