IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/50078/2013
IA/50086/2013
IA/50091/2013
IA/50097/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 December 2014	**On 16 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS PHYRUZ JELALDEEN
MS FARHA JAWARD
MR SARANHASSEN JAWARD
MS NAIYA JAWARD
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondents: Mr E Raw, Counsel instructed by AKL Solicitors

DECISION AND REASONS

1. The respondents in this case are all citizens of Sri Lanka. Ms Phyruz Jelaldeen's date of birth is 7 September 1956. The three remaining respondents are her adult children. Mr Saranhassen Jaward's date of birth is 7 July 1984. Ms Naiya Jaward's date of birth is 12 January 1986. Ms Farha Jaward's date of birth is 19 April 1992. I shall refer to the respondents as the appellants as they were before the First-tier Tribunal and to Ms Phyruz Jelaldeen as the main appellant.

2. The appellants arrived in the UK in 2001 and made an application for asylum which was refused in a decision dated 23 July 2001. The main appellant married an EEA national in July 2004 and on 15 June 2005 the Secretary of State issued residence cards to all the appellants which expired on 5 July 2012. They applied for permanent residence pursuant to Regulation 15 of the 2006 Regulations and these applications were refused on 21 October 2013.

3. The main appellant's marriage to the EEA national came to an end in February 2012 and a decree absolute was pronounced on 4 April 2013. The EEA national returned to Sweden in February 2012. It was not accepted by the Secretary of State that the EEA national had been exercising treaty rights at the date of the divorce.

4. The appellants appealed and their appeals were allowed by Judge of the First-tier Tribunal Keane in a decision that was promulgated on 13 October 2014 following a hearing at Taylor House on 10 September 2014. Judge Keane dismissed the appeal under the 2006 Regulations but allowed it under Article 8.

5. Permission was granted to the Secretary of State to appeal against the decision of the First-tier Tribunal by Judge of the First-tier Tribunal McCarthy in a decision of 3 November 2014. Thus the matter came before me.

The Findings of the FtT

6. The material findings of Judge Keane are found in paragraphs 8 and 9 of the determination:

> "8. In resolving the human rights appeals I have borne in mind the determination of the Upper Tribunal in **Gulshan** and judgment of the Court of Appeal (not cited to me at the hearing but resting within the public domain) of **R (MM) Lebanon v The Secretary of State for the Home Department [2014] EWCA Civ 985**. I have borne in mind that the amendment to the Nationality, Immigration and Asylum Act 2002 by way of the introduction of a new Part 5A does not apply to the instant appeals. In resolving the human rights appeal I have observed the '**Razgar**-style' approach. I find that the appellants did not establish family life

under Article 8 of the Human Rights Convention. I am entirely satisfied that very strong feelings of love and affection bind the individual members of Mrs Jelaldeen's family to each other. The evidence did not disclose additional elements of dependence which might transform such relationships into relationships attracting the protection of Article 8. The remainder of this analysis of the human rights issue is based on the premise that such a finding is in error. The appellants established private life under Article 8 of the Human Rights Convention. It is convenient for me to consider the nature and extent of that private life later in this determination. The removal of the appellants from the United Kingdom would not amount to an interference by the respondent with the appellants' right to respect for family life because they would be removed as a family unit and mindful of her duty under Section 6 of the Human Rights Act 1998 the respondent would not remove individual appellants so as to break up the family unit constituted by all of the appellants. The removal of the appellants would amount to an interference by the respondent with their right to respect for private life. The immediate consequence of the implementation of the removal of the appellants from the United Kingdom would be the abrupt cessation of the private life which each appellant has developed for him and herself in the United Kingdom over a period greater than thirteen years. Such consequences I am only prepared to characterise as consequences of such gravity as potentially would engage the operation of Article 8. The respondent discharged the burden of proving to the balance of probabilities that the interference posed to the appellants' right to respect for private life was in accordance with the applicable legislation and necessary in a democratic society for the maintenance of an effective immigration control.

9. In finding that the instant appeals disclosed exceptional circumstances which meant that the refusal of the applications for permanent residence resulted in unjustifiably harsh consequences for the appellants I find that the decisions to refuse to grant permanent residence were not proportionate to the legitimate aim of the maintenance of an effective immigration control for reasons which I now give. First, the appellants have resided continuously in the United Kingdom for a period greater than thirteen years. That was surely a lengthy period of time. Second, for significant parts of the period of their residence in the United Kingdom they have had leave from the respondent. The respondent granted residence documents to the appellants on 8 July 2005 and their residence cards issued on 5 July 2007 expired on 5 July 2012. For a significant period in which the appellants developed their private lives in the United Kingdom they had settled status. Third, it was no part of the

respondent's case that Mrs Jelaldeen's marriage to Mr Farook was not at its outset a genuine and sincere union or that Mrs Jelaldeen was in any way responsible for the breakdown of the marriage. I draw the inference that when Mrs Jelaldeen married she fairly entertained the hope that she would be able to continue to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights. I draw the inference that the remaining appellants entertained on reasonable grounds the hope that as the family members of an EEA national exercising treaty rights in the United Kingdom they too would be able to continue to reside in the United Kingdom. Fourth, I am satisfied that the appellants' private lives in the United Kingdom are deep and extensive and do not merely reflect the long period of their residence. The appellants have not returned to Sri Lanka Mrs Jelaldeen and Saranhassen are each employed, Farha is married and has two children, Naiya, if her immigration status is clarified, would like to read for a degree in nursing. The appellants individually and as a family unit are well-integrated into the life and culture of the United Kingdom. Finally, I am satisfied that the appellants lack meaningful contacts and connections with persons resident in Sri Lanka. Mrs Jelaldeen was commendably honest in volunteering that she still has friends in Sri Lanka. I am loath to overstate the importance to the appellants of such contacts given the length of the period in which they have been absent from their country of origin and given the strong private life ties which they have established in the United Kingdom. For all such reasons I find that the instant appeals disclosed exceptional circumstances which rendered the respondent's decisions to refuse to grant permanent residence to them disproportionate. The appeals on human rights grounds (Article 8) are allowed."

The Grounds of Appeal and Submissions

7. The Secretary of State's grounds to appeal assert that the Judge made a material misdirection of law in relation to Section 117 of the 2014 Immigration Act in concluding that it did not apply in this case because the appeals were brought under the EEA Regulations.

8. The second ground of appeal argues that the Judge erred in relation to Article 8 in allowing the appeal on the basis of the appellants' private lives as this was inconsistent with Section 117B(5) of the 2014 Act and inconsistent with established jurisprudence including **Nasim and others (Article 8) [2014] UKUT 00025**.

9. I heard oral submissions from both Mr Walker and Mr Raw. Mr Walker indicated that the ground he was relying on primarily was the second

ground of appeal relating to the Judge's assessment of the appellants' private lives.

Conclusions

10. The facts in this case are that the appellant's now adult children came here when they were aged 9, 14 and 16 and that they have lived here continuously since then. They have been here lawfully since the main appellant was married in July 2004 until 21 October 2013. There was no assessment of Article 8 in the Reasons for Refusal Letter and it is not clear what submissions the Presenting Officer made at the hearing before Judge Keane, but it was not argued in the grounds that it was not open to the Judge to determine the appeal under article 8. This was not an argument advanced by Mr Walker before me.

11. The first issue that arises is whether the Judge made an error in deciding that Section 117 of the 2014 Act did not apply to an appeal under the 2006 Regulations. However, it is not necessary for me to determine that issue because in my view the assessment under Article 8 conducted by Judge Keane is not flawed.

12. The Judge clearly found that the first three of Lord Bingham's questions in the case of **Razgar** [2004] UKHL 27 should be answered in the affirmative. He considered necessity and proportionality correctly and identified the issues, namely whether the decision was necessary and proportionate to the legitimate aim which he identified as the maintenance of effective immigration control (see [8} and [9] of the determination.

13. The Judge correctly identified the relevant issues and understood the balancing exercise to be conducted and that the maintenance of immigration control is a legitimate aim. He found that the decision was not proportionate in this case for a number of reasons. I asked Mr Walker to identify what the Judge failed to consider which he would have considered should he have applied Section 117B but he was not able to do so.

14. It is accepted that the appellants were lawfully in the UK between 2004 and 2013. They were not settled and the Judge was wrong about that, but they were here with a lawful right to be here and their status was not precarious. This point was conceded by Mr Walker.

15. It was accepted by the Judge that the family is self-sufficient. The main appellant works as a carer. Her son is employed. The appellant's eldest daughter is married and lives with her husband and the main appellant's youngest daughter intends to study having relatively recently completed compulsory education in the UK. They all live together in private rented accommodation. The family owns a property which they rent out. There is

no suggestion that the family is not assimilated and integrated or that there are language problems. .

16. Had the Judge applied section 117B he would have reached the same conclusion. There are weighty factors in favour of the appellants and the facts are wholly different to those in the case of **Nasim**. The main appellant did not come here to study. They have all been here for many years and have clearly developed significant private lives. In addition the three youngest appellants came to the UK as children.

17. This was an appeal under the 2006 Regulations and not the Immigration Rules, but it is worth noting that the youngest appellant meets the requirements of paragraph 276ADE(v) of the Rules and the two other adult children would have in my view strong claims under paragraph 276(vi). The eldest daughter's unchallenged evidence is that she has two children who at the date of the main appellant's witness statement, 5 September 2014, were aged 6 and 7. There was no evidence that was adduced about these children and I assume that neither is a British citizen but there is a reasonable prospect that at least one of them is a qualified child under 117B (5).At some time all the appellants have been family members of an EEA national and on the face of it it appears to me that the main appellant and her youngest daughter have a right of permanent residence under paragraph 15(b) of the 2006 Regulations.

18. There is a possibility that the Court of Justice of the European Union will decide that the requirements under the 2006 Regulations for an appellant to establish that a third party spouse was exercising treaty rights in the host member state at the time of their divorce is not in accordance with Article 13(2) of Directive 2004/38/EC. This is the question that was posed by the Court of Appeal to the CJEU in **NA v SSHD [2014] EWCA Civ 995**. This was the only reason for the refusal of the appellants' applications under the 2006 Regulations.

19. The decision granting permission raises the CJEU's decision in **Dereci (case number C-256-11, 15 November 2011)** with specific reference to paragraphs 70 to 74 but I understand this to relate to the 117B issue and it is not necessary for the purpose of this decision to determine whether or not part 5 of the 2002 Act amended applies to this appeal.

20. In my view there is no material error of law and the decision of the Judge to allow the appeal under Article 8 of the 1950 Convention on Human Rights is maintained.

The Decision

The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed Date **16 December 2014**

Deputy Upper Tribunal Judge McWilliam