



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24623/2016

THE IMMIGRATION ACTS

Heard at Field House
On 09th July 2018

Decision & Reasons Promulgated
On 09th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR UPALI EDIRISINGHE PEEDIGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Kumudusena (Solicitor)

For the Respondent: Mr P Duffy (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Andonian, promulgated on 12th March 2018, following a hearing at Taylor House on 23rd February 2018. In the determination, the judge dismissed the appeal of the Appellant, therefore the Appellant subsequently applied for, and was granted permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Sri Lanka, who was born on 27th January 1963. He appealed against a decision of the Respondent dated 14th October 2016, refusing his application for leave to remain on the basis of his family and private life, in that both his wife and his son have got indefinite leave to remain in the UK.

The Appellant's Claim

3. The basis of the Appellant's claim is that the Appellant arrived in the UK on 23rd February 2014 with his son, who was born on 29th December 2006 and was at the time of entry 7 years of age (and is 11 years old now). The Appellant's wife, however, had already been in the UK since 23rd July 2009. In Sri Lanka he lived with his wife, and had only been separated from her for four years. He does not speak English properly. His wife is the main breadwinner. He collects his son from school whilst his wife earns £21,000 per annum gross. If the Appellant now had to go back to Sri Lanka to make an entry clearance application this would mean that she could not work full-time, as she would have to take time away from work to look after the child, and her income level would drop significantly, such that she would not be able to show the £18,600 requirement for entry clearance to be successful on his part.

The Judge's Findings

4. The judge took into consideration the fact that the Appellant works part-time "and does the needful for the child and takes care of him and picks him up from school" (paragraph 20). He held, however, that it was perfectly open to his wife to organise her affairs in such a way that, if the Appellant were to return back to Sri Lanka in order to apply for entry clearance, the child could be looked after and be picked up from work. As the judge observed, "Indeed she said there were times when he was not available" (paragraph 20). There was a letter before the judge from the Appellant's school confirming that the child had been a pupil at [] Primary School and had been enrolled since 31st October 2016 and the child was "in good attendance and punctual, and is brought to school and picked up by his father" (paragraph 20). However, as the judge concluded, there was "No reason why the child's mother cannot accept to deal with these issues as well and make further arrangements in that regard around her work" (paragraph 20). For all these reasons, there was no case proven on behalf of the Appellant that there were insurmountable obstacles or "very significant difficulties" for the family were the Appellant to leave the UK and return on a proper entry clearance visa.
5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge had failed to conduct an overall assessment of the child's best interests. He had accordingly misdirected himself in assessing the proportionality of the Appellant's removal. Reliance was placed upon the case of **EV (Philippines)** where Clarke LJ had stated that, "The best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent".

Submissions

7. At the hearing before me on 9th July 2018, Mr Kumudusena, appearing on behalf of the appellant, submitted that it should not be overlooked that the Appellant had always been the primary carer of his child. This was evident from the fact that when the

mother came to the UK in 2009, she had left the child, to be looked after in Sri Lanka, by the Appellant, and when the child came to the UK he was already 7 years of age, and therefore well aware of the fact that the father was the main figure in his life, with whom he had formed an attachment. The Appellant and his wife had no other family members in the UK that they could turn to. Having arrived in the UK, they were now living very much as a family unit, in much the same way as they had been doing in Sri Lanka, with the Appellant working part-time, and aside from that devoting his life to the care of the child, dropping him at school and picking him up, so as to enable the wife to earn the £21,000 per annum that she was doing. In these circumstances, to suggest, that a child who had formed a strong bond with his father, could be separated, without a proper assessment being made of the impact upon the child himself by requiring the father of the child to return to Sri Lanka, was untenable.

8. For his part, Mr Duffy submitted that although some judges may well have come to the very conclusion that Mr Kumudusena was advancing, this was a disagreement with the decision of the judge, in circumstances where the decision was entirely open to this particular judge. This was not a case where the child had already been in the UK for seven years so as to attract the strictures referred to by Elias J in **MA (Pakistan)**, and given that the Appellant did not meet the requirement of the Rules, it was not disproportionate to require him to leave this country to return back to Sri Lanka to make a valid application for entry clearance.

Error of Law

9. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. The circumstances and facts of this case are such that it was incumbent upon the judge to consider and to make a finding upon what was in the child's best interests, and only then to proceed to conduct a proportionality assessment in the context of that finding. Instead, what the judge has done is to conclude that the child could remain with the mother, who could continue to provide for his welfare, while the father returned back to Sri Lanka.
10. It was necessary to consider what the disruption would be in the child's life. The status of the father may well have been "precarious" but this was not true of the status of the child and the determination in this regard has a tendency to overlook this fact, such that it cannot, in the absence of there being a clear finding on what was in the child's best interests, be said that the balance of proportionality fell in favour of the Secretary of State and against the Appellant.

Notice of Decision

11. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Andonian pursuant to Practice Statement 7.2(A).

12. No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Juss

Date
3rd August 2018