IAC-F-NL1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45097/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 October 2015	**16 November 2015**
Oral judgment delivered on 28 October 2015	

Before

THE HONOURABLE MR JUSTICE HOLGATE
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MSNL
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Senior Presenting Officer
For the Respondent: Mr J Siri, Counsel instructed by SBG Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of the First-tier Tribunal promulgated on 3 June 2015, but it is convenient if we continue to refer to the parties as they were described in the Tribunal below.

2. The First-tier Tribunal allowed the Appellant's appeal against the Respondent's refusal of his application for leave to remain as a partner on human rights grounds under Article 8 ECHR.

3. Mr Jarvis had only very shortly before the hearing been asked to present the appeal on behalf of the Respondent. When the hearing began he told us straight away that the Secretary of State would not pursue either of the two grounds set out in the application for permission to appeal because they are unarguable. We concur with Mr Jarvis's concession. It accords with the provisional view that we had formed on reading the papers beforehand. Indeed, we express some surprise that permission to appeal was granted by a judge of the First Tier Tribunal on either of the two grounds as set out in the application for permission.

4. Nonetheless Mr Jarvis prepared a skeleton argument in which he sought to raise three additional points. During oral submissions he reduced these points to one single criticism of the judge's determination. Mr Siri, who appeared for the Appellant opposed the introduction of new grounds of appeal at the hearing for which leave was required. He said that he had not had a proper opportunity to consider the skeleton argument and deal with the new point.

5. Had there been any potential unfairness to the Appellant in the Respondent's new point being argued as an additional ground of appeal, or any necessity to adjourn the hearing so as to enable the Appellant to deal with that point, it is virtually certain that we would have refused the Respondent's application for leave to amend. No explanation, let alone a sufficient one, was put forward to justify an amendment of the grounds of appeal at such a late stage. The fact that (once Mr Jarvis had considered the papers) the Respondent had formed the view that the two grounds which formed the basis for obtaining permission to appeal were unarguable, could not justify an amendment so as to raise a new ground of appeal at such a late stage. A party to an appeal, whether an Appellant or a Respondent, has an expectation of coming to a hearing knowing properly in advance which arguments are going to be raised, so as to be able to prepare to deal with those points and, by the same token an expectation that other matters are not under challenge. The same applies to this Tribunal, so that the members of a panel are able to prepare for the hearing and the finite resources of the Tribunal devoted proportionately and fairly to each case.

6. However, in this instance the additional point that Mr Jarvis sought to argue turned out to be a very short one indeed and allowing it to be pursued did not give rise to any unfairness to the Appellant. For those reasons, most exceptionally, we granted leave for the new point to be raised at the hearing and have dealt with it.

7. The Respondent's new complaint is that in the course of the judge's reasons dealing with the Article 8 claim he said at paragraph 62 when referring to the Appellant's partner, a British citizen, that:

> "He had health problems and although appropriate treatment might be available in Sri Lanka, there is no guarantee that the treatment that he would receive would be as good as he gets in the United Kingdom where he also receives it free under the NHS."

The legal point which Mr Jarvis seeks to extract from that passage is that the language "there is no guarantee" indicates that the judge was not applying the civil standard of proof, namely the balance of probabilities.

8. Mr Jarvis accepted that this argument depends upon reading the paragraph as if the judge was directing himself that unless there was something equivalent to a guarantee or certainty that the treatment receivable by the Appellant's partner in Sri Lanka would be as good as that available in the United Kingdom, then this particular factor had to be treated as a factor supporting the Article 8 claim (or could not be disregarded in that context).

9. On any fair reading of the judge's decision it is impossible to accept this new line of argument. The judge was not indicating any divergence from the civil standard of proof. He was simply expressing the view that there was *no certainty* that the treatment would be received to the same standard in Sri Lanka, in the straight forward sense that there was a *risk* that it might not be. He was not putting the point any higher than that. He therefore attached the weight he considered to be appropriate to that factor and that is not a matter which is open to legal criticism in this Tribunal.

10. Mr Jarvis, having thought very carefully about the merits of the original grounds and indeed the other additional grounds that he had been seeking at one stage to put forward in his recent skeleton argument, told the Tribunal very candidly that the point set out in paragraph 7 above was the only matter which he would wish the Tribunal to determine in this appeal.

11. Because the Respondent's case at the hearing was limited to the one very short point which we have rejected, there is no need in this decision for us to refer to the several, strong findings made by the judge in the Appellant's favour leading him to allow the appeal under Article 8. The brevity of our reasoning should not, however, be misconstrued as indicating that the judge's decision to allow the Appellant's appeal simply turned on the passage quoted in paragraph 7 above.

Decision

12. Having rejected that single point it must follow that the Respondent's appeal to this Tribunal is dismissed. We conclude that the decision of the judge on the Appellant's appeal did not involve any error of law and that decision must stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 2 November 2015

The Hon. Mr Justice Holgate

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award. The decision made by the First–tier Tribunal stands. The Judge made no order for a fee award.

Signed Date 2 November 2015

Mr Justice Holgate