Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12917/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th January 2017	**On 5th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE ENTRY CLEARANCE OFFICER SRI LANKA

Appellant

And

MRS PREMASIRI UPALINI ILLEPRUMA ACHCHIGE
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Isherwood Senior Home Office Presenting Officer
For the Respondent: Mr Talachi instructed by Solidum Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of Judge of the First-tier Tribunal N M Paul.

2. The respondent, Mrs Premasiri Upalini Illepruma Achchige date of birth 2nd July 1941, is a citizen of Sri Lanka. Having considered all the circumstances, I do not consider it necessary to make an anonymity direction.

3. The original application was made by the respondent on 29 September 2015 for entry clearance to the United Kingdom as an adult dependent relative of a person present and settled in the United Kingdom under the

Immigration Rules, Appendix FM, and under Article 8 of the ECHR. By decision of the 4th November 2015 refused the application.

4. In refusing the appeal the ECO relied upon:-

   i) Paragraph FM E-ECDR 2.4 whereby the respondent had to prove that by reason either of age, illness or disability she required long term personal care to perform everyday tasks.

   ii) Paragraph E-ECDR.2.5 whereby the respondent had to prove that it was not possible even with practical and financial help to obtain the level of required care in the country in which she was living, either because it was not available or there was no one who could reasonably provide it or it was not affordable.

   iii) As to the factual circumstances it was noted that the respondent was living in the property she had occupied since her daughter was 4 or 5 years old; that the respondent's nephew, his wife and children resided in the ground floor part of the property; and that they provided the respondent with meals and assisted in her personal care.

5. The judge allowed the appeal on the basis of Article 8 of the ECHR, family and private life. Prior to coming to that conclusion however the judge found at paragraph 25 that the respondent could not meet the requirements of the rules. In making that finding the judge considered the medical condition of the respondent, finding that her condition was such that it had not been proved that the respondent was unable to care for herself.

6. The judge in allowing the appeal of the appellant made the following findings:-

   i) The evidence shows a lady with various medical conditions but none of which point to an inability for her to care for herself.

   ii) It was unrealistic to expect a lady of the respondent's age with apparently very limited English ability to integrate into society in the UK, ostensibly finding that the appellant could not be expected to speak English.

   iii) The respondent's family had sufficient resources and training to be able to provide for the respondent's everyday needs.

   iv) The respondent's sister and daughter would be able to apply the necessary support and care for her having regard to her medical and mental condition.

   v) The judge at that stage indicates that the proportionality exercise involved determining the extent to which the very obvious mother and daughter tie will be significantly affected by continuing separation.

7. The problem with regard to the approach made by the judge is that there is no assessment as to whether or not in the sense protected by Article 8 there is a genuine family life and whether it is the decision of the ECO that interferes with that family life. In that respect the criteria for establishing a family life is that set out in the case of Kugathas 2003 EWCA Civ 31.

8. From the brief outline of the facts contained within the documentation it appears that the respondent's sister has been in the United Kingdom a significant period of time working here in the National Health Service. Any concept of family life that existed between the sister and the respondent ceased long ago.

9. Similarly there is reference in the documentation to the respondent's daughter being in the United Kingdom and to her being separated from her husband. It appears again that the daughter has been in the United Kingdom a significant period of time although it is unclear exactly how long. However whatever can be said it appears that the daughter has established her own family life with her husband in the past, whilst the respondent has throughout lived in Sri Lanka.

10. Inevitably as children grow and marry they cease to part of the family unit of their parents and form their own family units. That is even more so where children moved to live in another country and they are separated from their parents. The close family unit protected by Article 8 may cease between parent and child. A desire to look after a parent is understandable but a careful assessment has to be made of whether the family unit protected by Article 8 continues to exist or whether a child has formed her own family unit. As the parents age it will result in significant degree of anguish and concern on the part of the child for the parent. However there is nothing exceptional or unusual in that.

11. It was necessary for a careful examination of the criteria as set out in the case of Kugathas to be made in order to establish whether there was a family life in the sense protected under article 8. Also the judge is obliged to follow the criteria set down in the case of Razgar 2003 UKHL 27. It is clear that the judge has not undertaken that exercise rather the judge appears at paragraph 27 to make findings with regard to proportionality. The simple fact that it was very obvious that *the mother and daughter tie will be significantly affected by the continuing separation* does not establish that family life in the sense protected by Article 8 exists. Similarly Article 8 is not merely a dispensing power to ignore the Immigration Rules.

12. The rules in their current form clearly make provisions under which adult dependent relatives can enter the United Kingdom. Where provisions are made within the rules careful examination has to be made to identify factors which justify considering article 8 outside the rules. Merely saying in respect of criteria specifically set down in statute that it is unrealistic to expect the appellant to comply, seems to ignore the very fact that it is a statutory provision.

13. Clearly the daughter and sister have some commitments in the United Kingdom but there was nothing to indicate either one or the other of them could not go to Sri Lanka and could not live in Sri Lanka. Indeed if they are so concerned about the respondent there is nothing to indicate why both of them not go to Sri Lanka. No reason or obstacles to family life continuing in Sri Lanka have been advanced.

14. In the first instance the approach taken by the judge fails to follow the guidance given in the case law of Razgar and Kugathas. There is no proper assessment whether family life as protected by Article 8 exists as set out in the case law and whether or not it is the decision that significantly interferes with that. In a sense it is not the decision that is interfering with it but the desire of the sister and daughter to remain in the United Kingdom.

15. On the basis of the reasons set out there is a material error of law in the decision in that the judge has failed properly to assess criteria within Razgar and Kugathas and failed in the circumstances to assess Article 8 properly.

16. I am satisfied in the circumstances that the appropriate step to set the decision aside.

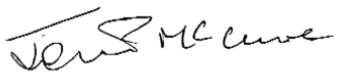
17. I have considered what the appropriate courses with regard to the appeal. Having considered all the circumstances I am satisfied that the appeal should be returned to the First-tier Tribunal for the appeal to be heard afresh.

18. I have considered whether any of the findings of fact made by the judge should be preserved. It appears to me that there is no reason to go behind the findings with regard to the Immigration Rules. The remit is therefore limited to the extent the proper assessment of the Article 8 rights outside the Immigration Rules of the respondent, her sister and her daughter has to be made in accordance with the case law identified, although clearly the issues under the rules and statue will be relevant in assessing those rights.

Notice of Decision

19. I allow the appeal of the Secretary of State for the Home Department to the extent that the appeal is remitted back to the First-tier Tribunal on the basis indicated.

20. I do not make an anonymity direction

Signed 

Date 29th January 2018

Deputy Upper Tribunal Judge McClure