IAC-FH-CK-NL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04588/2013

THE IMMIGRATION ACTS

Heard at Field House On 17 July 2015 Prepared 20 July 2015	**Decision & Reasons Promulgated** **On 26 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

U S T
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:
For the Appellant: Ms A Heller, Counsel instructed by Sri Kanth & Co
For the Respondent: Mr P Duffy, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Sri Lanka, date of birth 23 November 1986, appealed against the Respondent's decision, dated 19 December 2012 to refuse entry clearance as a returning resident on the basis that he had used a false birth certificate in order to obtain a new passport. The Appellant therefore fell to be refused under the mandatory provisions of paragraph 320(7A) of the Immigration Rules HC 395 (as amended) (the Rules).

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2. By a decision [d] dated 28 March 2014 of First-tier Tribunal Judge Plumptre (the judge) concluded that the Respondent had correctly applied the provisions of paragraph 320(7A) as well as 320(3) and 320(9) of the Rules. The judge, however, allowed the appeal under Article 8 of the ECHR.

3. Permission to appeal the judge’s decision on Article 8 ECHR was granted to the ECO by First-tier Tribunal Judge Ransley on 8 May 2014.

4. The Appellant by an application, made 22 April 2014, sought permission to appeal the decision, under paragraph 320(7A), by the Judge which was refused by First-tier Tribunal Judge Fisher on 31 July 2014. The application was renewed and permission was given by Upper Tribunal Judge Reeds on 19 September 2014.

5. On 3 November 2014 I concluded that the judge had made no error of law in relation to the findings on the use of a false birth certificate to obtain a passport. It was accepted that the Appellant had, whether by himself or by use of an agent, provided a false birth certificate. Thus the appeal on that issue had been bound to fail. I gave my reasons in a determination dated 17 December 2014. Thus the Original Tribunal decision upon the immigration rules stands. I also set out why I was satisfied the judge had failed to provide adequate reasons to deal with the childrens’ (K and S) best interests or the issue of the public interest or why the Respondent’s decision was disproportionate

6. The Appellant had acknowledged the false certificate by obtaining a new birth certificate and obtaining a valid passport. I noted what Upper Tribunal Judge Reeds had commented upon but it did not seem to me that added anything to the fundamental issue as to whether or not a false document had been used to obtain the passport.

7. Before me Ms Heller sought to reargue the point that the Appellant had not knowingly made false representations or provided a false document. The judge heard the evidence, assessed it against the case law and submissions made but concluded that the Appellant did know at the time that he used birth certificate number 2656 that it was false. The Appellant made no mention of his lack of knowledge about the invalidity of the birth certificate in his undated letter to the ECO, referred to as ‘page 16’, or the circumstances in which the passport was obtained via an agent.

8. The judge noted the false birth certificate 2656 was used to obtain an emergency travel document and a Sri Lankan passport. The judge did not accept that the Appellant made such use of the birth certificate 2656 unwittingly or without knowledge that it was false given the circumstances of its production to him by an agent. I do not accept that the judge’s reasoning on the point disclosed any error of law.

9. As I understand it the Appellant’s wife through naturalisation became a British national in 2006 and similarly so did their two children (11 and 12 years born and brought up in the UK) as the judge found [D52]. It seemed to me that the likelihood was that the Appellant’s wife and K and S have dual nationality, in law, even if in fact they do not presently possess

passports from Sri Lanka. It is plain therefore that the Appellant's wife and the Appellant himself have decided that they would prefer the family to remain in the United Kingdom.

10. Ms Heller doubted whether or not the Appellant had ever needed to make an application under Regulation 18 of the Rules bearing in mind he had previously had indefinite leave to remain. Given the circumstances of the Appellant's return I did not understand that argument to be seriously pursued as opposed to one raised in faint hope. In any event I do not accept the issue discloses any error of law by the judge. Nor did the point constitute a matter of weight when assessing proportionality

11. It seemed to me in the factual circumstances raised, even if ILR had previously been granted, when such a person leaves the United Kingdom and later seeks to return, an application under paragraph 18 of the immigration rules application may be required unless published advice by the Secretary of State indicated to the contrary.

12. It was argued that the returning resident route and the Immigration Rules were not a complete code in the consideration of private and family life. I agreed and it seemed to me that the appropriate course was to ask whether or not the Respondent's decision was ECHR-compliant.

13. On 19 July 2015 I considered whether or not in addressing Article 8 of the ECHR the Appellant had raised any circumstances which were exceptional to justify looking at this matter outside of the rules. It seemed to me the appellant's and his wife's circumstances, of his having been in the UK about 14 years , his wife 21 years, the British nationality of his wife and children, their ages, schooling, circumstances and the effects of his exclusion from return to the UK for not less than 10 years were exceptional circumstances.

14. On the evidence before me I considered the refusal of entry of the Appellant was an arguable interference to re-establishing family life. Further on the evidence that was not substantially challenged that the interference was significant and sufficient to engage the operation of Article 8(1) ECHR.

15. I was satisfied that the Respondent's decision was lawful and properly served the purposes identified under Article 8(2) of the ECHR.

16. I note there was no reason why the Appellant's wife, who originated from Sri Lanka, or the children could not relocate as a family if they wished to do so. The fact that they are British citizens born of Sri Lankan parents does not exclude them, on the evidence before me, from entry to Sri Lanka. I take particularly into account the length of time the Appellant's wife has lived in the United Kingdom for some 21 years and when she became a UK national in 2007. Her date of birth is 7 September 1968. She is therefore some 46 or 47 years of age. There was no evidence to show that the Appellant and she had not grown up in Sri Lanka understanding the language, lifestyle, customs and mores of the country.

17. The family are not being required to leave. Their doing so may lose such benefits as flow from their presence in the United Kingdom.

18. I do not accept that there would be a culture shock from the return of the family to Sri Lanka and much of the impact depends upon the conduct of the Appellant and his wife.

19. It is plain that it is considered desirable that a family should live together and thus develop the kinds of family support and structures. I take into account the Appellant’s lengthy residence in the United Kingdom since 2000.

20. I note the Appellant’s children are nearly 14 and 13 years of age who have grown up in the UK, have their friends here, wish to remain and who are able to express their views as they have done in correspondence. I accept as a starting point the importance of the children’s interests with reference to Section 55 of the BCIA 2009 . It is a primary consideration. I apply the approach identified in ZH (Tanzania) as to how that matter can be addressed bearing in mind that of course the Appellant’s children are in the UK.

21. I take into account the difficulties that the Appellant’s wife has had with the children leading to the intervention by the Royal Borough of Greenwich in seeking to protect the wellbeing of the children, the reports from schools raised concerning the performance of the children, their general happiness and their position as a whole. I take into account the issue of whether or not there was any basis under the Rules which would enable the Appellant to return which of course has been confounded by the issue of his dishonesty.

22. Thus the Appellant may be unlikely to succeed in relation to ‘suitability’ (Appendix FM) but I accept that the reasons for falsehood may have some relevance to the issue of proportionality and the assessment of public interest. In coming to a view upon that matter I find the judge’s unequivocal findings rejecting the Appellant’s explanation should be given significant weight. I also take into account that at least one of the children (K in Yr 9) now moves into the next educational phase (Yr10) of GCSEs. S in Yr 7 moves to Yr 8. There is no information before me that particularly relates to the standards in Sri Lankan schools and what consequences there might be for the Appellant’s children’s development were they to remove as a family to Sri Lanka. I note the child S is asthmatic and currently age uses an inhaler but I do not know on the evidence if that would be of any significance on a return to Sri Lanka . K has visited Sri Lanka 3 occasions: S on 2. I readily understand that the children prefer to be reunited with their father in the United Kingdom and that they are upset by his continued absence.

23. I also take into account the public interest with reference to Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. The assessment of proportionality in the Respondent’s decision takes into account the events, the references to the impacts of separation from his

wife and children, his wife's own mental health problems and the concerns represented by the Royal Borough of Greenwich putting in place an agreement to secure the protection of the children in the family home. I take into account the correspondence from the children and from good friends of the children K and S.

24. It is clear to me that the children are very unhappy without their father being absent and to a degree I accept the children's performance at school may not be as good as it has been; although I do not understand the standard to be falling below that of their peer groups. It seemed to me the benefits of life in the UK and the best interests of the children do not inevitably lead to the conclusion that a life in Sri Lanka is necessarily worse or not in their best interests. I have no evidence to show that may be the case nor to sustain such an assumption. Rather I find the benefits of a united family are in the best interests of these children which can be with the Appellant in Sri Lanka.

25. Ultimately the children have been back to Sri Lanka to visit the Appellant and it is understandable that the children would prefer to remain in the United Kingdom where they have grown up and their current friends are present.

26. Having weighed the public interest as a factor to which I give significant weight I take into account that the Appellant had been in the United Kingdom and as I understand it can speak English and has worked here. The Appellant has been and would be the primary breadwinner. To that extent he is not likely to be an obvious burden upon the taxpayer. I take into account the potential upheaval for the family if they decide to relocate to Sri Lanka although no specific evidence was produced. In these circumstances, weighing all these factors up, I find this is a case where the Respondent's decision, in the light of the Appellant's conduct and the public interest, was proportionate.

NOTICE OF DECISION

The Original Tribunal's decision on the issues arising under paragraph 320 of the Immigration Rules stands. The following decision is substituted. The appeal on Article 8 ECHR grounds is dismissed.

ANONYMITY

No anonymity was requested but it seems to me given the two children that an anonymity order is appropriate.

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 his 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 13 August 2015

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

The appeal of the Appellant is dismissed, no fee award is appropriate.

Signed Date 13 August 2015

Deputy Upper Tribunal Judge Davey