Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34582/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 April 2014	**On 9 June 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MISS AMBIGAI VINAYAGAMOORTHY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Palmer of Counsel
For the Respondent: Mr S Whitwell, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING NO MATERIAL ERROR OF LAW

Introduction

1. The appellant is a citizen of Sri Lanka born on 7 March 1979.

2. The appellant appeals the decision of the First-tier Tribunal to dismiss the appellant's appeal on the grounds that she neither qualified under the Immigration Rules nor satisfied the requirements for consideration outside those Rules under Article 8 of the European Convention on Human Rights (ECHR). The decision, made on 19 February 2014, was made by First-tier Tribunal Judge Grimmett (the Immigration Judge) following a hearing at Birmingham on 23 January 2014.

3. The appellant was given permission to appeal to this Tribunal by Judge of the First-tier Tribunal Landes. Judge Landes considered that it was at least arguable that the appellant, who had been from her country of origin for 23 years, had sufficiently strong ties here to make the Immigration Judge's findings in that respect (at paragraph 3.6-3.8) unsustainable. The judge granting permission had regard to the observations of the court in a case called **Ogundimu** at paragraph 24. The appellant appeared to have few ties with Sri Lanka having not been in that country since she was aged 9.

4. Directions were made for the parties to prepare for the Upper Tribunal hearing on the basis that no supplementary oral evidence would be adduced nor written documents allowed save where an appropriate application was made under Rule 15. On 24 March 2014 a skeleton argument was submitted on the appellant's behalf and on the same day a notice served pursuant to Rule 15(2A)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 seeking to adduce an opinion by S K Naganathan, an Indian advocate and notary dated 22 March 2014, suggesting that there were difficulties in the appellant re-establishing a right of residence in India.

The Hearing

5. At the hearing the appellant attended represented by counsel, Mr Palmer. The appellant had the benefit of a Tamil interpreter. The hearing lasted approximately one hour. Mr Palmer submitted that based on the case of **Edgehill [2014] EWCA Civ 402** it was questionable whether the provisions of Appendix ADE of the Immigration Rules applied to this application given that it was made on 28 June 2012. The new provisions did not come into force until 9 July 2012. Mr Palmer explained that his client had been a refugee from Sri Lanka departing from that country aged 9 and settling in India until 2009. When left India she lost the right of residence there. In this connection I was referred to the document at page 27 in the bundle of documents prepared for the Tribunal hearing dated 13 October 2009, in which the Superintendent of Police indicated that she was to lose her status of refugee being granted an exit permit. Given her loss of status, it was argued, the Immigration Judge had been required to consider her ties to Sri Lanka. Issues with regard to the extent of her ties with that country were equally pertinent to an Article 8 claim. The question was whether the appellant can or should be required to go back to India. The test was whether she had lost the ability to re-establish her ties there. She had been away for 23 years and it was submitted that the case would have fallen within paragraph 276ADE(vi) of the Immigration Rules. As I understood Mr Palmer's argument, in the event that paragraph 276ADE (vi) did not apply, he suggested that

his client ought to be treated as though it did, despite the fact that her application had been made before the commencement of that provision into force.

6. The respondent submitted that the appellant must have been older than 9 when she left Sri Lanka having been born on 7 March 1979. She continued to maintain a connection with that country as the Immigration Judge had implicitly found at paragraph 21 of her determination. Alternatively, the appellant could safely return to India. There was a lack of evidence supporting her claim to losing status there. As her application had been made before 9 July 2012 the Secretary of State was not entitled to consider paragraph 276ADE and she would have to rely on Article 8 of the European Convention on Human Rights (ECHR). She came here with a two year residence permit to study. She could have had no expectation that she would be given leave to remain indefinitely. The Secretary of State's decision was not disproportionate but based on the evidence was the correct one.

7. Mr Palmer submitted by reply that it was not right to reject the Article 8 application even if it was accepted that the appellant did not qualify under paragraph 276ADE of the Immigration Rules.

8. At the end of the hearing I reserved my decision as to whether or not there was a material error of law.

Discussion

9. The appellant came to the UK in 2009 as a student for an initial period of two years. However she ceased to study here in 2012 and made an application for further leave to remain on 26 June 2012, which was refused on 7 August 2013. Therefore, as the "new" Rules did not come into force until 9 July 2012, her application was made under the old Rules and she cannot rely on paragraph 276 ADE (vi).

10. In any event, the present grounds of appeal make it clear that the application before the respondent was made "outside" the Immigration Rules (see paragraph 1.1 of the grounds).

11. The appellant's circumstances were unusual. She had left Sri Lanka at the age of 9 and spent most of her life living in India with relatives. Mr Palmer's skeleton argument dated 22 January 2014 prepared for the First-tier Tribunal posed the question before that tribunal in this way: whether or not it would be proportionate to expect the appellant to leave the UK and return to a country (Sri Lanka) where she had not lived for 23 years in order to make an entry clearance application? It was submitted on behalf of the appellant that it was disproportionate to expect her to do so having regard to her relationship with her partner Mr Maheswaran.

12. It is important to note that the Immigration Judge found that the appellant had not satisfied the burden of establishing a durable relationship with Mr Maheswaran of a strength and character claimed. In particular she was not satisfied that the parties

were in an intimate relationship as partner or fiancé of the other. Therefore the appellant had not established any family life in the UK and had to rely solely on the private life she had established in the UK in the four years or so since she arrived. There appears to be no appeal against the Immigration Judge's decision on the relationship with Mr Maheswaran.

13. In paragraph 19 of her determination the Immigration Judge approached the appeal as though it were to be determined under the new Rules rather than the old. However, neither advocate appears to have referred the Immigration Judge to the requirements of the old Rules and the application was argued on the basis that it was "outside" the Rules altogether this does not appear to have been a relevant error.

14. The Immigration Judge concluded that there was no disproportionate interference with the appellant's right to a private life under Article 8 having regard to the fact that the appellant came to the UK for the purposes of a short period of study, she had not continued that course, and as an educated woman who had been to university in India would be able to continue her private life either there or in Sri Lanka, where she had family members living.

15. The key basis of the challenge before the Upper Tribunal relates to the finding that the appellant could live in Sri Lanka having regard to the fact that she had only unidentified "family members" living there. It is suggested that the relationship between other family members in India and family members in Sri Lanka was irrelevant and her only real connection with Sri Lanka was the fact that she spoke Tamil, was born there and lived there until she was aged 9. However, I note that the primary focus of the attack on the Immigration Judge's decision in the grounds of appeal to this Tribunal relates to the appellant's family connection with the LTTE.

16. The respondent states that the appellant had the burden of showing that she had "no ties" to Sri Lanka and her circumstances were exceptional so as to bring her within current guidance on Article 8 in the case law. The respondents submit that the Immigration Judge was entitled to reach the view she did and, having found no intimate relationship between the appellant and Mr Maheswaran, she was entitled to conclude she had not lost her ties with Sri Lanka, having regard to the fact that she had relatives there.

Conclusions

17. The burden rested on the appellant to satisfy the First-tier Tribunal that she ought to be allowed to remain in the UK outside the Immigration Rules. It was open to her to explore in greater detail her family ties with Sri Lanka. The fact that her family may have LTTE connections has not been pursued before the Upper Tribunal as a reason why the Immigration Judge should have allowed her appeal. The assertion in paragraph 14 of her grounds of appeal before the First-tier Tribunal that she had "no family or friends in Sri Lanka" was plainly not borne out by her own witness statement (see paragraph 15). The Immigration Judge was entitled to make the

finding that she did at paragraph 21 that there were family members to whom she could turn in Sri Lanka there, albeit not close ones. The allegation that the appellant may be at risk from her family's LTTE associations was not pursued before the Upper Tribunal.

18. The notes of cross-examination within the Tribunal file also record that the appellant was in daily contact with her family in India, yet she asserted in her evidence that she had "no support there." The appellant was an adult. The fact that her Indian relatives were in contact with her Sri Lankan relatives appears to be a matter of some importance. In this connection no good reason has been shown for obtaining the Mr Naganathan's evidence so late and this evidence ought to have been obtained much earlier if it was to be relied on. In any event the issue before this Tribunal is :whether there was a material error in the decision of the First-tier Tribunal and it is only if I find that there is that consideration would be given to additional evidence that may be needed to re-make the decision.

19. In addition, the appellant's economic circumstances were far from unfavourable. She was an educated person who had acquired valuable skills in the UK. This combined with the presence of relatives with whom she might settle in Sri Lanka provided sufficient evidence to support the finding that there would not be undue interference with the appellant's private life if she were required to return to Sri Lanka. The respondent would be able to justify such interference by the need for effective immigration control.

20. In the circumstances the Immigration Judge was entitled to conclude that the appellant had not shown that she fell for consideration outside the Immigration Rules. Having failed to establish any family life in the UK the respondent was entitled to reach the view the appellant could return to Sri Lanka and make any application for entry clearance there. There appears to have been no material error of law in the Immigration Judge's approach.

My Decision

The decision of the First-tier Tribunal does not contain a material error of law and this appeal is dismissed. Accordingly, the decision of the respondent to refuse further leave to remain stands.

No anonymity direction has been sought.

Signed Date

Deputy Upper Tribunal Judge Hanbury