Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23480/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 October 2013	**On 22 October 2013**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THILAGAWATHY CHELVARARAGAH

Appellant

and

ENTRY CLEARANCE OFFICER - CHENAI

Respondent

Representation:

For the Appellant: Mr R Singer, Counsel, instructed by Sriharans Solicitors
For the Respondent: Ms H Horsley, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 14 October 2013, I sat to re-make the decision in the appellant's appeal, as regards Article 8 of the ECHR. This followed the setting aside in September 2013 of the determination of the First-tier Tribunal, which had dismissed the appellant's appeal against the respondent's decision to refuse her entry clearance as a dependent relative. I set out below the

decision on error of law and subsequent set aside, made by Deputy Upper Tribunal Judge Murray:-

"1. The appellant in these proceedings is the Entry Clearance Officer but for convenience I shall now refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Sri Lanka born on 1 December 1928. She appealed against the decision of the respondent refusing her entry clearance to the UK as an adult dependent relative under Appendix FM of HC395 as amended. The date of the refusal was 17 October 2012. The appeal was heard by First-tier Tribunal Judge Hawden-Beale on 15 May 2013 and dismissed under the Immigration Rules in a determination promulgated on 28 May 2013.

3. An application for permission to appeal was granted by Judge of the First-tier Tribunal Macdonald. The grounds of application state that the judge erred in law by treating the application as having been made after 9 July 2012, the judge erred in his findings that the appellant did not meet the requirements of the Rules and erred in his assessment under Article 8 ECHR.

4. There is a response to the grounds of appeal by the respondent under Rule 24, being that the First-tier Tribunal directed itself appropriately and gave full reasons for concluding that the application was not validly made prior to the rule change and finding that Appendix FM now applies. The response accepts that the judge's finding on Article 8 is inadequate but states that this is immaterial in light of his findings regarding Appendix FM and states that as the judge found that the appeal failed under the Rules no separate assessment for Article 8 was required.

5. Mr Singer, for the appellant, submitted that the appellant was aged 83 at the date of the decision and is now 84 and whether the claim should be decided pre 9 July 2012 or post 9 July 2012 is extremely important in this case. He submitted that in respect of accommodation the application would have succeeded under paragraph 317 before the new Rules came into being on 9 July 2012.

6. He submitted that the judge may not have considered all the evidence before reaching her decision. I was referred to the Affidavits dated in July 2013. He stated that the facts were before the judge relating to the actual application made by the appellant. I was referred to the letter dated 9 July 2012 to the Entry Clearance Officer from the appellant. This gives details of how the application was made on 6 July 2012 when the appellant went to the VFS centre and was told that she required her birth certificate although she had her passport with her date of birth therein. The appellant paid the fee in cash on 6 July but because she was unable to produce her birth certificate the money was returned to her. Mr Singer submitted that this was an error on the part of the Entry Clearance Officer as the appellant's birth certificate was not required. On the same day the appellant's daughter made a correct online application on behalf of the appellant, on her instructions. When an online application is made the fee cannot of

course be paid. A reply was received asking for the supporting documents to be submitted on 19 July. She was told that the online application dated 9 July was invalid as the VFS centre had been advised not to accept any application with dates before 9 July 2012. Because of this the application was considered after 9 July 2012. Mr Singer submitted that had the correct advice been given on 6 July with the original application then the application would have been successful as it would have been considered before 9 July 2012 under paragraph 317.

7. I was asked to consider whether the appellant was given the wrong advice on 6 July as if so her application should have been considered under Rule 317. It was submitted that if the appellant was wrongly prevented from making the application before 9 July 2013 then this historic wrong should now be righted and the application should be considered under the old Rules.

8. I pointed to the Entry Clearance Manager's review letter which states that some of the documents supplied after the online application was made and at interview on 19 July, were dated after 6 July 2012.

9. Mr Singer submitted that the appellant is an elderly and vulnerable woman and this issue should be looked at with care.

10. Mr Singer then asked me to consider section EC-DR2.4 and whether the appellant, because of her age, illness or disability, requires long term personal care to perform every day tasks. The judge found that she did not but it was submitted that by coming to this conclusion he cannot have considered properly the medical evidence before him, the oral evidence given in court or the appellant's compassionate reasons. The judge refers to age, illness and disability instead of age, illness or disability. It was submitted that the substitution of the word "and" for the word "or" is significant and that had the judge properly considered this he would have found that the requirements of section EC-DR2.4 had been met.

11. With regard to the requirements of EC-DR2.5 Mr Singer submitted that this is a very onerous rule. It refers to there having to be no person in the whole of Sri Lanka who can reasonably provide the required levels of care for the appellant and it was submitted that this appellant's human rights have to be considered relating to this. Because the appellant has a maid, the judge found that this requirement had not been satisfied.

12. Mr Singer submitted that Ground 4 – the lack of a separate assessment under Article 8 of ECHR – is the strongest issue. He submitted that the appellant in this case can meet the terms of the new Rules but if I find that that is not the case, Article 8 of the ECHR needs to be dealt with. He submitted that the respondent has accepted that the judge's findings on Article 8 are inadequate. I was asked to find that this is a material error. The judge has not properly applied the 5 stage test in Razgar [2004] UKHL 27 and the rights of the appellant and her wider family members must be looked at. It was submitted that the judge

has not balanced this with the legitimate requirements of the Immigration Rules.

13. The respondent's argument is that if the claim cannot meet the terms of the Rules then it must fail but it was submitted that that is not the case, the Rules cannot meet every circumstances and I was referred to the cases of MS [2013] CS IH52 and Nagre [2013] EWHC 720 (Admin).

14. In his determination the judge states that the decision maintains the status quo but what he should have considered is whether the continuance of the status quo is a disproportionate violation and I was asked to find that this is the case. It was submitted that Article 8 has to be considered in the proper way and the judge has not done this.

15. Mr Singer submitted that there should be a rehearing of this case with the appellant's daughter and son-in-law giving evidence and if I find that an inadequate decision has been made then the claim should be remitted back to the First-tier.

16. I was also asked to take into account when dealing with Article 8, the issues the appellant faced on 6 July 2012 when she made her original application and paid her fee. It was submitted that she was unfairly deprived of the opportunity of making a pre 9 July 2012 application. This has not been taken into account in the balancing exercise and it was submitted that if it had been it is likely that the claim would have succeeded.

17. The Presenting Officer made his submissions relying on the Rule 24 response.

18. He referred to the said letter of 19 July 2012 and submitted that this letter refers to the refund of the application fee. He submitted that there is no valid application if no fee is paid and the judge was right to find that this application has to be considered under the new Rules and not under paragraph 317 of the old Rules. He pointed out that several of the documents submitted at the interview on 19 July were dated after 6 July 2012. I was referred to paragraph 19 of the determination which deals with this point. It is clear that the judge was not satisfied that a valid application was made before 9 July 2012. He submitted that the findings in paragraph 19 of the determination were open for the judge to make.

19. With regard to EC-DR2.4 and EC-DR2.5, the Presenting Officer submitted that the case is being reargued here. The judge has taken into account the terms of the Rules and the evidence before him and has come to a decision he was entitled to reach. He has properly explained his decision.

20. With regard to Ground 4 and the inadequate Article 8 assessment the Presenting Officer asked me to look at materiality. He submitted that the judge cannot be blamed for looking at the matter in the way he did. He had clearly taken into account all the evidence before him including the medical evidence and it was submitted that there was little before the judge for him to consider relating to Article 8. The Presenting

Officer submitted that it is not clear what arguments were put to the First-tier Tribunal Judge. There is nothing to show that the arguments now being made were put to him. At paragraph 24 of the determination the judge states "The decision merely continues the status quo as it has been for many years and I have heard nothing to suggest that family life cannot continue as it has done, by choice over the years." The Presenting Officer submitted that Article 8 rights are not protected if there is a choice involved as to where family life should be catered for. He submitted that this point was not made to the judge. Paragraphs 21 and 22 of the determination deal with EC-DR2.4 and EC-DR2.5 and the judge refers to the lack of evidence to support the fact that the appellant needs help to perform every day tasks and is unable to cook for herself, apart from the statements from her family. He goes on to note that the appellant is being looked after by a servant and that practical help in Sri Lanka is a possibility and is presently happening in Sri Lanka. The judge at paragraph 23 states that he has every sympathy for the sponsor who does not want her elderly mother to be alone. She would rather she was with the family but the sponsor left Sri Lanka voluntarily and it must have been known that her mother would get old and perhaps lose her faculties. It was submitted that the judge has taken all of these points into consideration and even if all these points were raised specifically before him, his decision would have been the same. At paragraphs 21 to 23 the judge deals with Article 8, taking into account the appellant's whole family emigrating from Sri Lanka over a passage of time.

21. The appellant's representative then submitted that the grounds of application are pleading Article 8 specifically, in light of all the above matters. Although the judge may find that the Article 8 aspect of the Rules cannot be met the judge's decision must take into account Article 8 of the ECHR, in particular the appellant's health and the fact that all her family members are in the United Kingdom. It was submitted that there is no proportionality assessment by the judge and this is a case where even if the terms of the Rules cannot be met, to dismiss the appeal under Article 8 of the ECHR must be disproportionate. It is not clear from the determination how the balancing exercise was carried out and Mr Singer submitted that a rehearing is required with an actual Article 8 assessment carried out by the judge. He submitted that the determination is silent on Article 8 of the ECHR and I was referred to the Entry Clearance Manager's review in the bundle and the appellant's right to family life. It was submitted that Article 8 must be engaged and the respondent has not looked at the wider aspect of Article 8 outside the Rules.

22. I was asked to direct a rehearing before me or by the First-tier Tribunal.

Determination

23. I have given serious consideration as to whether the appeal should be considered under the Immigration Rules before 9 July 2012 or the Rules after 9 July 2012. It is clear that no fee was paid apart from the fee which was reimbursed before 9 July 2012. There is no evidence of the fee being paid and reimbursed, apart from the witness's evidence. Because no fee was accepted, no valid application can be said to have

been made before that date. There is also the fact that some of the evidence which was submitted at the interview on 19 July, was dated after 6 July 2012. I find that the judge was correct to find that this application has to be considered post 9 July 2012. This can be given consideration when Article 8 of ECHR is considered.

24. The grounds of application relating to Article 8 of ECHR make a valid point, which is accepted by the respondent in his Rule 24 response. "The judge's finding on Article 8 is almost certainly inadequate but arguably immaterial in light of his findings regarding Appendix FM."

25. The judge has found that the Article 8 aspect of the Immigration Rules cannot be met. I find that there is a "good arguable reason" for the claim to be considered under Article 8 of the ECHR. There have been problems outwith the appellant's control relating to her application and this has to be taken into account along with the appellant's circumstances in Sri Lanka, her state of health and the fact that all her family members have left Sri Lanka. I accept that they left through choice and must have been aware that what is now happening to the appellant could happen in her later years. The fact that the judge did not carry out the balancing exercise and did not take into account, not only the case of Razgar but the other relevant Article 8 cases and the human rights of not only the appellant but also of her family members, is sufficient for there to be an error of law in the determination. There are points in favour of her Article 8 claim and points against her Article 8 claim but proportionality has to be properly argued and the reasoning narrated in the determination. A structured decision is necessary on this point.

DECISION

26. The original Tribunal made a material error of law by not considering Article 8 of the ECHR and by not carrying out a proper balancing exercise.

27. The First-tier decision under the Immigration Rules must stand. The appeal is dismissed under the Rules.

28. I direct a second stage hearing on Article 8 of ECHR only.

29. No anonymity order is made."

2. Pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I permitted the appellant to file a witness statement of her daughter Mrs Sivayogasuntaram dated October 2013, with attachments. These materials related to a visit made by her to the appellant in Sri Lanka in August 2013. I made it plain that the question of whether this evidence could be substantively considered in connection with the remaking of the appeal depended upon the operation of section 85A(2) of the Nationality, Immigration and Asylum Act 2002, whereby in an appeal of this kind, the Tribunal "may consider only the circumstances appertaining at the time of the decision".

3. Mrs Sivayogasuntaram spoke to her witness statement, which she confirmed was true (as was the earlier statement adduced in connection with the proceedings before the First-tier Tribunal). The witness said that the servant who had been looking after the appellant had moved to Colombo. The servant had observed that the appellant had been frequently getting upset and had not been eating. Another servant had been hired, but she had indicated that she would be unable to stay for more than a short period.

4. The appellant was taken by the witness to Jaffna Teaching Hospital for a period of tests and observations, following which she was diagnosed as having "early onset of dementia". Reference is also made to depression in the appellant's "diagnosis ticket", comprising one of the attachments to the witnesses' statement. The doctors advised the witness to give special attention to safety issues regarding the appellant. The witness said that she was advised that the appellant needed 24 hour constant care and that that care should be by the family, in order to improve her current state of mental health and prevent further deterioration.

5. The witness said that the appellant had been very happy to see her but had talked about not wanting to live anymore, having been badly affected by her husband's death in 2011. The witness also said that she and her immediate family had left Sri Lanka in the 1990s, following problems with the LTTE. Ms Horsley objected to that answer, since the reasons for the family's departure had not been raised before the FtT.

6. Cross-examined, the witness said that she had last been in Sri Lanka in 2011, along with her sister. The witness confirmed that the entry clearance application had not mentioned dementia problems; what had been mentioned were a stroke, diabetes and loneliness. In answer to a question from me, the witness said that she had investigated to some extent the position regarding care homes in Sri Lanka. There were, however, problems with care homes offering accommodation for those with dementia. In answer to a question from Ms Horsley, the witness recalled the statement of care needs (page 40 of 88 of the appellant's original bundle). That statement, dated 11 November 2012, made reference to the appellant having a tendency to forget to take her medication and that her low mood and loneliness were "likely to have had a deteriorative effect on her cognition, which is why she has started having memory problems".

7. In reaching a decision in this case, I have analysed all the evidence (whether or not specifically identified above) in order to determine whether exclusion of the applicant would constitute a violation of Article 8 ECHR, both as regards her rights and those of her family in the United Kingdom. In doing so, I have had regard to the submissions of both parties; in particular, the able submissions of Mr Singer, who advanced vigorously the case for the appellant.

8. It is common ground that the relevant Immigration Rules are those introduced with effect from 9 July 2012. These are to be found at section E-ECDR of Appendix FM (eligibility for entry clearance as an adult dependent relative). Although the dismissal of the appeal by reference to the Rules is not directly before me, it is of relevance to consider what those Rules comprise. For present purposes, the following is relevant:-

> "E-ECDR.2.5 The applicant, or if the applicant and their partner are the spouse's parents or grandparents, the applicant's partner, must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because –
>
> (a) it is not available and there is no person in that country who can reasonably provide it; or
>
> (b) it is not affordable."

9. Mr Singer submitted that, in determining the issue of proportionality with regard to Article 8, I should have regard to the fact that the application was, in effect, almost made in time, so as to be decided under the "old" Rules, and that had it been so decided the appellant would have succeeded. I accept that this is so; but as there are bound to be such cases whenever Rules are changed, I give the matter only relatively limited weight. Mr Singer described the new Rules as "Kafkaesque", in that if United Kingdom sponsors are in the position of being able to fund care in the foreign country concerned, that will mean that the Rules cannot be complied with. As can be seen from the citation above, however, that is not actually the position. Entry clearance will be demanded by the Rules where, even with practical and financial help, the required level of care is unavailable and there is no person in that country who can reasonably provide it.

10. It is clear from the structure of the new Rules that they are, in this instance, highly mindful of ECHR rights. Provided that a person has access to "the required level of care", it will be difficult to say that Article 8 would be violated by a refusal under the Rules. Nevertheless, I have also separately considered whether, given that the appellant has been found not to meet the requirements of the Rules, her case is such as to constitute an exception, demanding her entry to the United Kingdom pursuant to Article 8.

11. The problem for the appellant and those of her relatives in the United Kingdom is that the evidence put forward in connection with the present application was exiguous, as regards the alleged unavailability of the required level of care for the appellant in Sri Lanka. The letter from the doctor of 4 July 2002 (pp82 and 83 of 88) boldly asserts that

> "There aren't any care homes or old people's homes around in Jaffna district. I also wish to state that care home or old people home won't be

> suitable to her as she hasn't any family members or friends to visit her and to take responsibility."

The last part of that sentence frankly does not make logical sense. The first part is purportedly supported by some materials entitled "Health security challenges in Sri Lanka and Bangladesh" but these fall far short of indicating that there are no care homes of a suitable nature in Sri Lanka.

12. The appellant's daughter, who gave her evidence in an open manner and whose sincerity I do not doubt, was asked by me whether she had made enquiries about care homes. It was manifest that she had made only rudimentary inquiry and, in particular, had not considered whether there might be suitable facilities available in Colombo. The family in the United Kingdom has concentrated its efforts on bringing the appellant to live with them here, rather than making any concerted effort to find care facilities that do not depend upon individual servants coming and going to the appellant's own home.

13. I am not persuaded that the August 2013 evidence involving a diagnosis of early-onset dementia in the appellant satisfies section 85A(2). I say that, notwithstanding the indications, set out in the evidence to which I have already referred, that the appellant had certain cognitive problems in 2011. A diagnosis of dementia, even in its early stage, is a significant matter and there is nothing to indicate that the appellant was suffering from that condition at the date of the decision. However, even if she were, there has been no serious attempt on the part of the family to investigate facilities for caring for those with the beginnings of dementia in Sri Lanka. Although the appellant lives in Jaffna, no evidence has been forthcoming as to why it would not be possible for her to receive appropriate treatment in Colombo, which, as the capital of Sri Lanka, would plainly be likely to have the best of the medical facilities available in that country.

14. Thus, even on the best possible case for the appellant, notwithstanding section 85A, she still would not satisfy the requirements of the relevant Rules. I take account of the understandable desire of the United Kingdom family to have the appellant live with them, rather than in Sri Lanka, however well she might be cared for there. But mere choice of residence is not one of the rights guaranteed by Article 8. Something more has to be shown. As matters stand, even accepting that Article 8 has a material application outwith the "new" Rules, it has not been demonstrated that the appellant's exclusion from the United Kingdom would be a violation of her rights and/or those of her family.

15. These proceedings may have the benefit of identifying what the family need to do in order to ascertain whether the appellant can be brought within the relevant Immigration Rules. If she can, then she will be entitled to succeed. If not, a case will need to be made as to why human rights require her to be admitted, when adequate care is available in Sri Lanka. I appreciate that, at the appellant's age, a further application for entry

clearance will be unwelcome. I do not, however, consider that this consideration, either alone or in combination with other relevant factors, requires me to find a present violation of Article 8.

16. This appeal is accordingly dismissed.

Signed

Date

Upper Tribunal Judge Peter Lane