



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

Appeal Number: AA/09763/2013

THE IMMIGRATION ACTS

Heard at Field House

On 25 March 2015

**Determination
Promulgated**

On 9 June 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SURESHKUMAR POOLOGASINGAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: Mr N Paramjorthy of Counsel instructed by S Satha & Co

DETERMINATION AND REASONS

- 1) This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Metzer allowing an appeal by Mr Sureshkumar Poologasingam (hereinafter referred to as "the claimant") on Article 8 grounds.
- 2) This history of this matter is as follows. The claimant was born on 15 December 1986 and is a national of Sri Lanka. The previous appeal by him made on asylum grounds was dismissed in July 2012 on the basis that his asylum claim was not credible. Subsequently further submissions were made and following the commencement of judicial review proceedings the Secretary of State accepted the further submissions as a fresh claim under paragraph 353 of the Immigration Rules. The basis for the fresh claim was

medical evidence relating to the claimant. The Secretary of State made a decision on the fresh claim on 14 October 2013 in the form of a decision to remove the claimant. This decision was appealed to the First-tier Tribunal solely under Article 8. The Judge of the First-tier Tribunal had medical evidence before him, including a psychiatric report from Dr Raj Persaud dated 19 November 2014. This report stated that the claimant was not fit to give evidence because of withdrawal and lack of concentration. The claimant had symptoms of PTSD, including heightened anxiety, withdrawal, startle reaction, intrusive thoughts and flashbacks. The claimant was also diagnosed as suffering from major depression. The claimant was living with his sister and her family in the UK. Dr Persaud stated that it was not clear how the claimant would cope without the care and close supervision provision provided by his sister and her family. The claimant was alleged to have made at least two suicide attempts.

- 3) The claimant's sister, Mrs Vijayakumar, gave evidence before the First-tier Tribunal. She described the claimant as having difficulty with sleeping and having nightmares. She had taken him to the GP and from October 2013 he was prescribed medication for sleeping problems and mental health issues. She described him as being in a state of helplessness and despair. He is often withdrawn and distant and she described him as completely different from when he first arrived in the UK. He barely eats now and has difficulty sleeping even on medication. He talks about suicide.
- 4) The judge considered the appeal under Article 8 outside the Immigration Rules. Having regard to the psychiatric evidence and the evidence of the claimant's sister, the judge found the claimant had a very high level of dependency upon his sister and brother-in-law. They provided him with day-to-day care. The question of the claimant's psychological integrity arose for consideration in relation to his private life. His psychological well-being had been severely adversely affected since his arrival in the UK in 2012. The medical evidence showed that the effect of removal would increase the likelihood of a suicide attempt. The claimant had no close family in Sri Lanka apart from one uncle. He had been given great care and consideration by his sister and her family and the relationship of dependency extended far beyond that of normal emotional ties between an adult and a sibling.
- 5) The judge further found that if the claimant were returned to Sri Lanka he would not be able to obtain the level of support which he currently received from his sister and her family, and from his GP and other medical services. Taking into account the claimant's close family life with his sister and her family and the deterioration in the claimant's mental health which had resulted in two serious psychiatric conditions being diagnosed, the judge found that it would be disproportionate for the claimant to be removed to Sri Lanka.
- 6) In the application for permission to appeal the Secretary of State submitted that the judge erred by failing to have regard to the public interest considerations in section 117B of the Immigration, Nationality and Asylum Act 2002. In particular, the judge failed to consider the claimant's ability to

speak English and whether he was financially independent. The judge had failed to attach little weight to private/family life when assessing proportionality, as required by section 117B. As a result the judge's findings in relation to proportionality failed to take into account the public interest considerations as required by section 117B.

- 7) Permission was granted on the basis that these grounds were arguable.
- 8) A rule 24 response was submitted on behalf of the claimant on 24 March 2015. It was acknowledged that section 117B was not referred to in the determination and it could not be inferred from the determination that the judge had had regard to this. Nevertheless the failure to consider the claimant's ability to speak English and whether he was financially independent was not material to the outcome of the appeal. The claimant was dependent upon his sister and her family both emotionally and financially. There would therefore be no recourse to public funds. The judge considered the Secretary of State's legitimate interest in immigration control but nevertheless considered that under the balancing exercise removal would be disproportionate.
- 9) At the hearing before me, Mr Clarke submitted on behalf of the Secretary of State that the failure to consider section 117B would have had a significant impact on the balancing exercise in relation to proportionality. There was no evidence that any of the Immigration Rules were met or that there was any application under European law. There was no evidence of the claimant's ability to speak English. In relation to whether the claimant was financially independent, there was no evidence of self-sufficiency. The claimant had formed a private life in the UK while his position was precarious. Mr Clarke acknowledged that the family life of the claimant was not affected by section 117B but this family life was formed in full knowledge of the claimant's position. Mr Clarke referred to the case of Nagre at paragraphs 39-41. He submitted that family life was not a trump card and a proper re-balancing exercise was required.
- 10) For the claimant Mr Paramjorthy relied on the rule 24 notice. The lack of consideration of section 117B was not material. The claimant did not give evidence at the hearing so his spoken English was not heard by the judge. Mr Paramjorthy indicated that he was instructed that the claimant spoke basic English but his grammar was poor.
- 11) Mr Paramjorthy further submitted that the claimant is exclusively dependant upon his sister and is not a burden on the tax payer. This point was made by the judge at paragraph 10 of the determination. The relationship between the claimant and his sister extended far beyond normal emotional ties. Mr Paramjorthy accepted that section 117B was constructed to prevent Article 8 from being a trump card for those with precarious immigration histories. In the case of the claimant, however, there were serious psychiatric issues.
- 12) In response Mr Clarke referred to the cost to the tax payer of the claimant remaining in the UK. The judge had made no reference to the financial

implications of the claimant remaining in the UK and this would have to be considered by a judge. Under sub-sections 117(4) and (5) the judge was required to give little weight to private life. The claimant's family life was instituted in the knowledge of his immigration status. There was no evidence before the judge of the impact on the UK of the claimant's use of language and his financial circumstances. The appeal should have been dismissed. According to the GP notes, which pre-dated the report by Dr Persaud by only three days, the claimant had no thoughts of self-harm and no consideration was given to this. Further submissions on the medical evidence were required.

- 13) Mr Paramjorthy pointed out that the medical evidence, in particular the report of Dr Persaud, was not challenged by the Secretary of State before the First-tier Tribunal. The medical evidence played no part in the alleged errors. It was acknowledged, however, that in commenting on the medical evidence Mr Clarke was not alluding to an error of law but referring to the possibility of a further hearing.

Discussion

- 14) There is really no dispute in this appeal that the judge ought to have referred to section 117B of the 2002 Act (as amended). The question is whether this omission was material.
- 15) For the Secretary of State, Mr Clarke has pointed out that the judge did not have proper regard to whether the claimant was able to speak English and whether he was financially independent. These are considerations which arise from sub-sections 117B(2) and (3). According to section 117B(4) little weight should be given to a private life established by a person at a time when the person is in the UK unlawfully and under section 117B(5) little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. It seems that the claimant entered the UK illegally but claimed asylum on the day he arrived. Although his entry was illegal, it would seem that once he claimed asylum his status became not unlawful but precarious, at least until the asylum claim, including the fresh claim, have been resolved.
- 16) Nevertheless, the judge's decision is based primarily on family life rather than private life. The decision is based on the claimant's dependency upon his sister and her family and the likely effect of the claimant of being deprived of their care and support. Even accepting that the claimant's private life in the UK is to be given little weight, the judge's decision based on family life will not necessarily be affected.
- 17) The judge clearly erred by not having regard to the question of whether the claimant is able to speak English and not fully considering whether he is financially independent. The further question which arises though is whether the judge's failure properly to consider these matters materially affected the outcome of the appeal. The judge's findings indicate that the claimant is dependent on his sister for his living expenses and day-to-day needs. Mr Clarke submitted that that was not the end of the matter and

there is, of course, the continuing need for medical treatment. In carrying out the balancing exercise the judge was clearly aware that the claimant receives medical services. However, although the costs which may arise from the claimant being in the UK are weighed on one side of the balancing exercise, they are by no means determinative. It is important to stress, in addition, that this is not a case about a need for continuing medical treatment but a case about respect for family life. In the terms considered by Laws LJ in GS (India) [2015] EWCA Civ 40 at 86, this appeal is within the Article 8 paradigm in respect of the capacity to form and enjoy relationships.

- 18) Mr Clarke referred me to the case of Nagre, which is one of several cases dealing with the proper approach to Article 8 outside the Immigration Rules. I note, for example, that in Oludoyi [2014] UKUT 00539 it was said that there was nothing in Nagre or Gulshan [2013] UKUT 640 to indicate that a threshold test was being suggested, as opposed to making it clear there that there was a need to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. This is consistent with the decision of the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985, at paragraph 128. Since the hearing before me there has been a further decision of the Court of Appeal concerning these issues in SS (Congo) [2015] EWCA Civ 387.
- 19) There is no question but that the judge's reasoning would have been better expressed and more thorough had the judge had regard to section 117B. The judge's essential finding remains, however, that the claimant succeeds due to his emotional and financial dependence upon his sister and her family, with whom he has established family life in the UK. This dependency was found by the judge to extend far beyond that of normal emotional ties between adult siblings. The medical evidence satisfied the judge that to disrupt this dependency would have a serious adverse effect upon the claimant's mental health. The claimant's mental health had deteriorated significantly in the two years since his previous appeal.
- 20) On the basis of these findings I consider the judge was entitled to find that the removal of the claimant would be disproportionate interference with his right to family life under Article 8. Under section 117, given the precarious nature of the claimant's sojourn in the UK little weight can be given to private life but this is not, in the circumstances of this case, material. Similarly, consideration of the ability to speak English and of financial independence are not matters that would weigh heavily against the claimant in the balancing exercise. It seems that he has some knowledge of English and he has financial support from his sister. Accordingly, although the judge made errors in the decision, these are not of such significance as to materially have affected the outcome of the appeal.

Conclusions

- 21) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

Anonymity

22) The First-tier Tribunal did not make an order for anonymity and as there has been no application for an order before me, I make no such order.

Signed

Date

Judge of the Upper Tribunal