Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01931/2014
IA/01932/2014
IA/01933/2014

THE IMMIGRATION ACTS

Heard at Field House

On 22nd September 2014

Determination Promulgated
On 26th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR TISSA RAVINDRA KUMAR SIRIWARDENA
(2) MRS SUJEEVA VASANTI FERNANDO DEHIWATHTHAGE
(3) MISS NEHANSA SIRIWARDENA
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms L Greening (Solicitor)
For the Respondent: Mr S Kandola (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Wright promulgated on 3rd June 2014, following at a hearing at Hatton Cross on 16th May 2014. In the determination, the judge allowed the

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appeal of the Appellants on human rights grounds (though dismissing them on immigration grounds). The Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are citizens of Sri Lanka. They are a family of a father, a mother, and a daughter. The first Appellant, the father, was born on 17th September 1969. The second Appellant, the mother, was born on 20th November 1975. The third Appellant, the daughter, was born on 27th April 2006.

3. The determination of Judge Wright describes the wife, as the "main Appellant" because it is the wife who was last granted leave as Tier 1 (Post-Study Worker) on 17th December 2010 until 17th December 2012, with her husband and daughter being her dependants. The applications for leave to remain were on the basis of the second Appellant, the wife's, establishment of private and family life in the UK.

The Judge's Findings

4. The judge applied the applicable Immigration Rules and held that the Appellants could not succeed under Appendix FM R-LTRP. They did not meet the requirements for leave to remain as partners and they did not meet the "relationship requirements of E-LTRP.1.2" because they were not British citizens or present and settled in the UK with refugee leave or humanitarian protection. Under the mandatory nature of the Immigration Rules their applications fell to be dismissed. The judge gave reasons (see paragraphs 23 to 27).

5. However, in considering the situation under Article 8 ECHR "outside the Rules" (see paragraphs 29 to 43) the judge found that, on the basis of the established case law that was emerging from the Upper Tribunal and the Court of Appeal, that the appeals stood to be allowed.

Grounds of Application

6. The grounds of application state that the judge purported to direct himself in accordance with **Nagre [2013] EWHC 720** and **Gulshan [2013] UKUT 640**, but misapplied the import of those judgments, because he failed to show what compelling circumstances there were entitling him to consider the situation under freestanding Article 8 jurisprudence.

7. On 6th August 2014, permission to appeal was granted on the basis that it did appear that the judge had allowed the appeal of the adults primarily because the third Appellant, the child, Nehansa, had been in the UK for approximately eight years, and so with her appeal being allowed, the parents' appeal was also granted in line with that appeal. However, the family could be returned to Sri Lanka as a family unit and the judge may

have erred in finding that there were compelling or exceptional circumstances in this regard.

The Hearing

8. At the hearing before me on 22nd September 2014, the Appellants were represented by Ms Greening, a solicitor, who handed up a bundle dated 16th September 2014, which included a detailed skeleton argument (pages 1 to 8), together with a bundle of authorities that she purported to rely upon.

9. Mr Kandola, appearing as Counsel on behalf of the Respondent Secretary of State, submitted that the judge was wrong to have allowed the appeal because paragraphs 24 and 27 showed clearly why the Appellants could not meet the Immigration Rules. If consideration was to be given to the child, Nehansa, then it ought to have been recognised that she had not been in the UK for eight years because she had returned back to Sri Lanka in February 2009 because her father's leave had expired, returning back to the UK only on 16th October 2009, some eight months later.

10. The precise timeline is easy to discern from the judge's own reference to the "immigration history" where he sets out the "brief timeline" (see paragraph 2). It is made clear here in sub-paragraph (xi) that Nehansa and her father entered the UK as the wife's dependants on 16th October 2009. The entire family consisted of temporary migrants and they had no entitlement to remain. The judge was wrong to have allowed the appeal.

11. For her part, Ms Greening simply relied upon the determination of Judge Wright. She initially argued that each family member had their own private and family life in the UK. Furthermore, the father had now applied for settlement. I pointed out that settlement had not been granted to him. She suggested that Nehansa could not return back to Sri Lanka because she no longer had the requisite language skills, having gone to nursery school in this country.

No Error of Law

12. I am 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 I should set aside this decision. My reasons are as follows. First, the judge sets out the "latest guidance of the Upper Tribunal on Article 8", referring to the key cases (see paragraph 31) before subsequently analysing the principles in these cases. For example, the judge make its clear that following **Gulshan**, the position now is that recourse to Article 8 is only justified if there are "unjustifiably harsh consequences such as to be disproportionate under Article 8" (see paragraph 33).

13. Second, the judge then considers the facts in the context of the established law. He makes it clear that,

> "Whilst both Nehansa's father and mother entered the UK for temporary purposes (firstly together in 2004 when her father was a student and then secondly in 2009 when her mother became the student respectively) with the legitimate expectation that they would leave at the end of their respective studies, the fact remains that Nehansa (born here on 27th April 2006 and now aged 8) has resided here now (as at the date of hearing, *not application*) for more than eight years (it is still more than seven years even if one discounts the eight months spent in Sri Lanka in 2009 pending the issue of visas for her mother [student] and her …... [as dependant])".

14. The judge so stated at paragraph 35.

15. Third, the judge then immediately proceeded to consider that "the best interest of Nehansa ….. and children generally are a primary consideration ….. but not the paramount consideration …." (paragraph 36). This, is also, an accurate recitation of the law.

16. Fourth, the judge considered **<u>SC</u> (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056**, where the Upper Tribunal had held that, in the absence of strong countervailing factors residence of eight years in the UK with a child is likely to make removal at the end of that period not proportionate to the legitimate aims in this case" (see paragraph 39).

17. It was in this context that the judge finally concluded that,

> "Nehansa is clearly well settled into life in the UK, and clearly well settled into education here (see up-to-date reports of her teacher and year 3 class teacher dated 15th May 2014). Her future development is clearly at stake here. Her friends are here. While she has visited Sri Lanka, life would be very different there. Whilst there was a delay in the necessary visas being issued in 2009 (leading to an eight month stay in Sri Lanka), this was not of Nehansa's doing" (see paragraph 40).

This was clearly an entirely proper consideration for the judge to give regard to. It shows why the judge was driven to the conclusion that there were indeed compelling and exceptional circumstances. Indeed, the judge refers to "exceptional cases" at the end of the determination (paragraph 43). All in all, accordingly, the determination does not elicit an error of law.

<u>Decision</u>

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

19. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 26th September 2014