Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05483/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2016	**On 7 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PK
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr J Butterworth, Counsel, instructed by Ravi Solicitors

DECISION AND REASONS

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

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order.

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.

1. Although the Secretary of State is the Appellant in this appeal I refer to the parties as they were before the First-tier Tribunal.

2. The Appellant, a citizen of Sri Lanka, appealed to the First-tier Tribunal against the decision of the Secretary of State to refuse her application for asylum in the United Kingdom. First-tier Tribunal Judge Sweet dismissed the asylum appeal (there is no challenge to that decision) and allowed the appeal under Article 8 of the European Convention on Human Rights. The Secretary of State now appeals with permission to this Tribunal against the decision to allow the appeal under Article 8.

3. The background to this appeal is that the Appellant (now aged 74) entered the UK on 4 June 2006 with a visit visa valid until 19 November 2006. She made two unsuccessful applications for indefinite leave to remain as a dependent relative. These were refused on 8 December 2006 and 5 April 2007. Her appeal against the second refusal was dismissed in June 2007. She made further representations in October 2008, February 2009 and October 2010 and was served with IS151A as an overstayer on 19 December 2013. She then claimed asylum. She lives with her daughter and is supported by her daughter and son in the UK, both of whom have been granted asylum in the UK.

4. Having dismissed the asylum appeal the judge went on to consider the appeal under Article 8 of the European Convention on Human Rights. The judge found that it would be a disproportionate interference with the Appellant's private and family life to return her to Sri Lanka.

5. In the Grounds of Appeal the Secretary of State contends that the judge made a material misdirection in law in relation to Article 8. It is contended that the judge failed to take into account the guidance in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31** in assessing the family life between the Appellant and her adult children. It is further contended that the judge failed to point to a relationship where something more exists than the normal emotional ties between an adult and his parent and other siblings. It is further contended that the First-tier Tribunal Judge failed to take account of the guidance in **Akhalu (Health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)** when assessing the proportionality of removal. It is contended that the Appellant is currently receiving National Health Service treatment for her medical condition and this has played a part in the First-tier Tribunal Judge's proportionality assessment. The final ground of appeal contends that the judge failed to provide adequate reasons for finding that the Appellant has family life with her adult children. It is contended that the judge failed to provide adequate reasons for deciding that the Appellant's removal would be disproportionate to the legitimate aim.

6. Permission to appeal was granted on the basis that the grounds were arguable and it was stated to be further arguable that the judge failed to

give adequate consideration to Section 117B of the Nationality, Immigration and Asylum Act 2002 and the weight to be attached to the public interest.

Error of Law

7. Mr Nath contended that at paragraph 41 of his decision the judge relied on the Appellant's health issues and that this amounted to an error of law in light of the case law. He submitted that this conclusion places undue emphasis on the Appellant's medical condition without taking account of the decision in the case of **Akhalu.**

8. The judge dealt with the Article 8 issues at paragraphs 40 and 41 of the determination. The judge noted that it was accepted that the Appellant could not meet a claim for family life under Appendix FM as an adult dependent relative and went onto consider the case outside the Immigration Rules. the judge set out the five stage approach set out in **Razgar**. At paragraph 41 the judge made his main findings in relation to Article 8. I accept that these findings could have been clearer and would have been better had the judge followed the structure of the five stage approach set out at paragraph 40 from the case of **Razgar**. However, I accept that it is sufficiently clear that the judge found that the Appellant has established a private and family life in the UK. This is because the judge, having found a number of factors against the Appellant concluded

> "Above all, having been in the UK since 2006 and accepting her close relationship with her two children and grandchildren in this country – although I do not think her medical condition is such that she would not been able to obtain medical treatment in Sri Lanka – I consider it would be disproportionate for her to return to that country at this point in her life."

9. In my view this sentence shows that the judge did accept that there was family life between the Appellant and her children and grandchildren over and above that normally found between adults and their parents. I accept that this was on the basis of the evidence before the judge as to the Appellant's medical condition and as to any assistance that would be available to her in Sri Lanka.

10. I do not accept Mr Nath's submission that this sentence demonstrates an over-emphasis on the medical condition because in my view it is clear that the judge does not consider the Appellant's medical condition to be such that she would not be able to obtain medical treatment in Sri Lanka. Also, the conclusion of this sentence indicates that in fact a weighty factor in the judge's mind is the Appellant's age. In my view the phrase "at this point in her life" refers to the Appellant's age and the length of time that she has been in the UK.

11. I accept it would have been better had the judge set this out more clearly. However I accept the submission made by Mr Butterworth and his reliance on the case of **Dasgupta (Error of law – proportionality – correct approach) [2016] UKUT 00028 (IAC).** In that case the Presidential panel emphasised the principles in **Edwards v Bairstow [1956] AC14** where the House of Lords employed the language of "perversity" which they defined as a case in which "the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal" and that a decision should be set aside only where it appears that the judge has "... acted without any evidence or upon a view of the facts which could not reasonably be entertained." [17].

12. The Upper Tribunal went on to apply these principles in the following way [18]

> "In the decision of the FTT there is an underlying acceptance of Article 8 family life involving all five people in question. We consider that our scrutiny of the decision of the FTT must take into account both the evidence available to it, its undisputed nature and the significant contextual factor, also uncontentious, that the existence of family life among the five relatives concerned was not contested. In **JB (India)** the test formulated by Sullivan LJ was whether the Tribunal could rationally have found that there was family life if it had expressly applied the **Kugathas** principles. Weighing all of the evidence in tandem with the *de facto* concession on this issue, which illuminates the content of the FtT's decision, we conclude that it withstands the Secretary of State's challenge. In our judgment the assumption, or finding [the precise formulation matters not] of family life underlying and underpinning the decision of the FtT was properly open to the judge having regard to the findings express or implicit in the decision, the available evidence, the terms of the ECO's decision and the *de facto* concession. In these particular circumstances, while a more structured approach coupled with more extensive findings by the FtT would have been preferable, this does not vitiate its decision ..."

13. I consider that this guidance is particularly relevant in this case. In the context of the evidence before the judge the implied finding that there is family life in terms of the **Kugathas** principles between the Appellant, her children and her grandchildren in the context of the evidence is sustainable given the Appellant's age, her length of time in the UK, the length of time she has resided with her daughter, and her family members in the UK, and the findings made by the previous Tribunal in a decision promulgated on 11th June 2007 in relation to the short term limited nature of any support available to the Appellant in Sri Lanka.

14. It is my view the decision of the judge in this case is not perverse being open to the judge conducting a proper proportionality assessment on the basis of all of the evidence.

15. Mr Nath submitted that the judge failed to properly consider Section 117B of the Nationality, Immigration and Asylum Act 2002. I accept that the judge gave a cursory consideration to Section 117B at the first sentence of paragraph 41. However, the judge properly said that in relation to private life Section 117B militates against the Appellant's stay in the country while her immigration status was precarious, so the judge was therefore aware of the provisions of Section 117B and I am satisfied that the reasoning, reading the decision as a whole, was sufficient to deal with Section 117B.

Notice of Decision

16. In conclusion, I am satisfied that the decision of the First-tier Tribunal Judge contains sufficient and adequate reasons in relation to the conclusion that the removal of the Appellant would be a disproportionate interference with her private and family life in the UK. In these circumstances I conclude that there is no material error of law in the First-tier Tribunal Judge's decision and that the decision of the First-tier Tribunal Judge shall stand.

Signed Date 21 March 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 21 March 2016

Deputy Upper Tribunal Judge Grimes