Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: AA/03703/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 5 November 2014	**On 7 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAILAINAYAGI SIVAPATHASUNDRAM

Respondent

Representation:
For the Appellant: Ms S Sreeraman, Home Office Presenting Officer
For the Respondent: Mr R Rai, instructed by Waran & Co Solicitors

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal

2. The appellant is a national of Sri Lanka. She has been in the UK since 2001 and she claimed asylum in 2011. Her application for asylum was refused by the Secretary of State on 19 May 2014. The Secretary of State also decided that the

removal of the appellant would not breach her right to private and family life under Article 8 of the European Convention on Human Rights. The appellant appealed to the First-tier Tribunal on both grounds. First-tier Tribunal Judge G A Black dismissed the appeal on asylum grounds but allowed it under Article 8. The decision in relation to the asylum issue is not challenged. The Secretary of State now appeals with permission to this Tribunal.

3. The application the subject of this appeal was made in 2011, before the introduction of the changes to the Immigration Rules introduced by HC194 which came into effect on 9 July 2012. The First-tier Tribunal Judge decided that as the application was made before 9 July 2012 the 'new Rules' did not apply. The Judge went on to consider the Article 8 appeal in accordance with the case law and outside of the Immigration Rules. The Secretary of State contends that the First-tier Tribunal Judge erred in so doing because she did not consider the approach taken by the Court of Appeal in Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558. Ms Sreeraman relied on paragraphs 40 and 41 of the Court of Appeal's decision in Haleemudeen and submitted that the Judge materially erred in failing to consider the requirements of the Immigration Rules.

4. However there is a tension between the decision in Haleemudeen and that of the Court of Appeal in Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402. Ms Sreeraman submitted that the decision in Edgehill was limited to private life and to the facts of that case. She submitted that the transitional provisions of HC194 which were relied on by the Court of Appeal in Edgehill were only relevant where there is an equivalent provision in the 'old Rules' which covers and appellant's situation. She submitted that an Article 8 application made prior to 9 July 2012 was not provided for in the Rules and could therefore be distinguished from Edgehill. She further submitted that the Judge's error was material as the Judge had not undertaken an adequate assessment of the public interest.

5. Mr Rai submitted that the Judge was right to consider the appeal under Article 8 and not under the 'new Rules'. He submitted that the arguments made by Ms Sreeraman were similar to those put forward and rejected in Edgehill. He submitted that the Court in Haleemudeen did not consider the transitional provisions which apply in this case. He submitted that there was no material error in any event as the Judge considered all relevant factors and that, even if the Judge had been obliged to consider paragraph 276ADE of the 'new Rules' she could have decided to go on to consider Article 8 due to the exceptional circumstances in this case.

6. I accept Mr Rai's submission that the Court of Appeal in Edgehill rejected submissions similar to those put forward by Ms Sreeraman. In Edgehill Jackson LJ asked whether it is lawful to reject an Article 8 application made before 9 July 2012 in reliance upon the applicant's failure to achieve 20 years'

residence, as specified in the new rules. The relevant extracts from his judgment under that heading are as follows;

> "24. Mr Charles Bourne, for the respondent, points out that the old rule 276B provided that 14 years' continuous residence was a substantive ground upon which the Secretary of State may grant indefinite leave to remain. The new rule 276ADE, by contrast, specifies requirements to be met by an applicant for leave to remain under ECHR article 8. He goes on to submit that an application for leave to remain under ECHR article 8 is not an application under the rules. Therefore the second paragraph of the transitional provisions does not apply to it.
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> 25. This interpretation, which is advanced upon behalf of the Secretary of State, is one of some subtlety. I must confess that it did not occur to me when I was reading the transitional provisions. Since rule 276ADE regulates article 8 applications, it might be thought that such applications are made under the rules.
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> …
> 29. Aided by this guidance, I now return to the central issue in the two current appeals. Mr Bourne submits that applications made under article 8 before 9th July 2012 did not fall under any of the Immigration Rules, either old or new. The decision maker simply had to apply article 8, taking into account the wealth of guidance provided by Strasbourg and the domestic courts.
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> 30. The next stage in Mr Bourne's argument is that appellate tribunals make article 8 decisions by reference to the current state of affairs, not by reference to the state of affairs when the Secretary of State reached her decision. In both of the present cases the current state of affairs included new rule 276ADE, providing a requirement for 20 years' continuous residence.
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> 31. I admire the dexterity of this argument. Nevertheless it produces the bizarre result that the new rules impact upon applications made before 9th July 2012, even though the transitional provisions expressly state that they do not do so.
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> 32. The Immigration Rules need to be understood not only by specialist immigration counsel, but also by ordinary people who read the rules and try to abide by them. I do not think that Mr Bourne's interpretation of the transitional provisions accords with the interpretation which any ordinary reader would place upon them. To adopt the language of Lord Brown in *Mahad*, "the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State's administrative policy," is that the Secretary of State will not place reliance on the new rules when dealing with applications made before 9th July 2012.
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> 33. Accordingly, my answer to the question posed in this part of the judgment is no. That answer is subject to one important qualification. A mere passing reference to the 20 years requirement in the new rules will not have

> the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision."

7. The Court of Appeal in Edgehill therefore considered the transitional provisions and similar submissions to those made by Ms Sreeraman. The Court of Appeal's decision is clear. In a case such as this where the application was made before 9 July 2012 the transitional provisions meant that the application, and the appeal, should be considered under the 'old Rules'. The First-tier Tribunal Judge therefore made no error in deciding to go straight to an Article 8 assessment in this case.

8. In any event I also accept Mr Rai's submission that in her assessment of Article 8 the Judge took all relevant factors into account, including the finding that, although it became apparent in 2005 that the EEA family permit on which the appellant had entered the UK was false, the appellant believed it to have been genuine; that the Secretary of State took no steps thereafter to remove the appellant, a period of over nine years, during which she continued to report regularly as required by the Secretary of State. The Judge also took account of the fact that the appellant had no meaningful ties in Sri Lanka as she had not lived there since 1998. These were all factors which could have led the Judge to conclude that there were arguably good grounds for considering the appeal outside of the Immigration Rules had she considered them. These were also relevant factors to be taken into account in the Judge's proportionality assessment under Article 8. The Judge's assessment under Article 8 was within the range of permissible decisions open to her.

Conclusions:

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

Signed Date: 5 November 2014

A Grimes
Deputy Judge of the Upper Tribunal