Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06482/2015
HU/06486/2015
HU/06487/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 June 2017	**On 11 July 2017**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

(1) SK
(2) KS
(3) HS
(ANONYMITY ORDERS MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Unless and until a Tribunal or court directs otherwise, the appellants herein are granted anonymity. No report of these proceedings shall directly or indirectly identify the appellants. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellants: Ms V Dirie, instructed by G Singh Solicitors
For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS
(Delivered orally on 29 June 2017)

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Introduction

1. The appellants are citizens of India. The first and third appellants are husband and wife, and parents to the second appellant (born in the United Kingdom in February 2016). On 24 July 2015, the first appellant made an application for leave to remain (a human rights claim) which was refused on 9 September 2015. The Secretary of State's decision letter specifies that it relates to all three appellants.

Decision and Discussion on Error of Law

2. The central, albeit not the only, issue before the First-tier Tribunal was the legal and factual consequences of second appellant's medical problems, which were summarised by the First-tier Tribunal – with reference to evidence from Dr Sanghavi – in the following terms:

> "[20] [the second appellant] is suffering from an apparently incurable condition which is described as parenchymal haemorrhagic infarct in the peri natal period which has led to [the second appellant] having increasing frequent seizures [such that] he requires full-time supervision … ongoing support."

3. The primary contention of the appellants, both to the Secretary of State and before the First-tier Tribunal, was that requiring the second appellant to return to India would lead to a breach of Article 3 - ostensibly as a consequence of the medical condition he suffers from. The appellant's submissions before the First-tier Tribunal included the discrete assertion that the undertaking of the journey to India would of itself carry sufficient risk to the second appellant so as lead to a breach of Article 3. The assumption in this submission is that the family would be removed by air.

4. As referred to above, the appellants produced evidence in form of a report dated 13 October 2016 authored by a Dr Sanghavi, a consultant paediatrician. It is not in dispute that such evidence did not make reference to particular risks which would eventuate on, or as a consequence of, the journey to India.

5. At the outset of the hearing before the First-tier Tribunal Mr O'Dair of Counsel, who appeared for the appellants below, made an application for an adjournment in order for the appellants to obtain further medical evidence (i.e. medical evidence in addition to that dated just over a month before the hearing) to deal specifically with the medical consequences of the second appellant's journey to India.

6. That application was refused in the following terms,

> "[7] In refusing the application I considered the provisions of Rule 2 of the Tribunal Procedure (First-tier) (Immigration and Asylum Chamber) Rules 2014 entitled the 'overriding objective and parties' obligation to cooperate with the Tribunal." I also considered the presidential guidance issued on 17 October 2014. Dealing with a case fairly and justly includes Rule 2(e) "avoiding delay, so far as compatible with proper consideration of the

> issues." I concluded, in the circumstances, that I should proceed with the appeal and that it was in the interests of justice to do so. There had been a very recent report from a consultant paediatrician which dealt with the impact on the second appellant of his medical condition. "The application was made at a very late stage and was speculative by its nature."

7. The first ground deployed before me is to the effect that the First-tier Tribunal erred in refusing the adjournment. I must consider this issue under the auspices of the overarching question of, whether there was any deprivation of the appellants' right to a fair hearing? Any temptation to review the conduct and the decision of the First-tier Tribunal through the lens of reasonableness or rationality is to be resisted. This was made clear by the Court of Appeal in SH Afghanistan [2011] EWCA Civ 1284 [at 13] in which the court said:

   > "First, when considering whether the Immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and the sole test was whether it was unfair."

   Fairness needs to be considered in the context of the proceedings as a whole.

8. The First-tier Tribunal properly directed itself to Rule 2 of the 2014 Rules and considered the interests of justice. This though is far from determinative of whether the proceedings were tainted by unfairness.

9. However, looking at all of the circumstances that the First-tier Tribunal were presented with including, but not limited to, the appellants case as put to the First-tier Tribunal, the case that was made for the need to obtain of further evidence, the fact that one of the appellants is a child, that the appellants were legally represented for a lengthy period prior to the hearing as well as the existence of the recent medical evidence, in my conclusion it cannot be said that the hearing before the First-tier Tribunal was procedurally unfair.

10. This conclusion is re-enforced by the absence of evidence before me going to the consequences of the second appellant returning to India by plane and the circumstances which might eventuate upon such journey. The appellants complain about the lack of opportunity to obtain evidence in this regard, the lack of which was, it appears, first highlighted by Mr O'Dair at the time of the hearing before the First-tier Tribunal. They have now had seven months since the date of the First-tier Tribunal's decision to fill that gap, or at the very least to provide evidence to the effect that it is a gap that requires filling. I observe that they have been legally represented throughout. It was not suggested by Ms Dirie that the possibility of obtaining such evidence in the past seven months is a course of action that their experienced legal representatives would not have been alive to, particularly given the terms of the grounds they sought to pursue before the Upper Tribunal.

11. In all the circumstances, I concluded that the proceedings before the First-tier Tribunal were not unfair, but even had I concluded that the First-tier Tribunal ought to have adjourned so as to enable the proposed further evidence to be obtained, I would not now set aside the First-tier's decision on such basis, given the length of time that has passed since its decision and the still current absence of relevant medical or other evidence relating to potential consequences of the second appellant travelling by air to India. I further observe that there has been no application to adjourn the proceedings before the Upper Tribunal in order to obtain such evidence.

12. That is not to say that the appellant cannot now obtain such evidence, but the relevance of doing so for the purposes of a hearing before the Tribunal has now passed. If such evidence is obtained the appellants could, depending on its contents, make a further application to the Secretary of State for leave based upon it. It would, at least at first instance, be a matter for the Secretary of State how she treats such evidence. The Secretary of State does not necessarily have to address such evidence by granting leave but could, for example, provide medical assistance to the appellants during their journey. These would be matters for the Secretary of State to consider.

13. The second ground raised by the appellants is closely linked to the circumstances said to underpin the first ground.

14. Ms Dirie focuses on paragraph 24 of the First-tier's Tribunal's decision and, in particular, the following passage therein:

> "There is simply no evidence to suggest that there is any heightened risk of treatment envisaged under Article 3 in the return journey, and the evidence points firmly to his mother being able to deal adequately with seizures which have been a constant feature of his short life."

15. The grounds point to the evidence given by the first appellant during her oral testimony, which is set out in paragraph 12 of the First-tier Tribunal's decision:

> "There are routine appointments every month but if seizures do occur they have been advised to take their son to hospital."

16. It is submitted that in light of the aforementioned evidence the First-tier Tribunal's reasoning and conclusions, found in paragraph 24 of its decision, are irrational. With respect, I disagree. The First-tier Tribunal considered the evidence as a whole. It was not required to conclude that there would be an Article 3 breach for the second appellant to fly to India on the basis of what the appellant's mother said in her oral evidence.

17. I start by observing once again that there was no medical evidence before the Fist-tier Tribunal, nor is there before me, which supports the contention that the circumstances of the second appellants' journey to India would breach Article 3 ECHR. Furthermore, there is no indication as to what would happen if the second appellant is not taken to hospital,

what happens if he is taken to hospital in such circumstances, how many times he has been taken to hospital, and why the advice, identified by the first appellant in her evidence, was given. There is also no indication as to the consequences of any seizure the second appellant may have had already. All of these features of the evidence are matters which the First-tier Tribunal were, I'm sure, aware of. It was not required to give reasons for reasons. I find that the conclusions of the First-tier Tribunal were perfectly rational, indeed inevitable on the evidence presented. In short, this ground argues that the appeal should have been allowed on the basis of one sentence in the oral evidence given by the first appellant in the absence of any medical evidence supporting or explaining it. This is not the sort of evidence envisaged as being sufficient by the House of Lords in N v SSHD [2005] UKHL 31, or the Court of Appeal in GS [2015] EWCA Civ 40.

18. I reiterate again, however, if the appellants' claims are ever to succeed then detailed medical evidence supporting their case must be obtained. There was no such evidence before the First-tier Tribunal, nor is it before me.

Decision

The decision of the First-tier Tribunal stands. This appeal is dismissed.

Signed:

Upper Tribunal Judge O'Connor