Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
IA/02471/2014

IA/03461/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 September 2014	**On 1 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PLIMMER

Between

LD
BC
(ANONYMITY DIRECTIONS MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Asanvic (Counsel)
For the Respondent: Mr Kandola (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellants are citizens of Sri Lanka. The first appellant is the mother of the second appellant. The first appellant's husband and the second appellant's father ('the sponsor') is also a citizen of Sri Lanka. He was

granted discretionary leave ('DL') in 2011, having been in the UK since 2002.

2. The first appellant was granted leave to remain in 2010 until 2013. The second appellant was born in 2011. They both applied for leave to remain on 15 October 2013. The respondent refused this application and decided to remove the appellants in decisions dated 20 December 2013.

Procedural history

3. This is a matter that has previously been considered by First-tier Tribunal Judge Thorne in a determination promulgated on 5 August 2014, in which he dismissed the appellants' appeals under Article 8 of the ECHR. This was the sole ground upon which the appellants appealed against the respective decisions to remove them.

4. The appellants appealed against this determination relying upon three grounds of appeal: the Judge was wrong not to grant an adjournment; the Judge erred in law in failing to properly apply the respondent's policies concerning claims for international protection; the Judge erred in law in his approach to Article 8. First-tier Tribunal Judge Saffer granted permission to appeal on 22 August 2014.

5. The matter now comes before me to determine whether or not the decision of the First-tier Tribunal contains a material error of law._

Hearing

6. Ms Asanvic relied upon the grounds of appeal, focussing in particular on ground 3. Mr Kandola submitted that the determination is a detailed one and invited me to find that the Judge's findings of fact and conclusions were open to him.

7. At the end of the hearing I reserved my determination, which I now provide.

Discussion

Ground 1 – adjournment application

8. Ms Asanvic submitted that the Judge took irrelevant matters into account such as the failure to give notice of

the adjournment application and the failure to make the sponsor's application earlier, in light of the relevant chronology. The real question for the Judge was whether or not he could fairly determine the appeal without an adjournment. He considered that ultimate question and concluded that the appeal could be justly determined without an adjournment [23(iii)]. The grounds of appeal submit that it was crucially important to await the outcome of the sponsor's recent application to extend his DL. This misunderstands the relevant legal framework as it now exists. The sponsor remains in the UK with limited leave. The appellants do not meet the immigration rules and are not treated as his dependents. Even if the sponsor was successful in obtaining a DL extension it does not follow that the appellants would be granted leave in line. The Tribunal would still have to determine whether or not the appellant should be removed notwithstanding his limited leave. There was no procedural unfairness in not granting an adjournment in these circumstances.

Ground 2 – Claim for international protection and SSHD's policy on removal

9. Ground 2 submits that the sponsor made an application for international protection when he submitted his application to extend his DL. The SSHD's own policy on DL states that when considering an application for further leave, consideration should first be given to whether the reasons for seeking an extension given by the applicant amount to an asylum application. It also makes it clear that where, like the present case in which the sponsor was granted leave because of his long residence and then makes an application for further leave on asylum grounds, it must be considered whether this application amounts to a fresh claim for asylum.

10. It is further argued that this is relevant to the present case because either by reason of paragraph 329 or 353A of the immigration rules, the appellants as the sponsor's dependents cannot be required to be removed from the UK. It is therefore submitted that in failing to take into account that the appellants as dependents, cannot be removed, the Judge has erred in law.

11. I accept that it appears that the Judge has erroneously failed to take into account the relevant legal framework and policies referred to in ground 2. These are matters

that seem to have been argued before him as can be seen from paragraph 60.

12. However Mr Kandola meets this submission head on because he claims that the appellants have not been treated as dependents at any material time. In a letter dated 23 July 2014 the respondent confirmed that the appellants are not dependents. This has been the subject of a letter before claim and is not a matter for me in this statutory appeal. Ms Asanvic accepted that the appellants have not been treated as dependents. It therefore follows that the prohibition on a removal decision in relation to them pursuant to rule 329 and / or 353A does not apply – such a prohibition only applies to dependents. In these circumstances the submission set out at ground 2 is bound to fail. The Judge has not made a material error of law in failing to take into account and apply the relevant policies, because if he had, it would have made no material difference.

Ground 3 – approach to the best interests of the child and Article 8

13. Ms Asanvic submitted that the Judge impermissibly assumed that the sponsor would be removed to Sri Lanka alongside the family members when he had DL since 2011 and an extant application for an extension of DL. I accept that the Judge should have directed himself more clearly to the fact that the sponsor had DL when considering Article 8. However the Judge did not assume that the sponsor would be removed but that it would be reasonable for the child to return to Sri Lanka <u>if</u> her parents are removed [43 and 46].

14. Judge Thorne addressed the child's best interests sufficiently. He noted a dearth of evidence about the child's best interests [42]. In the absence of any cogent evidence one way or another, the Judge was entitled to conclude that the best interests of the child are for him to live with his parents [42]. The Judge considered the evidence he had and concluded that the child could adapt and be brought up in Sri Lanka [54] where his mother would be able to care for him and he would be able to be educated [55].

15. It was submitted in the grounds of appeal that the sponsor could not be expected to live in Sri Lanka as his links to the UK had been recognised by the grant of DL.

The Judge was well aware of this and explicitly referred to Ms Asanvic's submissions to this effect [50, 53]. The Judge could have dealt with this issue more carefully and clearly but when the determination is read as a whole I am satisfied that the Judge was well aware that the sponsor had DL and had made an application to extend it, and as such was not removable at present. That is why he used the word 'if' when referring to the sponsor's removal.

16. Judge Thorne was well aware that the sponsor chose to make an application to remain in the UK and was of the view that it would be reasonable to expect him to live in Sri Lanka with his wife and children. His asylum claim had been successful. Although it is said that the sponsor has sought to reactivate this claim, this is difficult to follow. In his application, the sponsor's solicitor has not identified why the sponsor fits into any of the risk categories in **GJ Sri Lanka CG** [2013] UKUT 00319. On the evidence available to the Judge and before me, the sponsor does not fit into any such risk category. This is a case in which it is accepted that the appellants cannot meet the requirements of the Immigration Rules and under the present legal framework the Judge was entitled to find that the circumstances are not compelling and as such the Article 8 submissions must fail.

17. Even if I am wrong and the Judge did err in law regarding his approach to Article 8 in light of the sponsor's DL, I would not have set aside the decision. Had the Judge directed himself to the reasonableness of expecting the sponsor to leave the UK with the appellants notwithstanding his DL and pending application to extend it, on the evidence available he was bound to find that it would be reasonable for the sponsor to leave with them. The sponsor was granted DL in 2011 at a time when he did not have an established and long standing family life with Sri Lankan citizens with current links to Sri Lanka. It was emphasised in **VW (Uganda) v SSHD** [2009] Imm AR 436 that what "*must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.*" There was no evidence before the Judge to show that the sponsor would suffer more than mere hardship in returning to Sri Lanka. The evidence before the Judge did not come anywhere near demonstrating that there would be anything other than mere difficulty in the family returning to Sri Lanka together as a family unit,

notwithstanding the sponsor's pending DL application. As I have already explained the submissions relying upon **GJ** are unfounded on the evidence available to the Judge.

18. I am aware that in the past certain Judges have been prepared to find that it would be a breach of Article 8 to remove the family members whilst that father's application was under consideration. Ms Asanvic submitted that the Judge should have given consideration to giving the appellants leave in line with the sponsor. These decisions were made at a time when the Article 8 landscape under the pre- July 2012 Rules was materially different.

19. I must decide whether or not this Judge made an error of law in his findings on Article 8. He clearly took into account the evidence such as it was and made findings of fact open to him. He effectively decided it was reasonable for the family to return together to Sri Lanka notwithstanding the fact that the sponsor was the beneficiary of leave to remain. That may be a harsh finding but it is not one that can properly be described as perverse or disclosing a material error of law.

Anonymity

20. As this determination refers to sensitive issues relating to the second appellant child I have anonymised this determination.

Decision

21. I do not find that the decision of the First-tier Tribunal contains an error of law.

22. I do not set aside the decision of the First-tier Tribunal.

Signed:

Ms M. Plimmer
Deputy Judge of the Upper Tribunal

Date: 30 September 2014