Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01066/2020 (V)
HU/01910/2020

THE IMMIGRATION ACTS

Heard at a remote hearing	**Decision & Reasons Promulgated**
On the 16th June 2021	**On the 29th June 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MR GURDIAL SINGH
MRS JAGDEEP KAUR DUYEA
(NO ANONYMITY DIRECTION MADE)

Appellants

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C. Holmes, Counsel instructed on behalf of the appellant
For the Respondent: Mr M. Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellants, who are citizens of India, appeal with permission against the decision of the First-tier Tribunal (Judge Mack) (hereinafter referred to as the "FtTJ") who dismissed their human rights appeals in a decision promulgated on the 22 December 2020.

2. No anonymity direction was made by the FtTJ and there has been no application for such an order made before the Upper Tribunal.

3. Permission to appeal was issued and on 24 February 2021 permission was granted by FtTJ Haria.

4. In the light of the COVID-19 pandemic the Upper Tribunal (Judge Pitt) issued directions on 9 March 2021 inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could be by way of a paper hearing. Both parties have indicated that they considered that an oral hearing by way of a remote hearing should take place. On the 29 April 2021 UTJ Allen issued directions listing the appeal as a remote hearing in the light of the submissions made by both parties. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

5. The hearing took place on 16 June 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I confirmed with Mr Holmes that a bundle of documents had been sent to the Tribunal by email. It consisted of material which had not been before the FtT and Mr Holmes confirmed that it was not relied upon for this hearing. Mr Diwnycz also confirmed that there was a short Rule 24 response prepared by his colleague and provided a copy to the Tribunal and Mr Holmes.

6. I am grateful to Mr Holmes and Mr Diwnycz for their clear and helpful oral submissions.

Background:

7. The history of the appellants is set out in the decision letters and the decision of the FtTJ. The appellants are citizens of India and are husband and wife. They have 2 children, A born in January 2018 and H born in February 2019.

8. The 2nd appellant entered the UK on 26 May 2009 with entry clearance valid until 30 November 2010. Her leave was extended as a Tier 1 migrant until 17 December 2012 and on 15 December she applied for leave to remain as a student. This was refused in March 2013 with a right of appeal. She was appeal rights exhausted on 27 March 2013. In April 2013 she made an application which was out of time but within 28 days of her being appeal rights exhausted for leave to remain as a student which was granted from December 2013 until 26 September 2016.

9. A further application was made in time as a Tier 1 migrant which was granted on 19 September 2014 until 19 October 2017.

10. However on 3 October 2016 the respondent curtailed her leave as a result of her educational sponsors licence being revoked. The leave was curtailed to expire on 27 January 2017.

11. On 26 January 2017, the day before her curtailed leave would expire, she applied for indefinite leave to remain outside the rules on compassionate grounds. The application was refused on a decision dated 30 June 2017 on the basis that she did not meet the requirements under the rules and that there were no compelling reasons or exceptional circumstances to justify leave to remain outside of the rules. She lodged an appeal, and the appeal was dismissed by the First-tier Tribunal (Judge Pickup) in a decision promulgated on 25 October 2017.

12. First-tier Judge Pickup set out his conclusions as follows:

    (1) "The appellant cannot meet the requirements of Appendix FM, as conceded by Mr Caswell. She does not assert that she meets 276ADE in relation to private life, but in any event, she has not demonstrated that there are very significant obstacles to her integration, or that of her husband, in India.

    (2) I am not satisfied that either the appellant or her husband have been disowned by their own family or that they face hostility from either side of the family (at [34]). I also find the husband's continuing contact with his family, regular telephone calls, inconsistent with the claim to have been disowned by them (at [38]).

    (3) I also note that the appellant and her husband have been able to return to India without difficulty from the family. I reject the claim that this was because they did so in secret. The appellant spent 3 weeks in India at the time of her marriage before returning to the UK and he has said he spent 4 weeks in India in 2015 on vacation without any difficulty from his family. She has also said she returned every year after marriage to visit him in India. That they were able to do this undermines the claim that they would not be able to return to India without being at risk from their respective families (at 39]).It also undermines the claim that they could not relocate elsewhere in India. On the evidence, I do not accept that they are at any risk on return, and thus there is no need to relocate (at [40]). I am in fact satisfied that it is an entirely contrived claim (at [41]).

    (4) Neither the appellant nor her husband has any settled status in the UK. They are both from India, which is where they have spent the vast majority of their life and the country of their religious, ethnic, and family background. They both have family in India, and I have rejected the claim to be estranged from either parental family. They thus have social, family, and cultural ties to India.

(5) The husband has qualifications and professional work experience in India. Similarly, the appellant was in the nursing profession and has obtained further nursing qualifications in the UK. Together with her experience in working here, she will be in a good position to seek work in India, once her child has been weaned.

(6) The relationship between the appellant and her husband as far as family life in the UK is concerned was precarious from the outset, so that there is no legitimate entitlement or expectation to be able to continue family life in the UK. As they both have no status they can both return to India together and continue family life there without interference.

(7) In considering the public interest, I have to take into account section 117B of the 2002 Act, as amended, that it is in the public interest. The statute provides that little weight should be given to a private life developed whilst immigration status is precarious, as it was in this case. It is also clear that whether or not covered by s117B, the family life as related to life in the UK was also always in a sense precarious, so that they had no legitimate expectation of being able to continue that family life in the UK.

(8) Having taken account of the whole facts and circumstances of the appellant and her husband, giving careful consideration in the round to all of the evidence, documentary and oral, and the submissions made, I find that there are no compelling reasons to justify granting leave to remain outside the Rules, or that would suggest that removal would be unjustifiably harsh. In fact, there is nothing compelling at all about this case."

13. Permission to appeal by the First tier and the Upper Tribunal was refused. The 2nd appellant became appeal rights exhausted on 17 September 2018 and thus a continuous period of leave ended on 17 September 2018.

14. On 26 September 2018 she made a further out of time application for leave to remain outside of the rules which is refused on 8 February 2019.

15. Further application was made on 22 February 2019 for leave to remain outside of the rules and the application was later varied but was voided on 18 June 2019.

16. On 12 June 2019 she applied out of time for indefinite leave to remain under the rules relating to long residence and on article 8 grounds.

17. The respondent made a decision on 21 January 2022 refused leave to remain in the UK. It was this decision that formed the basis of the appeal before Judge Mack.

18. In relation to the 1st appellant, who is the 2nd appellant's spouse, he entered the United Kingdom on 5 May 2011 with entry clearance as the partner of the 2nd appellant with leave valid until 17 December 2012. The stated history was that

the 2nd appellant proposed the 1st appellant prior to her entering the United Kingdom and that she had returned to India to marry him in 2009.

19. All further applications that were made in relation to the 1st appellant were on the basis that he was a dependent of his wife. On appeal before Judge Pickup, he was a dependent on his wife's application made on 26 January 2017.

20. The 1st appellant's appeal rights were deemed exhausted with effect from 3 July 2018.

21. On 11 July 2018 the 1st appellant made an application for leave to remain in the UK outside of the rules on compassionate grounds which was refused on the 8th of February 2019 with an out of country right of appeal.

22. On 22nd February 2019 the appellant was included as a dependent of his wife and an application for leave to remain in the UK which was voided as inappropriate on 18 June 2019.

23. On 17 June 2019 the appellant made an application for leave to remain in the UK under family/private life tenure route. This is refused on 27 September 2019 with no right of appeal.

24. On 10 October 2019 the appellant made an application for leave to remain in the UK outside of the rules on compassionate grounds on the basis of private life in the UK. This resulted in a decision of the respondent dated 6 January 2020 and formed the basis of the appeal before Judge Mack.

The decision of the FtTJ:

25. The appellants each appealed the decisions made by the respondent on 6 January 2020 (1st appellant) and 21 January 2020 (2nd appellant)., and the appeals came before the FtTJ on the 16 December 2020.

26. In a decision promulgated on 22 December 2020 their appeals were dismissed. The FtTJ heard evidence from both of the appellants and considered documentary evidence, including the medical evidence that had been advanced on the appellants' behalf. It had been conceded on behalf of the appellants that they could not meet the Immigration Rules (either under Appendix FM or under paragraph 276ADE, and in the case of the 2nd appellant could not meet the long residence requirements and also that the 2 children born in 2018 and 2019 were not "qualifying children" under Appendix FM or S117B (6) (see [57]). It was confirmed that the only issue before the tribunal was the application of article 8 "outside of the rules".

27. The FtTJ undertook an analysis of the evidence advanced on behalf of the appellants, taking into account their claim that they had no family they were in contact with in India, they had built a private and family life in the UK and would be unable to leave the country and would be severely disadvantaged if

they returned to India (at [35)) and that in relation to their children, both born prematurely, H had medical conditions which made him unfit to travel and would require medical treatment in the UK.

28. The judge took as his starting point, the previous factual findings made by FtTJ Pickup at [76] –[80] and upon the claim maintained that both appellants had no contact with their families in India, the judge rejected that claim as "unlikely and not credible" for the reasons set out at [80] and thus concluded that both appellants had family in India with whom they were in contact with (at [80]). The judge went on to find that the appellant had family in India who would be able to provide them with support on return who had also provided substantial financial support whilst they been in the UK and that they had "close ties with their relatives" and they had visited family in India on a number of occasions. The judge found that those relatives "will not immediately withdraw their support when the appellant return to India" (at [90]).

29. In relation to the medical evidence, the judge summarised this at [68 – 75]. The judge rejected the claim made that H's life would be at risk if he travelled out of the UK and found that there was medication suitable for both children which could easily be obtained. The judge did not find that H's medical condition was at such a level that is life would be in danger if unable to receive treatment in the UK and that the evidence did not support that H would be unable to receive effective treatment in India (at [71]). The judge considered the evidence given by the 2nd appellant that he was awaiting "life changing surgery" but gave reasons at [74] that that was a deliberate and over exaggeration as to his medical issues and at [75] consider the issue of cost of treatment.

30. At [81] the FtTJ summarised the relevant immigration history of each of the appellant's, the length of residence and the basis of that residence. He concluded that when the 2nd appellant came to United Kingdom as a student and on a temporary basis she had no legitimate expectation of being able to remain beyond her studies. The marriage was entered into in India during her student leave in the UK and whilst he had joined in 2011 it was as a dependent and with the expectation that both would return on conclusion of her studies. At [91] the judge took into account that they had leave to enter and remain on the 2nd appellant's status as a student and that was not a "route to settlement" and they were aware that when they developed any private life or ties they had "no expectation of remaining in this country".

31. The FtTJ concluded at [92] that the appellants had over significantly exaggerated the medical conditions of H and that there was no evidence that would indicate H needed life changing surgery or that travel would be life-threatening or that he could not receive treatment in India. The judge found also at [92] that both appellants had employment prospects upon return in India.

32. The judge considered the best interests of the children involved at paragraphs [94 – 96] as a primary consideration and considered this in the context of the circumstances of H and the medical evidence previously summarised. The FtTJ rejected the suggestion that if he travelled his life would in danger or would be in jeopardy as neither remotely reasonable and was not evidenced. The FtTJ found that the appellant had over exaggerated his medical condition and had not provided evidence that H could not receive treatment in India.

33. As to the issue of proportionality, taking into account all of the factors outlined in the earlier assessment, and taking into account the public interest considerations under section 117B, and in the light of H's needs and circumstances, the judge concluded that the decisions of the respondent to refuse leave to remain was proportionate.

34. The judge therefore dismissed their appeals.

The hearing before the Upper Tribunal:

35. Mr Holmes, Counsel on behalf of the appellant, who did not appear before the FtTJ but had drafted the grounds, relied upon those written grounds of appeal. There were no further written submissions. There was a Rule 24 response on behalf of the respondent dated 23 March 2021.

36. I also heard oral submissions from Mr Holmes and Mr Diwnycz. I confirm that I have taken them into account when reaching my decision. I intend to consider those submissions when addressing the grounds of challenge.

Ground 2:

37. Mr Holmes began his submissions with Ground 2. Mr Holmes submitted that the FtTJ's consideration of the best interests of the appellant's children is deficient and that the judge had not reached any conclusions as to what their best interests were or whether it was in the children's best interests for their treatment in the UK to end.

38. In his oral submissions, he referred to the decision at paragraph [95] and that whilst there was some discussion as to their best interests there, the reader would not be clear as to what conclusion the judge had reached. Thus he submitted this was a material omission and thus a material error of law.

39. Mr Diwnycz relied upon the rule 24 response. On behalf of the respondent it is submitted that the best interests of the appellants children would be to remain with them in their family unit given there is no intention of splitting them up. It was argued that this was not in dispute between the parties, but rather, the issue was, taking into account the importance of the children remaining in a family unit; whether this should be in the UK or in their home country. The judge took this into account alongside the medical issues that were relevant to the appeal. The judge records the relevant evidence and the submissions made

(decision of FtTJ at paragraphs 64, 66) which form the basis of the considerations that were undertaken by the judge (see paragraphs 67 – 75, 92 – 95). There is nothing in the evidence or grounds of appeal to demonstrate why the appellants' children could not travel and live in India, beyond a preference to remain in the UK or to show why their parents would not be able to continue to meet their best interests and that the family would be able to obtain any necessary treatment for the child on return.

40. I have given careful consideration to the grounds of challenge and have done so in the light of the decision of the FtTJ and the evidence before the FtTJ. Having done so I am not satisfied that there is any error in the assessment made. Whilst Mr Holmes has directed the tribunal's attention to paragraph [95], in my judgement it is necessary to consider the decision as a whole and the basis upon which the appellant's claim was advanced.

41. The FtTJ set out at paragraph [35] the basis of the claim made on behalf of the appellants and at [57] it was conceded that the family could not meet the Immigration Rules as there were no very significant obstacles to the family's reintegration to India and the children were not "qualifying children" for the purposes of Appendix FM (at [85]).

42. In this context, and in the light of the analysis of the evidence concerning the circumstances in India upon the family's return, the FtTJ reached the following factual findings:

    (1) both appellants have family members in India whom they are in contact with (at [80]).

    (2) The appellants had returned to India on a number of occasions including lengthy holidays without adverse incident. This demonstrates continuing ties to their home country (at [80(iii]).

    (3) The appellants have family in India who will be able to provide them with support on their return and that while in the UK the family have been found to have received substantial financial support from family members and they have been found to have close ties with their relatives. The relatives will not immediately withdraw their support when the appellants return to India (at [90]).

    (4) Both appellants would be able to find employment. The judge rejected the 2nd appellants claim that there was no provision in India for work in the care sector and found that she had achieved educational and professional certificates whilst in the UK. In relation to the 1st appellant the judge found that he had worked as a computer operator in India and had undertaken care work in the UK; he had skills that he could use to provide for the family in India (at[92]).

    (5) The 1st appellant had lived in India until he was 28 years of age and the 2nd appellant until she was 23 years of age both having lived there for their childhoods and formative years; they had continuing cultural language

and social links to India and there were no very significant obstacles to the integration (at [103]).

(6) The 2nd appellant had been in the UK since 2009 and her husband since 2011 as her dependent. The 1st appellant came as a student and had no legitimate expectation of began to remain beyond studies in the UK; it was not clear when her studies concluded but leave was curtailed when her sponsor's licence was revoked. She did not apply to remain further as a student.

(7) The marriage was entered into during the 2nd appellant's student leave in the UK and her husband joined in the UK in 2011 as a dependent with the expectation that both would return to India on conclusion of her studies.

(8) The 2nd appellant is no longer a student with no legitimate basis to remain in the UK and that the appellants only had leave to enter and remain in the UK based on the 1st appellant's status as a student which is not a route to settlement and they were aware when they developed any private life or ties that they had no expectation of remaining in the United Kingdom (at[80], [91], [100]).

(9) Neither appellant had any criminal convictions or circumstances such as deception or dishonesty (at [98]).

(10) In reality refusal of leave would not prevent either appellant from continuing family life together or with the children (at [99]).

43. The FtTJ summarised the medical evidence at [69]-[75]. There is no suggestion in the grounds, or the oral submissions made that the analysis of the medical evidence was incorrect or that he failed to properly have regard to the medical evidence that was presented to him.

44. Whilst the grounds referred to both children, in fact the medical evidence relied upon related to the circumstances of H born in 2019. The reference to A who was also born prematurely in 2018 referred to his "skin issues" but there was no reference to any further medical problems as a result of his birth or otherwise (at [69]).

45. In relation to H, he was born at 31 weeks and has a small ventricular septal defect in his heart which is under the cardiologist. He had been referred to physiotherapy as he was having problems grasping and holding things and it was stated he would need a follow-up for 2 years from a neurological aspect. It was also noted that he had recently suffered reflux. In addition, H had a diagnosis of mild hearing loss likely due to middle ear fluid (at [71] and [72]).

46. The FtTJ concluded that there had been no evidence from any specialists but from the GP practice and that whilst the letter from the appellant solicitors referred to H suffering from reflux and that the "child's life was in jeopardy" (recorded at [69]), the judge considered at [71] that reflux would not mean that during travel the condition would risk the child's life and that if that had been

the case there would have been medical evidence in support of such a contention. The judge concluded that reflux was a "reasonably common condition which would not make travel life-threatening" and there was no evidence to demonstrate that. In respect of the medication that H was taking (cream and Gaviscon at [73]), the FtTJ concluded that the medication suitable for children could easily be obtained. As to the reference in the medical evidence to a neurological follow-up the judge found that rather than regular appointments this indicated that H's medical conditions were "not at a pitch that his life would be in danger if he were unable to receive treatment in the UK." The judge found that despite the evidenced medical conditions of H, the evidence did not support that either he or the appellants will be unable to receive effective treatment in India.

47. At [74] the judge addressed the evidence given by the 2nd appellant that H was "awaiting life changing surgery". The judge found that he had not been presented with "any medical evidence other than that identified and confirmed with the appellants in the presence of their representative. It is simply not credible that if H had a hearing problem approaching that describe his parents then, notwithstanding the current pandemic, I find that there will be documentary evidence of this, and I would have been presented with the same." The judge concluded that the evidence given that H needed "life changing surgery" was a "complete and deliberate over exaggeration of his medical issues."

48. In terms of whether treatment was available in India for H, the judge observed that when cross-examined the 1st appellant stressed the cost but eventually conceded that he hadn't asked or checked about this issue. The judge also rejected the 2nd appellant's evidence that she would not know who to contact to obtain treatment for the fluid behind H's ears. The judge found that she had a BSC in nursing and it was not credible that she would have "so little knowledge of treatment".

49. Whilst Mr Holmes refers to both children in the context of medical treatment, it is plain from the evidence that the thrust of the case advanced related to H and the only issue relating to A was having "skin issues" (at [69]).

50. The conclusions reached by the judge were summarised at [92]. The judge found that the appellants but particularly the 2nd appellant had significantly over exaggerated the medical conditions of H. The judge found that he was not presented with evidence that would indicate H needed life changing surgery or that travel will be life-threatening or that he could not receive treatment in India and that if that were the position he would have been presented with evidence in support.

51. It was against that factual background and analysis of the evidence that the judge addressed the best interests of the children and properly stated at [94] and [95] that they were a "primary consideration".

52. At [95] the judge referred to the medical evidence relevant to H stating, "H was born prematurely, and there is evidence that he has medical conditions as described from the evidence above." I pause at this stage because Ground 3 (a) asserts that the judge failed to have regard to "H suffering from a small ventricular septal defect in his heart" and that it did not feature in the assessment. That is plainly incorrect as the reference made by the judge at [95] to the "medical conditions as described from the evidence above" necessarily included the evidence relating to the heart defect which the judge had set out previously at [71].

53. At [95] the judge took into account the medical evidence that he had previously summarised and that when considering H's best interests "I have not been presented with evidence that he cannot receive adequate medical treatment in India. "As to the suggestion on behalf of the appellants that travel to India would place his life "in jeopardy" the judge found that the suggestions made were "neither remotely reasonable and is not evidenced". He concluded "I have found that the appellants have over exaggerated H's medical conditions and I have not been provided with evidence he cannot receive treatment in India."

54. There had been no dispute that the best interests of both children given their young ages (having been born in 2018 in 2019) would be for them to remain with their parents and their family unit; neither child had established a private life independent of their parents.

55. The issue that the judge had to consider was whether the medical issues of H in were such that his best interests were to remain in the UK. In the light of the factual findings made by the FtTJ it is plain that H's circumstances, including those relating to his medical condition, did not lead to the conclusion that they could not be met in India.

56. When looking at the analysis of the evidence and the factual findings made by the judge there was no evidence to suggest it was not reasonable to expect both of the children to return to India with their parents as a family unit or that such a return would be contrary to their best interests. As the respondent submits there was nothing in the evidence nor in the ground to demonstrate why both children's needs (medical or otherwise) could not be met in India or to show why their parents could not continue to meet their best interests and their needs and that the family would be able to obtain necessary treatment on return.

57. The assessment of the best interests of a child must be taken conducted by reference to the real-world context in which the child's parents find themselves. In the present matter that context is as follows. Both parents are citizens of India. Neither had leave to remain in this country; that is the context within which the assessment of their child's best interests was to have taken place and in the light of the factual findings that I have summarised earlier.

58. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath endorsed what was said in EV (Philippines) v The Secretary of State for the Home Department [2014] EWCA Civ 874 concerning this issue at [58]. Lord Carnwath said that the approach of the Court of Appeal in EV (Philippines) to assessing the best interests of children was sound. At [58] the Court of Appeal said:

> "In my judgment, therefore, the assessment of the best interests of the must be made on the basis that the facts as they are in the real world if one parent has no rights to remain, but the other does, that is the background against which the assessment is conducted. If neither parent has the rights to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it right to expect the child to follow the parent with no rights to remain to the country of origin?"

59. On the factual findings made on the evidence by the FtTJ, for this family and children the "real world" analysis in which they find themselves is such that it would not be unreasonable or lead to unjustifiably harsh consequences for them to be expected to return to India. Their best interests were plainly to remain with both their parents. The factual assessment made by the FtTJ was that as citizens of India, the appellants would be able enjoy the full extent of the rights to which citizens of India are entitled. They are familiar with the language, the culture, and the customs. They will be well-placed to bring their children up within the wider cultural context of their own nationality and ethnicity and in the case of H would be able to undertake any necessary medical treatment there as required. Those were findings open to the FtTJ to make.

60. Even if the judge had addressed in greater terms the best interests of the children particularly H, in the light of the factual findings that there was no evidence that treatment was unavailable in India , and the FtTJ's rejection of the claim that H's circumstances were "life threatening " I cannot see that on the facts of this case any different conclusion could have been reached. In my judgment that analysis would have admitted of only one conclusion: that it would be reasonable to expect the appellants' children to return to India with them, and their best interests were therefore to be with their parents, wherever they were.

Ground 3 (b):

61. I now turn to consider the remainder of ground 3 (b) having addressed ground 3 (a) above.

62. It is submitted on behalf of the appellants that the judge failed to have regard to a material matter namely that the 2nd appellant had 9 years and 3 months of lawful residence and that this was not properly weighed in the balance in favour of the appellants.

63. In my judgement this submission is without merit. The judge gave express consideration to the history of both appellants and was aware of the 2nd

appellant's length of residence which had concluded on 17 September 2018 following the dismissal of her appeal before Judge Pickup in October 2017 and after permission had been refused by both the First tier and the Upper Tribunal. She was appeal rights exhausted on 17 September 2018 thus her period of lawful leave ended on 17 September 2018. The FtTJ was plainly aware of her history at [44] and referred to her leave at paragraph [80]. The judge was entitled to take into account that while she had lawful leave in the UK for that period of time, she could not meet the Immigration Rules (on the basis of either 10 years continuous lawful residence) or on the basis of 20 years residence under paragraph 276ADE, and that the private life established was at a time when both she and her husband's leave to remain was on a temporary basis and that the 1st appellant's leave was based on his wife's status.

64. I agree with the submission made on behalf of the respondent that the judge had adopted the previous findings of fact which also had regard to the length of the appellants residence (see paragraphs 57, 77 – 81, 89 – 91, 100, 103). As such, the judge cannot be criticised for finding that the appellants could return notwithstanding the length of residence.

65. The matter of weight attached to the period of lawful residence was entirely a matter for the judge and was required to be seen in the context of the circumstances as a whole. Their residence was but one factor that the tribunal considered in the round and would have only carried limited weight given the precarious nature of their residence. Applying subsection 5; little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. In Rhuppiah v SSHD [2018] UKSC 58 the Supreme Court held that any leave other than indefinite leave is "precarious".

66. Consequently it has not been demonstrated that there was any such failure to take account of the 2nd appellant's period of lawful residence in the UK.

Ground 1:

67. Dealing with ground 1, it is submitted by Mr Holmes that the judge erred by holding against the appellant the previous adverse credibility findings of Judge Pickup and then further holding against the appellant a failure to maintain what the previous tribunal had found to be untrue. Mr Holmes refers to paragraph 81 (vi) of the FtTJ's decision.

68. It is submitted that the judge had already considered the adverse findings of the previous tribunal and weighed them against the appellant but suggested that the appellant's failure to maintain what the tribunal previously found to be untruthful again damaged the appellant's credibility. Thus it was submitted that this was "double accounting" and the judge's approach to credibility was therefore flawed.

69. At paragraph 81 (vi) (in relation to the 1st appellant only), the judge appeared to state that the first appellant had not referred to the previous assertions made of

"family issues in India" and that as he had previously asserted a set of circumstances which he now did not mention, it damaged his credibility.

70. This has to be seen in the context of the claim advanced before him. The judge set out the accounts of both appellants that they had no contact with their families in India (at[80]) and it seems to me that the judge was making the point that as he had made no reference in his witness statement to any problems (either previously or now) that the failure to make reference to his previous claim in his recent statement damaged his credibility.

71. However even if it were correct that the judge gave the appearance of holding an earlier adverse finding against the 1st appellant in 2 ways, it does not demonstrate that the overall decision of the judge concerning proportionality was not open to the judge to make. The point made at paragraph 81 (vi) does not appear to have had any or any great weight in the assessment of proportionality.

72. Furthermore, when assessing the credibility of both appellants, the FtTJ identified other credibility issues which were not set out at paragraph 81.

73. At [80] the FtTJ properly took as his starting point the factual findings made by Judge Pickup which was set out at paragraphs 76 – 80, which included the reference to "numerous adverse credibly findings" and that he was not satisfied that "either the appellant or her husband had been disowned by their own family or that they face hostility from either side of the family." Judge Pickup found that they were "no more than economic migrants" had come to the UK to better lives in the UK. FtTJ Mack cited that Judge Pickup not only rejected their account have been disowned by their families but also found that their claims had been "contrived".

74. Applying the principles in Devaseelan, the FtTJ took into account those factual findings as his "starting point" but was entitled to consider that in the light of the claims made before him. The judge stated, "I note that the hearing before me both appellants maintained that they do not have any contact with their families in India." The judge then undertook an analysis of their evidence given before him and that notwithstanding that claim, the 1st appellant was able to state that his wife had nephews although became vague and when the 2nd appellant gave evidence it became clear that the nephews were not born when she stated she stopped having contact with the family. The judge considered that her explanation for the discrepancy was "unlikely and not credible and I do not accept that both the appellants would conclude her brother had 2 children based on an apparent call from someone who saw in the children." The judge also considered that neither appellant could give a good reason for the many trips to India and reached the conclusion that the likelihood is "the reason they travelled there in 2009, 2011, 2014 and 2015 is to see family for at least some of the time. Other reference was made to oral evidence given concerning his wife's student fees and being paid for by her parents. The judge concluded on his

analysis that "on the balance of probabilities both appellants are maintaining the fictitious narrative that was previously found to lack credibility and equally I found that it was not a true reflection of the contact between extended family in India."

75. A further adverse credibility point that was made related to the appellant's description of the medical evidence and the judge found that it was [74] and [95] that the appellant had over exaggerated H's medical issues. At [75] the judge did not find the 2nd appellant's evidence credible on the issue of treatment available in India given her qualification in nursing.

76. Therefore, and for those reasons, I am not satisfied that even if there was an error at paragraph 81(vi) it was material to the outcome given the other adverse credibility issues that the judge had identified.

77. Drawing those conclusions together, for the reasons given I am not satisfied that the grounds of challenge on behalf of the appellants are made out. It therefore follows that it has not been shown that the decision of the FtTJ involved the making of an error on a point of law. I dismiss the appeal and the decision of the FtT shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT shall stand.

Signed *Upper Tribunal Judge Reeds*
Dated 20 June 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email