



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/43212/2013

THE IMMIGRATION ACTS

Heard at Field House

On 9th September 2014

**Determination
Promulgated**

On 16th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

DAYANI LAKMALEE KASTHURI ARACHCHILAGS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pararajasingam, Solicitor instructed by Freedman Alexander LLP

For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals with permission a decision of the First-tier Tribunal (Judge Oakley) promulgated on 18th March 2014 in which the judge dismissed this Sri Lankan national's appeal against a decision of the

Respondent refusing her application to switch from visitor status to dependant of her husband, present as a Tier 2 (Entrepreneur) under the points-based system. The Respondent had refused the application because the Rules made no provision for switching, requiring applicants to have been granted leave to enter as the dependant of the points-based migrant.

2. In the grant of permission Upper Tribunal Judge Freeman draws attention to the judge's recognition that the Appellant's two children, both who had been in the United Kingdom since 2011, attending Clifton Lodge Preparatory School, had been permitted to switch to leave in line with their father, a circumstance facilitated by the fact that the Tier 4 status they enjoyed was also a points-based status, and the Rules permitting switching between points based categories.
3. The judge noted the submission that a correct application of the case of Beoku-Betts [2008] UKHL 39: to the point that in assessing the interference with family life and the proportionality of the same to the legitimate economic aim as referenced by the application of the immigration rules the position of all the family members affected by a removal must be taken into account, the position of the husband and the two minor children of the appellant, should result in an allowing of the appeal because a refusal resulting in an interference with a genuinely subsisting and significant family life in order to obtain formal compliance with the Rule requiring an out-of-country application, is rarely proportionate. The judge distinguished the position from Beoku Betts, at paragraphs 19 and 27 to 28, finding that the Appellant's arriving here before her husband as a visitor had been devised by someone to avoid the provisions of the Rules applicable to dependants of Tier 2 Entrepreneurs. In the context of that adverse finding the judge found that the Appellant could easily return to Sri Lanka and apply for and obtain a visa in the proper way from there. The judge also found, at [32] that the Appellant and her husband could easily hire a carer or manage to look after the children in the United Kingdom, if necessary, whilst that was done.
4. In his grant of permission Judge Freeman reasons that if there was some good reason for supposing that the Appellant's Visit Visa Application had been made to avoid the requirements of the PBS then the decision would not be contrary to the guidance in Beoku-Betts. However, he notes, the Respondent had never relied on such a suggestion in the refusal letter, and the judge's decision does not set out any good reason for such a conclusion. Upper Tier Judge Freeman indicates that if there was such a reason, obvious on the evidence before the judge, albeit not apparent from the decision, would be a position for argument before the Upper Tribunal.
5. Before me Mr Nath readily indicated that there was nothing in the Respondent's refusal letter, or referenced in the evidence before the judge, which would substantiate such an adverse credibility, finding, and he had no argument to make on the point. No evidence was required, the

Respondent having raised no issues about the bona fides of the Appellant. Mr Nath confirmed that he did not intend to defend the decision of the judge on the basis that the chronology alone was sufficient to sustain such a finding, and told me that in the circumstances he was not in a position to argue that the refusal was proportionate.

6. The Appellant's husband was not granted his visa until April 2013 and the finding of the judge at paragraph 19 to the point that the Appellant "is unable to explain why no application was made at that time for her to come to the United Kingdom as the dependant of an Tier 1 (Entrepreneur) and one would have expected that an application would have been made jointly with her husband but no explanation has been forthcoming in the evidence" raises an issue which was not taken by the Respondent in the decision or in submissions. I note that the Appellant has a history of visiting the United Kingdom in connection with the two children's education here since 2011 and so on its face there is nothing unusual or suspicious about her arrival on 3rd October 2012 having been issued with an entry clearance as a special visitor with a child at school, valid between 26th September 2012 and 26th September 2013. There is no basis to find bad faith.
7. I find that the decision of the First-tier Tribunal was vitiated by material legal error, relying on an unsustainable finding that the Appellant's in-country application was vitiated by mala fides, to the point that the interference with her and her family's life necessitated by requiring her to return to Sri Lanka to make an application out of country was justified and proportionate to the legitimate aim of requiring conformity to the Immigration Rules.
8. The error is material because as the grant of permission identified, and Mr Nath was unable to resist, absent mala fides, this is not one of those rare cases where such a requirement can be seen as being proportionate.

Decision

9. I set the decision of the First-tier Tribunal aside and re-make it allowing the Appellant's appeal on Article 8 grounds.

Signed

Date

Deputy Upper Tribunal Judge Davidge