



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

Appeal Numbers: OA/17229/2013
OA/17237/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 2 June 2016**

**Decision &
Promulgated
On 1 July 2016**

Reasons

Before

**MR H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)**

Between

ENTRY CLEARANCE OFFICER, CHENNAI

and

**NAGESWARY NAVEENANAJAGAM
NURUSANTH NAVEENANAJAGAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondents

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondents: Ms S Jegarajah, Counsel

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer, against a decision of the First-tier Tribunal (Judge Jackson) allowing the respondent's appeal against

the decision made on 23 July 2013 refusing to grant the applicants entry clearance to the UK as the partner and child of the sponsor, the first applicant's husband and the second applicant's father. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicants as the appellants and the Entry Clearance Officer as the respondent.

Background

2. The appellants are citizens of Sri Lanka, currently living in India, born on 12 January 1972 and 1 May 1997 respectively. The first appellant married the sponsor on 19 August 1991, the marriage being solemnised on 23 October 1996. They have three children, a son who came to the United Kingdom in January 2009 and has successfully claimed asylum, a daughter who came to the United Kingdom in September 2010 as a student and the second appellant who continues to live with the first appellant. The family went to India in 1976 where they were permitted to stay although not formally recognised as refugees. The sponsor was subsequently arrested on the basis that he had worked for the LTTE and could not stay in India. He was released on the basis that he would be called back for investigation but he returned to Sri Lanka in 1997 and then came to the UK in March 1999. He applied for asylum but was eventually granted discretionary leave to remain under the legacy programme and indefinite leave to remain on 7 September 2015 following ten years' lawful residence.
3. The appellants' applications for entry clearance were refused on 23 July 2013 on the basis that they could not meet the immigration status or the maintenance and accommodation requirements of the Rules. An appeal against this decision was dismissed by the First-tier Tribunal in a decision issued on 13 November 2014 but that decision was set aside by the Upper Tribunal on 31 March 2015 and the decision was remitted for rehearing by the First-tier Tribunal.

The Hearing Before the First-tier Tribunal

4. At the remitted hearing it was accepted that the maintenance and accommodation requirements of the Rules were met but the appellants were unable to meet the immigration status requirements as the sponsor was not a person "present and settled" in the UK at the relevant time. It was therefore conceded that, as they could not meet all the requirements of the Rules, the appeal had to proceed on article 8 grounds only. It was accepted that the appellants and sponsor had existing and continuing family life with each other despite their prolonged separation. The sponsor and first appellant had lived in India since 1996 until the sponsor left in 1997. The family were in touch with each other and had maintained their family life despite the absence of face to face contact for many years. The judge accepted that the refusal of entry clearance would be an interference with family life as it prevented the greater enjoyment of

family life in the same country. It was also accepted that family life could not continue in Sri Lanka or in India as the appellants' status was such that they did not have any permanent rights of residence and were unable to sponsor a family member to join them there. The judge did not accept that the sponsor would not be able to visit the appellants in India but he could only visit and would not be able to live there.

5. The judge accepted that the interference with family life was in accordance with the law and pursuant to a legitimate aim within article 8(2). She went on to consider the final issue, whether the refusal of entry clearance was proportionate to this legitimate aim. She found that the public interest in maintaining immigration control was not particularly weighty, taking into account the main reason for refusal and the factors to be considered in s.117B of the Nationality, Immigration and Asylum Act 2002. The appellants met the substantive requirements of the Rules save for the sponsor's status in the UK at the time of decision.
6. The judge noted that the second appellant was a child at the date of decision although he was now an adult. She found that it was predominantly in his best interests to remain with his mother who had brought him up and with whom he had lived since birth. She noted that there were no clear or compelling factors suggesting that it would be in the second appellant's best interests to reside in the UK, rather than in India, and that it was arguable that at his age, continuity of residence in the country where he was socially and culturally aware was of considerable importance.
7. The judge summarised her conclusions as follows:

"In all of the circumstances I find that the respondent's refusals of entry clearance to the appellants is a disproportionate interference with their right to family life. The public interest in refusing entry clearance is relatively weak in this case and at least in the case of the first appellant, a future application under the Immigration Rules seems likely to be successful now that the sponsor has been granted indefinite leave to remain and pending that there would be continued separation. The effect of the refusal would however practicably be to continue to leave the appellants separated from the sponsor as they could not enjoy a family life in India or Sri Lanka or at least for the second appellant, that could potentially be a permanent state of affairs as a future application for him would not be successful under the Immigration Rules as he is now an adult. Article 8 of the European Convention on Human Rights is there not just to prevent a worsening of family life but also to positively promote it, the latter of which is pertinent in this case given the long separation of family members and the lack of ability for them to improve their enjoyment of family life outside of entry clearance to the United Kingdom for the appellants. The appellants' appeals are allowed on human rights grounds."

The Grounds and Submissions

8. In the respondent's grounds it is argued that the First-tier Tribunal has failed to provide adequate reasons for its findings that the refusal of entry clearance was disproportionate despite the inability to meet the requirements of the Rules. The Tribunal had made a finding that the sponsor could visit the appellants in India and that it was predominantly in the best interests of the second appellant to remain with his mother. It is argued that there were no clear or compelling factors suggesting that it was in the second appellant's best interests to reside in the UK, rather than India.
9. Mr Tarlow submitted that there was nothing compelling in the facts of this case to justify a grant of discretionary leave outside the Rules. It was open to the first appellant to make a further application which may well be granted but that was no justification in itself for allowing the appeal under article 8 grounds.
10. Ms Jegarajah submitted that the judge had reached a decision properly open to her. She had taken into account that this was an admission, rather than an expulsion case. The judge had looked at all the relevant factors both for and against a finding that removal would be disproportionate. Her decision was wholly sustainable for the reasons she gave.

Consideration of Whether the First-tier Tribunal Erred in Law

11. It is argued on behalf of the respondent that the First-tier Tribunal failed to provide adequate reasons for its finding that the refusal of entry clearance was disproportionate as the requirements of the rules could not be met. It is further argued that the judge failed to take into account the fact that the sponsor could visit the appellants in India and that in the light of the fact the second appellant had lived in India, this was at least suggestive that it was in his best interests to remain there, rather than coming to the UK.
12. However, I am not satisfied that these arguments are made out. When the determination is read as a whole it is clear why the judge allowed the appeal. She was entitled to consider the strength of the public interest and to take into account the fact that the only reason the appellants could not meet the requirements of the Rules at the relevant date was that the sponsor did not have settled status. It was accepted at the hearing that the appellants could meet all the other requirements of the Rules and that there was continuing family life between all members of the family. They had originally left Sri Lanka for India in 1996 because of the situation in their home country. The sponsor had been detained in India and then returned to Sri Lanka before travelling to the UK in order to claim asylum. Although his claim was refused on the basis that there had been a ceasefire in Sri Lanka he remained in the UK and was eventually granted discretionary leave to remain. His son came to the UK in January 2009 and claimed asylum on the basis that he had been detained and ill-treated in

detention because of his relationship to the sponsor. He was subsequently granted asylum.

13. The judge accepted that in all likelihood the sponsor would be able to pay visits to India but the appellants who had no permanent status there and had not been granted Indian nationality could not sponsor family members to enter and reside.
14. The judge did not ignore or leave out of account factors supporting a submission that the refusal of entry clearance was proportionate. She noted the decision in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 that weighty reasons would be needed for a grant of entry clearance outside the Rules. She considered the position of the second appellant and the fact that he had lived in India for all his life. The issue was not simply whether it was in his interests to be in India where he had always live rather than the UK but whether it was proportionate for him to continue to be separated from family members in the UK. The judge found that it was predominantly in his best interests to remain with his mother if she moved to the UK even though there was at least an argument that continuity of residence in India would be of considerable importance. The judge was simply considering both sides of the question, as she was required to do, before reaching a decision.
15. I am satisfied that the judge reached findings and conclusions properly open to her on the evidence. She has explained why, in her judgment, in the particular circumstances of this case the refusal of entry clearance was disproportionate. The respondent therefore fails to show any inadequacy in the judge's reasons.
16. For the sake of completeness I would add that when directing herself on the law the judge did not refer to any cases since 2014 and therefore made no mention of the Court of Appeal judgment in Secretary of State v SS (Congo) [2015] EWCA Civ 387 where the court summarised at [39] the position under article 8 in relation to an application for leave to enter on the basis of family life with a person already in the UK. The court said at [40] that the leave to enter rules maintained in general terms a reasonable relationship with the requirements of article 8 in the ordinary run of cases but it remained possible to imagine cases where the individual interests at stake were of a particularly pressing nature so that a good claim for leave to enter could be established outside the Rules. The appropriate formulation for this category would arise where an applicant for leave to enter could show that compelling circumstances existed which were not sufficiently recognised under the rules to require the grant of such leave. I am satisfied the judge was entitled to find that the facts in this appeal did disclose compelling circumstances requiring the grant of leave under article 8.

Decision _____

17. The First-tier Tribunal did not err in law and its decision stands.
18. No anonymity order was made by the First-tier Tribunal and no application was made for an order before the Upper Tribunal.

Signed H J E Latter

Dated: 29 June 2016

Deputy Upper Tribunal Judge Latter