



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/20002/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 17 March 2015**

**Decision & Reasons Promulgated
On 23 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

**VIPUSSHAN SANMUGARASA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner of Counsel

For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a 22 year old citizen of Sri Lanka born on 22 August 1992. He has appealed, with permission, against the decision of First-tier Tribunal Judge Rhys-Davies who, in a decision promulgated on 12 November 2014, dismissed his appeal against the Entry Clearance Officer's refusal to grant him entry clearance for settlement in the UK under the Family Reunion provisions of the Immigration Rules. The appellant's sponsor is his father Mr Shanmugarasa Thambiayah who has refugee status in the UK.

2. In granting permission to appeal on 28 January 2015 First-tier Tribunal Judge Osborne noted that the appellant could not succeed under the Immigration Rules on substantive grounds but indicated that it was arguable that, in considering the appellant's claims under Article 8, the judge had applied the wrong or inappropriate test by considering whether or not the refusal was "unjustifiably harsh" as opposed to whether it was disproportionate in all the circumstances of the case.
3. On 6 February 2015 the Secretary of State responded under Rule 24. It was submitted that the appellant had conceded at the First-tier Tribunal hearing that he could not meet the requirements of the Immigration Rules but that the judge's findings in respect of Article 8 were sustainable.
4. I heard submissions from both representatives as to whether there was, in the judge's decision, a material error of law such that the decision should be set aside in whole or in part. Mr Turner relied on the grounds seeking permission to appeal. He argued that, although the appellant had conceded that he could not succeed under the Immigration Rules, the judge had nevertheless not dealt appropriately with the Article 8 claim or the issue of proportionality. He had made a positive finding of family life [26] but he did not go on to apply the five stage **Razgar** test. Nor had he applied any of the most recent cases relating to Article 8 and proportionality. At [24], [28], [29] and [33] the judge had found that the Entry Clearance Officer's decision was not "unjustifiably harsh" but that is not the test. Indeed there is no mention of proportionality at all in the judge's decision.
5. Mr Turner went on to submit that there had been no clear analysis of the competing balances on the question of proportionality. It was accepted by the Respondent that the family had all lived together in Sri Lanka. The purpose of the Family Reunion policy is for families to stay together and the fact that the sponsor is a refugee means that he could not visit the appellant there. Nor had the judge considered at all the impact of the refusal on other family members as required by the House of Lords' decision in **Beoku-Betts**.
6. In reply the Presenting Officer submitted briefly that the judge had given adequate reasons for refusing the application under Article 8 and it was not necessary for him to quote specifically the relevant case law.
7. In my judgment the decision of the First-tier Tribunal contained a clear and obvious error of law. The four times use of the expression "unjustifiably harsh" is not an expression that is relevant directly in Article 8 considerations of proportionality and its repeated use, at the very least, gives a strong perception that the judge applied the wrong test. Similarly there was no examination by the Judge of the competing interests of both parties to the appeal on the balance of proportionality which the Judge was duty bound to assess.

8. I therefore set aside the First-tier Tribunal decision. The only remaining issue is that of private and family life under Article 8. There will need to be a full rehearing of the evidence and for that reason it was agreed by both representatives that this case should be remitted to the First-tier Tribunal for further evidence and for a decision on the consideration of Article 8 outside the Immigration Rules.

Notice of Decision

The First-tier Tribunal decision contained an error of law. It is set aside in its entirety. The appeal is remitted to the First-tier Tribunal at Hatton Cross for a rehearing (by any judge other than Judge Rhys-Davies) on the sole outstanding issue of Article 8 outside the Immigration Rules.

No anonymity direction was sought and none is made.

Designated Judge David Taylor
Deputy Upper Tribunal Judge
23 March 2015