IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/39355/2014
IA/39356/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st October 2015	**On 21st October 2015**

Before

THE HONOURABLE LORD BURNS
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR MAHAMARAKKALA PATABENDIGE COORAY
(2) MRS DILSHANI LAKSHIKA SABREENA SALGADOE
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Faisal Safee (Counsel)
For the Respondent: Mr Tony Melvin (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Maxwell, promulgated on 13th May 2015, following a hearing on 5th May 2015 at Richmond. In the determination, the judge dismissed the appeals of Mr Mahamarakkala Patabendige Cooray and Mrs Dilshani Lakshika Sabreena Salgadoe. The Appellants subsequently applied for, and were

granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Appellants

2. The Appellants are husband and wife. They are citizens of Sri Lanka. The first Appellant, the husband, was born on 25th May 1980. The second Appellant, his wife, was born on 4th May 1983. The first Appellant applied for leave to remain in the United Kingdom as a Tier 1 (Entrepreneur) Migrant and the second Appellant as his dependent spouse. On 2nd October 2014, the applications were refused and a decision made to remove the Appellants.

The Appellants' Claim

3. The Appellants claim is that the claim did not succeed only because of the failure of the first Appellant to submit a letter from his bank when he lodged his application to confirm that he had the requisite funds in order to meet the provisions of paragraph 245AAA. Secondly, that even if this was the case, given that the first Appellant had originally come to the UK on 22nd October 2004, he had clocked up ten years of lawful stay in the UK, thus enabling him to make an application under the so-called ten year Rule. If he could show ten years of continuous lawful residence, then he would have the right to remain in that capacity.

The Judge's Findings

4. The judge observed how the Appellant had initially come to the UK on 22nd October 2004 with leave to remain as a working holidaymaker for two years. He then left the UK on 12th September 2006, but returned on 17th January 2007, having been granted entry as a student (see paragraph 8). He was thereafter granted further leave to remain as a student until 30th September 2008, following which he made further applications (see paragraph 8).

5. The judge went on to state that there was a clear historic timeline set out by paragraph 276B, which was ten years' continuous lawful residence in the United Kingdom. However,

> "In the present instance, putting the first Appellant's case at its highest, the timeline commenced on 22nd October 2004. The Respondent made a decision to refuse the original application on 2nd October 2014. It follows that by the date of the decision the first Appellant did not have ten years' continuous lawful residence in the United Kingdom ..." (paragraph 14).

The timeline set out by the Appellant (paragraph 15 was accepted by the Judge.

6. As for the failure to submit the bank statement at the time of the application, he held that its subsequent submission could not remedy the earlier error because,

> "In the present instance, the document in question does not meet the criteria set out in sub-paragraph (b) [of paragraph 245AAA]. It is a 'stand alone' document rather than one of a sequence and as it did not exist at the date of the application it cannot be suggested it might otherwise fit within this scheme" (paragraph 19).

7. That left the application of human rights law. The judge here held that the Appellants could not succeed under Article 8 either because they could not comply with paragraph 276ADE, not having been in the UK for twenty years, and as far as looking at their situation outside the Immigration Rules, there was nothing exceptional in their situation, with the result that with the application of the "**Razgar** principles" (see paragraph 29), the appeal would fail on this basis as well.

8. The appeals were dismissed.

Grounds of Application

9. The grounds of application state that the judge failed to give proper consideration to the Respondent's "evidential flexibility policy", with the result that if a document had been submitted late, and not with the application, it could still have been taken into consideration, and the application allowed on that basis by the Secretary of State. The grounds also asserted that the judge failed to give proper consideration to the Appellants' long residence in the UK.

The Hearing

10. At the hearing before us on 1st October 2015, Mr Faisal Safee, appearing on behalf of the Appellants, submitted that the Appellants had continuing leave under Section 3C of the Immigration Act 1971. On 22nd October 2014, they had clocked up ten years of lawful residence in the UK. The first Appellant's application had been refused on 2nd October 2014, and he had leave for the duration of his time here pending the outcome of his appeal hearing. He directed our attention to the well-known cases of **AS (Afghanistan) [2011] 1 WLR 385** at paragraphs 83 and 35 and to **Patel [2014] AC 651** at paragraph 34. In relation to paragraph 276A and B he drew our attention to the long residence policy of the Respondent Secretary of State, a copy of which he handed up (dated 8th May 2015). He submitted that the Appellants would have succeeded on these bases.

11. In reply, Mr Melvin submitted that the Appellants could not succeed for the following reasons. First, the first Appellant did not submit the required certified document for Tier 1. The case of **Durrani (Entrepreneurs: bank letters; evidential flexibility) [2014] UKUT 295**, makes it quite clear that this is so. Therefore, this particular Ground of Appeal has no merit whatsoever.

12. Second, in relation to the claim based on long residence, Mr Melvin submitted that the judge was again correct. This is because, although the Appellant had first come to the UK as a working holidaymaker in 2004, he

had then returned back to Sri Lanka in 2007, only then to return in a different capacity, as a student. His continuous residence had been broken. The Appellant could only have come back in another lawful capacity if he had done so within 28 days of his return. This was not the case here. As a result, the correct timeline in his case was not 2004, but 2007, which was the period when he returned back to the UK as a student.

13. In his reply, Mr Safee submitted that the Home Office's own policy (see guidance – long residence – v13.0) makes it clear (at page 13 of 54) that "breaks in continuous residence" are permissible and there was no requirement that a person should return back in the same capacity of legal leave as he had initially entered. It was an unlawful one.

No Error of Law

14. We are satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that we should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). Our reasons are as follows.

15. First, the judge was plainly right in concluding that the despatch of the bank statement after the first Appellant had lodged his application, did not comply with paragraph 245AA(b) in that this was a document which was not one of a sequence of documents missing from the original submitted application, as it did not exist at the date of the application. The established case law confirms this. The "evidential flexibility policy" is not intended to cover the situation in which the present Appellants found themselves.

16. Second, the first Appellant did not have continuing leave when he returned back to the UK in 2007 in the capacity of a student. This means that he could not avail himself of the long residence Rule on the basis of having had ten years' continuous residence in the UK. The Home Office document "guidance – long residence – version 13.0" (dated 8th May 2015) contains the explanation at page 13 under the heading "Breaks in continuous residence". It recognises that time spent outside the UK does not break continuous residence, provided that the applicant is not absent from the UK for six months, and provided that they "departed the UK after expiry of their leave to remain, but applied for fresh entry clearance within 28 days of the previous leave expiring".

17. The first Appellant in this case did not apply for entry clearance within 28 days of the previous leave expiring. Therefore, although he returned to the UK with valid leave, the continuous residence had by that stage been broken on account of his having returned to Sri Lanka at the end of his existing leave as a working holidaymaker on 12th September 2006, but then returning only on 17th January 2007. It has not been the Appellant's case before this Tribunal, or before the Tribunal below, that he did apply for entry clearance within 28 days of the previous leave expiring.

Accordingly, the Appellant cannot avail himself of the ten years' continuous residence Rule.

18. Third, the Appellant cannot succeed under Article 8 ECHR either because, for the reasons given by the judge at paragraphs 24 to 42, the Appellants had not been in the UK for twenty years, and although they had a child in the UK, this was not a qualifying child within the meaning of Section 117D (see paragraph 36). It was the judge's findings that, "neither Appellant has had a reasonable expectation that their leave would be extended at any point. Both of them came to the United Kingdom with leave that was transient in nature and have, in effect, hopped from one form of leave to another" (paragraph 38). In the circumstances, it cannot be said that the judge's determination was perverse or one that was not otherwise reasonably open to him. This appeal fails for all these reasons.

Notice of Decision

19. There is no material error of law in the original judge's decision. The determination shall stand.

20. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st October 2015