



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01774/2017

THE IMMIGRATION ACTS

Heard at Field House
On 8th May 2018

Decision & Reasons Promulgated
On 17th May 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SIVASHAIYANTHAN SIVASUBRAMANIAM

Claimant/Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Claimant/Respondent: Mr B Bundock of Counsel instructed by Sriharans Solicitors

DECISION AND REASONS

1. The claimant is a citizen of Sri Lanka who is married to the sponsor who is a Canadian citizen but exercising leave to remain in the United Kingdom upon a Tier 2 (General) visa valid until 5th December 2017.
2. The claimant sought leave to remain as her spouse which application was refused by the Secretary of State on 16th January 2017.
3. Refusal was made on the basis that the claimant failed to meet the requirements of suitability in that he had previously presented false documentation. Although it was

acknowledged that there was a genuine and subsisting relationship, neither were settled in the United Kingdom such as to meet the requirements of E-LTRP1.2.

4. Consideration was also given to EX.1 of Appendix FM. It was considered there were no insurmountable obstacles or very significant difficulties which would be faced by the claimant or his partner in continuing family life together outside the United Kingdom in Sri Lanka. It was considered that there were not any exceptional circumstances over and above such matters to engage Article 8 of the ECHR.
5. The appeal came before First-tier Tribunal Judge Trevaskis on 2nd August 2017. In a decision promulgated on 16th August 2017 the appeal was allowed on the basis of Article 8 of the ECHR.
6. Challenge was made to that decision by the Secretary of State on the basis that inadequate reasoning had been applied to the findings of fact and that proportionality had not been properly considered in accordance with the required directions of law.
7. Permission to appeal was granted by Judge of the First-tier Tribunal on 26th January 2018. Thus the matter comes before me in pursuance of that grant.
8. Mr Tarlow relies upon the grounds of appeal as set out in the bundle. He challenges the reasons advanced by the Judge for finding there to be very significant obstacles to integration. Little weight is given by the Judge to the lack of an English language test. It was further contended that the Judge failed to identify what was properly compelling about the facts of the case such as to allow the appeal outside of the Rules. Sensible reasons had been given as to why the claimant in any event could not return to Sri Lanka to make the application or alternatively why family life could not be enjoyed by both parties in Canada.
9. Mr Bundock, in his response, relies upon the Rule 24 response as filed dated 7th March 2018. He submits that when read as a whole the determination adequately considers all matters such as to lead to a proper conclusion.
10. He submits that it was a proper course for the Judge to adopt namely to deal with the decision which was under challenge and the issues which were raised therein. Though the Secretary of State now seeks to raise return to Canada as an alternative to family life in the UK, that was not a suggestion that was made in the original decision nor indeed was it canvassed in any detail in the hearing.
11. In terms of suitability, it was noted the claimant had entered the United Kingdom on 1st July 2006 with entry clearance as a student. This leave had continued until 15th October 2012. An in-time application was then made for leave as a Tier 1 Entrepreneur. Although that was refused in 2014, seemingly the notice of refusal was not served upon the claimant so his Section 3C leave continued as the Judge noted in the course of the determination. That meant that in practice the claimant had eleven years of lawful leave in the United Kingdom. Indeed there is no suggestion in the decision under challenge that he did not. The suggestion is made in the decision that he had

exercised deception by presenting false documents. The Judge considered that matter as a preliminary matter as the hearing and refused to allow the Secretary of State to adduce late evidence of that matter. The only matter standing in the way of suitability was therefore the failure to have the language test. However it was noted that the claimant had passed a degree in the United Kingdom and English and gave evidence in English at his hearing.

12. It was the conclusion of the Judge at paragraphs 30 and 31 that there were very significant obstacles to integration in Sri Lanka and in establishing family life together in Sri Lanka. It was found that the claimant had no family in Sri Lanka other than his parents and an uncle with whom had no recent contact. He has not worked in Sri Lanka for many years and would find difficulties in employment and accommodation. Particularly his wife could not return there having left as a refugee and now working in the United Kingdom.
13. Challenge is made to those findings on the basis that they do not in substance really justify the finding as to the significant obstacles. The claimant is a healthy male, familiar with the language who came to the United Kingdom to study presumably with the understanding that thereafter he would return. It is contended that mere passage of time is an insufficient basis upon which to make such a finding. Grounds of challenge do not however engage with the finding also made as to the impossibility of family life in Sri Lanka on the basis of the fact that the spouse/sponsor is a refugee who fled Sri Lanka as a child and was granted refugee status in Canada.
14. Also noted, so far as the sponsor is concerned, is that she left Sri Lanka when she was 8 years old and has not returned there since. She has no family there as they are all either in the United Kingdom or in Canada. In terms of a potential return to Canada it was noted that her career is essentially in the United Kingdom occupying a responsible position as a senior optometrist working with Boots Opticians. The nature of the visa that was granted, indicates that this is an occupation of a specialist nature and there is a paucity of persons in the United Kingdom able to fulfil that occupation. The sponsor entered the United Kingdom as a student in 2007 with a visa to study optometry. She completed her degree in 2010. She returned to Canada to make the appropriate application for a migrant visa to work as an optometrist which was granted. She met the claimant in February 2013 and married in April 2014. She returned to Canada to obtain her qualification of doctor of optometry and returned to the United Kingdom in 2015 with a Tier 2 (General) visa valid until 15 December 2017. There is a letter from her employer confirming that they would be seeking to support the application that she makes for that visa to be extended beyond that time. Thus it is readily apparent that she has specialist employment which would not necessarily be available to her were she returned to Canada and certainly not if she went to Sri Lanka. In terms of her earnings for the tax year to 5 April 2015 as a P60 exhibited in the bundle she earns in excess of £41,000 a year in that employment. Thus she and the claimant would not be dependent upon the state.
15. As part of the grounds of appeal submitted by the Secretary of State, reliance is placed upon the fact that the leave of both her and the claimant is precarious in that it is not

settled status. In terms of the principles as set out in Section 117B it is to be noted that such status, albeit of limited duration, was lawful with the sponsor fulfilling as I have indicated a particularly valuable role in society. In terms of finance they are no burden upon the state and as the Judge noted, although technically the claimant did not have the test in English, nevertheless there does seem to be a little difficulty in his integration with his familiarity with English and his integration in society generally. Whilst looking at the factors set out in 117B the majority would seem positive matters to be placed to the credit of the claimant not against. Matters were noted in particular by the Judge at paragraph 40 of the determination, indeed at paragraph 43.

16. A factor of a compelling nature outside of the Rules, was briefly mentioned by the Judge at paragraph 43 in relation to the loss of their child. That is set out in some detail in the statement of the sponsor and seems to me to be a particularly relevant consideration in this case. She became pregnant in August 2016 but at five months pregnancy she lost the baby in December 2016. Unfortunately she had to give birth to the dead child with a requirement of an autopsy. The funeral took place on 11th January 2017. It was clearly a devastating event for both parents, being a matter that has deeply affected her since that time. She relies very heavily upon him for emotional support as a result of that family tragedy.
17. The suggestion that the claimant leave the United Kingdom to make the application to return was specifically considered by the Judge. The Judge considered whether the nature of the public interest would require that course of action balanced with the harm that such would cause, that harm being the need of the sponsor for emotional support of the claimant which would be denied her if he were required to return to Sri Lanka.
18. The grounds of appeal contend that the First-tier Tribunal had failed to identify what is properly compelling about the facts of the case. It seems to me that that matter has been identified.
19. At paragraph 25 the Judge has properly referred to the guidance in the case of **Hayat** as to the question as to whether there was a sensible reason for enforcing the policy. The decision in **Hayat** required the Judge to weigh all matters positive and negative and come to a proportionality assessment. Indeed it is one of those cases where, apart from the failure to have a test, all other matters would seem to be positively advanced in favour of the sponsor and of the claimant. It follows clearly that his leave to remain will be dependent upon the sponsor obtaining a further grant of leave in the United Kingdom to fulfil her specialist role and function.
20. I find that, when looked at as a whole, the reasoning of the Judge is very much as set out in the decision of **Hayat** as to how matters should be approached particularly with regard to Section 117B and Article 8 in particular. I find that the challenges that have been made are largely challenges as to interpretation. I find that the Immigration Judge was entitled to structure the considerations in the way that was done and that her conclusions in terms of Article 8 were properly open to be made in all the

circumstances. I do not find a lack of reasons, rather I find that the decision was one properly open to be made.

21. In those circumstances therefore the Secretary of State's appeal before the Upper Tribunal is dismissed. The findings of the First-tier Tribunal Judge shall stand namely that the appeal be allowed on a human rights grounds predicated on the basis that the sponsor continues to have lawful leave to remain.

Notice of Decision

The appeal is allowed to the extent that the First tier Tribunal decision is upheld.

No anonymity direction is made.



Signed

Date 15 May 2018

Upper Tribunal Judge King TD