



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

Appeal Number: OA/11383/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 28th November 2014**

**Decision & Reasons Promulgated
On 18th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**SINTHUYA SUTHARSAN
(ANONYMITY ORDER NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellant: Ms A Walker of Counsel instructed by Ravi Solicitors
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal Ghaffar promulgated on 24th July 2014.
2. The Appellant is a female Sri Lankan citizen born 29th September 1988 who, in January 2013, applied for entry clearance to the United Kingdom as the

spouse of Seevaratnam Sutharsan (the Sponsor) who is settled in the United Kingdom.

3. The application was refused on 22nd April 2013, the Respondent not accepting that the Appellant satisfied the financial requirements of Appendix FM of the Immigration Rules. The Respondent contended that the requirements of paragraph 2(b) and (c) of Appendix FM-SE were not satisfied as letters from the Sponsor's employers did not contain all of the specified information, and bank statements submitted did not show the Sponsor's salary was paid into the account. It was therefore not accepted that evidence had been provided to prove that the Sponsor earned a minimum of £18,600 per annum.
4. The application was also refused on the ground that it had not been proved that adequate accommodation was available, and the Respondent considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) but decided that refusal of entry clearance did not breach Article 8.
5. The appeal was heard by Judge Ghaffar on 8th July 2014. The judge found that adequate accommodation would be available, but found that the financial requirements of the Immigration Rules were not satisfied and therefore dismissed the appeal. The judge declined to consider Article 8 outside the Immigration Rules.
6. The Appellant applied for permission to appeal to the Upper Tribunal. Following the grant of permission I heard representations on behalf of both parties at a hearing on 10th October 2014. I found that the judge had not erred in dismissing the appeal on financial grounds, but had erred in not considering Article 8 outside the rules, which meant that there had been no proportionality assessment. I made this finding on the basis that in this case the Immigration Rules were not a complete code, this was an out of country appeal, and the Appellant could not rely upon section EX.1 of Appendix FM.
7. I therefore set aside the decision of the First-tier Tribunal but preserved the findings in relation to the Immigration Rules and the dismissal of the appeal on those grounds. The hearing was adjourned for further evidence to be given in relation to Article 8.
8. The grounds seeking permission to appeal, the grant of permission, and my reasons for setting aside the decision in relation to Article 8, are contained in full in my decision dated 13th October 2014 which was promulgated on 17th October 2014.

The Hearing – 28th November 2014

Preliminary Issues

9. I ascertained that I had all documentation upon which the parties intended to rely. I had all the documentation which had been before the First-tier Tribunal.
10. I was told that the Sponsor would be giving evidence, and both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

11. The Sponsor gave evidence with the assistance of an interpreter in Tamil. I was satisfied that there was no difficulty in communication.
12. The Sponsor adopted as his evidence his witness statement dated 4th July 2014 which is briefly summarised below.
13. The Sponsor has indefinite leave to remain in the United Kingdom and has lived in this country since 13th October 2000. The Appellant is his spouse and he believes that he can adequately maintain and accommodate her.
14. The Sponsor provided evidence with the entry clearance application that he had employment with Supersave Express and Southfield Newsagents. His salary from Supersave was paid directly into his bank account, but his salary from Southfield Newsagents had been paid in cash which is why it was not possible to see the exact salary going into the account.
15. At the date of making his statement the Sponsor no longer worked at Supersave Express but still worked at Southfield Newsagents.
16. The Sponsor's bank account had to be closed down in April 2013 because of some fraudulent activity when his bank account was hacked into by some fraudsters. The Sponsor had not sorted the problem out with the bank, and therefore it looks as though he has a very bad credit rating and he has not been able to open any new bank accounts.
17. The Sponsor was not questioned by Ms Walker but was cross-examined by Mr Parkinson. The Sponsor accepted that he married the Appellant in Sri Lanka and lived together with her in Sri Lanka after their marriage before returning to the United Kingdom. The marriage took place on 26th October 2012 and the Sponsor spent just over a month in Sri Lanka.
18. The Sponsor had mentioned in his witness statement that he had not returned to Sri Lanka to visit his wife because he did not think it was safe. He explained to Mr Parkinson that at night, in Sri Lanka strangers call at

houses and demand money. The Sponsor confirmed that he had travelled to Sri Lanka on his own passport.

The Respondent's Submissions

19. Mr Parkinson pointed out that the appeal had failed under the Immigration Rules because inadequate evidence had been provided, to prove that the Sponsor earned £18,600 per annum which was the required minimum annual salary.
20. Mr Parkinson submitted that there needed to be a good reason why Article 8 was to be considered outside the Immigration Rules, and in this case he could see no such reason. I was reminded that in relation to Article 8, there was no "near miss" principle
21. I was asked to attach significant weight to the fact that the financial requirements of the Immigration Rules could not be satisfied, and that this should be taken into account if I found Article 8 to be engaged and considered proportionality. I was asked to find that there was nothing to stop the Sponsor returning to Sri Lanka and enjoying married life with the Appellant.

The Appellant's Submissions

22. Ms Walker pointed out that the First-tier Tribunal had erred in law in not considering Article 8 outside the Immigration Rules, and therefore Article 8 should be considered, and the main issue related to proportionality.
23. I was asked to accept that the Sponsor and Appellant had established genuine family life and that refusal of entry clearance interfered with that family life.
24. Ms Walker accepted that section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) stated that maintenance of effective immigration controls is in the public interest. I was asked to consider whether refusal of entry clearance was proportionate given the circumstances of this case, and although the Appellant had failed to meet the financial requirements of the Immigration Rules, I was asked to consider the underlying purpose of the rules, which was that adequate maintenance must be available in the United Kingdom. The rules stated that the Sponsor must have an annual income of at least £18,600, and I was asked to conclude that the Sponsor had this income, even though the required evidence had not been submitted to prove it.
25. If I accepted that the Sponsor earned in excess of £18,600, then there would be no need to refuse entry clearance in the interests of the economic well-being of the United Kingdom. I was referred to paragraph 55 of Patel and Others [2013] UKSC 72 in support of Ms Walker's submission that it was

not a “near miss” case, and it was relevant to consider the nature of the Appellant’s failure to meet the rules.

26. I was asked to find that it would not be proportionate for the Sponsor to return to Sri Lanka as he is settled in this country and has an established life here. Ms Walker submitted that the issue to be decided was whether it would be proportionate for the Appellant to make a new application rather than be granted leave to enter outside the Immigration Rules in reliance upon Article 8. I was asked to accept that there is some uncertainty as to how long a further application would take bearing in mind the Sponsor’s difficulties with his bank account. He would have to open a new bank account and it would therefore take at least six months for his salary to be paid into that account, and there would thereafter be a further period of two months (which is apparently the visa processing time in Sri Lanka) before a decision would be made. On that basis I was asked to find that refusal of entry clearance is disproportionate and the appeal should be allowed under Article 8 outside the Immigration Rules.
27. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

28. In considering Article 8 I have taken into account all the evidence, both documentary and oral, that has been placed before me. I have considered that evidence in the round.
29. In my view it is appropriate to consider Article 8 outside the Immigration Rules. I indicated this when setting aside the decision of the First-tier Tribunal. The Appellant in this appeal would not be able to rely upon EX.1 and therefore the rules in this case are not a complete code. I take into account the guidance given by the Court of Appeal in paragraph 135 of MM [2014] EWCA Civ 985 in making this decision.
30. I therefore consider Article 8 taking into account the guidance given by the House of Lords in Razgar [2004] UKHL 27 which indicates that the following questions should be considered;
 1. Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?
 2. If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 3. If so, is such interference in accordance with the law?
 4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

5. If so, is such interference proportionate to the legitimate public end sought to be achieved?
31. The decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the family life of all members of the family, not only the Appellant. In this case that means the family life of the Sponsor as well as the Appellant.
32. I conclude that Article 8 is engaged. The Appellant and Sponsor are married. There is no dispute as to the genuineness of their relationship. Although Razgar related to a removal case, I am satisfied that the guidelines are appropriate when considering an entry clearance application.
33. I find that refusal of entry clearance is an interference with family life, with consequences of such gravity as potentially to engage Article 8.
34. I find that the proposed interference with family life is in accordance with the law because the Appellant cannot satisfy the financial requirements of Appendix FM which are necessary in order to be granted entry clearance.
35. I conclude that the proposed interference is necessary in a democratic society in the interests of maintaining effective immigration control.
36. The issue is whether the refusal of entry clearance is proportionate. I have taken into account paragraph 117B of the 2002 Act. This confirms that maintenance of immigration control is in the public interest.
37. The Appellant could not satisfy the financial requirements of the Immigration Rules because the Sponsor's bank statement did not show payments of salary from both his employments into the account, and the letter from one of his employers did not specify his annual salary.
38. I have to consider whether it is appropriate to disregard the fact that it has not been proved that the financial requirements of the Immigration Rules can be satisfied, and allow this appeal under Article 8. It is clear that there is no "near miss" principle, and as Ms Walker drew my attention to Patel, I have considered the principles set out by the Supreme Court and set out below paragraphs 55 and 56 of that decision;
55. Thus the balance drawn by the rules may be relevant to the consideration of proportionality. I said much the same in Rudi. Although I rejected the concept of a "near-miss principle", I did not see this as inconsistent with the Collins J's words in Lekstaka:

"Collins J's statement, on which the court relied [in SB], seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy

are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment. He is not saying that there arises any presumption or expectation that the policy will be extended to embrace them." (para 31(ii))

(My reference to "exceptional treatment" needs to be read now in the light of Huang para 20 in which Lord Bingham made clear that, contrary to previous Court of Appeal case law, there was no separate "test of exceptionality.")

56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart also of Article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.
39. I also remind myself of the first sentence of paragraph 57 of Patel which is set out below;
 57. It is important to remember that Article 8 is not a general dispensing power.
40. In my view the Sponsor in this appeal has failed to prove he has the required minimum annual salary of £18,600, because he has failed to provide the specified evidence which is mandatory. It is said that the Sponsor still has employment and therefore a new application could be made by the Appellant but Ms Walker submitted that it would be disproportionate to require this, as it would take six months for the Sponsor to establish a new bank account, and a further two months thereafter for the application to be processed.
41. I find no satisfactory explanation has been given as to why the Sponsor has decided not to open a new bank account, given that his previous account was closed as long ago as April 2013. Even if a new application would take eight months, I do not find this to be disproportionate.
42. I do not find that it is appropriate to disregard the lack of specified financial evidence which is required in order for entry clearance to be granted under the rules. I set out below part of paragraph 16 of Huang [2007] UKHL 11;
 16. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under Article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the

damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory;

43. Referring to paragraph 117B(iii) it states that it is in the public interest and in particular in the interests of the economic well-being of the United Kingdom that persons seeking to enter, are financially independent, I do not find, due to the lack of specified financial evidence, that this has been proved in the Appellant's case.
44. I conclude that the weight to be given to the public interest in maintaining effective immigration control outweighs the weight to be given to the wish of the Appellant to be granted leave to enter the United Kingdom, despite not meeting the requirements of the Immigration Rules. The decision to refuse entry clearance is proportionate and does not breach Article 8.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

I dismiss the appeal under the Immigration Rules.

I dismiss the appeal on human rights grounds.

Anonymity

The First-tier Tribunal did not make an anonymity direction. There was no application for anonymity before the Upper Tribunal, and no anonymity order is made.

Signed

Date 4th December 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 4th December 2014

Deputy Upper Tribunal Judge M A Hall