



IAC-FH-NL-V1

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

Appeal Number: OA/15051/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 February 2016**

**Decision &  
Promulgated  
On 1 April 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**and**

**SELLAPACKIAM ARUMUGAM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Home Office Presenting Officer

For the Respondent: Ms A Benfield, Counsel instructed by Theva Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against a decision of Judge of the First-tier Tribunal Judge Somal following consideration of the Respondent, to whom I shall refer as the Claimant's

case on the papers at Stoke on 20 August 2015. The Claimant is a national of Sri Lanka born on 20 January 1945. An application was made for entry clearance for her to join her children in the United Kingdom as an adult dependant relative. This application was refused on 21 October 2014 because the Respondent was not satisfied on the balance of probabilities that the Claimant met the relationship requirements; nor that the Claimant required long-term personal care to perform every day tasks and could not obtain this level of care in Sri Lanka nor were the financial requirements met. In her entry clearance application, the Claimant stated that she had no medical conditions and was capable of caring for herself on a daily basis such as washing and dressing herself and preparing food. She stated that her husband had passed away in July 2013. She also stated that she was no longer able to travel to the United Kingdom due to age and illness and she suffered from unipolar depressive illness.

2. In the appeal bundle it was asserted that she now required long-term personal care as she was suffering great weight loss and was also failing to eat properly. She no longer undertook daily activities at home; there was no one to assist her; she was aged 70 and lived alone and she could not now travel independently to visit her sons in the United Kingdom. There was a letter from Sivaraam Medicines and Surgery dated 23 November 2014 stating that the Claimant had been a patient at the clinic for unipolar depressive illness for the last four years and her illness was aggravated by the death of her husband.
3. The appeal was reconsidered by an Entry Clearance Manager on 19 March 2015 and in the light of additional evidence, the ECM found that the financial requirement was arguably met but he upheld the decision of the Entry Clearance Officer in respect of the other issues.
4. In her decision, First-tier Tribunal Judge Somal found at [13] that the Claimant cannot meet the Immigration Rules. She further found at [14] that the Claimant has not shown that due to her age, illness or disability she requires long-term personal care to perform everyday tasks and at [15] *"I am not satisfied the Appellant requires long-term personal care to perform everyday tasks and even with the financial support from her Sponsor the required level of care is not available"*. She further found at [16] in respect of further evidence as to financial requirements that this was post decision evidence that could and should have been sent with the application and so could not be taken into consideration.
5. The Judge then turned to consider Article 8 of the European Convention on Human Rights and found at [22]:

*"In all the circumstances, considering all of the evidence in the round and the compelling circumstances of this Appellant, I do not consider it would be reasonable to exclude her from the UK so as to prevent her enjoying a family life with her sons, their wives and her grandchildren."*

6. In an application made, in time, on 18 September 2015 the Entry Clearance Officer sought permission to appeal to the Upper Tribunal on the basis that, having found that the Claimant could not satisfy the Immigration Rules, the First-tier Tribunal Judge materially misdirected herself in law in considering a freewheeling Article 8 assessment; that this was contrary to the decision in SS (Congo) v SSHD [2015] EWCA 387 and it was clear that the inability of the Claimant to satisfy the Rules is a weighty factor in assessing an Article 8 claim outside of the Rules; the Judge had failed to reconcile the factors in that aspect of the case and in particular within her own decision she failed to reconcile the factors relied upon by her in allowing the appeal under Article 8 with her conclusion at paragraph 15 that she was not satisfied that the Claimant required long-term personal care. The grounds further submitted that the First-tier Tribunal Judge failed to have regard to the public interest statements codified in Section 117B of the 2002 Act, namely that the maintenance of effective immigration controls is in the public interest.
7. Permission to appeal was granted by Judge of the First-tier Tribunal Easterman on 18 January 2016 on the basis that it was wholly unclear how the family life the judge found had been established had been interfered with by the current decision; that no consideration appears to have been given to the Secretary of State's right to control immigration nor to the fact that the Claimant failed to meet the Immigration Rules in the category in which she sought to come.
8. The judge added a further point which is this: being an out of country appeal it is unclear whether the judge's consideration of Article 8 outside the Rules has taken place against the background of the evidence of the position at the date of the ECO's decision or at the time of the hearing.

#### *Hearing*

9. At the hearing before me the Secretary of State was represented by Mr T Wilding and the Claimant by Ms A Benfield of Counsel. I heard submissions in some detail from both parties and I also was provided with a copy of a Rule 24 response on behalf of the Claimant. I found at the hearing that the Judge erred materially in law for the reasons set out by the Entry Clearance Officer in the grounds of appeal. I consider that the Judge's findings are inadequate to explain why she considered the appeal should be allowed with regard to Article 8 of the Human Rights Convention outside the Immigration Rules, particularly given her findings at [13] to [15] that the Claimant could not meet the Rules and on that basis it was incumbent upon the judge to correctly direct herself in respect of the jurisprudence *vis* SS (Congo) (op.cit) and to find that there were exceptional or compelling circumstances that justified allowing the appeal outside the Rules.
10. In addition, although it is not incumbent upon the judge to set out the terms of Section 117B of the NIAA 2002 if the public interest factors are contained within her decision read as a whole, nowhere within the decision

is the public interest referred to as a factor in any assessment of proportionality. For these reasons I find that the Judge's decision cannot stand because it is vitiated by material error.

**Notice of Decision**

- 11.** I allow the appeal by the Entry Clearance Officer and remit the appeal back to the First-tier Tribunal for an oral hearing on a *de novo* basis before a Judge other than First tier Tribunal Judge Somal.
- 12.** No anonymity direction is made.

Signed

Date: 16 March 2016

Deputy Upper Tribunal Judge Chapman