



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17536/2016
HU/17543/2016
HU/17544/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21st May 2018

Decision & Reasons Promulgated
On 5th June 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR THANUSHAN SRIKARAN
MISS THANUSHKA SRIKARAN
MR THUSHANTHAN SRIKARAN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Ms Z Ahmed, Home Office Presenting Officer
For the Respondents: Ms S Iengar, instructed by S. Satha & Co Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I shall refer to the parties as in the First-tier Tribunal. The Appellants' appeals against the refusal of leave to remain were allowed by First-tier Tribunal Judge Fowell on human rights grounds.
2. The Appellants are citizens of Sri Lanka. At the date of hearing before the First-tier Tribunal they were 26, 23 and 22 years of age. Their father came to the UK first and was granted indefinite leave to remain in November 2009. He was joined by his wife

and children in September 2011. At that stage the First Appellant was aged 20 and the other two Appellants were still under the age of 18.

3. On 2 December 2013, the Appellants and their mother applied for further leave to remain. The application was refused and their mother's appeal, heard on 11 September 2014, was allowed. She was granted indefinite leave to remain in 2016. An unsuccessful appeal by the Respondent caused further delay, during which time the Appellants appealed and their applications were reconsidered by the Home Office in light of their mother's successful appeal. They were, however, refused on 4 May 2016 and it is against this decision that the Appellants appealed to the First-tier Tribunal. The matter came before First-tier Tribunal Judge Fowell on 6 November 2017 and he allowed their appeals.
4. Permission to appeal was granted by First-tier Tribunal Judge Brunnen on 18 April 2018 on the grounds that it was arguable "the Judge failed to give reasons for finding that requiring the Appellants to leave the UK would involve disproportionate interference. It was arguable that the judge failed to consider the test propounded in Agyarko, namely whether there were exceptional circumstances such that the refusal of leave to remain would have justifiably harsh consequences." Permission was refused on the ground that the judge erred in law in failing to view the human rights appeal through the prism of the Immigration Rules and the failure to make a finding that the Appellants could not satisfy the Immigration Rules.

Relevant law

5. The relevant paragraphs of Agyarko [2017] UKSC 11 are set out below:

"54. As explained in para 49 above, the European court has said that, in cases concerned with precarious family life, it is 'likely' only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8. That reflects the weight attached to the contracting states' right to control their borders, as an attribute of their sovereignty, and the limited weight which is generally attached to family life established in the full knowledge that its continuation in the contracting state is unlawful or precarious. The court has repeatedly acknowledged that 'a state is entitled, as a matter of well-established international law, and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there' (*Jeunesse*, para 100). As the court has made clear, the Convention is not intended to undermine that right by enabling non-nationals to evade immigration control by establishing a family life while present in the host state unlawfully or temporarily, and then presenting it with a *fait accompli*. On the contrary, 'where confronted with a *fait accompli* the removal of the non-national family member by the authorities would be incompatible with article 8 only in exceptional circumstances'."

“56. The European court's use of the phrase ‘exceptional circumstances’ in this context was considered by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; Lord Dyson MR, giving the judgment of the court, said:

‘In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be ‘exceptional’) is required to outweigh the public interest in removal.’

Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, ‘something very compelling is required to outweigh the public interest’, applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.”

“57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are ‘insurmountable obstacles’ or ‘exceptional circumstances’ as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether giving due weight to the strength of the public interest in removal of the person in the case before it the Article 8 claim was sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong compelling claim is required to outweigh the public interest in immigration control.”

(Paragraph 51 refers to when the applicant is in the UK unlawfully or temporarily and paragraph 52 states that “the weight to be given to precarious family life is liable to increase if there is a protracted delay in the enforcement of immigration control”.)

“60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word ‘exceptional’, as already explained, as meaning ‘circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate’. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that ‘exceptional’ does not mean ‘unusual’ or ‘unique’: see para 19 above.”

Submissions

6. Ms Ahmed referred to the judge’s proportionality assessment at [56] and submitted that the judge had failed to properly apply Agyarko. She submitted that the test to be applied was whether there was a strong or compelling claim such as to outweigh the public interest. The judge had failed to appreciate this was the test. The Appellants had developed their private life when they did not have settled status. The judge did not refer to exceptional circumstances or apply such a test. The decision was not clear as the judge had not set out the relevant test or the factors which showed how it was satisfied. Ms Ahmed submitted that anything other than settled status was precarious.
7. Ms Iengar submitted that there was no challenge to the judge’s finding that family life existed and therefore Article 8 was engaged. The judge referred to Agyarko and discussed whether the Appellants’ presence in the UK was precarious. They had lawful leave throughout, although their leave was limited. There had also been delay on the part of the Secretary of State for the Home Department.
8. In the alternative, Ms Iengar submitted that the judge had looked at whether there were exceptional circumstances and considered the consequences of return. On the facts, there would be unjustifiably harsh consequences for all family members.
9. The judge took into account the Appellants’ lawful presence in the UK and assessed whether their status was precarious. He separately considered the position of the First Appellant and properly applied Agyarko. Even if the Appellants’ status was considered precarious, which the judge found it was not, then the judge’s finding at

[56] showed that there would be unjustifiably harsh consequences in returning the Appellants to Sri Lanka.

The judge's findings

10. The judge made the following findings:

- “51. In Agyarko [2017] UKSC 11, Lord Reed emphasised a passage in the IDIs instructing Home Office caseworkers that it is people who put down roots in the UK in the full knowledge that their stay here is unlawful or precarious who should be given less weight in the Article 8 balance. His Lordship went on to envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.
52. The Appellants all arrived as dependants of their mother and the public interest at that stage was considered to be satisfied. They remain part of the same family group and during that period their mother has been successful in obtaining indefinite leave to remain so they may well have been under a reasonable misapprehension as to their ability to remain.
53. The point was also made that the weight to be given to precarious family life is liable to increase if there is a protracted delay in the enforcement of immigration control. Here, there has been delay, although not necessarily on the part of the Home Office, but it has taken a substantial time for these matters to come before this First-tier Tribunal.
54. The question of whether their immigration status is precarious is not straightforward. The Home Office instruction, which is cited with approval by Lord Reed as consistent with the case law of the ECHR, actually states:
- ‘Family life which involves the applicant putting down roots in the UK, in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.’
55. This differentiates lawful presence (which would include limited leave) from a precarious stay (which is not unlawful, but is presumably a lesser status than ordinary leave).
56. It is difficult however to weigh these considerations to a nicety. There is not here a clearly stated immigration rule encapsulating the public interest against which such weight as can be given to private life can be assessed. The overall position is that this is a family group, there is now to some

extent dependence for help by their mother on the children for help and by them on their parents for accommodation and living expenses. Return to Sri Lanka would involve a considerable upheaval after six years. They have no experience of living independently and their return would also deplete their parents' finances. It is unlikely that there could be much, if any, financial support to them from the UK. There are some relatives still in Sri Lanka who could provide initial accommodation while they sought to establish themselves, and there would be a profound emotional impact and cultural adjustment. The public interest in their removal, in the interests of managed migration, has to be borne in mind, but is tempered here by their use of English, their earnings and their general integration. Overall I find in each case that the public interest in these circumstances is satisfied and so the appeals are allowed."

Discussion and Conclusion

11. The Appellants came to the UK lawfully, relying on their father's settled status since 2009. Their status was not precarious because it was lawful and it could not be considered temporary because when they came to the UK their father already had settled status. Their father was not, for example, a student who intended to return to Sri Lanka. I am not persuaded by Ms Ahmed's submission that any leave short of settled status would be precarious. I rely on [44] of Rhuppiah [2016] EWCA Civ 803 which states:

"This discussion is sufficient to dispose of the Appellant's argument about whether her own immigration status was 'precarious' at the relevant time, i.e. between 1997 and late 2010. I would wish to reserve my opinion about the submission of the Secretary of State that any grant of limited leave to enter or remain short of ILR qualifies as 'precarious' for the purposes of section 117B(5). I have to say that I am doubtful that this is correct. If that had been intended, the drafter of section 117B(5) could have expressed the idea more clearly and precisely in other ways. There is a very wide range of cases in which some form of leave to remain short of ILR may have been granted, and the word 'precarious' seems to me to convey a more evaluative concept, the opposite of the idea that a person could be regarded as a settled migrant for Article 8 purposes, which is to be applied having regard to the overall circumstances in which an immigrant finds himself in the host country. Some immigrants with leave to remain falling short of ILR could be regarded as being very settled indeed and as having an immigration status which is not properly to be described as 'precarious'. The Article 8 context could be taken to support this interpretation. However, it is not necessary to decide in this case whether the Secretary of State is correct in her

submission or not, since whichever view is correct the Appellant clearly loses on this point.”

12. The issue of whether the Appellants’ status in the UK was precarious is relevant to the assessment of proportionality. I find that the judge properly applied the decision of Agyarko in looking at the Appellants’ status in the UK and whether it was legitimate for them to establish roots. Having found that there was family life, the judge considered whether the Appellants were ‘entitled’ to lay down roots in the UK. They were not here on a temporary or unlawful basis, but as a result of their father’s indefinite leave to remain granted in 2009 (two years prior to their arrival in the UK), their mother’s lawful grant of limited leave to remain and subsequent grant of indefinite leave to remain in 2016, and their own grant of limited leave to enter. The Appellants had remained in the UK lawfully for six years (at the date of the First-tier Tribunal hearing).
13. The Second and Third Appellants were under the age of 18 when they came to the UK, they have never moved out of the family home and they have never been independent. The First Appellant, was an adult when he came to the UK, but he was still part of the family unit and that situation remained. Although he had become independent financially and was working, he provided financial support to other members of the family.
14. The judge found that the Appellants came to the UK as a family unit and have lived here lawfully with their settled father. They were integrated in the UK and the Second and Third Appellants were still dependent, even though they were working. On the facts found by the judge, it would be unjustifiably harsh to separate the First Appellant and return him to Sri Lanka just because he was financially independent. It would be disproportionate for him to return alone and it would also have unjustifiably harsh consequences for his parents who would lose his financial contribution to the family unit.
15. I find that the judge properly applied Agyarko, initially looking at the status of the Appellants in the UK and whether it was legitimate for them to establish family life and set down roots. He put his findings on this issue into the balance with all other factors when he assessed proportionality. The judge’s finding that the Appellants’ right to family life outweighed the public interest in removal was open to him on the evidence before him.
16. Accordingly, I find that there was no error of law in the judge’s decision dated 16 November 2017 and I dismiss the Secretary of State’s appeal to the Upper Tribunal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

J Frances

Signed

Date: 4 June 2018

Upper Tribunal Judge Frances