Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/11401/2014
OA/11400/2014
OA/11399/2014
OA/11398/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 June 2016	**On 28 July 2016**

Before

Mr H J E LATTER
DEPUTY UPPER TRIBUNAL JUDGE

Between

MALATHY THASARATHAN
[M T]
DIVAKARAN THASARATHAN
SHAMANTHY THASARATHAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellants: Mr C Yeo, Counsel, instructed by Birnberg Peirce & Partners
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellants against a decision of the First-tier Tribunal issued on 18 September 2015 dismissing their appeals against the respondent's decision

dated 24 November 2014 dismissing their application for settlement as the partner and children respectively of the sponsor.

Background

2. The appellants are citizens of Sri Lanka. The first appellant was born on 2 October 1966. She married the sponsor on 15 May 1995 and the legal registration was on 1 June 1995. They have three children, the second appellant, born on [ ] 2001, the third appellant, on 15 March 1996 and the fourth appellant, on 1 June 1998. In 2002 the sponsor left Sri Lanka and travelled to the UK where he claimed asylum. His application was refused but eventually his leave to remain was regularised under the legacy scheme and he became a British citizen on 12 November 2013. The appellants applied for entry clearance on 6 March 2014 and in support of the application they submitted evidence showing the sponsor's earnings for the year 2012 – 2013 amounting to £14,483. This is significantly less than the sum of £27,200 he was required to show by the provisions of Appendix FM.

3. When the application was initially considered no decision was made pending the hearing of the appeal in MM & Ors [2013] EWHC (Admin) 1900 where Blake J had held that the position of income threshold levels was unlawful. The Secretary of State's appeal was successful, the Court of Appeal, at [2014] EWCA Civ 985 upholding the lawfulness of the income threshold requirement. By that stage another financial year had been completed and the appellants were able to produce evidence showing that the sponsor's income for the year 2013/2014 had significantly increased to £30,000, a sum exceeding the level required in the Rules.

4. However, the application was refused on 13 August 2014 on the basis that as at the date of application the appellants were unable to show that the specified evidence of the income requirements set out in Appendix FM-SE were met. The respondent went on to consider whether the application raised any exceptional circumstances, which might warrant consideration for a grant of entry clearance outside the Rules but decided that it did not do so.

The Hearing before the First-tier Tribunal

5. The appellants appealed against this decision. The substance of the appeal was that, although the appellants could not meet the requirements of the Rules at the date of application, they were able to do so by the date of decision. The judge did not accept this submission. He held that the requirements of the Rules had to be met at the date of application. When considering whether the application could succeed outside the rules, he said that he bore in mind the interests of the children and the fact that they had been separated from their father for a long period, as had their mother. However, it seemed to him that this could have been remedied by a fresh application as soon as it was known that the current application did not meet the requirements of the Rules.

6. The length of the separation was the only compelling circumstance put before him as justification for a grant outside the Rules. He repeated that if, as seemed to be the case, the financial requirements were now met he could see no reason why a fresh application should not succeed. There would be some delay in reuniting the family but that was caused by the fact that they chose to put in an application at a time when the Rules could not be met and then chose to pursue the appeal rather than put in a fresh application. For these reasons the appeal was dismissed.

The Grounds and Submissions

7. In the grounds it is argued that, whilst the provisions of Appendix FM-SE provided under para D that in deciding an application under Appendix FM-SE the Entry Clearance Officer could only consider documents submitted with the application save for specified exceptions which did not apply, by virtue of s.85(4) and (5) of the Nationality, Immigration and Asylum Act 2002 read with s.85A(2) it was open to the First-tier Tribunal to consider circumstances as at the date of decision. The judge was therefore obliged to have regard to the fact that the evidence demonstrated at that time that the sponsor had sufficient earnings.

8. In respect of article 8 it is argued that the judge erred by finding that the only fact which might amount to a compelling factor was the length of separation when at the time of the appeal it was no longer open to the third appellant to apply as he was over 18. The sponsor was a British citizen but still too afraid to return to Sri Lanka as he considered he would be at risk. The judge had therefore failed to take into account the circumstances of the separation as a factor relevant to the assessment of article 8.

9. At the hearing before me Mr Yeo adopted the grounds and relied on the Tribunal decisions in DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038 and LS (post-decision evidence; direction; appealability) Gambia [2005] UKAIT 00085. He submitted that the provisions of s.84(4) and (5) required the judge to look at the circumstances applicable at the time of the decision to refuse. This was not a points-based scheme appeal and therefore did not fall within s.85(5)(a). There were cases where there was a historic timeline: see NA and Others (Tier 1 Post-Study Work, funds) [2009] UKAIT 00025 but he argued that, certainly so far as self-employed income was concerned, there was no such historic timeline in Appendix FM-SE. Further, para D explicitly referred to the Entry Clearance Officer and the Secretary of State and could not be taken as overriding the statutory powers in s.85. In the absence of a historic timeline, the proper course was to fall back on the approach set out in LS (Gambia).

10. Mr Yeo submitted that the judge had erred by failing, when considering article 8, to consider the delay in the light of all the circumstances of the appeal. The fact remained that at the date of decision the sponsor did have sufficient earnings within the Rules although he accepted that by that time the third appellant by virtue of his age fell outside the requirements of the Rules.

11. Mr Walker submitted that whilst the arguments in relation to article 8 may well have substance, there was no merit in the appeal in relation to the Rules. The appellants were required to produce the specified evidence with the application and by necessary implication there was a historic timeline as part of the Rules. The position was made clear by the Court of Appeal in Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387, which the judge had been correct to follow.

Assessment of whether there is an Error of Law

(i) The Rules

12. I will deal firstly with the issue of whether the judge was entitled to take into account evidence of the sponsor's finances at the date of decision as opposed to the date of application when considering whether the requirements of the Rules were met. The provisions of Appendix FM-SE set out the specified evidence applicants need to provide to meet the requirements of the rules in Appendix FM. At para D it is provided that, in deciding an application in relation to which the Appendix states that specified documents must be provided, the Entry Clearance Officer will consider documents that have been submitted with the application and will only consider documents submitted after the application where specified subparagraphs apply, it being common ground that neither do in the present case.

13. In relation to self-employment the requirement is that specified documents for the last full financial year (or for the last two such years where the documents show the necessary level for gross income as an average for those two years) must be submitted including an annual self-assessment tax return and if the business is required to produce annual audited accounts, such accounts for the last full financial year or if not so required an accountant's certificate of confirmation: para 7.

14. It is clear from Appendix FM-SE that the specified evidence of the required income must be produced with the application. In the appellants' case, in respect of an application made on 6 March 2014 that was for the last full financial year, 2012 – 2013. The reason the application was made on 6 March 2014 was because the third appellant was at that stage still under 18, his birthday being 15 March 1996. After that date he fell outside the definition of a dependent child within Appendix FM. The appellants subsequently sought to produce evidence relating to financial year 2013 – 2014 but that post-dated the date of application.

15. The judgment of the Court of Appeal in SS (Congo) at [50] – [53] and [58], as set out in the First-tier Tribunal's decision, has confirmed that the evidential requirements of the Rules are to be treated in the same way as the substantive requirements of the Rules and must be established at the date of application. At [58], the Court said that an appeal against a decision refusing leave to enter was to be heard by the First-tier Tribunal by reference to the evidence and circumstances which applied when the

matter was considered by the Entry Clearance Officer. These circumstances include the requirement to meet the evidential requirements of the Rules as at the date of application.

16. I am therefore satisfied that the judge was right to find that he was not entitled to take into account the financial circumstances as at the date of decision as opposed to the date of application. In relation to an appeal against the refusal of entry clearance, the provisions of s.85(5) set out that the judge could only consider the circumstances appertaining at the time of the decision to refuse. Those circumstances refer to what needed to be proved, including income, as evidenced in accordance with the Rules at the date of application. There was, therefore, a historic time-line and it was not open to the appellants to rely on the facts as they were at the date of decision.

(ii) Article 8

17. I now turn to consider the position under article 8. In the grounds of appeal it is argued that the judge erred in law by failing to take into account a number of relevant factors including the fact that by the time the decision was taken, evidence had been provided to demonstrate that the appellants could meet the financial requirements of the Rules and that it was no longer open to the third appellant to apply under the Rules as he was now over 18. The sponsor had become a British citizen but was too afraid to return to Sri Lanka as he considered he would be at risk. The grounds refer to SS (Congo) where the Court of Appeal specifically referred to the circumstances of the separation as being relevant to the assessment of article 8.

18. It is also argued that the respondent appeared to take into account evidence relating to another appeal, representations and accounts from chartered accountants. It is also said that the review decision by the Entry Clearance Manager (ECM) had asserted that family life could be resumed in India when neither the appellants nor the sponsor had ever lived there. There is no substance in these two grounds. It is true that papers relating to another application were included in error with these appeal papers but nothing to indicate that the decision or ECM review took them into account. It is also correct that the ECM review referred to whether it was reasonable for the family to live in India/Sri Lanka but this is simply a failure to delete the inappropriate country.

19. It is argued that the judge failed to have regard to the fact that at the date of decision the sponsor was earning in excess of what was required by the Rules but at [30] the judge noted when considering article 8 that he was not restricted to considering income as at the date of application. The fact that in the financial year after the specified financial year for the purposes of the application the respondent did meet the requirements was accepted as a circumstance known at the time of decision. The judge did not deal specifically with the fact that it was the appellants' claim that the sponsor was afraid to return to Sri Lanka as he considered that he would still be at risk nor did he refer in terms to the fact that the third and potentially the fourth child would no longer be able to qualify under the Rules. In this context the judge said

that if, as seemed to be the case, the financial requirements were now met that he saw no reason why a fresh application would not succeed. This overlooks the point that on a fresh application the third appellant could no longer bring himself within the eligibility requirements of the Rules.

20. The position was therefore not as the judge appears to have assumed one where there was no reason why a fresh application would not succeed but one where there would need to be a further consideration of whether the third and potentially the fourth appellant could succeed outside the Rules. The judge commented that the position could have been remedied by a fresh application as soon as it was known that the current application did not meet the requirements of the Rules. I am therefore satisfied that the judge erred in law by proceeding on the basis that an application under the Rules was likely to succeed and that there was no need for him to consider article 8.

Re-making the Decision under Article 8

21. As this is an out of country appeal I must consider the position as at the date of decision. In SS (Congo) the Court of Appeal confirmed that in entry clearance cases the appropriate general formulation in such cases is that an applicant will need to show that compelling circumstances exist not sufficiently recognised under the new Rules so as to require the grant of leave. This is described as a fairly demanding test reflecting the reasonable relationship between the Rules themselves and the proper outcome of article 8 in the usual run of cases but is not as demanding as the exceptionality or very compelling circumstances test applicable in specific contexts such as precariousness of family relationship and deportation of foreigners convicted of serious crimes [40] – [41]. The appellants do not fall within either of these categories but, nonetheless, the importance of the procedural requirements of the rules must be taken into account.

22. In this context the Court of Appeal at [58] in SS (Congo) expressed concerns about applications being made at a time when the requirements of the Rules were not satisfied in the hope that by the time the appellate process had been exhausted those requirements would be satisfied. It is arguable that the application made in the present case in March 2014 was based on unrealised possible future compliance with the Rules but that the facts would in any event have had to be considered at the date of decision rather than at the date of a prospective appeal hearing. The application was perhaps speculative on the outcome of MM but in any event it must have been envisaged that in so far as the Rules could not be met the appellants would rely on article 8. Whatever the position, taking into account the long separation, the fact that an application could not be made until the sponsor achieved settled status and his claimed fears of returning to Sri Lanka, I am satisfied applying the approach in SS (Congo) that this a case where the appeal can properly be considered under article 8 outside the Rules.

23. I am satisfied that there is family life within article 8(1). The third appellant was over 18 when the decision was made but there was nothing to indicate that he did not remain a member of the family. The decision to refuse entry clearance is sufficiently serious to engage article 8. It was lawful decision and was made for a legitimate aim within article 8(2). The remaining issue is whether the decision is proportionate.

24. It is common ground that an application by the appellants save for the third appellant if made at the date of decision would meet the requirements of the Rules. I must also take into account the fact that the applications could only realistically be made after the sponsor had acquired settled status, having come to the UK in 2002. I must take into account the fact that when the application was lodged on 6 March 2014 evidence had to be supported by the earnings in the previous financial year. The applicants, had they delayed the application until April 2014, would have been able to rely on the 2013/2014 accounts and tax return but by that time the third appellant would have been over 18. So far as the Rules are concerned these considerations cannot benefit the appellants as they amount to a near miss argument but a more fact-sensitive approach is appropriate in article 8 appeals subject, of course, to keeping in mind the nature and purpose of the Rules, to provide a workable, predictable and consistent system in which applications can be assessed.

25. The sponsor has maintained throughout that he is not able to return to Sri Lanka because of a continuing fear of persecution and he is now a British citizen. Taking into account this factor with the length of the family's separation and the fact that as at the date of decision at least the substantive requirements of the Rules could be met so far as the first, second and fourth appellants are concerned, I am satisfied that it would be disproportionate for them to be refused leave to enter. So far as the third appellant is concerned in light of the fact that, although over 18 he still remained a member of the family and the requirements of the Rules were met save for the fact that he was over 18, it would be disproportionate for him to be left in the position of a stranded sibling and he also should be granted leave to enter.

Decision

26. I am not satisfied that the First-tier Tribunal erred in law in its assessment of the application under the Immigration Rules but it did err in respect of article 8. I substitute a decision allowing the appeal on article 8 grounds in respect of all appellants. No anonymity order was made by the First-tier Tribunal.

Signed H J E Latter Date: 28 July 2016

Deputy Upper Tribunal Judge Latter