Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15988/2013
OA/15989/2013
OA/15990/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st May 2017	**On 12th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MOHIDEEN FAREENA KAREEM ILYAS
(2) NAJAH HASSAN KAREEM ILIAS
(3) NAJEELA HASMIN KAREEM ILIAS
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Burrett (Counsel)
For the Respondent: Mr Tufan (Senior HOPO)

DECISION AND REASONS

1. The Appellants in this appeal are citizens of Sri Lanka. The first Appellant, who is the mother of the second and third Appellants, was born on 29th April 1973. The

second Appellant, her son, was born on 31st May 1994. The third Appellant, her daughter, was born on 4th August 1997. They appealed the decision of the Respondent, Entry Clearance Officer in Chennai, dated 24th June 2013, refusing their applications of 5th April 2013, for entry clearance as respectively the spouse and dependent children of a British citizen, namely, Mr Ilyas Kareem (hereafter "the Sponsor"). The relevant Immigration Rules are paragraphs 320(3) and (11) and paragraphs EC-P.1.1(c) and (d) and S-EC.1.5, and E-ECP.3.1 of Appendix FM of the Immigration Rules.

2. By a decision promulgated on 14th March 2017, the Right Honourable Lord Boyd, sitting as a judge of the Upper Tribunal, ordered that there should be a rehearing before the Upper Tribunal, having found there to be an error of law in the decision of the First-tier Tribunal Judge, Judge Eban, which was promulgated on 20th May 2014, and after there had resulted a fresh appeal before the Tribunal of Lord Boyd, pursuant to the consent order handed down by the Court of Appeal on 6th July 2016, allowing the appeals of the Appellants, because the Upper Tribunal had earlier on 18th September 2014 upheld the original decision of the Entry Clearance Officer in Chennai, when the Respondent Entry Clearance Officer, had appealed the decision of Judge Eban, that I have just referred to.

3. The reason why Lord Boyd in the Upper Tribunal had in March 2017 ordered that there be a rehearing was that Judge Eban had failed to consider whether it would be possible for the Sponsor and the Appellants to conduct family life outside the UK, and in particular in Sri Lanka, given that the Sponsor had lived his entire life in Sri Lanka until the age of 36, when he came to the UK, which was some eleven years ago. It was true that thereafter, having had his asylum appeal rejected, he had remained here unlawfully for some eight years, until he was eventually granted ILR in December 2010, but if family life could have been carried on outside the UK, then there will be no breach of the Article 8 rights of the parties concerned, even if the Sponsor might not wish to live in Sri Lanka.

4. After the Sponsor had been granted ILR on 1st December 2010, he subsequently travelled to Sri Lanka in January 2011 and has been there at least three times since then, but he is now a British citizen, and he owns a company and runs his own business, and has employees. The judge even found that the Sponsor and the first Appellant had been married in 1992, for almost 22 years, and that there was a genuine bond between the first Appellant and her sponsoring husband, and they wished to live together, such that there was a family unit between them. Even though the second Appellant was over 18 at the time of the application, he had not formed an independent life of his own.

5. Judge Eban looking at the situation had concluded that if the application was allowed of the first and third Appellants, the second Appellant, who was over 18, would naturally be separated from them, and yet he was part of the family unit, and so she had decided to allow the appeal of all of the Appellants. A significant aspect of these appeals is the reason as to why the Appellants' applications to join the

sponsoring Mr Ilyas Kareem in this country, had been refused in the first place. This was because they had made no less than six applications under a false name.

6. This was a matter that Judge Eban did not overlook. In fact, she concluded that had it not been for the ill-advised conduct of the first Appellant, who had persistently applied in a false name, the first and third Appellants would by now have joined their sponsoring father in the UK. Nevertheless, Judge Eban had concluded that the weight to be given to a fair and consistent immigration system was outweighed by the compassionate circumstances of this case.

7. Lord Boyd, who heard the Upper Tribunal appeal on 4th October 2016, in giving his decision some six months later on 14th March 2017 took into account the judgment in **SS (Congo) [2015] EWCA Civ 387**, and this led him to the conclusion that, although there may well be compassionate circumstances, which may compel a case for leave to be given outside the Immigration Rules, the test which Judge Eban addressed was a rather different one, because she considered whether it would be reasonable to expect the Sponsor to relocate to Sri Lanka, and she did not address the question of whether there would be insurmountable difficulties in the Sponsor and the Appellants' continuing family life in Sri Lanka. For these reasons, he ordered that there be a rehearing before the Upper Tribunal, and "the parties should address the question of whether there are compelling reasons for entry clearance to be given outwith the Rules" (see paragraph 17). It is in these circumstances therefore, that this matter appears before me today.

Submissions

8. In the submissions before me, Mr Burrett, appearing on behalf of the Appellants, handed up his skeleton argument, which was before the Court of Appeal, when the Appellants' application for leave to appeal was granted by the Court of Appeal on 28th May 2015 by Underhill LJ. He submitted that the reason why the first Appellant, the wife of the sponsoring Mr Ilyas Kareem, had applied under a false name repeatedly, was because her husband's asylum claim had been rejected, and he had continued to live in the UK unlawfully. The effect of this ill-advised conduct was unnecessarily visited upon the innocent children, the second and third Appellants, who had tarnished with it, and were also unable to then succeed in their applications under the Immigration Rules before the Entry Clearance Officer in Chennai. However, it was significant that once ILR had been granted to Mr Ilyas Kareem, the Sponsor, the applications were then made under the correct name. He did not seek to excuse their conduct but simply to explain how it had arisen on the part of the first Appellant.

9. Second, and nevertheless, the Respondent Entry Clearance Officer had then made decisions which had punished the innocent children, the second and third Appellants, who have been kept apart from their father, which was a matter accepted even by Lord Boyd in his determination, as he had recognised that, had it not been for the foolhardy behaviour of the first Appellant, the children would have joined

their sponsoring father. The fact remained, however, that they were children. They were not themselves exercising any deception.

10. Third, in this sense, the children themselves could have succeeded under the Immigration Rules because paragraph 320(11) is not couched in mandatory terms (and here Mr Burrett referred to the skeleton argument before the Court of Appeal at paragraphs 27 to 32) pointing out that Judge Eban had not conducted an Article 8 assessment under paragraph 320(11), which in any event does not refer to the exclusion of family members, and if only the exercise of discretion had been considered under paragraph 320(11) there is every reason to assume that the balance of considerations would have fallen in favour of the second and third Appellants. It was, he submitted, recognised within the Immigration Rules themselves that cases of deception had been used in previous applications for entry clearance are not always cases "strongly justifying refusal".

11. Where children were concerned, justifying exclusion, would have been particularly difficult to do, as a discretionary matter under the Rules, and this aspect should have been expressly considered by Judge Eban. The weight to be given to the children's interests had simply been overlooked. Finally, the fact here remained that the family had been separated from the sponsoring Mr Ilyas Kareem for a number of years, and yet they were a genuine family unit, and the second Appellant had formed no independent family unit of his own even to this day.

12. For his part, Mr Tufan submitted that although paragraph 320(11) of the Immigration Rules was expressly before the Court of Appeal, when the Appellants had appealed the decision of the Upper Tribunal which had gone against them, following the challenge to the decision of Judge Eban, by the Respondent Entry Clearance Officer, the fact was that the consent order itself did not refer to paragraph 320(11) being a live issue. Moreover, Lord Boyd did not regard paragraph 320(11) to be a live issue any longer. What one had, in this appeal, was a voluntary separation between the parties, whereby, after the rejection of his asylum claim, the Sponsor chose not to return back to Sri Lanka, but to lay down roots in this country and to effectively settle himself with a business established subsequently. He was essentially an economic migrant. There was nothing preventing him from returning back to Sri Lanka.

13. Secondly, if one has regard to the established legal authorities now, it was plain that the Appellants could not succeed. Two years ago in **Agyarko [2015] EWCA Civ 440**, the Court of Appeal had determined that where there had been a "precarious family life" there had to be exceptional circumstances shown if leave to remain was to be granted (see paragraph 51). That decision had now been upheld by the Supreme Court in **Agyarko [2017] UKSC 11**, where Lord Reid had endorsed the principle that where "precarious family life" was concerned it was "likely only to be in exceptional circumstances" that removal of a non-national family member would constitute a violation of Article 8 (see paragraph 54).

14. Indeed, the fact that a British citizen was involved, who had lived all his life in the United Kingdom, had a job here, did not change the position because as Lord Justice Sales recognised (at paragraph 25), the fact that such a person "might find it difficult and might be reluctant to relocate" did not mean that this would constitute "insurmountable obstacles" to his doing so. One could not get away from the fact that in this case there was a "precarious family life". It had arisen due to a voluntary separation whereby the Sponsor had left Sri Lanka to come to the UK on the basis of a claim that was subsequently found to have been unsubstantiated.

15. It is true he managed to get ILR and thereafter British citizenship. But the case law does not suggest that the grant of British citizenship makes it a "insurmountable obstacle" to return back to one's country of origin. In **MM (Lebanon) [2017] UKSC 10** the Supreme Court more recently observed that

> "The fact that it will cause hardship to many, including some who are in no way to blame for the situation in which they now find themselves, does not mean that it is incompatible with the Convention rights or otherwise unlawful at common law" (paragraph 81).

That was the position here, submitted Mr Tufan. In **SS (Congo) [2015] EWCA Civ 37**, the Court of Appeal even considered the position of applications made by family members outside the United Kingdom for leave to enter to come here to take up or resume their family life (see paragraph 34), and the reality was that no exceptional or compelling circumstances had been demonstrated in this case. The appeals should be refused.

16. In reply, Mr Burrett submitted that there was a distinction to be drawn between those seeking leave to remain ("LTR") and those seeking leave to enter ("LTE"), and this distinction is expressly recognised in the very authorities that Mr Tufan had referred to, so that in **SS (Congo)** itself, Lord Justice Sales had observed that "the position in relation to LTE Rules is different from that immigration to LTR Rules" (paragraph 35). Plainly, if one had committed serious criminal offences, and was facing deportation, one had to show "exceptional circumstances" and "insurmountable obstacles" to demonstrate why one's removal would be wrong in law. This distinction was significant because Judge Eban had already concluded, when she heard the evidence of the Sponsor, that but for the deception of the principal Appellant, they would have met the Immigration Rules and would have been able to come to the UK a long time ago.

17. Secondly, reliance upon **Agyarko** was misplaced because the parties there did not meet the Immigration Rules at all. These are completely different cases. In the instant case, it has never been in dispute that the Sponsor, Mr Ilyas Kareem, has had a family life with his wife and children. The issue therefore was to what extent the Sponsor, who came to the UK in 2003 and settled by 2010 in a perfectly legitimate and lawful way, should be expected to return back to Sri Lanka, and whether he should be barred from enjoying a family life in this country because of the historic use of deception by his wife, for reasons which had been explained. The balance of

considerations, he submitted, went in favour of the Appellants in this case, and these appeals should be allowed.

My Findings on the Facts

18. I have given careful consideration to the oral submissions before me and the documentary evidence and I am satisfied that the Appellants discharge the burden of proof that is upon them. My reasons are as follows. I note that what the Court of Appeal in **SS (Congo)** emphasised was that compelling circumstances would need to be identified to support a claim for grant of *leave to remain outside the new Rules* in Appendix FM. The court pointed out that that is a formulation which is not as strict a test of exceptionality or a requirement of very compelling reasons which applies in different circumstances, but nonetheless the test is one of compelling circumstances (see paragraph 33 of the judgment).

19. There is, however, a distinction to be drawn between the LTR Rules and the LTE Rules, as the judgment of Lord Justice Sales made clear in the Court of Appeal in **SS (Congo)**. This is because

> "Cases involving someone outside the United Kingdom who applies to come here to take up or resume family life may involve family life originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls" (paragraph 36).

20. In the instant case, I note that the Sponsor and the first Appellant were married in 1992, which was 22 years ago, and that the marriage has stood the test of time, such that there is a close and genuine bond between the first Appellant and the Sponsor, who wish to live together, and do still retain a family unit, with their two children, neither of whom have formed an independent family life.

21. Secondly, the Court of Appeal also made clear that,

> "what is in issue in relation to an application for LTE is more in the nature of an appeal to the State's positive obligations under Article 8, rather than enforcement of its negative duty which is at the fore in LTR cases. This means that the requirements upon the State under Article 8 are less stringent in the LTE context than in the LTR context" (paragraph 38).

22. I note that Mr Burrett submitted before me that, whatever the position earlier, the family life between the parties here was no longer "precarious", but that is to be less than charitable to the parties in this case, because the plain fact is that for the entire time that the Sponsor came to the UK in 2003, his Article 8 family life with his dependant wife and children was not precarious. It was lawful and legitimate.

23. Indeed, whereas one may describe the Sponsor's immigration status in the UK as being one which is "precarious" to all intents and purposes, up to the time that he is granted ILR in the UK on 1st December 2010, one cannot reasonably describe his

"family life" with his wife and children to be "precarious", a fact that is made abundantly clear by his subsequently visiting his family in January 2011, and thereafter three times again, when he is able to do so.

24. In point of fact, however, I do find the circumstances in this appeal to be "compelling", if I were to apply that epithet, bearing in mind that this is not as strict a test as that of "exceptionality" or of "very compelling reasons", because this is a case where as the supplementary witness statement of the Sponsor makes clear (in the bundle of 21st April 2017 before me), the Sponsor has been living in the UK for fourteen years now has set up a business with an average income of £35,000 per annum, such that his company now also has employees (see paragraph 8 of his witness statement). He makes it clear that although he has indeed made a few visits to them, these have been "for very short periods as I cannot stay there for too long due to my business and employment commitments in the UK" (paragraph 12). He makes it clear that he is not able to give up his business and go and live in Sri Lanka "without a primary source of income" because if he does then not only will he suffer, but his family will also suffer, together with the three employees and their families as well (paragraph 13). At the same time, his two children, both of whom are over 18, as well as his wife, are economically dependent upon him (paragraph 15).

25. Whether or not these are "very exceptional circumstances", I am in no doubt that there certainly are "compelling" reasons for choosing to enjoy family life in this country, rather than in Sri Lanka, a fact attested to by the Sponsor's living in this country for the last fourteen years. I notice that the "Affinity Global Ltd" a company which he has established (see page 7) is a viable company and that he has P60 returns (see page 17), showing that this is a proper business. The Appellants succeed outside the Immigration Rules and not least because if the **Razgar** principles are employed, it is clear that the decision of the Respondent disproportionately interferes with the family life rights of the Appellants to enjoy a family life with the Sponsor, Mr Ilyas Kareem. For all these reasons, these appeals are allowed.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 10th June 2017