



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09056/2014
IA/09062/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 February 2015

Determination Promulgated
On 24 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE APPELYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GANASEKARAM KATHIRAMAPPODY First Respondent
MRS NANDINE GANASEKARAM Second Respondent
(ANONYMITY ORDER NOT MADE)

Representation:

For the Appellant: Ms L. Kenny, Home Office Presenting Officer.
For the Respondents: Ms K. Rahman, Counsel.

DECISION AND REASONS

1. No application for anonymity has been made in these proceedings and there is nothing before me today to suggest that such an order is appropriate.
2. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were

known before the First-tier Tribunal, with the Secretary of State referred to as “the respondent” and Mr Kathiramappody and Mrs Ganasekaram as “the appellants”.

3. The appellants are husband and wife and citizens of Sri Lanka. They were born respectively on 21 September 1951 and 17 April 1960.
4. The appellants made an application on 17 December 2013 to vary their limited leave to enter or remain in the United Kingdom under the European Convention on Human Rights. The respondent’s decision to refuse the application was dated 29 January 2014 coupled with a direction for removal under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellants appealed and, following a hearing at Taylor House, Judge of the First-tier Tribunal Moore, in a determination promulgated on 23 October 2014, dismissed the appellants’ appeal under the Immigration Rules but allowed it on human rights grounds.
5. The respondent sought permission to appeal. Her application was considered by Judge of the First-tier Tribunal Lever who granted it. His reasons for so doing are:-
 - “1. The Respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Moore) who, in a determination promulgated on 25 Oct 2014 allowed the Appellant’s appeal to remain as the parents of an adult son settled in the UK.
 2. The grounds assert that the judge did not properly engage with the credibility issues nor deal properly with proportionality under A8 ECHR.
 3. The Appellants aged 62 and 54 entered the UK in July 2013 as visitors. They claimed that shortly after arrival in the UK that their home, land and business in their home country was taken over by unknown people and they applied to stay in the UK as a result.
 4. The judge did not appear to deal fully with issues of credibility. He refers at [28] and [33] to these people being Sinhalese, possibly LTTE breakaway group and the Appellant fearing the government. There is a reference by the judge to A2/3 ECHR and a somewhat unusual reference to the standard of proof at [35].
 5. In considering A8 ECHR outside of the rules the judge notes quite properly at [37] the short time they have been in the UK and accordingly the lack of development of family or private life. However the judge allows the appeal under A8 ECHR and also appears to place much reliance upon medical conditions of the Appellants without reference to the high standards in such cases nor any real consideration of the public interest.
 6. There are arguable errors of law in this case.”
6. Thus the appeal came before me today.

7. Ms Kenny relied upon the respondent's grounds, asserting that the judge had made a material misdirection of law in two respects. Firstly, so far as credibility is concerned the judge accepted the evidence of the appellants to the effect that their home in Sri Lanka had been taken from them and that this happened when they arrived in the United Kingdom. The judge does not refer to any independent corroborative evidence but accepted the accounts of the appellants and their neighbours regarding these problems. Ms Kenny argued that the evidence in this regard was self-serving and that there was an absence of any enquiries being made by the appellants through official channels. Further, that the judge has failed to engage with the overall credibility issues in the appeal. In her oral submissions Ms Kenny argued that the absence of corroborative evidence impacted upon the weight that could be attached to the appellants' evidence overall.
8. Secondly, it is argued that the judge erred in relation to the proportionality exercise and in particular failed to take account of the public interest in coming to his conclusions. Beyond that there is an absence of a proper proportionality assessment rendering the decision on Article 8 grounds unsound. It is not inherently clear that the appellants would be unable to readapt to life in Sri Lanka owing to their claimed circumstances. In the alternative the respondent argues that the appellants have lived in their country of origin for the majority of their lives and could seek assistance from UK based relatives in acquiring further property, if they have lost their own. A temporary period of upheaval is, on the facts, not disproportionate to the legitimate aim pursued. The judge noted that the appellants have not formed sufficient private/family life in the United Kingdom based on the length of their residence and therefore as such the respondent asserts that it cannot be disproportionate to result in a breach of the appellants' Article 8 rights. Ms Kenny emphasised that it was the proportionality issue that was the main thrust of her argument and that essentially this was an appeal allowed on medical grounds without taking into account the high threshold that is demanded in such cases. She referred me to paragraph 37 of the judge's determination where the judge states:-

"It is the physical and mental condition of the lead appellant which drive me to a particular conclusion in this appeal."

9. Ms Kenny emphasised the absence of any consideration of the high threshold required in medical cases within this particular paragraph of the judge's determination and also a lack of discussion in relation to the public interest.
10. In reply Ms Rahman submitted that there was no error in the judge's approach to assessing credibility of the appellants' claim. There was nothing wrong in him accepting the evidence of the appellants that a couple of months after their arrival into the United Kingdom and when ready to return to Sri Lanka they were informed by a neighbour that their house and land had been taken over by Singhalese people. Not only did the judge take account of the oral evidence but also documentary material, including a letter from the daughter of a female who was looking after the appellants' property in their absence. As to Article 8, Ms Rahman argued that the Article 8 assessment outside of the Immigration Rules remains a discretionary matter

of judgment for the First-tier Tribunal Judge. She brought to my attention various cases in relation to Article 8 but placed particular emphasis on **Mukarkar v SSHD [2006] EWCA Civ 1045** and **Katshunga, R (on the application of) v SSHD [2006] EWHC 1208 (Admin)**. She argued that there are a small amount of cases in which a question of judgment for the Tribunal of fact arises which normally raises no issue of law for the Secretary of State. Further, that following **Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC)** after applying the requirements of the Rules only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. She submitted that this “compelling circumstances” test gives a degree of latitude on the issue of proportionality.

11. I will say now that Article 8 has moved on from **Gulshan**. In **R (on the application of Esther Ebum Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 - MM (Lebanon) and Nagre) IJR [2014] UKUT 539 (IAC)** it was held that there was nothing in **Nagre, R (on the application of) v SSHD [2013] EWHC 720 (Admin)**, **Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC)** or **Shahzad (Article 8: legitimate aim) [2014] UKUT 85 (IAC)** that suggested that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This was consistent with paragraph 128 of **MM & Others, R (On the Application of) v SSHD [2014] EWCA Civ 985** that there was no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in **Ganesabalan, R (On the Application of) v SSHD [2014] EWHC 2712 (Admin)**, there was no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations.
12. In **Aliyu & Anor, R (On the Application of) v SSHD [2014] EWHC 3919 (Admin)** the claimants, Nigerian nationals, sought judicial review of the Secretary of State’s decisions refusing them leave to remain. The Administrative Court, in allowing the application, held that the Secretary of State had been required to give separate consideration to Article 8 of the ECHR in her decisions and that there had been no adequate assessments made outside the Immigration Rules, resulting in unlawful decisions. The errors were not immaterial, as it could not be concluded with any degree of confidence that the claimants’ claims would necessarily fail.
13. Ms Rahman went on to opine that Article 8 protects the family life between an applicant and their adult family members residing in the United Kingdom where there is dependency beyond normal emotional ties. In **Katshunga** it was held that an adult claimant could establish that her removal would breach Article 8 by reference to a relationship with her adult brother upon whom she was particularly dependent owing to her own and her family’s traumatic history and her consequent mental

illness. In Mukarkar, she submitted, the Court of Appeal held that there was “strong family ties of dependency in this country” between the appellant, a father and a son in circumstances where the appellant (who suffered from diabetes, was frail, and prone to falling and could be doubly incontinent) was dependent on his son for his day-to-day care, even though the appellant, having arrived in the UK as a visitor, was in the country for a short period. Beyond that the judge has not erred in his Article 8 balancing exercise and overall he was entitled to come to the conclusions that he did thereby resulting in there being no error of law within his determination.

14. In dealing with the respondent’s first ground, there was no requirement on the judge to refer to “independent corroborative evidence”. The judge has analysed the evidence that was before him and has given cogent and sustainable reasons which were fully open to him for concluding that these were appellants giving credible evidence. There is no requirement for corroboration within this jurisdiction and there is no failure by this particular judge to engage with the issues that fell to be analysed. There was ample justification for coming to his findings on credibility and there has clearly been no error of law.
15. As to Article 8, the judge has again considered the totality of the evidence. In so doing he was equally entitled to conclude that the respondent’s decisions were disproportionate in all the circumstances. There is, contrary to the grounds, “a proper proportionality assessment” and the judge has taken all factors into account, not least the public interest. It is referred to at paragraph 24 of the judge’s determination. In coming to his conclusions the judge has weighed all factors including the relatively short period of time the appellants have been in the United Kingdom. Indeed he concludes at paragraph 37 that in the short period they have been present he is “not satisfied that they have put down any roots in the United Kingdom or that within the same period of time they have developed close ties with family and friends as claimed”. On the other side of the balance though he has been satisfied that due to the medical and mental condition of the first appellant his son and daughter-in-law have to take particular care to see that his needs are met due to the first appellant’s failing memory. Indeed it is the physical and mental condition of the first appellant which causes the judge to come to the conclusions that he did. In so doing he has taken account of medical evidence including a comprehensive report from Antonia Kreeger, psychotherapist, which the judge found particularly significant. The judge was entitled to conclude that there are strong family ties between the appellants and their son and that there is both a physical and psychological dependency upon him.
16. Beyond the abovementioned reference to the public interest the judge has further analysed it at paragraph 36 of his determination and it is clear that it has been built into the balancing exercise carried out.
17. The judge has looked at the evidence cumulatively before coming to the conclusions regarding the inability of the appellants to readapt to a life in Sri Lanka outside their current family environment.

18. This is not simply a medical case which might demand a high threshold but one where there are many strands of evidence which come together to enable the judge to come to the conclusion that he did. The judge was entitled to find that the appellants' removal would breach their Article 8 rights.
19. The grounds of appeal are a disagreement with findings and reasoning which are legally adequate and which take proper account of relevant case law. There is here no material error of law.

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.

I do not set aside the decision.

No anonymity order is made.

Signed

Dated: 23 February 2015

Deputy Upper Tribunal Judge Appleyard