



IAC-AH-DN/DP-V1

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

Appeal Number: AA/10062/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 17th November 2015**

**Decision & Reasons Promulgated
On 21st December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MISS RANITHA THIYAGESU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Talacchi, Counsel

For the Respondent: Ms C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on 8th October 1994. The Appellant left Sri Lanka on 10th June 2010 and travelled via Malaysia arriving in the UK on 20th January 2011. The Appellant claimed asylum on 4th February 2011. The Appellant was refused asylum and granted discretionary leave till 8th May 2012. An application for further leave to remain was made on 4th May 2012. The Secretary of State noted that the Appellant's original claim for asylum was based upon a fear that if returned she would face mistreatment due to her imputed political opinion as a member of a particular social group and that she contended that her

risk arose because her brother had connections with the LTTE. By Notice of Refusal dated 4th November 2014 the Appellant's application for further leave to remain in the UK was refused.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal McDade sitting at Stoke on 12th January 2015. In a decision and reasons promulgated on 22nd January 2015 the Appellant's appeal was dismissed on asylum and human rights grounds and the Appellant was found not to be in need of humanitarian protection.
3. On 2nd February 2015 the Appellant lodged Grounds of Appeal to the Upper Tribunal. It is noted that the sole basis upon which permission to appeal was sought was based on a contention that the First-tier Tribunal Judge had erred in law in relation to his findings pursuant to Article 8 of the European Convention of Human Rights.
4. On 13th February 2015, First-tier Tribunal Judge Fisher granted permission to appeal. Judge Fisher noted that the grounds seeking permission asserted that the judge had erred in law in his consideration of Article 8 by failing to undertake a proportionality exercise outside the Rules by concluding that there was no family life between the Appellant and her relatives in the UK and in his consideration of Section 117B of the Nationality, Immigration and Asylum Act 2002. Judge Fisher noted that in his decision the judge dealt with Article 8 issues in one paragraph and concluded that there was no evidence of dependency which would establish family life and found that there were no compelling or exceptional circumstances which warranted consideration outside of the Rules. In terms of Section 117B the judge simply said that he had regard to that provision.
5. In granting permission Judge Fisher considered that it was arguable that the judge erred in imposing a threshold test before considering Article 8 outside the Rules and that given the lack of reference to the evidence given by the Appellant's cousins it was arguable that the judge had also erred in finding that there was no element of dependency between them which was sufficient to engage Article 8. Furthermore he considered that the judge may have failed to explain the weight which he attached to the various factors under Section 117B.
6. On 24th February 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24 submitting that the judge was entitled to find that there was no family life between the Appellant and her cousins in the UK based on the evidence before the Tribunal and that the judge had also been correct to find that the provisions of paragraph 276ADE of the Immigration Rules were not met. The Rule 24 response went on to state that authority should not be read as seeking to suggest that a threshold test was being suggested as opposed to making it clear 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 and that the

judge had correctly considered that there was nothing that has not already been considered in the context of the Immigration Rules which could do so.

7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Talacchi. The Secretary of State appears by her Home Office Presenting Officer Ms Johnstone.

Submission/Discussion

8. Mr Talacchi states that this is an appeal outside the Immigration Rules and takes me to paragraph 6 the First-tier Tribunal Judge's determination where the judge has found that there was no particular dependency between the Appellant and her cousin and therefore held that a family life in the context of Article 8 did not exist. He submits there was no reason given for this finding and takes me to the witness statements of the Appellant's cousin that was before the First-tier Tribunal. He refers to the relevant paragraph (paragraph 4) where the Appellant's cousin states:

"The Appellant arrived in the UK as a minor in 2011 and sought asylum in the UK and since her arrival she has been living with me and I take full care of her welfare ..."

9. He submits that there is no findings of the evidence relating to dependency between the two to be found within the First-tier Tribunal Judge's determination. He submits that the approach adopted by the judge is wrong, that the judge has not directed himself to the concept of exceptional circumstances and submits that the error is that the judge has given weight to immigration control and not considered the other factors of Section 117B especially Section 117A(2). He submits that the judge has failed to properly address the issue of proportionality.
10. He further points out that the Appellant has had no access to public funds (save child benefit) and that there has been an element of integration by the Appellant into UK society pointing out that she has attended some twelve courses. He comments that the judge has failed to make any findings with regard to the Appellant's cousin's evidence and submits that there is a material error of law therein.
11. In response Ms Johnstone points out that the issue that is being addressed is a claim pursuant to Article 8 and that the judge was entitled to find that the Appellant had no dependency upon her cousin pointing out that she is an adult and that she had no medical problems. The fact that she had eight months' discretionary leave as a minor does not, Ms Johnstone submits, imply that the Appellant has any form of dependency. She states that the judge has given due and proper consideration to the issues. She has made a finding that as far as the Appellant's private life is concerned there is nothing exceptional or compelling that would cause her to consider it outside paragraph 276ADE. Ms Johnstone points out the

Appellant is a failed asylum seeker with precarious status and no private life under paragraph 276ADE. She submits that the judge has had regard to all these factors.

12. She comments that for the Appellant's legal representative to contend that there has been no reliance on public funds is in fact not true. While she acknowledges that the Appellant was for a short period a minor and was granted discretionary leave child benefit was claimed for the Appellant during that period. She points out that that does constitute public funds and further that this is an Appellant who cannot show that she can speak English. She submits that there is no material error disclosed in the decision of the First-tier Tribunal Judge and asked me to dismiss the appeal.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on the Error of Law

15. I start by reminding myself that the issue outstanding before me is whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. The thrust of the Appellant's Counsel's submissions are that the judge may have imposed the wrong test when considering Article 8 outside of the Rules. I do not think such a contention is sustainable. To start with at paragraph 2 of the determination the judge sets out the oral testimony that has been considered including that of the three Appellant's witnesses and her cousin Jeyakanthan Kanapathipillai

with whom the Appellant stayed. The judge expresses clearly that he has given due consideration to the witness evidence and made findings that the relationship she had with her cousins are those between adults and that there is no particular dependency one for the other. These are findings that the judge was perfectly entitled to make. The fact that the judge has not specifically referred to paragraph 4 of Mr Kanapathipillai's witness statement is not material he has considered all the evidence and made findings with regard to dependency that he was perfectly entitled to. There is consequently no material error of law in that finding.

16. It is appropriate however to go further. The judge thereafter found that family life in the context of Article 8 did not exist. He then gave due and proper consideration to the submission that the Appellant would return to Sri Lanka as a person with no political profile and as such did not fall within any of the risk categories and therefore was not at risk of serious harm. The judge went on to find that her removal would be wholly proportionate to the legitimate purposes of immigration control and had regard to Section 117B of the Nationality, Immigration and Asylum Act. That seems to me to be a perfectly proper approach.
17. The authorities show that there is nothing to suggest that a threshold test has ever been suggested as opposed to making it clear that there is a need to look at the evidence to see if there was anything which has been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. This approach appears to have been quite properly adopted by the judge. As is held in *Ganesabalan, R (on the application of) v SSHD [2014] EWHC 2712 (admin)* there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.
18. The Court of Appeal in *SS (Congo)* restated the context and considered the role of public policy as expressed within the Rules in the proportionality assessment. *SS (Congo)* sets out that this will necessarily involve deciding whether there is a gap between the Rules and Article 8 and then whether there are circumstances within the case under consideration which take it outside the class of cases which the Rules properly provide for. Whether the circumstances are described as "compelling" or "exceptional" is not a matter of substance. They must be relevant, weighty and not fully provided for within the Rules. In practice they are likely to be both compelling and exceptional but this is not a legal requirement. Further the authority confirms there is no prior "threshold" of whether there are arguably good grounds to grant leave to remain outside of a pre-condition to conducting a full proportionality assessment.
19. The public interest provisions are now contained in primary legislation and they override existing case law and whilst Section 117A(2) requires a Tribunal to have regard to the considerations listed in Sections 117B and 117C there is no duty upon the Tribunal to reach any specific conclusions or findings as the facts as listed are ones that would normally have always

been taken into account. I acknowledge that Section 117A(3) imposes upon a judge a requirement to carry out a balancing exercise where an Appellant's circumstances engage Article 8(1) in deciding whether the proposed interference is proportionate in all the circumstances. This addresses the basic principles set out in *Razgar [2004] UKHL 27*. Sections 117A to 117D are essentially a further elaboration of *Razgar's* question 5 which is essentially about proportionality and justifiability. It is not an error of law to fail to refer to Sections 117A to 117D considerations providing the judge has applied the test he or she was supposed to apply according to its term; what matters is substance, not form.

20. This is what the First-tier Tribunal Judge has done. I acknowledge that his considerations are not detailed and they come at the end of an appeal relating to predominantly asylum grounds but the judge has given the issue full and proper consideration. In her submissions to me Ms Johnstone has made reference to *Forman (ss117A-C considerations) [2015] UKUT 412 (IAC)*. It seems to me that the rationale of that authority is appropriate namely the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified. Further the list of considerations contained in Section 117B and Section 117C of the Nationality, Immigration and Asylum Act 2002 is not exhausted and the court or Tribunal is entitled to take into account additional considerations provided that they are relevant in the sense that they properly bear on the public interest question.
21. I emphasise that I am not re-trying this matter but the combination of all the above authorities indicate quite clearly that the First-tier Tribunal Judge carried out properly his assessment albeit his findings are succinctly put within one paragraph. That in itself cannot constitute a material error of law providing the judge has properly carried out the assessment and consideration. In this instance for all the above reasons I am satisfied that he has and the decision discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal is maintained.

Decision

The decision of the First-tier Tribunal discloses no material error of law and is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris