



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/07451/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1st June 2015
Prepared 8th June 2015**

**Decision & Reasons Promulgated
On 12th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MISS KALIMAHAL PREMNASEER
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellant: Ms A. Benfield of Counsel

For the Respondent: Ms L. Kenny, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 10th July 1994. She appeals against a decision of Judge of the First-tier Tribunal Khan sitting at Hatton Cross on 22nd December 2014 in which he dismissed the Appellant's appeal against a decision of the Respondent dated 21st May 2014. That decision was to refuse the Appellant's application for entry clearance to

the United Kingdom as an adult dependent relative pursuant to Section E-ECDR of Appendix FM of the Immigration Rules.

2. The Appellant's application was that she intended to live with her parents and siblings in the United Kingdom. Her father is a British citizen, her mother, brother and sister were granted entry clearance to join him. The Appellant is currently living with her grandmother in Sri Lanka and is financially supported by her UK based parents. The Appellant made her application on 1st March 2014 when she was over 19 years of age. The Appellant's two siblings born 19th December 1996 and 15th February 1999 respectively saw their applications granted as they were both under 18 at the time.
3. The Respondent refused the Appellant's application after interviewing her noting that the Appellant's father had left Sri Lanka for the United Kingdom in 2001 and did not return to Sri Lanka/India until 2010. In that period the Appellant established an independent family unit. The Appellant had stated she was previously studying but had ceased her course in India in 2011 since when she had not worked. The Respondent noted that no reason had been put forward as to why the Appellant could not seek work or continue with higher education. The Appellant was fit and healthy and did not require long-term personal care. Whilst she might have a desire to be with her family the Respondent could see no exceptional or compelling reasons why she could not continue to reside in Sri Lanka as she had been since her father's departure in 2001. The Appellant could not bring herself within Section E-ECDR2.4 as she had no requirement for long-term personal care and could not bring herself within E-ECDR2.5 for the same reason.

The Article 8 Claim

4. The Appellant argued that the Respondent's decision breached her rights under Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The burden of establishing that rested upon the Appellant and the standard of proof was the usual civil standard of balance of probabilities. In the skeleton argument dated 20th December 2014 submitted for the hearing before Judge Khan on 22nd December Counsel conceded on behalf of the Appellant that the requirements of the Immigration Rules could not be met in respect of the evidence required. The Tribunal was therefore requested to consider the Appellant's application under Article 8 outside the Rules in the light of what were described as the compelling and compassionate family circumstances in the case. Family life could exist between adult children and their parents. The threshold for interference to engage Article 8 was not an especially high one, the issue was one of proportionality.
5. The relevant factors weighing on the Appellant's side were:
 - (a) That the Appellant, her mother and siblings had been living in a precarious situation between 2001 and the present having to repeatedly leave Sri Lanka to seek safety in India. As a result the

Appellant required a stable family life in which she could develop as a young adult.

- (b) She was living in poor conditions with her maternal grandmother who was in old age and ill health.
- (c) There was a negative impact on the younger children who had been separated from the Appellant.
- (d) She was unable to work or study due to concerns for her safety.
- (e) Her father was able to adequately maintain and accommodate her without recourse to public funds and the whole family were anxious and worried about her safety in Sri Lanka due to the current situation in the country and the absence of family support.

The Hearing at First Instance

6. At the hearing before Judge Khan evidence was given by both of the Appellant's parents who said that the Appellant suffered from asthma attacks and had been to hospital to have oxygen. The Appellant had not mentioned her asthma condition in her application because she thought her application would be refused due to illness. When the Appellant and her grandmother went shopping they were assisted by a driver. The Sponsor sent money every month and the Appellant took a rickshaw to the collection point about two miles away from where she lived to collect it. The Appellant's grandmother accompanied the Appellant. The Appellant's mother had visited Sri Lanka in September 2014 but had not been back since because of financial problems and the lack of safety in Sri Lanka. The Appellant's mother told Judge Khan that the Appellant was able to do simple things but "she is ill she cannot even [wash her own face] and has to be helped by neighbours". The Appellant had not thought about her illness seriously and had not mentioned it in her application form. When the Judge pressed the Appellant's mother on why the Appellant had not mentioned her illness or the visit to the hospital the Appellant's mother made no reply.
7. The Judge found that both the Appellant's parents had exaggerated their evidence particularly in relation to the Appellant's alleged inability to look after herself and her illness. Whilst the parents had claimed that the Appellant suffered from asthma and had attended hospital the Appellant had made no mention of that and the Judge did not find either witness to be credible or consistent. The Appellant could not meet Appendix FM of the Immigration Rules and she had no medical condition. The Judge noted the evidence as to the Appellant's collection of funds sent from the UK and reminded himself again that both of the Appellant's parents had exaggerated the Appellant's circumstances in Sri Lanka. As the Appellant could not satisfy Appendix FM the Judge went on at paragraph 33 to consider the matter outside the Immigration Rules under Article 8. He wrote:

"She is now over 18 years of age. She is living with her grandmother. According to the Appellant's own evidence she has no medical condition.

The Sponsor came to the UK and gained his indefinite leave on the basis of the legacy policy. The Sponsor has been visiting the Appellant in Sri Lanka. I have [not] been given any reason whatsoever as to why the Appellant's family could [not] return to Sri Lanka to continue with their family life there. Article 8 is a qualified right and does not give the choice to an applicant or Sponsor to exercise their family life in a member state."

8. I pause to note here that in quoting from paragraph 33 of the Judge's determination I have inserted the word "not" in two places. It appears that there was a typographical error in the determination at paragraph 33. Reading the determination as a whole it is clear what the Judge intended to say in paragraph 33 but unfortunately what actually emerged on the page did not exactly reflect what the Judge intended. There was no dispute before me as to what the Judge meant at paragraph 33. For the sake of convenience therefore I have amended the paragraph as, it seems clear to me, the Judge intended it to read.

The Onward Appeal

9. The Appellant appealed against that decision arguing that there was no analysis of Article 8 outside the Rules or any application of the **Razgar** step by step approach. There was no account taken of the position of the Appellant's two minor siblings, I pause to note here that one of the siblings had in fact just turned 18 at the date of the hearing before Judge Khan. The grounds added that the Judge had failed to take note of the Appellant's medical condition. Her asthma had deteriorated since the rest of the family had come to the United Kingdom and the Appellant would wish to adduce further medical evidence on that.
10. The application for permission to appeal came before First-tier Tribunal Judge Cruthers on 24th March 2015. In granting permission to appeal the Judge criticised the reference to new medical evidence in the letter which accompanied the application for permission to appeal stating that it was most unlikely that serving new evidence that was not before the Judge would establish an error of law on his part.
11. Judge Cruthers also commented that the Appellant and her family members should be aware that it was generally very difficult to establish a disproportionate breach of Article 8 in this type of entry clearance appeal and referred to the case of **AAO [2011] EWCA Civ 840**. In that case (by coincidence an appeal from Judge Khan the Judge in this case) the Court of Appeal stated at paragraph 47:

"When consideration is given to the weakness of family life in this case and to the lack as it seems to me of any positive duty which imposes on the United Kingdom an obligation which goes beyond making systematic allowance for a right of entry which is governed both by carefully composed Immigration Rules such as Rule 317 and an overriding consideration of Article 8 on a case by case basis, it is not possible to say that there has either been an interference with family life or a lack of respect for family life which amounts to a breach of Article 8 or would amount to a breach of Article 8 but for justification on the basis of proportionality. ... Any such

interference or lack of respect would be justified by the principles of immigration control by what would otherwise amount to the imposition on the admitting state of the use of public resources to maintain the immigrant”.

12. Judge Cruthers’ conclusion was that as Judge Khan had addressed Article 8 only through the eight lines of paragraph 33 (see paragraph 7 above) it was arguable that the Appellant and her family members were entitled to a more fully reasoned treatment of any Article 8 case that she might have. He added the rider that the Appellant should not take this grant of permission “as any indication that the appeal will ultimately be successful”.
13. The Respondent replied to the grant of permission by letter dated 10th April 2015 stating that the grounds advanced by the Appellant were a mere disagreement with the negative outcome of the appeal and did not establish a material arguable error of law that would be considered capable of having a material impact upon the outcome of the appeal. The Judge at first instance had provided adequate reasons to support his findings in respect of Article 8.

The Hearing Before Me

14. At the hearing before me the issue was whether there was such an error of law in the determination that it fell to be set aside and the matter reheard. If there was not then the determination would stand. For the Appellant Counsel who had appeared at first instance argued that on advice at the appeal hearing the concession had been made that the Appellant could not meet the Rules as was said in the skeleton argument. The Respondent’s argument had been that she failed to see how Article 8 was engaged as there was no family life and thus any interference was proportionate. The Judge had failed to consider whether there was family life and if there was whether the interference was proportionate.
15. The Judge had erred at paragraph 5 of his determination where he had reported the Appellant as claiming that she met the requirements of Appendix FM. The reasoning at paragraph 33 was wholly inadequate. There were no relevant findings. The Appellant’s father having come to the United Kingdom in 2001 as an asylum seeker had eventually been granted indefinite leave to remain under the legacy programme and thereafter granted British citizenship. The Appellant had been heavily reliant on her mother and family unit for essential support. There was family life between them and there needed to be a reasoned analysis of the interference with it. This would be so that the losing party would know why they had lost. There was no analysis by the Judge as to why the balancing exercise came down on the Respondent’s favour.
16. Citing the case of **MK [2013] UKUT 00641** counsel submitted that there was a duty on the Tribunal to give reasons. The head note to **MK** read:

“(1) It is axiomatic that a determination discloses clearly the reasons for a Tribunal’s decision.

(2) If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.”

17. It was impossible to properly appeal in the absence of adequate reasoning. There had to be some weighing of both parties’ arguments in the balancing exercise. There was evidence from the parents on the negative impact on the younger children. The ability of the Sponsor to maintain and accommodate the Appellant was a factor the Judge should have weighed. The Judge’s reasoning could not be said to be sufficient. The Appellant could not understand from the determination whether the Judge had found Article 8 engaged or not.

18. In reply for the Respondent it was acknowledged that the Judge’s findings under Article 8 were brief but they were adequate. In order to allow the appeal the Judge would need to have good reason to make a freestanding assessment of the application outside the Rules. The Judge was not persuaded that those factors existed in this case. The Judge had not found the witnesses to be credible. The Appellant could look after herself and there was no evidence of a medical condition. This was a case of an adult living with her grandmother who needed to establish why if the case hinged on family life her relationship with her family in the United Kingdom went beyond normal emotional ties. The Judge could only work from the evidence put forward. He was unable to see what there was about this Appellant’s case which meant that he should consider it outside the Rules. There was no reason why the family could not return to Sri Lanka so there was thus some acceptance of the existence of family life but Article 8 was a qualified right. If the family wished to be together they could do so in Sri Lanka. To succeed under Article 8 outside the Rules was a high threshold and the circumstances in this case did not cross that threshold. There was no reason for the Judge to give lengthy reasons because there could be no other outcome.

19. Finally in reply Counsel stated that the Judge had considered Article 8 but it was very brief and inadequate. It was not a requirement that the Judge should write pages of reasons but adequate reasons were required.

Findings

20. The Appellant has lodged a reasons based challenge to the Judge’s decision to dismiss her appeal outside the Immigration Rules. It was conceded in Counsel’s skeleton argument and in submissions to the Judge that the Appellant could not succeed under the Immigration Rules because she had insufficient evidence to show that the requirements of Appendix

FM could be met. It is worth recalling that the requirements are that the Appellant must need long-term personal care to perform everyday tasks and be unable to obtain that required level of care in Sri Lanka. The concession in the skeleton argument was thus not that the Appellant did not require personal care etc. but that there was no evidence to show that she required it. Coupled with the fact that when the Appellant's parents gave evidence of the Appellant's medical condition which was said to have deteriorated and required hospital treatment, it is not surprising that the Judge in his determination should have stated at paragraph 5 that the Appellant's case was based on her claim that she did meet the Immigration Rules. The concession made by Counsel was somewhat undermined by the oral testimony of the Appellant's witnesses. The Judge was concerned about the Appellant's witnesses' evidence on the Appellant's condition noting that it was exaggerated. The Appellant's condition whatever it might be did not prevent her from travelling two miles by rickshaw to collect the monthly payments from her father based in the United Kingdom. The need the Appellant might have for care was an issue raised in the oral evidence which the Judge had to deal with and did so.

21. It is fair to say that the Judge's conclusion that the appeal should be dismissed under Article 8 was brief but the issue is whether it was adequate. The Judge was clear that he was dealing with Article 8 outside the Immigration Rules. It was not necessary for the Judge to set out the detailed jurisprudence on dealing with Article 8 cases outside the Immigration Rules. That jurisprudence indicates that there do need to be compelling circumstances for an applicant to succeed outside the Immigration Rules.
22. In the case of **SS Congo [2015] EWCA Civ 387**, the Court of Appeal held that it could not be maintained as a general proposition that leave to remain outside the Immigration Rules should only be granted in exceptional cases. However in certain specific contexts a proper application of Article 8 may itself make it clear that the legal test for grant of leave to enter outside the Rules should indeed be a test of exceptionality. The Court of Appeal went on to say at paragraph 32 that if the Respondent had sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope the Rules themselves would provide significant evidence about the relevant public interest considerations which should be brought into account when a Tribunal sought to strike a proper balance of interests under Article 8.
23. The Tribunal was required to give the new Rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights. At paragraph 33 the Court stated that compelling circumstances would need to be identified to support the claim for a grant of leave to remain outside the new Rules. The position was slightly different where the application (as in the instant case before me) was an application for leave to enter. That was more in the nature of an

appeal to the state's positive obligations under Article 8 rather than enforcement on the negative duty as would be in the leave to remain cases. Thus the requirements upon the state under Article 8 were less stringent in a leave to enter context than in a leave to remain context. Article 8 did not confer an automatic right of entry and imposed no general obligation on the state to facilitate the choice made to reside in it (appoint made by Judge Khan). A court would be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure.

24. The interests of a child would not be a trump card. The state had a wider margin of appreciation in determining the conditions to be satisfied before leave to enter was granted in contrast to the position in relation to decisions regarding leave to remain. The leave to enter Rules maintain their reasonable relationship with the requirements of Article 8 in the ordinary run of cases. The Court of Appeal noted that it remained possible to imagine cases where the individual interests at stake were of a particularly pressing nature such that a good claim for leave to enter could be established outside the Rules. Such cases will arise where an applicant for leave to enter could show that compelling circumstances existed which required the grant of such leave.
25. Bearing this jurisprudence in mind it can be seen from the determination of Judge Khan that he could find no compelling circumstances such that the Appellant should be granted leave to enter outside the Rules. I would agree with the Respondent's submissions to me (which I have set out above at paragraph 18) in this context.
26. It is possible to criticise Judge Khan's determination for not specifically setting out the **Razgar** questions and then going through them step by step. What the Judge was concerned with in this case was whether there were compelling circumstances such that this appeal should be allowed outside the Rules. For the reasons he gave at paragraphs 30 to 33 he did not find such compelling circumstances. The Appellant had no evidence of a medical condition, she was living with a grandmother and was able to travel some two miles to collect the monthly remittances from her father. The Judge did not find the Appellant's parents to be credible witnesses, the Appellant's mother had not been able to answer an important question put to her by the Judge by way of clarification.
27. There was no reason why family life could not be continued elsewhere that is to say why the family could not return to Sri Lanka. The Appellant's mother and siblings had only recently travelled to the United Kingdom and the Appellant's father might have made a claim for asylum in the past but his grant was on the basis of a legacy provision that is to say that his case had been outstanding for a period of time. The Appellant's father had been able to travel to Sri Lanka to see his family there and there appeared to be no particular reasons why he should not return with the rest of the family. The Judge found there was no reason why the family could not return to Sri Lanka, a conclusion which was open to him on the evidence.

The father's asylum claim had been refused and he had returned voluntarily to Sri Lanka to visit his family suggesting there was no fear of persecution.

28. If family life could be continued elsewhere Article 8 would not be engaged and there would be no interference with family life by the decision to refuse the Appellant entry clearance. The issue of proportionality would not then arise. The criticism made of the Judge's approach and the fact that he did not follow the **Razgar** step by step approach precisely, is in my view a matter more of form than substance.
29. The Judge recognised that Article 8 was a qualified right and did not give a choice to an Appellant where to exercise her family life. To that extent it might be argued that the Judge had accepted that there was family life in this case albeit it was a relationship between an adult Appellant, her two parents, and two siblings one of whom was herself over 18 at the date of hearing. If the Article was engaged the key question would then be whether the decision to refuse the Appellant was proportionate. In the absence of compelling circumstances, this was an appeal that was bound to fail at the proportionality stage (as implied by the grant of permission to appeal). It did not meet the criteria in an out of country leave to enter case as explained in the recent Court of Appeal decision of **SS Congo**. The Judge gave adequate reasons for his finding that there were no compelling circumstances. Thus either the case did not engage Article 8 as the Respondent had argued and the Judge had found that the family life could be continued elsewhere, or if it did there were no compelling circumstances which tipped the balance in the Appellant's favour at the proportionality stage. I do not find therefore there was a material error of law in the Judge's consideration of this appeal and I dismiss the Appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appeal dismissed.

No anonymity direction was made at first instance and I make no anonymity direction in this case.

TO THE RESPONDENT **FEE AWARD**

The appeal was dismissed and no fee order can therefore be made in this case.

Signed this 11th day of June 2015

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Deputy Upper Tribunal Judge Woodcraft