IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/16178/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th June 2015	**On 19th June 2015**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MRS PULANI UDARA WIJESIRIWARDANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Hill, Counsel instructed by Malik Law Chambers Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on 13th January 1985. She appeals against the decision of the First-tier Tribunal dated 24th November 2014 dismissing her appeal, against the refusal of leave to remain and the decision to remove her, under Appendix FM, paragraph 276ADE and on Article 8 grounds.

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2. The Appellant arrived in the UK on 9th September 2006 and was granted leave to enter as a student. She was granted further leave to remain until 28th October 2013. On 9th September 2013 she applied for leave to remain as the partner of Dushantha Tharanath Muthuthanthrige, the Sponsor. The Sponsor is a Sri Lankan national who came to the UK in 2003 as a student and was granted indefinite leave to remain under paragraph 276B of the Immigration Rules on 23rd January 2014. The application was refused by the Secretary of State on 21st March 2014 on the basis that the Appellant and Sponsor could live together in Sri Lanka and there were no insurmountable obstacles preventing them from doing so. The Appellant was unable to satisfy paragraph EX.1(b) of Appendix FM of the Immigration Rules.

3. At the hearing before First-tier Tribunal Judge Russell the Appellant submitted evidence that she had a daughter born in May of 2012 who had been naturalised as a British citizen. There was no mention of the Appellant's daughter in the application for leave to remain made in September 2013. The judge therefore went on to consider whether it was reasonable to expect the child to return to Sri Lanka with her parents.

4. The judge cited relevant case law in directing himself on the best interests of the child. He found that given her age the Appellant's daughter would be focused on her parents and despite being at nursery school she had not formed attachments outside the family unit. The judge accepted that removing the Appellant to Sri Lanka would involve a degree of disruption. However, he found that there was no suggestion that the family would be separated. They were Sri Lankan citizens who spoke English and Sinhalese at home. They had family ties in Sri Lanka and their social and cultural links remained substantially Sri Lankan. The judge did not accept that relocation of the family would represent a significant disruption. He did not accept that, given their education and experience in the UK, the Appellant and Sponsor could not find work in Sri Lanka or that they had nowhere to live.

5. The judge concluded that it was in the best interests of the child to remain with her parents and there was no evidence that it was not reasonable to expect her to go to Sri Lanka. The judge found that the removal of the Appellant was not serious enough to engage the operation of Article 8 in light of the lack of evidence about the impact on the family other than disruption to their lives.

6. The Appellant applied for permission to appeal on the ground that the First-tier Tribunal had erred in law in tacitly following Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640(IAC) because this case had been overruled by the Court of Appeal in MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985.

7. Permission to appeal was initially refused by the First-tier Tribunal on the grounds that the judge found, for reasons which were not challenged, that

the Appellant could not meet the requirements of the Immigration Rules. He did not adopt the approach advocated in Gulshan.

8. Permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge erred in law for a different reason, which was Robinson obvious, in that the judge entirely failed to determine the Appellant's appeal against the refusal to vary her leave to remain as a partner, but rather focused on whether or not it would be reasonable to expect the Appellant's daughter to leave the UK.

9. The judge did not make any findings as to whether or not the Secretary of State's decision in respect of the Appellant herself was sustainable or whether or not the Appellant met the requirements of the Rules and whether there were exceptional circumstances meriting consideration of Article 8 outside the Rules.

Submissions

10. At the hearing, Mr Hill submitted an opening note, a chronology, a copy of the relevant Immigration Rules at the date of decision and the case of Razgar [2004] UKHL 27. Mr Hill submitted that the judge's finding at paragraph 21 only focused on whether it was reasonable to expect the Appellant's child to return to Sri Lanka. There was no consideration of the Appellant's case as a partner of a person settled in the UK.

11. Paragraph 11 of the judge's decision was insufficient in that it made no specific reference to paragraph EX.1(b). The judge should have stated the test to be applied therein, namely insurmountable obstacles, and demonstrated whether or not the Appellant was able to satisfy that test. The judge's findings were in the wrong order in that he concluded at paragraph 11 that the Appellant could not satisfy the Immigration Rules but made findings of fact in relation to that conclusion at paragraphs 18 to 21. The failure of the judge to demonstrate that he had applied the correct test under the Immigration Rules amounted to an error of law.

12. The error was material because there were insurmountable obstacles to family life continuing in Sri Lanka. For example, the Appellants had both spent considerable time in the UK and had studied here. They had become accustomed to life in the UK and had excellent jobs. In effect they had put down strong roots such that their integration into UK society meant that there were insurmountable obstacles to their return. There were no family members in Sri Lanka save for maternal parents.

11. In relation to paragraph 276ADE the judge again failed to make express reference to the test which was whether there were no ties remaining in Sri Lanka. The judge could therefore not demonstrate that he had applied his mind to this test.

12. Further, there was no reference to exceptional circumstances and the matters referred to above, in relation to the Appellant's integration into

the UK, would have amounted to exceptional circumstances justifying a grant of leave outside the Immigration Rules. Each test should have been separately considered and the judge should have demonstrated that he had applied it appropriately to the facts.

13. In relation to Article 8 the judge's finding at paragraph 22 was exceptionally brief. He made no mention of the case of Razgar and did not follow the five step process set out therein. There was a lack of clarity as to why the Appellant could not succeed under Article 8.

14. The Appellant was entitled to receive a judgment in which it was clearly demonstrated why her appeal had been dismissed. Each part of the appeal should be separately identified and the relevant test considered. The judge should state the facts he accepted and applied to the test, and which were determinative. The decision in this case failed to do that.

15. If the judge had adopted the correct approach then there were insurmountable obstacles to family life continuing in Sri Lanka. There were no ties to Sri Lanka and there were exceptional circumstances. Accordingly, the decisions to refuse leave to remain and remove the Appellant from the UK were disproportionate.

16. Mr Clarke submitted that permission was not granted in relation to an error of law under Article 8. There was no threshold test to be applied but the Rules must constitute a disproportionate interference. The judge's findings at paragraph 22 were sufficient. The Appellant could not succeed under the Immigration Rules and it was open to the judge to find therefore that he could not succeed under Article 8. There were no circumstances not covered by the Immigration Rules to render the application of those Rules disproportionate.

17. The findings at paragraph 22 followed substantial analysis of the Appellant's circumstances and those of her child. In paragraph 11 it was clear that the judge was mindful of the Immigration Rules and his findings at paragraphs 19 to 21 demonstrated that he has considered the Appellant's application as a partner. The test is that of insurmountable obstacles and given the judge's finding at paragraph 20 that "I do not accept that the relocation of the family will represent a significant disruption and I do not accept that, given their education and experience in the UK, they cannot find work in Sri Lanka or have nowhere to live there" could not be interpreted in any other way. It was clear from this paragraph that the judge had found that there were no insurmountable obstacles to family life continuing outside the UK.

18. The list of insurmountable obstacles referred to by Mr Hill in his submissions by and large amounted to private life considerations. Paragraph 276ADE was not raised in the grounds of appeal for permission. In any event, the judge found that there were substantial ties to Sri Lanka and there was no evidence that such ties had been lost and, following the decision in Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT

00042 (IAC), even if they were lost they could be resurrected. There was no error of law in relation to paragraph 276ADE and the judge had expressly dealt with it. The judge also found that married life could continue back in Sri Lanka.

19. Accordingly, there was nothing to warrant a consideration outside the Rules. The judge was entitled to say, as he did at paragraph 22, that the Article 8 claim stands and falls with the Immigration Rules.

20. I asked Mr Clarke whether the judge had erred in law in failing to demonstrate that he had applied the relevant test under the Immigration Rules. He submitted that the judge's finding that their return did not represent a significant disruption in conjunction with paragraph 11 was sufficient to show that the judge was mindful of paragraph EX.1(b) of the Immigration Rules. The judge had identified specific aspects of family life which he had considered and therefore, even though he had not specifically mentioned 'insurmountable obstacles', his findings were sufficient to enable such a conclusion to be drawn. If there was an error it was not material to the decision.

21. In response, Mr Hill sought to submit further evidence. This amounted to submissions by the Appellant relating to length of residence in the UK; lack of family ties; the fact that her daughter was due to start at kindergarten; reliance on her husband's employment; and the fact that he clearly earned sufficient funds in order to be able to support her under the Immigration Rules. These submissions were not before the First-tier Tribunal Judge and therefore, in relation to my decision on whether there was an error of law, I disregard the further evidence contained therein. The judge, however, was well aware of the fact that the Appellant and her husband had resided in the UK since 2006 and 2003 respectively, and of the fact that they had made very few visits to Sri Lanka over the last ten years.

Discussion and Conclusion

22. The Secretary of State refused the application on the basis that there were no insurmountable obstacles preventing the Appellant from continuing her relationship with the Sponsor in Sri Lanka. The issue on appeal was therefore paragraph EX.1(b) of Appendix FM.

23. The judge made specific reference to the refusal letter at paragraph 11 of his decision stating that: "I agree with the Respondent that the Appellant did not meet the requirements of Appendix FM at the date of decision on the basis of the evidence provided." Accordingly, I find that the judge did determine the Appellant's appeal under Appendix FM and found that the Respondent's decision was sustainable.

24. At paragraph 20, the judge made the following findings:

> "They are a Sri Lankan family who speak English and Sinhalese at home and the parents are citizens of Sri Lanka. They have family ties there. In summary their social and cultural links remain substantially Sri Lankan. I do

> not accept that the relocation of the family will represent a significant disruption and I do not accept that, given their education and experience, in the UK they cannot find work in Sri Lanka or have nowhere to live there."

25. Although the judge did not set out the relevant paragraph of the Immigration Rules, his findings at paragraph 20 support the conclusion that there were no insurmountable obstacles to family life continuing outside the UK.

26. Mr Hill submitted that not only had the judge erred in law in failing to demonstrate he had applied the test of insurmountable obstacles but that the particular facts of the Appellant's case did amount to insurmountable obstacles. He referred me to the Appellant's witness statement and that of her husband which were before the judge. I have read those with care.

27. In summary, the Appellant and her husband have a strong and profound quality of life in the UK. They have completed their studies here and have worked in the UK for a significant length of time. They have social, educational and economic connections in the UK which are profound and substantial. They also have a substantial number of friends. Both the Appellant and her husband were deeply integrated into this country. The Appellant's husband runs and manages his own business and has done so for the past two years. Prior to that he worked at United Parcel Services and for Marriott International. He also worked as a website designer and systems developer. He is a computer engineer.

28. The Appellant and her husband have lost or substantially lost all ties to Sri Lanka. The Appellant's husband had no relatives there and did not have contacts with any friends. The Appellant's parents were in Sri Lanka. Her father was 69 years old and her mother was 62. They would be unable to provide for the Appellant and her husband and she was an only child. It was submitted that the Appellant and her husband would not be able to get jobs in Sri Lanka because of the significant length of time they had spent in the UK, which meant they had no domestic based work experience. Getting a job in Sri Lanka was highly competitive and they would suffer real and substantial challenges.

29. In essence the conclusion of the judge at paragraph 20 is that, even taking the Appellant's case at its highest, there would be no significant disruption to continuing their family life in Sri Lanka. I find that, although the judge has failed to use the words 'insurmountable obstacles' his finding at paragraph 20 and the particular facts of the Appellant's case outlined in both of the statements and summarised above do not amount to insurmountable obstacles preventing the Appellant, her husband and daughter from continuing family life outside the UK.

30. I appreciate that the Appellant and her husband have lived in the UK for a significant amount of time. They are financially independent and they have employment here. Unfortunately, looking at all the circumstances of the Appellant's case, their integration into the UK does not amount to

insurmountable obstacles to them continuing family life in Sri Lanka given that they are Sri Lankan citizens and they still maintain social, cultural and family links with Sri Lanka.

31. In relation to the judge's findings on whether it would be reasonable to expect the child to be returned with her parents, that finding was not challenged in the grounds of appeal. Looking at the determination as a whole this finding was open to the judge on the evidence before him and he gave cogent reasons for his conclusion.

32. In relation to Article 8 the judge states at paragraph 22:

> "The claim under Article 8 stands and falls with the claim under the Immigration Rules. For the sake of completeness I add that the removal of the Appellant is not serious enough to engage the operation of Article 8 in light of the lack of evidence noted above about the impact on the family other than a disruption to their lives."

33. I find that the judge did not adopt the approach set out in Gulshan. He separately considered Article 8 but found that an Article 8 consideration would not give a different result to that under the Immigration Rules. He found that the removal of the Appellant did not amount to an interference whose consequence was of such gravity so as to engage the operation of Article 8. The judge found that family life could continue in Sri Lanka as it had done in the UK although there would be some degree of disruption to private life.

34. The judge's failure to adopt the five step approach in Razgar did not amount to an error of law. In any event, even if I am persuaded by Mr Hill's submission that the judge's failure to specifically refer to the tests under the Immigration Rules and demonstrate how they were applied and to specifically deal with all five steps of Razgar, I find that on the particular facts of the Appellant's case this did not amount to a material error of law. The decision to refuse leave to remain and to remove the Appellant from the UK was proportionate in all the circumstances.

35. Accordingly, I find that there was no material error of law in the decision of the First-tier Tribunal. The Appellant's appeal is dismissed and the decision dated 24th November 2014 shall stand.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

Signed Date 15th June 2015

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 15th June 2015

Upper Tribunal Judge Frances