**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/35472/2014**

**THE IMMIGRATION ACTS**

**Heard at** Field House
**On** 26 November 2015

**Decision & Reasons Promulgated**
**On 21 December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**PAVALARAJAH KESAVAN**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Z Nasim (counsel) instructed by Chris Raja, solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of Designated Tribunal Judge Manuell dated 20 April 2015, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 2 April 1989 and is a national of Sri Lanka. The appellant left Sri Lanka when he was only two years of age. Since then, his father has worked in Gulf States, where the appellant has lived for long periods. The appellant entered the UK on 25 August 2007 as a student, with leave to remain until 31 October 2009. The respondent extended leave to remain three times so that the appellant had leave to remain until 21 June 2014. On 18 June 2014 the appellant submitted an application for leave to remain in the UK on the basis of established article 8 ECHR private life in the UK. The respondent refused that application 22nd of August 2014.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. Designated Tribunal Judge Manuell ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 4 August 2015 Upper Tribunal Judge Knowles QC gave permission to appeal stating *inter alia*

> "The Judge's reasoning with respect to the appellant's ties to Sri Lanka is weak and insufficient as is the reasoning behind the conclusions in paragraph 15 that the appellant's private life in the UK is weak"

**The Hearing**

6. Mr Nasim, counsel for the appellant, told me that there are three deficiencies contained within the decision. The first is the approach taken by the Judge to paragraph 276 ADE of the rules. The second is the approach the Judge took to article 8 outside the rules. The third is the Judge's consideration of section 117B of the 2002 Act. He relied on the case of Bossadi (para 276ADE; suitability; ties) [2015] UKUT 00042(IAC), and argued that, in each of these three areas, the Judge has given inadequate consideration to the law and set out no reason for his findings in fact. He argued that in using the expression "*undue hardship*" in considering both paragraph 276 ADE and article 8 ECHR, the Judge has applied the wrong test. He referred me to [9]of the decision which records that a number of witnesses adopted letters of support as their evidence in chief, and complained that there are no findings of fact in relation to that evidence, nor in relation to the significant amount of documentary evidence produced. He told me that an inadequate fact finding exercise had been carried out, and as a result the decision is tainted by material errors of law. He asked me to set the decision aside.

7. Ms Holmes, for the respondent, argued that although the decision is brief, it contains everything it needs to contain and is not tainted by material error of law. She argued that, on the evidence presented, if more findings of fact were made they would not favour the appellant. She relied on the case of AM (Malawi) [2015] UKUT, and argued that the Judge had considered section 117B of the 2002 Act & found there were more factors weighing against the appellant than in the appellant's favour because his immigration status was precarious throughout his time in the UK. She told me that, in reality, the appellant had a weak case because any article 8 private life established (if any

is established at all) is of limited significance. She urged me to dismiss the appeal.

Analysis

8. In Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) it was held (*inter alia*) that the natural and ordinary meaning of the word '*ties'* in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has *'no ties'* to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to '*social, cultural and family' circumstances.*"

9. In Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 42 (IAC) it was held that:

> "(1) Being able to meet the requirements of paragraph 276ADE of the Immigration Rules requires being able to meet the suitability requirements set out in paragraph 276ADE(1). It is because this subparagraph contains suitability requirements that it is not possible for foreign criminals relying on private life grounds to circumvent the provisions of the Rules dealing with deportation of foreign criminals.
>
> (2) The requirement set out in paragraph 276ADE(vi) (in force from 9 July 2012 to 27 July 2014) to show that a person 'is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK', requires a rounded assessment as to whether a person's familial ties could result in support to him in the event of his return, an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of a claimant to achieve."

10. The Judge's decision is brief. The Judge commences [12] by stating "*there was no dispute of fact save possibly as to the extent of the appellant's ties with Sri Lanka*". At [13] the Judge finds that the appellant's absence from Sri Lanka has been part of his family's choice, but that the appellant has retained his nationality and has travelled to Sri Lanka. His ethnicity as a Tamil is not in dispute. He concludes [13] by stating that the appellant ".. *has no right to nominate the United Kingdom as his country of residence"*

11. The Judge then goes on to consider the appellant's article 8 rights at [14] and [15]. In reality there is nothing wrong with the logic employed by the Judge. The difficulty is that it is beyond dispute that the significant amount of documentary and oral evidence was presented. Between [5] and [9] the Judge succinctly summarises the hearing. The bundle produced by the appellant makes it clear that there was documentary and oral evidence from the appellant. There was documentary and oral evidence from a number of the appellant's friends. A witness statement from the appellant's father was placed before the Judge. The conclusions reached by the Judge may be correct. What is missing from the decision is an analysis of the evidence that was produced.

The error that has been made is that the Judge has come to a conclusion, but is not apparent from the decision that the conclusion is driven by findings in fact to which the law is applied.

12. In DC (Philippines) [2005] UKIAT 00011 the Tribunal said that a failure to make findings on points raised in the notice of refusal (in an immigration appeal) was an error of law. In Malaba v SSHD [2006] EWCA Civ 820 inadequate reasons were held to be an error of law.

13. Put simply, the decision contains conclusions but does not contain an analysis of the evidence nor does it contain adequate findings of fact. The result is that when the appellant reads the decision he knows that he has lost, but he does not know why. I therefore have to find that the decision is tainted by material errors of law because it races to a conclusion without sufficient explanation. As the decision contains material errors of law, I set it aside. There is sufficient evidence before me to enable me to remake the decision.

Findings of Fact

14. The appellant is an ethnic Tamil born in Sri Lanka on 2 April 1989. The appellant's first language is Tamil. The appellant left Sri Lanka with his family when he was two years old. The only other time the appellant has lived in Sri Lanka was for 18 months between 2005 and 2007.

15. The appellant first entered the UK as a student on 25th of August 2007 (when he was 18 years old). He returned to his family in Dubai for the holiday periods, but has spent the majority of time in the UK since August 2007. The respondent granted the appellant further leave to remain in the UK as a student until 21 June 2014. On 21 May 2014 the appellant applied for leave to remain in the UK describing himself as stateless. The respondent refused the appellant's application in part (at least) because the appellant holds a Sri Lankan passport and so is not stateless.

16. On 18 June 2014 the appellant submitted an application for leave to remain in terms of appendix FM and paragraph 276 ADE of the immigration rules. The respondent refused the appellant's application 22nd August 2014. It is against that decision that the appellant appeals.

16. None of the appellant's family members remain in Sri Lanka. The appellant's parents continue to live in Dubai. Some of the appellant's relatives have sought asylum in Europe and Canada. The appellant's sister is married and now lives in Thailand.

17. The appellant lives with his maternal grand uncle, whose son is of similar age to the appellant. In July 2012 the appellant graduated with a BSc in computer science. In January 2013 the appellant enrolled for a BTEC extended diploma.

Analysis

18. Although the appellant's application makes reference to appendix FM of the immigration rules, it is not seriously argued that he can fulfil the requirements of appendix FM. It is beyond dispute that the appellant's parents are in Dubai and that the appellant's only sibling lives in Thailand. The appellant might argue that he lives with his maternal grand uncle and that his maternal grand uncle's son is like a brother to him. What the appellant cannot escape is that he does not have any immediate family members in the UK. Including the exceptions set out in EX.1 of appendix FM, there are seven categories of persons to whom appendix FM applies. The appellant does not fall within any of those categories

19. The appellant argues that he can fulfil the requirements of paragraph 297 ADE of the immigration rules. The appellant submitted his application on 18 June 2014. The respondent's decision was made on 22nd August 2014. For applications made after 9 July 2012 when the decision was taken before 28 July 2014 the relevant wording of paragraph 276 ADE was "(*vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK*". For applications which are decided after 28 July 2014 the relevant wording is " *.... aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom*".

20. The cases of Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) and Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 42 (IAC) are of limited relevance, because the test applicable to the appellant's case is not a lack of ties, it is whether or not there are very significant obstacles to the appellant's integration into Sri Lankan society.

21. No reliable evidence of very significant obstacles to integration into Sri Lankan society is placed before me. It is a fact that the appellant is a Sri Lankan national and holds a Sri Lankan passport. It is a fact that the appellant is a gifted, well-educated, healthy young man. The appellant has only spent limited periods of time in Sri Lanka. He was only two when he left the country, but he returned there when he was 16. Between the ages of 16 and 18 he was in education in Sri Lanka. His evidence is that he did not enjoy that time and that he was bullied at school, but historic schoolboy bullying does not amount to a very significant obstacle to integration.

22. The appellant could return to Sri Lanka where he has no relatives and no friends. He would have to start afresh. To assist him, he has the benefit of education in Sri Lanka, Dubai and the UK. He now has a BSc degree. He has experience in moving between countries and starting anew. He is a gifted, intelligent, educated, capable young man. He knew enough of the Sri Lankan language to participate in education in his mid-teens. Put simply, what is to stop a young intelligent Sri Lankan from returning to his country of origin and establishing himself there? When I pose that question I can only come to the

conclusion that are no obstacles; I am certain that very significant obstacles to integration do not exist.

23. The appellant would prefer to stay in the UK rather than return to Sri Lanka. The appellant is 26 years old. He has lived in the UK since August 2007 (eight years ago). The appellant came to the UK from Dubai, but he had only lived in Dubai for seven months before coming to the UK. I find that I am drawn to the same conclusion as designated Judge Manuell. There is no justifiable reason for the appellant to nominate the UK as his choice of residence just because he has not spent much time his country of origin. The appellant cannot fulfil the requirements of paragraph 276 ADE of the immigration rules.

24. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that **t**here is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin)**,** Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests 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 has 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 is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is 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 R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.

25. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

26. I must ask the following questions

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8;

(ii) If so, has the right to respect for this been interfered with;

(iii) If so, was the interference in accordance with the law;

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

27. (a) In Kugathas v SSHD [2003] INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD [2009] EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was "*no way exceptional or beyond the norm*". In JB (India) and Others v ECO, Bombay [2009] EWCA Civ 234 the Court of Appeal reiterated that the approach in Kugathas must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children.

(b) The only family members the appellant has in the UK are his grand uncle and the son of his grand uncle. The appellant states that the son of his grand uncle is of similar age to the appellant, and that the two young men feel like they are brothers. What the appellant cannot escape is that he and his distant cousin are young men in their mid-20s. They enjoy an almost fraternal relationship, but both men are now well into majority. There is no evidence of any form of dependence. The appellant has normal emotional ties to his only two relatives in the UK. Family life within the meaning of article 8 ECHR does not exist for this appellant in the UK.

(c) This case really turns on consideration of the appellant's private life. Section 117B of the 2002 act tells me that immigration control is in the public interest. The appellant has always been lawfully in the UK. But any private life the appellant has developed has been whilst his immigration status was precarious (AM (Malawi). The appellant speaks fluent English and is financially independent.

(d) In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave; in some circumstances it may also be that even a person with indefinite leave to remain. In Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC) the Tribunal held that the adjective "precarious" in section 117B(5) of the 2002 Act does not contemplate only, and is not restricted to, temporary admission to the United Kingdom or a grant of leave to remain in a category which permits no expectation of a further grant.

(e) In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial

burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

(f) Even though there are factors set out in s.117B which weigh in the appellant's favour, their effect in the consideration of the appellant's appeal are neutral.

(g) After considering each strand of evidence in this case I still know very little about the component parts the appellant's private life. I know that the appellant has completed the course of study that he came to the UK for. I know that the appellant is a popular man with a number of friends. But those are the only conclusions that the evidence led in this case allow me to make. I still do not know how the appellant passes his time; what contribution the appellant has made to the community; the degree of the appellant's integration into UK life. I know nothing of the appellant's hobbies and pastimes. There is a paucity of evidence of the appellant's significant friendships. The appellant has a home in the UK the appellant has worked in the UK.

(h) Against those findings I balance the respondent's interest in preserving fair and effective immigration control to protect this country's fragile economy. In Nasim and others (Article 8) [2014] UKUT 25 (IAC) it was held that the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

(i) When I weigh all of these matters I can only come to the conclusion that if the respondent's decision amounts to a breach of the appellant's right to respect for private life at all, it does not amount to a disproportionate breach.

**Conclusion**

28. I therefore find that the Judge's decision is tainted by a material error of law. I remake the decision. **I set aside the decision of the First-tier Tribunal because it contains a material error of law. I substitute the following decision.**

**Decision**

**I dismiss the appeal under the Immigration Rules.**

**I dismiss the Appeal on Articles 8 ECHR grounds.**

Signed Date 4th December 2015

Deputy Upper Tribunal Judge Doyle