



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

Appeal Numbers: VA/00569/2014  
VA/00570/2014  
VA/00571/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25<sup>th</sup> February 2015**

**Decision & Reasons  
Promulgated  
On 9<sup>th</sup> March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**ENTRY CLEARANCE OFFICER - CHENNAI**

Appellant

**and**

**FATHIMA NUSRA BISRUL KAREEM (FIRST APPELLANT)  
FATHIMA ZAIBA MOHAMED SHIYAM (SECOND APPELLANT)  
MOHAMED AADIL MOHAMED SHIYAM (THIRD APPELLANT)  
(ANONYMITY ORDER NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer  
For the Respondents: Miss A Seehra of Counsel instructed by Solidum Solicitors

**DECISION AND REASONS**

**Introduction and Background**

1. The Entry Clearance Officer (ECO) appeals against a decision of Judge of the First-tier Tribunal Abebrese promulgated on 20<sup>th</sup> November 2014.

2. The Respondents before the Upper Tribunal were the Appellants before the First-tier Tribunal and I will refer to them as the Claimants.
3. The Claimants are Sri Lankan citizens born 3<sup>rd</sup> January 1981, 25<sup>th</sup> February 2008, and 17<sup>th</sup> June 2010 respectively. The first Claimant is the mother of the second and third Claimants. The Claimants applied for entry clearance as family visitors. They indicated that they wished to visit the Sponsor Abdul Cadar Udayar Mohammodu Shiyam for a period of ten days. The Sponsor is the husband of the first Claimant and the father of the second and third Claimants, and is a student in the United Kingdom.
4. The applications were refused on 19<sup>th</sup> December 2013. In relation to the first Claimant the refusal was based on paragraph 320(7A) of the Immigration Rules, on the basis that a false bank letter had been submitted with the application. The application was also refused with reference to paragraph 41(i), (ii), (vi) and (vii). The applications of the second and third Claimants were refused with reference to paragraph 46A(i), (iv) and (v). The refusals under paragraph 41 and 46A, followed on from the primary reason for refusal, which related to the submission of a false document.
5. The Claimants appealed, relying upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The appeals were heard together by Judge Abebrese (the judge) on 7<sup>th</sup> November 2014. The judge found that the first Claimant had not submitted a false document, and found that refusal of entry clearance was unreasonable and unjustified and breached the principles of Article 8 of the 1950 Convention. The evidence of the Sponsor was found to be credible. The appeals were allowed.
7. This decision caused the ECO to apply for permission to appeal to the Upper Tribunal. In summary the grounds contained within the application for permission to appeal make the point that the Claimants only had a right of appeal following refusal of entry clearance, limited to the grounds in section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The Claimants therefore could only appeal on grounds of racial discrimination, or breach of human rights.
8. The ECO pointed out that the judge had made limited findings at paragraph 13 in relation to Article 8, but had failed to give reasons for these findings and had failed to make a proportionality assessment. The Sponsor is a student with limited leave in the United Kingdom, and it was contended that family life could continue once his course had finished and he had returned to Sri Lanka. It was contended that the judge had failed to give adequate reasons for finding that the decision to refuse entry clearance disproportionately interfered with the Article 8 rights of the Claimants and Sponsor.
9. Permission to appeal was granted by Designated First-tier Tribunal Judge Zucker who found the grounds arguable.

10. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal, to decide whether the First-tier Tribunal determination should be set aside.

### **The Upper Tribunal Hearing**

11. Mr Kandola relied upon the grounds contained within the application for permission to appeal. While it was accepted that the judge needed to consider whether the decision to refuse entry clearance was lawful, Mr Kandola submitted that reasons given for allowing the appeal under Article 8 were woefully inadequate and lacked proper analysis.
12. In reply Miss Seehra relied upon her written response dated 16<sup>th</sup> February 2015, in submitting that the First-tier Tribunal had not erred in law. I was asked to note that the grounds on which permission to appeal had been granted, did not challenge findings made by the judge that the Claimants did not provide a false document, and the finding that the Sponsor was credible was not challenged.
13. I was also asked to note that the ECO had not challenged the finding that Article 8 was engaged. Miss Seehra submitted that because the judge found the refusal of entry clearance to be not in accordance with the law, the judge was not required to go on and consider the issues of necessity and proportionality.
14. Mr Kandola accepted that there had been no challenge to the finding that a false document had not been produced, nor any challenge to the finding that Article 8 was engaged.
15. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

16. It is common ground that the Claimants had a limited right of appeal following refusal of entry clearance, and that they raised Article 8 as a ground of appeal.
17. At first sight it is no surprise that the ECO sought to challenge the decision of the First-tier Tribunal. There is no mention of Article 8 until paragraph 13, and then the reference is brief.
18. If an appeal is made on Article 8 grounds, it is to be expected that the judge would firstly consider whether the appeal can succeed under Appendix FM or paragraph 276ADE of the Immigration Rules. If not, the judge would then consider whether Article 8 outside the Immigration Rules should be considered.
19. There is no reference in this decision to Appendix FM or paragraph 276ADE, and it has not been contended on behalf of the Claimants that they could succeed in their Article 8 claim under the Immigration Rules.

20. If Article 8 was to be considered outside the rules, this would be on the basis that the Immigration Rules are not a complete code, unlike the Immigration Rules dealing with deportation. Consideration should then be given to the approach set out in Razgar [2004] UKHL 27 which indicated 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?
21. The decision in Beoku-Betts [2008] UKHL 39 means that if Article 8 is engaged, the family lives of all members of the family must be considered, not only that of the Claimants.
22. There is no reference to the Razgar approach in First-tier Tribunal decision, but the ECO has not challenged the finding that Article 8 is engaged. This is perhaps surprising, given that this is an application for a family visit. However in the absence of such challenge, that issue is not before me.
23. The finding that the Claimants had not submitted a false document was open to challenge in view of the fact that the judge recorded that no specific reasons had been supplied by the ECO as to why it was contended that the bank letter was false. The ECO did supply evidence in the form of a Document Verification Report dated 17<sup>th</sup> December 2013. It appears that this was not provided to the Claimants, as the ECO wished to rely upon the procedure set out in section 108 of the 2002 Act. However, there has been no challenge to the finding that a false document was not submitted, and therefore this issue is not before me.
24. The challenge made by the ECO to the First-tier Tribunal decision relates to the lack of a proportionality assessment and inadequacy of reasoning for finding that refusal of entry clearance is disproportionate.
25. In view of the acceptance by the ECO that Article 8 is engaged, which is the second of the five questions set out in Razgar, the next question to be considered is whether the proposed interference is in accordance with the law.

26. The judge found that a false document was not submitted. The burden of proving that a false document has been submitted rests with the person making the allegation, and the judge erred in paragraph 10 in stating that the burden was on the Claimants. This is not however a material error, as the judge has found in favour of the Claimants. Mr Kandola accepted that the judge was entitled to consider the falsity of the document on the basis that the judge had to consider whether the decision to refuse entry clearance was lawful. The finding made by the judge, meant that the decision of the Respondent to refuse entry clearance on the basis of a false document was not in accordance with the law, and therefore the answer to the third of the Razgar questions has to be in the negative.
27. Having found that the decision was not in accordance with the law, it is therefore not necessary for the judge to go on and consider the fourth and fifth of the Razgar questions, which relate to necessity and proportionality, and would entail consideration of the factors set out in section 117B of the 2002 Act.
28. The challenge made on behalf of the ECO to the First-tier Tribunal decision rests solely on proportionality, and as the judge did not need to consider that, I find no material error of law and the decision of the First-tier Tribunal stands.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law.

I do not set aside the decision and the appeal of the ECO is dismissed.

### **Anonymity**

No order for anonymity was made by the First-tier Tribunal. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed

Date 2<sup>nd</sup> March 2015

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

As the appeal of the ECO has been dismissed the fee award made by the First-tier Tribunal stands.

Signed

Date 2<sup>nd</sup> March 2015

Deputy Upper Tribunal Judge M A Hall