Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17041/2013
OA/17044/2013
OA/17046/2013

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport **Determination Promulgated**
On: 19 October 2015 **On: 06 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

KANAGESWARY MAHENDRAN
THARSAN MAHENDRAN
VITHUSAN MAHENDRAN

Appellants

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:
For the Appellant: Ms A Benfield, Counsel instructed by Theva Solicitors
For the Respondent: Mr N Diwnych, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the determination of a panel of the First-tier Tribunal (Judges Denson and Henderson) in which the panel dismissed the appeals of the Appellants, citizens of Sri Lanka, against the Entry

Clearance Officer's decision to refuse leave to enter as the wife and minor children of the Sponsor Mahendran Selvarajah.

2. The Appellants applied for entry clearance on 28 March 2013 and their applications were refused by the Respondent on 26 June 2013 by reference to Appendix FM and Appendix FM-SE of the Immigration Rules (HC395). The Appellants exercised their right of appeal against the decisions and this is the appeal that was heard before the panel on 17 November 2014 and dismissed. The Appellants' application for permission to appeal against the First-tier Tribunal Judge's decision was refused on 26 January 2015 by Judge Fisher and on renewal to the Upper Tribunal was granted by Upper Tribunal Judge Grubb on 22 May 2015 in the following terms

> "The grounds to the UT identify two arguable errors of law by the FtT: (1) in reaching its adverse finding in respect of the sponsor's employment by misunderstanding the effect of the tax coding on the P60s, and taking into account the explanations for discrepancies identified by the FtT; and (2) in relying on the DVR without having regard to the supporting evidence and that the DVR was derived from an on-line source which was itself unverifiable.
>
> Whilst these errors related to the decision under the Rules, if established they would also impact upon the Art 8 of decision."

3. At the hearing before me Mr Diwnych appeared for the Entry Clearance Officer and Ms Benfield represented the Appellants. No additional papers were submitted.

Submissions

4. For the Appellants Ms Benfield said that it was conceded that the Appellants could not meet the requirements of Appendix FM-SE of the Immigration Rules. As such the appeal was confined to Article 8. However the findings in respect of the rules are relevant to the Article 8 decision. So far as the financial requirements of the rules were concerned the First-tier Tribunal had regard to a range of issues but made an error of fact when considering the Sponsor's tax codes. The Tribunal could not see why the tax codes from the two employments were not the same and held this adversely against the Sponsor. However it was clear that there was no discrepancy with the tax code 810L attached to the main employment being the code revealing the Sponsor's personal allowance whereas the tax code "BR" attaching to the part-time employment was the standard code given where the personal allowance had already been taken up. The Tribunal also found a discrepancy between the method of payment, cash and BACS, given by the Appellant and that given by his employer. However an explanation was given and no regard was had to that explanation.

Consequently even though the Appellants could not meet the requirements of the rules the Tribunal fell into factual error.

5. So far as the document verification report (DVR) was concerned the First Appellant had produced a TOEIC English language certificate which the Respondent said was not genuine. The DVR gave the address of a website and stated that online verification was done and no trace of candidate record was found. When the matter first came for hearing an adjournment was granted to enable the Respondent to submit further evidence since the website quoted in the DVR was an invalid web address. By the time the matter came back for hearing the Appellants had made further enquiries and submitted evidence to show that the certificate was genuine. The Respondent did not submit any further evidence but the Tribunal nevertheless found the DVR to be conclusive evidence of forgery. Clearly when the source was quoted inaccurately and could not be checked it was wrong to find that this was conclusive evidence.

6. Ms Benfield submitted that these factors should have been taken into account when considering Article 8. Contrary to the conclusions of the panel the First Appellant had an English language certificate and the panel was wrong to suggest that there was no evidence that she could speak English. The Sponsor held the two employments claimed and therefore earned sufficient to meet the financial requirements of the Immigration Rules even though he could not provide the specified evidence to accord with Appendix FM-SE. I asked Ms Benfield whether any evidence had been submitted to the First-tier Tribunal to show that the Sponsor was financially independent. Ms Benfield accepted that no evidence of the Sponsor’s financial position other than his income had been put forward.

7. For the Respondent Mr Diwnych referred to the rule 24 response. He accepted that the initial hearing of the appeal was adjourned for the Secretary of State to make further enquiries and there was nothing to suggest that this had been done. Mr Diwnych helpfully asked for the matter to be put back to enable him to make a further enquiries but on return said that TOEIC scores more than two years old could not be validated. He accepted that forgery should never have been alleged and that there was no basis for the allegation of forgery. So far as the Sponsor's employments were concerned Mr Diwnych accepted that the Revenue and Customs tax coding definitions are publicly available. He did not know what explanation of the tax codes had been put forward at the hearing but accepted that there may well have been an error of fact.

8. I reserved my decision.

Error of law – Immigration Rules

9. The Appellants are citizens of Sri Lanka and are the wife and children of the Sponsor who holds indefinite leave to remain in the United Kingdom. Their applications to join him were made shortly after he acquired settled status. At the time of the application the children were aged 17 and 16, they are now aged 20 and 18. Their applications were refused because the First Appellant did not meet the English language requirements of the Immigration Rules and the Sponsor did not meet the financial requirements. Their appeal against the refusals was dismissed with the reasons for refusal being upheld and the panel finding that the were no compelling circumstances justifying the grant of leave to enter outside the Immigration Rules by reference to Article 8. In making the Article 8 decision the panel had reference to their findings in respect of the Immigration Rules.

10. There can in my judgement be little doubt that the panel fell into material factual error in making their decision under the Immigration Rules and, as their Article 8 decision was made 'through the lens' of the Immigration Rules those errors clearly had an effect on their Article 8 decision.

11. The first error relates to the English language certificate submitted by the First Appellant. The decision of the First-tier Tribunal records

> "... the Entry Clearance Officer in a Document Verification Report has shown by virtue of an on-line verification no trace of the candidate record was found with searches made on the TOEIC registration number as regards the first appellant's certificate in connection with speaking English ..."

The panel goes onto conclude that the First Appellant

> "... is unable to show that she has the English language abilities ... and ... she has provided a false certificate in order to attempt to circumvent the Immigration Rules"

12. This finding is entirely unsustainable. The DVR gives an invalid website address. Far from the First Appellant's registration being unverifiable it is the Respondent's allegation that is unverifiable and, as Mr Diwnych conceded there was no basis for the allegation of forgery. The First Appellant submitted an English language certificate and confirmed the genuineness of that certificate (in response to the Respondent's allegation) by providing a receipt for course fees and examination fees and a letter confirming that she followed the course.

13. The second error relates to the evidence of the Sponsor's employment. The panel took no issue with the Sponsor's full time employment but found that no weight could be given to his claimed part time employment due to conflicts in evidence between the Sponsor and his part-time employer and to differences in tax coding between part time and full time employment.

14. So far as the tax coding is concerned the panel clearly fell into factual error. There is no conflict between a tax coding of 810L for full time employment reflecting as it does the personal allowance and a tax code of BR (basic rate) for subsidiary employment. Indeed if the same tax code had been shown for both employments that would be a discrepancy indicating that the personal allowance had been claimed twice. Turning to the alleged discrepancy between the Appellant's evidence (that his part time employment was paid in cash) and the employer's evidence (that it was paid sometimes by BACS and sometimes in cash) the panel failed to have regard to the Sponsor's bank statements which clearly showed that some payments were indeed made by BACS. This is an error of fact, there was no reason to doubt the genuineness of the second employment.

15. The consequence of these errors, so far as the Immigration Rules is concerned, is that the decision of the First-tier Tribunal to dismiss the appeal because the Appellants did not meet the English language and financial requirements of the Immigration Rules must be set aside. However as the Appellants concede that they do not meet the requirements of Appendix FM-SE the decision must be remade dismissing the appeal under the Immigration Rules.

Error of law – Article 8

16. So far as the Article 8 decision is concerned the First-tier Tribunal took the findings of fact in respect of the Immigration Rules appeal (at paragraph 45) as part of the reason for dismissing the appeal by virtue of Article 8. As I have made clear above those factual findings cannot stand.

17. However the primary finding (at paragraphs 40 to 44 of the decision) is that there are no exceptional or compelling circumstances demanding a consideration outwith the Immigration Rules. Whereas the panel nevertheless went on to consider proportionality this primary finding remains. The grounds for permission to appeal submitted to the First-tier Tribunal and adopted in this appeal, refer to R (on the application of Esther Ebun Oludoyi & Others v SSHD (Article 8 – MM (Lebanon) and Nagre) [2014] UKUT 00539. The jurisprudence in this regard has developed and is probably now best summarised in SS (Congo) and Others [2015] EWCA Civ 387 and Sunassee [2015] EWHC 1604. If the requirements of the rules cannot be met, and a judge finds that an Article 8 assessment outside them is required, there need to be compelling circumstances although it will usually be necessary to go through the Article 8 assessment to identify whether compelling circumstances exist. Paragraph 33 of the judgment in **SS (Congo)** provides guidance.

> "In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special

> contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM."

18. As a result it is not sufficient to simply find that if, in a particular case, the requirements of the rules are not met, an assessment outside them will be required. Compelling circumstances need to be identified taking into account the public interest although that identification may need to undertaken by carrying out the Article 8 assessment.

19. In this instance it is accepted by the Appellants that the requirements of Appendix FM-SE of the rules were not met. This is, in effect, a remediable matter. The Appellants fail to meet the requirements of the Immigration Rules. They fail to meet those requirements because the specified evidence of the Sponsor's financial position was not submitted with the application. No evidence has been called or submissions made as to why such evidence was not submitted or available. It should be a simple matter for the Appellants to submit a new application ensuring on this occasion that the application complies with the requirements of the Immigration Rules.

20. There is only one factor put forward in the grounds that could be said to seek to identify compelling circumstances such that a new application is not the appropriate course to follow. This is that the eldest child is now over 18 and therefore that if a new application were to be made it would not be possible for the whole family to be reunited.

21. To the extent that this could amount to compelling circumstances it does not enable the Appellants to succeed under Article 8 because the Appellants still need to show that the decision is a disproportionate interference in their family life.

22. There are two fundamental difficulties for the Appellants in this respect. The first is that there was remarkably little evidence before the First-tier Tribunal about the circumstances of the Appellants, in particular the children, in Sri Lanka. The First Appellant's letter to the Entry Clearance Officer of 20 March 2013 gives no detail of the family's living arrangements or circumstances in Sri Lanka. As far as the children are concerned says no more than that both children have been in regular Skype contact with their father and both are very fond of him and wish the family to live together. The children are now aged 20 and 18, if they have not moved away from the family home it can be anticipated that they will do so in the relatively short term whether that be a family home in Sri Lanka or one that has relocated to the United Kingdom.

23. The second is that no details of the financial circumstances of the Sponsor, other than his income, were submitted to the First-tier Tribunal. There is therefore no evidence to show that he is financially independent or if he is that he would remain so if the Appellants were to join him. Meeting the financial requirements of the Immigration Rules is not the same as financial independence because it takes no account of the Sponsor liabilities. As the panel rightly point out and taking into account section 117 Nationality Immigration and Asylum Act 2002 the maintenance of effective immigration control is in the public interest and it is in the public interest that person who seek to enter or remain in the United Kingdom are financially independent.

24. In my judgement the finding of the panel at paragraphs 40-44 of the decision contains no error of law and whereas the panel goes on to consider proportionality and in doing so to take into account errors of fact those errors were not material to the decision to dismiss the appeal by virtue of Article 8 ECHR. Where there are no compelling circumstances justifying a consideration of Article 8 outside the rules it must be inconceivable that on such consideration the appeal could properly be allowed.

Conclusion

Immigration Rules

25. The decision of the First-tier Tribunal involved the making of errors of law for the reasons set out above. I set aside the decision of the First-tier Tribunal.

26. I remake the decision and I dismiss the appeal.

The Human Rights Convention

27. The decision of the First-tier Tribunal did not involve the making of an error of law material to the decision to dismiss the appeal. The decision of the First-tier Tribunal stands.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal