



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/42504/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 23 September 2015

Decision & Reasons Promulgated  
On 6 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR. INDIKA MAHESH GONAPALADENIYA  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. S. Whitwell, Home Office Presenting Officer  
For the Respondent: Miss. A. Radford, Counsel instructed by CK Law Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Britton promulgated on 7 May 2015 in which he allowed Mr. Gonapaladeniya's appeal against the Secretary of State's decision to refuse leave to remain on the grounds of family and private life under the Immigration Rules.
2. For the purposes of this decision I will refer to the Secretary of State as the Respondent and to Mr. Gonapaladeniya as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. At the hearing I heard submissions, following which I announced that I found that the decision did not involve the making of an error of law. My reasons for this decision are set out below.

### **Submissions**

4. Mr. Whitwell adopted the grounds of appeal. He referred to paragraph [31] and the final decision, where there are references to two convictions, as opposed to paragraphs [25] and [29] where the judge refers to one conviction. He submitted that the position was not clear. For the purposes of the guidance referred to in paragraphs [24] and [30], one single conviction where a non-custodial sentence was imposed was not usually enough to cause a refusal under the character, conduct and association grounds. I was referred to the decision of Upper Tribunal Judge Gill to grant permission to bring judicial review proceedings in which it states:

“It is arguable that a single conviction for battery over a period of 10 years’ lawful residence for which a fine of £300 was imposed does not reasonably entitle the Respondent to find that the Appellant did not meet the suitability criteria on the ground that his presence was not conducive to the public good.”

5. In relation to the second ground of appeal relating to Article 8 outside the immigration rules, Mr. Whitwell submitted that this was dependent on the first limb. In paragraph [32] the judge found that there were no insurmountable obstacles to the Appellant returning to Sri Lanka, and his wife joining him there. He therefore submitted that there could be no exceptional circumstances justifying consideration or allowing the appeal outside of the immigration rules. The fact that the Appellant’s spouse had indefinite leave to remain and owned a home was not sufficient to make it exceptional.
6. Ms Radford relied on the Rule 24 response. She submitted that there had been a mistake of fact in the grounds when it stated that the Appellant had two convictions. The Appellant did not have two convictions, but had one conviction with two counts. I was referred to paragraphs [4] and [25] of the decision where the judge refers to one conviction. The one incident had led to two separate offences, and a multi-count charge. This one incident when the Appellant had acted in a criminal way had correctly led to one conviction.
7. In relation to the Respondent’s guidance, she submitted that this was not exhaustive. It was a discretionary power and involved considering whether the exclusion of an applicant was conducive to the public good taking into account the period of time spent in the United Kingdom and his character, amongst other factors. The judge had found that this was not an offence which led to the Appellant’s presence being not conducive to the public good.
8. Ms Radford submitted that the error in the decision was where the judge had said that the Appellant had two convictions, but this was not a material error. She

submitted that the judge had properly understood that there was one incident giving rise to two offences but one conviction.

9. In relation to the second ground, in paragraph [31] the judge had found that the Appellant met the suitability requirements. There was therefore no obligation for him to look at Article 8 outside the immigration rules and the question of whether or not the Article 8 consideration had been adequately reasoned therefore did not arise. In any event it needed to be read with the rest of the decision. Paragraphs [31] and [32] contained relevant considerations which would be balanced against the public interest.
10. In conclusion she submitted that the Appellant had one spent conviction. In the granting of permission for judicial review it had clearly been stated that this was not enough to suggest that the suitability criteria had not been met by the Appellant.

#### Error of law decision

11. I find that the Appellant has only one conviction, and I find that the decision is clear that the judge was aware of this. In paragraphs [4], [25] and [29] the judge correctly refers to the fact that he has only one conviction. I accept that in paragraph [31] and in the final decision the judge refers to two convictions. However, I find that this error is not material, and is not capable of affecting the decision. The relevance of one conviction is correctly understood by the judge in relation to the Respondent's guidance. This is quoted in paragraph [24]:

"It is unlikely a person would be refused under the character, conduct and association grounds for a single conviction that results in a non-custodial sentence outside the relevant timeframe."

It is clear from the decision when read as a whole that the judge is aware that the Appellant has one conviction for which he did not receive a custodial sentence only a fine and the conviction is spent.

12. The decision makes clear that the judge is well aware of the circumstances which led to the conviction. In paragraph [14] the judge sets out the circumstances of the incident. In paragraph [26] he states:

"Considering the whole of the evidence I am satisfied that the appellant's action on this day is out of character and it is extremely unlikely that he will appear before the criminal court again."

13. The judge has taken into account the circumstances leading to the conviction. He has taken into account the character of the Appellant. In so doing, he has taken into account the evidence of Mrs. Susan Green, paragraphs [19] and [20]. In paragraph [26] he refers to the fact that Mrs. Green gave evidence as to the Appellant's character. He found Mrs Green to be an honest and reliable witness.

14. Considering the decision as a whole, it is clear that the judge is aware that the Appellant has only one conviction. He has taken into account the Respondent's guidance and applied it to the Appellant's circumstances. He has taken into account the evidence of the Appellant, his wife and Mrs. Green in relation to the Appellant's character and conduct. He has found, as set out in paragraph [31], that the Appellant meets the suitability requirements. He does not find that the presence of the Appellant in the United Kingdom is not conducive to the public good.
15. I find that the decision does not contain a material error of law. The references to two convictions are an error, but are not capable of affecting the outcome of the decision. The judge was entitled to find that the Appellant met the suitability requirements and therefore met the requirements of the Immigration Rules.
16. In relation to the second ground, having found that the Appellant met the requirements of the immigration rules, it was not necessary for the judge to go on to consider Article 8 outside the immigration rules. Therefore, having found that the decision does not involve the making of a material error of law in relation to the immigration rules, there can be no material error of law in the consideration of Article 8 in paragraph [32]. As accepted by the Respondent's representative at the hearing, this ground was parasitic on the first ground.

**Notice of Decision**

The decision of the First-tier Tribunal does not involve the making of an error of law capable of affecting the outcome of the decision.

I do not set aside the decision.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Date 5 October 2015

Deputy Upper Tribunal Judge Chamberlain