IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/19709/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29th October 2014	**On 5th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRATHABAN KIRSHNAN PRATHABAN

Respondent

Representation:

For the Appellant: Ms R Pettersen, Home Office Presenting Officer
For the Respondent: Mr M Shahzad, Solicitor, instructed by Selva & Co

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State who was the Respondent before the First-tier Tribunal. When the subject of the immigration decision, the Respondent before me, was the Appellant. For ease of reference I shall refer to the parties as the Secretary of State and the claimant respectively.

2. The Secretary of State appeals the decision of the First-tier Tribunal, Judge Harmes, who in a determination promulgated on 3rd July 2014 allowed this 64 year old male Sri Lankan claimant's appeal against the refusal of entry clearance as a visitor.

3. The Claimant was seeking entry to see his daughter who had herself travelled here in 2009 with entry clearance as the dependent spouse of a Sri Lankan citizen who was here with refugee status. By the time of the application matters had moved on in terms of the spouse's status because he was no longer here with refugee status, but with indefinite leave to remain. The ECO found that the claimant did not meet the requirements of paragraph 41 of HC 395 in respect of accommodation, maintenance, and intention to return after a short visit. The Claimant appealed, in summary arguing the decision breached his human rights because it was a wrongful interference with his enjoyment of family life with his daughter and grandchildren in the UK, not least, because he did meet the requirements of the rule.

4. The judge allowed the appeal on the basis that all of the disputed requirements of paragraph 41: intention to conduct a short visit and return to Sri Lanka, maintenance and accommodation were all, contrary to the findings of the Entry Clearance Officer, satisfied on the oral and documentary evidence. The judge made no findings or decision in respect of Article 8 ECHR family and private life rights.

5. The Secretary of State challenges the decision on the basis that Section 52 of the Crime and Courts Act, operative from 25th June 2013, restricted the appeal rights of visitors coming to visit family members by amending Section 88A of the Nationality, Immigration and Asylum Act 2002. The only available grounds of appeal are set out in Section 84(1)(b) and (c) of the 2002 Act, namely human rights and race relations. In that context the judge had no jurisdiction to allow the appeal on the basis that the Claimant satisfied the substantive rule at paragraph 41 of HC 395, i.e. on Immigration Rules grounds as set out at Section 84(1) (a). Permission was granted by First-tier Tribunal Judge P J M Hollingworth on the basis that "the judge has erred in law as to the scope of the appeal".

6. The matter proceeded before me on the basis of submissions, there having been no application to adduce additional evidence.

7. Ms Pettersen relied on the application for permission and the grant thereof in respect of establishing error, and invited me to set aside the decision and re-make it dismissing the Appellant's appeal on ECHR grounds. The Grounds of Appeal to the First-tier Tribunal were directed at the provisions of paragraph 41 and raised nothing substantive in respect of ECHR. Although the Sponsor had refugee status, the Appellant's daughter had travelled to him and so had status as a spouse dependant. There was nothing preventing her returning to Sri Lanka to visit the Appellant, and, in the context of the wider family, the claimant had visited Italy in the past and so it was open to the family to conduct family life by further visits in

Italy. The fact that the judge had disagreed with the Entry Clearance Officer in the context of the requirements of the Rules, to the point that the judge found that they were in fact satisfied, did not of itself cause a breach of Article 8.

8. Mr Shahzad submitted the reverse. He pointed out that in the Grounds of Appeal at paragraph 3 the legal framework clearly indicated that the Grounds of Appeal were 84(1)(c) i.e. an unlawful decision under Section 6 of the Human Rights Act 1998 as being incompatible with the Appellant's Convention rights. In that context the judge's finding in respect of paragraph 41 remained relevant to the Convention consideration. Whilst he accepted that the judge had failed to appreciate the correct framework, the error was not material because on the basis of the factual finding the decision was not Article 8 compliant.

My Consideration

9. I find that on the face of the decision the judge failed to appreciate that restricted rights of appeal operate in this case so that there was no jurisdiction to allow the appeal on Immigration Rules grounds. The Grounds of Appeal before the judge were framed in the context of the Convention ground at s 84(1)(c) of the 2002 Act. Accordingly Article 8 was the ground that the judge needed to determine. The decision reveals errors of law both in allowing the appeal on Immigration Rules grounds and failing to deal with the Article 8 ground. I consider what to do about the error.

10. There was no issue before me that the factual matrix revealed a family life sufficient to deserve respect in the context of Article 8, rather the argument was that interference caused by the decision was slight, with the availability of visits in third countries such as Italy, so that there were no significant consequences sufficient to engage article 8. I am satisfied that that is wrong. The threshold of engagement is not a high one. The facts found at the first tier reveal work and family commitments of the claimant's daughter and spouse, as well as the presence of a number of grandchildren here on a commonsense basis demonstrate barriers to the enjoyment o the family relationship if it cannot be able to be enjoyed, at least in part, here. The inability to conduct visits in the UK is a significant interference with the family relationship. It follows I am satisfied that the first two tests in Razgar are answered affirmatively for the claimant.

11. In the absence of any challenge to the factual findings of the judge it is evident that on a proper application of the Rules the claimant, as at the date of decision, met the rules and so had an entitlement to enter. The decision, albeit wrong on the facts is a lawful one because it was none the less made "in accordance with the law" because it was made pursuant to the lawful domestic framework of the Immigration Rules.

12. I move to the fifth question of proportionality in the context justifying interference which serves the legitimate economic aim. Ms Pettersen's submission is to the effect that although the proportionality of the decision is not made out, as would usually be the case, by a proper application of the rules, it is, none the less, made a proportionate decision by the ability of the claimant to travel to Italy to meet with his family there, and the ability of his daughter and grandchildren to travel to Sri Lanka, alone if circumstances in Sri Lanka do not permit the son-in-law to travel with them, to meet the claimant there. In short there is simply no need for the claimant to visit the family in the UK. I find that position is of no avail to the Respondent, it is too onerous to the claimant and his family here, not least because of the self evident increase in expenditure and disruption to their employment and family circumstances here that that would entail. It is also an unattractive submission in the face of a wrong decision under the rules. I find it does not adequately answer the obligation of the UK to positively respect the family life ties which exist in this case, and fails to appreciate that there is little weight to be afforded to the public interest in refusing entry to an applicant who, as this claimant has been found to do, meets, at the date of the immigration decision, all the requirements of the rules.

13. In the circumstances I find the errors material making it appropriate to set aside the decision of the First-tier Tribunal. I re-make the decision and allow the appeal on Article 8 grounds.

Signed E DAVIDGE Date 04 November 2014

Deputy Upper Tribunal Judge Davidge