IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/27670/2013
IA/27679/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th October 2014	**On 20th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR DANUSHKA RUWAN KUMARA PERERA KIRULAPANAGE
MRS IMALSHI DHAMSARA SAKALASURIYA APPUHAMILAGE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Professor W Rees (Counsel)
For the Respondent: Ms S Vidyadharan (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellants' appeals against decisions to refuse to vary their leave and to remove them by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 were dismissed by First-tier Tribunal Judge O'Keefe in a determination promulgated on 26th February 2014. That decision was set aside in a

determination promulgated on 28th August 2014. On 7th October this year, the appeals were remade by the Upper Tribunal.

2. The appellants relied upon Article 8 of the Human Rights Convention in the First-tier Tribunal and before the Upper Tribunal. The first appellant arrived in the United Kingdom as a student in 2004. His wife arrived in September that year and a son was born here to the couple in the summer of 2011. All three family members are citizens of Sri Lanka. The Secretary of State refused to vary the first appellant's leave in the light of his conviction, on 28th October 2011, for driving with excess alcohol in his blood. This led to refusal of his application under paragraph 245CD(a) of the rules and to a similar decision in relation to his wife, the second appellant. Paragraph 245CD was deleted from the rules after the appellant made his application in May 2012. By the date of the adverse decisions on 17th June 2013, paragraph 322(1C)(iv) of the rules was engaged. The first appellant's conviction was unspent and the rules provided that leave to remain was to be refused where a person had, within the 24 months prior to the date on which the application was decided, been convicted of an offence for which he or she received a non-custodial sentence or other out of court disposal.

3. The appellants relied upon the bundle of documents prepared for the First-tier Tribunal hearing. This included witness statements made by them. The first appellant, Mr Kirulapanage, drew attention to his immigration history. He and his wife were employed and the first appellant had been lawfully present as a student and as a highly skilled migrant. The application he made in 2012 was for indefinite leave and he was, by then, employed as a Customer Service Manager. He also derived an income from self-employment. The only basis on which his application was refused was his unspent conviction. The appellant declared the conviction in his application and had at no time sought to hide anything from the Secretary of State. He regretted the offence, which was totally out of character. In the more than nine hears since his arrival in the United Kingdom, he and his wife established private and family life here, completing degrees from recognised universities and paying taxes and National Insurance contributions while employed. Not only is the first appellant a qualified engineer, he also provides private tuition in mathematics for GCSE and A Level students.

4. The second appellant's witness statement was similar. Mrs Appuhamilage has worked part-time since her son's birth.

The Hearing

5. The first appellant gave evidence and adopted his witness statement. In answer to questions from Ms Vidyadharan, he said that he arrived in the United Kingdom on 17th September 2004. Initially, he planned to return after completing his degree studies. He then decided to seek to remain here. He completed his degree in 2005 and found a work placement. He was able to obtain a work permit and became eligible to settle after five years in that capacity. He established himself as a teacher and private tutor and wished to remain to develop his career. His father remained in

Sri Lanka but he was not sure precisely where his brother and sister were. He had a sister in Dubai. His brother was planning to go abroad. He was last in touch about eight or nine months ago as he was busy with the appeal and with his job and family. His father lived alone in Sri Lanka.

6. The first appellant said that his wife's parents remained in Sri Lanka and she had a sister there and another sister studying in the United Kingdom. His conviction for drink driving was on 20th October 2011. Their son was now 3 years and 2 months old and at nursery. The first appellant said that he worked about 90 percent of his time as a tutor and the remainder in Ladbrokes, working part-time. There was no re-examination.

7. The second appellant gave evidence and adopted her witness statement. In cross-examination, she said that her parents remained in Sri Lanka. Her sister was in the United Kingdom. Her husband worked as an electrical engineer and also taught A Level Maths. There was no re-examination.

8. In submissions, Ms Vidyadharan said that the appellant had been present in the United Kingdom for over ten years, following his arrival on 17th September 2004. However, he could not rely on paragraph 276B because of the unspent conviction, engaging sub-paragraph (iii). It was also clear that neither appellant could succeed under Appendix FM and although it appeared from the skeleton argument prepared by Professor Rees that reliance was placed upon paragraph 276ADE, it was clear that neither appellant could show no ties to Sri Lanka, as family members lived there. The Secretary of State did not accept that their ties have been severed. The family could re-adjust on return to Sri Lanka. Their son, now 3 years old, would be returned with them, so that the family unit would remain intact.

9. Ms Vidyadharan said that the correct approach was set out in Gulshan. There were no arguably good grounds for granting leave outside the rules and no insurmountable obstacles to the family's return to Sri Lanka. The appellants had been present here with limited leave throughout, initially as a student in the first appellant's case. There were no unjustifiably harsh or compelling circumstances preventing return to Sri Lanka.

10. Professor Rees said that the first appellant would clearly qualify under paragraph 276B, were it not for the conviction, which was not spent yet. It was sub-paragraph (iii) that was the problem. It was clear from decisions of the Court of Appeal in MF and MM that an Article 8 assessment ought to be made outside the immigration rules, in particular cases. The appellants had a child, whose best interests fell to be assessed. Professor Rees accepted that the absence of a removal decision made in relation to the appellants' son did not in fact amount to a barrier to removal of the entire family. Relevant in the Article 8 assessment was the family's presence here for over ten years now. It was excessive to expect the ties built here to be abandoned on the basis of the first appellant's conviction.

11. In considering the position if the appellants were to apply today under the settlement route, Professor Rees said that paragraph 322(1C)(iv) would apply, this being the only barrier to success in the application. Ms Vidyadharan agreed with this proposition, saying that the conviction would be relevant in this context. She said that also relevant would be the Secretary of State's guidance. Case workers should refuse an application for indefinite leave to remain made on or after 13th December 2012, where the applicant has, within the 24 months preceding the date on which it is decided, been convicted of or admitted to an offence and received a non-custodial sentence or other out of court disposal recorded on a criminal record. As the conviction in October 2011 would fall outside the period of 24 months preceding the date of decision in relation to an application made now, it would not be a barrier and would not lead to refusal. Of course, this would be a matter for the Secretary of State.

12. Professor Rees said that the principle shown in Chikwamba [2008] UKHL 40 was relevant. The Secretary of State's case that the entire family should be removed was capable of being weakened if a route to settlement was available, as here.

Findings and Conclusions

13. In this appeal, the appellants rely upon Article 8 of the Human Rights Convention. The burden lies with them to prove the facts and matters they rely upon and the standard of proof is that of a balance of probabilities.

14. The appellants have been lawfully present in the United Kingdom for over ten years and married in 2007. At that point, the first appellant had leave as a highly skilled migrant and his wife was given leave as his dependant. Their son was born in the United Kingdom on 20th August 2011. It is accepted by both parties that, in relation to the decisions to refuse to vary their leave and to remove them, the appellants are unable to show that the requirements of the rules in Appendix FM and, so far as the fist appellant is concerned, paragraph 276B are met. His conviction, which resulted in a fine, represents a barrier to success in that context.

15. So far as Article 8 is concerned, there is no issue between the parties regarding the facts. Ms Vidyadharan submitted on behalf of the Secretary of State that the proper approach was identified by the Upper Tribunal in Gulshan [2013] UKUT 640 and so the appellant was required to show that they were arguably good grounds for granting leave outside the rules, in order to show that it is necessary for Article 8 purposes to consider whether there are compelling circumstances not sufficiently recognised under them. In response to the appellants' reliance upon guidance given by the Court of Appeal in MM [2014] EWCA Civ 985, she said that any view expressed by the Court of Appeal on the "Gulshan approach" was obiter. However, even if that is technically so, it is clear that the Court of Appeal in MM carried out a review of all the recent cases and so even obiter remarks have considerable weight. In fact, the judgment in that case can be read consistently with the judgments given in MF and Halimudeen. The broad principle which emerges from all three cases is that where the rules amount to a complete code (as in deportation) the entire

assessment should be made within the rules and not elsewhere. If "exceptional circumstances" are required to be considered, this will require a proportionality assessment. Where the rules do not amount to a complete code, the proportionality assessment is "more at large" (paragraph 128 of the judgment in MM).

16. In the present appeals, there is really no difference in outcome because even adopting the "Gulshan approach" there clearly are arguably good grounds for granting leave to remain and for considering whether there are compelling circumstances not sufficiently recognised under the rules. The rules do not make provision for this particular family, where removal is proposed of all three members in the light of the first appellant's conviction and fine. Legally relevant in the Article 8 context are the years the second appellant has spent here lawfully and the best interests of the couple's son. In view of his young age, his best interests are clearly to remain with both parents, whether they remain in the United Kingdom or return to Sri Lanka). He will not have established any independent ties of substance (and this was not suggested in or emerged from the evidence).

17. Also relevant, I find, is the evolution of the relevant rule regarding convictions. The rule in place when the applications were made has been deleted. There was a delay of some thirteen months, which amounts to a substantial delay, before the Secretary of State made a decision and, by then, paragraph 322 acted as a barrier to success in the light of the conviction. If the application were made today, however, paragraph 322(1C)(iv) would be no barrier at all as the unspent conviction is now three years old. I accept Professor Rees's submission that in this context, the principle identified in Chikwamba and developed in MA (Pakistan) [2009] EWCA Civ 953 is relevant. The family and private life ties established by the appellants are substantial, and they deepened in the period of delay following their application. Removal to Sri Lanka of the family unit would substantially disrupt the ties established by them here. An application would not be met with failure in the light of the conviction which forms the basis of the present refusal.

18. I have taken into account Part 5A of the 2002 Act and the public interest considerations in section 117B. Overall, these considerations add weight to the appellants' case. They can speak English and have not been a burden on tax payers. Far from it, they have been in gainful employment in the years they have been lawfully present here. The evidence shows substantial integration into society. It is not controversial to suggest that the first appellant's role as mathematics teacher is one that is likely to continue to benefit the United Kingdom. This is not a case where little weight should be given to private life ties or relationships as they have been established during lawful presence here, over many years. The first appellant is not a "foreign criminal".

19. Overall, I conclude that arguably good grounds for granting leave have been shown and that the rules do not sufficiently recognise the compelling circumstances in the case. These circumstances include the substantial ties established in a period of lawful residence that exceeds ten years and the reduced significance of the conviction which led to refusal of the applications. There is no question of a "near miss". My

focus is on the private and family life ties themselves and the extent to which the rules recognise and give weight to those ties. Weighing the competing interests, and for the reasons set out in the paragraphs above, I conclude that the balance falls in favour of the appellants. The decisions to refuse to vary their leave and to remove them from the United Kingdom amount to a disproportionate response, in the particular circumstances of their case. Should the appellants apply once again for indefinite leave, it will be for the Secretary of State to assess their circumstances and to apply the current rules.

DECISION

The decision of the First-tier Tribunal having been set aside, it is remade as follows:

Appeals allowed.

ANONYMITY

There has been no application for anonymity at any stage in these proceedings and I make no direction on this occasion.

Signed Date **20th November 2014**

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

The appeals have been allowed but this followed a decision on the rules which was open to the Secretary of State at the time. On the other hand, there was a substantial delay in deciding the applications. Both sides assisted the Tribunal in tracing the development of the particular rule in issue. In these circumstances, I make a fee award of half of the fee paid or payable in these proceedings.

Signed Date **20th November 2014**

Deputy Upper Tribunal Judge R C Campbell