IAC-AH-CO-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11048/2012

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 28th January 2015	**On 16th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR GAFFOOR MOHAMMED ABDUL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Harris, Counsel
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Sri Lanka born on 31st December 1966. The Appellant applied for a UK student visa on 8th July 1999. The Appellant's application for asylum was refused by the Secretary of State on 22nd November 2012 and that Notice of Refusal took into account that the Appellant had been living in the UK since 23rd July 1999, that his wife had joined him in the UK in 2003 and that he had two children who were born in the UK. It also took into account the various returns during that period by the Appellant to Sri Lanka when the Appellant's claim for

respect for family and private life under Article 8 of the European Convention of Human Rights were considered.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Foudy sitting at Manchester on 18th January 2013. The Appellant's claim was summarised in considerable detail by the First-tier Tribunal Judge at paragraph 10 of her determination and in a determination promulgated on 21st January 2013 the Appellant's appeal was dismissed on all grounds.

3. On 6th February 2013 the Appellant sought permission to appeal to the Upper Tribunal. Permission was granted by Designated Judge Lewis on 12th March 2013. The judge noted that it was contended that the judge had not properly considered country information evidence and country guidance authority, had not had regard to a possible explanation for the passage of time between the Appellant having left Sri Lanka and the authorities having issued an arrest warrant for him, and that the judge had wrongly discounted medical evidence without giving any cogent reasons for doing so.

4. On 22nd March 2013 a response to the Grounds of Appeal under Rule 24 was provided by the UK Border Agency opposing the appeal.

5. The appeal came before Deputy Upper Tribunal Judge Birrell sitting at Manchester on 8th May 2013. In a determination promulgated on 13th May 2013 Judge Birrell concluded that the case should be remitted back to the First-tier Tribunal because the Appellant did not have a fair hearing due to the credibility findings being tainted by the failure to deal with the medical evidence adequately and the failure to have regard to background material about risk on return. Judge Birrell found that none of the findings of fact were to stand and the matter would be subject to a complete rehearing.

6. The Appellant's appeal having been remitted to the First-tier Tribunal was heard by Judge of the First-tier Tribunal Simpson sitting at Manchester on 10th September 2013. In a determination promulgated on 18th November 2013 the Appellant's appeal was dismissed on both immigration and human rights grounds and the Appellant was found not to be in need of humanitarian protection.

7. On 29th November 2013 fresh Grounds of Appeal against the decision of Judge Simpson were submitted to the Upper Tribunal. Those grounds contended:

   (i) that the judge had failed to demonstrate that she had applied anxious scrutiny in considering the case;

   (ii) that the judge's credibility findings were flawed for lack of clarity and for failing to consider all necessary materials; and

   (iii) that the judge had failed to consider Article 8 lawfully.

8. On 12th December 2013 First-tier Tribunal Judge Nightingale granted permission to appeal. Judge Nightingale noted that it was contended that Judge Simpson had

failed to consider *GJ and Others (Post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC)* as the most recent country guidance case and that the judge had failed to consider the requirements of paragraph 276ADE(iv) of the Immigration Rules. In addition he noted that it was contended that the judge had failed to make clear findings of fact or to consider relevant evidence and that it was arguable the judge erred in failing to consider paragraph 276ADE with regard to private life, the determination arguably moving directly to a consideration of Article 8 outside the Immigration Rules.

9. On 30th December 2013 the Secretary of State filed a response to the most recent Grounds of Appeal under Rule 24 submitting that it was apparent from the determination that the case of *GJ* was not relied upon by the Appellant and irrespective of the fact that *GJ* was the country guidance case at the date of hearing, the Appellant could simply not have succeeded under the ratio of that case on the judge's well-reasoned findings. Further it was stated that the judge had clearly considered the medical evidence at paragraph 38 of the determination and given valid and adequate reasons for not accepting that the arrest warrant was issued in 2009. As for Article 8 the judge, it was contended, had summarised the submissions made at paragraph 29 of her determination and dealt fully with the issues raised and made appropriate findings from paragraph 44 through to paragraph 47 of the determination. The Secretary of State consequently submitted that there were no material errors of law in the determination.

10. The matter was listed before me to determine if there was a material error of law in the decision of Judge Simpson. The issues before me at that time related to an appeal on asylum and on human rights grounds. At paragraphs 18 to 20 of my error of law findings I set out why there was no material error of law in the decision of the First-tier Tribunal Judge so far as the asylum decision was concerned but found that there was a material error of law on the consideration of Article 8.

11. It is on that basis that the appeal comes back before me for rehearing. I note a couple of factors. This is an appeal solely restricted to the Appellant's claim under Article 8. It is not an appeal on asylum grounds. The whole thrust of the Appellant's arguments have substantially changed since this matter first came before the First-tier Tribunal Judge and indeed since the Appellant's original application was submitted to the Secretary of State. Secondly I note that Mr Harris appears on behalf of the Appellant and Mr McVeety on behalf of the Secretary of State. Consequently the constitution of the attendees before me are exactly the same as those that were before me when I considered the error of law hearing last year. In addition I note that there is now filed and served a substantial up-to-date bundle of evidence relating to the appeal under Article 8 running to some 137 pages. It is against that background that the appeal proceeds.

Evidence

12. The Appellant appeared and gave evidence. He confirmed his witness statement of 14th January 2015 as being his evidence-in-chief. He confirms that he first arrived in

the United Kingdom on 23rd July 1999 as a student and that his most recent entry was on 29th October 2007. His wife had arrived in the United Kingdom in February 2003 and has remained in the UK ever since. He has two children, Ishara born on 4th August 2006, and Ayman Mohammed born on 19th December 2010. He states that his whole family have resided in the United Kingdom since those dates and that his first child has attended education throughout from nursery to primary school. He points out the only time that Ishara has been out of the UK to Sri Lanka was for a period of nineteen days when she was aged $1^1/_2$ and contends that she does not speak the language and she is unaware of the life and culture within Sri Lanka. He further points out that he has effectively been away from Sri Lanka since 1993, i.e. a period in excess of twenty years and that he has no social and cultural ties with Sri Lanka and has no friends over there. He states that Ishara has been to classes on Tamil and they do try to speak the language to her but that her knowledge is limited. Their principal language is in English. He confirms that he is a Muslim and attends a mosque every Friday night in Longsight and that Ishara goes on Saturdays and Sundays to Bible classes which are held in Arabic. When asked as to whether he had ever discussed with Ishara the prospects of returning to Sri Lanka he advises that he has but even as late as the day of this hearing Ishara, he indicates, has told him that she does not wish to go back to Sri Lanka, that she is a British girl and wishes to remain being brought up as a British girl. He confirms he is unable to work because he was stopped from working in 2002 due to his immigration status, however he seeks to develop his career in IT where his qualifications are. Prior to arriving in the UK the Appellant was a computer programmer in Saudi Arabia.

13. The Appellant is cross-examined by Mr McVeety. He is asked if he practised his religion in Sri Lanka and he advised that he did although it is still difficult he believes for Muslims out there. When asked as to whether his daughter could undertake her studies in Sri Lanka, he responds by pointing out that she has friends and family in the UK and in any event lessons would not be in English. He also believes that she would be at risk from the majority population in Sri Lanka and that the only family member that remains there is his mother and he lasted visited her in 2007.

14. The Appellant acknowledges that his leave to remain ran out in 2008 and that the first time he went to court was regarding his asylum appeal. He acknowledges that he should have returned in 2008 but claims that he had failed to do so due to the security position in Sri Lanka. He states that he is only in rare contact with his mother although they have not fallen out, speaking to her on the telephone about once or twice a month. He indicates she is not in good health and that her sister looks after her. When asked as to the whereabouts of his own siblings, he advised that his brothers and sisters live abroad and that the only family his wife has in Sri Lanka are her parents.

Submission/Discussions

15. Mr McVeety acknowledges that the test here turns very much on whether or not it is reasonable for the Appellant's daughter Ishara Sathiena Gaffoor to return to Sri

Lanka because if it is not reasonable for her to return then it would not be reasonable for the family to return without her and, similarly, if it is reasonable for her to return then there is no reason why the rest of the family should not be able to return with her. He submits that it was reasonable for her to return and that she would be returning with her family and at an age when she can adapt. He submits that the law has moved on since the decision in *ZH (Tanzania)* and that it is necessary to differentiate between British and non-British citizens, pointing out that none of the Appellants are British citizens. He submits that we are not the "educators of the world" and that there is no other basis upon which this appeal should be allowed.

16. Mr McVeety acknowledges the documents produced in support of the appeal and the school reports in particular which show that Ishara is doing well at school and is involved in activities in the UK. However he submits that there is no reason why she, nor indeed any other family member, cannot practise the Muslim religion in Sri Lanka and that she can adapt to learn Tamil. He points out that it is not a matter of her being able to rely on the preference of being in the UK and that people move with their jobs and that every move that takes place does not create a breach of Article 8. He refers to Section 117 of the Nationality, Immigration and Asylum Act 2002 pointing out that immigration control is in the public interest and that the Appellant must meet the Rules and that he failed to go home when he should have done. He emphasises that the family have no lawful right to be in the UK and that the Appellant has never had indefinite leave to remain. He refers to Section 117B(5) and asked me to give little weight to the Appellant's private life when his leave in the UK is precarious. He acknowledges that such a decision would affect Ishara but she would not be returning on her own, she would be returning with her parents, and that there is no reason why the family cannot return. He asked me to refuse the appeal.

17. Mr Harris acknowledges that the family would be removed as a unit therefore it is necessary to focus on the family's private life and, because there are children involved, it is necessary to take into account their best interests and that it would be necessary and appropriate to look at Article 8 outside the Immigration Rules. He reminds me that the test under *Razgar* moved quickly to an analysis of proportionality and submits that under paragraph 117B introduced by Section 19 of the Immigration Act 2014 a similar structure is given statutory authority. He acknowledges that the starting point is Section 117B(1), namely that the maintenance of effective immigration control is in the public interest. He points out that the Appellant can speak English and therefore meets the public interest test at least in part in paragraph 117B(2) albeit that he acknowledges that the Appellant is not economically independent as he is unable to work. However he indicates that that is purely because of the Appellant's immigration status and that the Tribunal should take into account the Appellant's qualifications, the fact that he has worked in the past and give some weight to this.

18. He takes me to Section 117B(6) and submits that if this paragraph is engaged that can outweigh other matters. He contends that it is not disputed that Ishara is a qualifying child. He accepts that neither she nor her parents are British citizens but

that she would come under a child who has not been here for seven years at date of application but is approaching the threshold and she would meet the Immigration Rules. Consequently the issue relates to the private life of Ishara. He acknowledges that she would return with her parents and accepts that there is a limited amount of family of the Appellant in Sri Lanka. He relies very much on the guidance given in *E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC)* and the finding therein that the Supreme Court in *ZH (Tanzania) [2011] UKSC 4* was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own. He considers therefore that the crux of the matter relates to Ishara and the family's ties to the UK.

19. He takes me to the Appellant's bundle. I am referred to the letter from the head teacher at St James' CE Primary School where Ishara attends and to the letter from Ishara dated 17th January 2015 where she sets out why she wants to remain in the UK. He points out that Ishara has begun to identify a life outside her family and has made contact with friends and at the mosque. He is not saying that she could not follow her religion in Sri Lanka but that it is in her best interest to stay in the UK and for her family to stay with her. He invites me to find that it is not reasonable to uproot Ishara and to relocate her, nor is it in the public interest, and he asked me give extra weight to the length of time that the Appellant and his wife have been in the UK and that the Appellant's younger child has also been brought up in the UK. He asked me to find that any removal would be disproportionate and to allow the appeal.

Findings and the Law

20. The Appellant has had an extensive immigration history. He arrived in the UK in 1999 and benefited from the UK education system. Between 2001 and 2007 the Appellant made six subsequent applications for further leave to remain in the UK as a student with his wife and daughters as dependants. The final successful application made by the Appellant was granted until 30th June 2008. On 20th June 2008 the Appellant had applied for further leave to remain in the UK on the same terms. That application was refused on 30th September 2008. The Appellant appealed and that appeal was dismissed following which an application for judicial review was refused on 16th December 2008. A further application for judicial review was lodged and refused on 17th February 2009 when the Appellant's appeal rights were exhausted. In April 2009 the Appellant's wife was encountered and arrested by immigration officials whilst working in a shop, she was served with a 151A notice on 15th April 2009 stating she was liable to removal from the UK as an overstayer. Consequently as at February 2009 the Appellant became an overstayer in the UK with no right to remain here. I note that he made an application for leave to remain under the Human Rights Act in March 2010 but that that application was rejected in June 2010 because no fee had been lodged. I consequently discount that application. Despite being an overstayer the Appellant finally graduated from the Chartered Institute of Management in November 2010.

21. The Appellant finally claimed asylum on 25th October 2012. I acknowledge that from then on his appeal has been going through the appeal process but it is clear that both the Appellant and his wife were overstayers between 2009 and 2012. That is a factor I have to take into account. At the time that the Appellant's application was made for leave to remain for asylum the Appellant's eldest child was aged 6. It is accepted and acknowledged by both legal representatives that the Appellant's appeal falls to be addressed pursuant to Article 8 outside the Immigration Rules. The appeal process has taken some considerable time due to the fact that the matter has been before two First-tier Immigration Judges. The basis of the Appellant's appeal now changes. The findings of Judge Simpson that the Appellant was not in need of asylum nor could pursue a claim for humanitarian protection did not disclose any material errors of law have been upheld. The appeal purely relates to the Appellant's claim pursuant to Article 8 outside the Immigration Rules based on the fact that the First-tier Tribunal Judge failed to address those issues.

22. In any consideration of an Article 8 claim the starting point is the law itself. Article 8 states:

    (a) everyone has the right to respect for his private and family life, his home and his correspondence;

    (b) there should be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing 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 freedom of others.

23. In *LD [2010] UKUT 278 (IAC)* the Tribunal stated:

> "The interests of the minor children and their welfare are a primary consideration in the balance of competing considerations in this case and their educational welfare as part of the UK educational system point strongly to their continued residence here as necessary to promote those interests."

24. The general approach to Article 8 cases is that in *Nhundu and Chiwera (01/TH/00613)*. In those cases the Tribunal said that, in deciding claims under Article 8, there is a five stage test which must be applied in order to determine whether a breach has occurred:

    (i) does family life, private life, home or correspondence exist within the meaning of Article 8;

    (ii) if so, has the right to respect for this been interfered with;

    (iii) if so, was the interference in accordance with the law;

    (iv) if so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

    (v) if so, is the interference proportionate to the pursuit of the legitimate aim?

Those were essentially the five questions endorsed by the House of Lords in *Razgar [2004] UKHL 27*.

25. There has been a very considerable amount of case law as to the approach to be adopted to a claim pursuant to Article 8 outside the Immigration Rules. I take due note of those authorities but in particular the Tribunal in *Gulshan* made clear and has repeated subsequently in *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)* at paragraph 31:

> "Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

26. The Court of Appeal in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 985* at paragraph 128 went on to state:

> "Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision maker."

In *Haleemudeen v the Secretary of State for the Home Department [2014] EWCA Civ 558* Beatson LJ held at paragraph 17 that where the Article 8 ECHR element of the Immigration Rules is not met, refusal would normally be appropriate, "*but that leave can be granted where exceptional circumstances, in the result of 'unjustifiably harsh consequences' for the individual, would result*".

27. There is a requirement to look at the evidence to see if there is anything which has not already been adequately considered within the context of the Rules which could lead to a successful Article 8 claim. The further intermediary test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion based Rules is now no longer appropriate and in *Ganesabalan, R (on the application of) v SSHD [2014] EWHC 2712 (Admin)*, there was no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations.

28. It is against that general background that it is necessary to consider this claim. There are two factors however of specific importance on the general approach to Article 8 that I need to give due consideration to. First is the position expressed in children cases. The law was considered in *Zoumbas v the Secretary of State for the Home Department [2013] UKSC 74*. Paragraph 10 of that determination sets out the basis principles the court needs to follow:

(i) the best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;

(ii) in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of paramount consideration;

(iii) although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(iv) while different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(v) it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(vi) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and

(vii) a child must not be blamed for matters for which he or she is not responsible such as the conduct of a parent.

29. It is also necessary to consider Section 117B of the 2002 Immigration Act which was brought into force by the 2014 Immigration Act. Section 117B makes public interest considerations applicable to all cases. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, and while Section 117A(2) requires me to have regard to the considerations listed in Section 117B and 117C, there is no duty upon me to reach any specific conclusions or findings as the factors listed are ones that would normally have always been taken into account. I am though conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me 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. In doing so I remind myself of the guidance contained within *Razgar* (mentioned above).

30. Section 117B states that the maintenance of effective immigration control is in the public interest and it is in the interest and in particular the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English. I acknowledge that this threshold is met by the Appellant and from his evidence and indeed having seen the letter written by Ishara that she speaks English. I further acknowledge that the Appellant may well be someone whose academic qualifications would enable him in due course to obtain employment that would make him financially independent. However his qualifications are of course such that he should be in a position to obtain such

employment either in Sri Lanka or elsewhere. I use the latter reference bearing in mind the Appellant's previous history.

31. What is important is that at 117B(4) little weight should be given to the private life established by a person when he is in the UK unlawfully and when his immigration status is precarious. Applying that statutory consideration I give scant consideration to the private life of the Appellant during the period he was an overstayer.

32. Further it is necessary to consider paragraph 117B(6). That states:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom".

In this case neither child is a qualifying child. It is however appropriate to consider whether or not it is reasonable to expect Ishara to leave the United Kingdom. I acknowledge that Ishara has spent her life in the UK and I give due consideration to her request to be allowed to stay. However I do not consider that such a request outweighs the public interest in this matter and the requirement of the enforcement of immigration control. The Appellant is an overstayer. Both he and his wife have quite deliberately flaunted terms of their immigration status since the Appellant's leave as a student expired in 2008. He deferred several years before making an asylum claim which was given very careful scrutiny and then dismissed. There is no reason why the Appellant cannot return to Sri Lanka. Further, it has to be remembered that the children would be returning with their parents in a family unit. The Appellant, on his own admission, indicates that Ishara is learning Tamil and I have no reason to assume that Tamil is not spoken at home. She is also having religious training in Arabic and speaks English. She is clearly a talented child who has the ability to be multilingual.

33. Children should, save for the very most exceptional of circumstances, always be with their parents particularly at the tender age of these two children. Carrying out the balance of proportionality and the legitimate interest of immigration control, having given due consideration to the position of Ishara in particular, and to the guidance provided by the Supreme Court in *Zoumbas*, I am satisfied that this is an appeal that cannot succeed under Article 8 and that the public interest considerations outweigh other considerations, all of which are given due and proper weight in consideration in reaching my conclusion. There is a requirement imposed upon the judiciary to apply the law and to properly exercise their discretion. In such circumstances I am satisfied that for all the above reasons this is an appeal that cannot succeed pursuant to Article 8. I appreciate this will be disappointing to the Appellants and I also appreciate that this case has a very extensive history of appeals. However for all the above reasons I am satisfied this appeal cannot succeed and the Appellant's appeal pursuant to Article 8 of the European Convention of Human Rights is dismissed.

Notice of Decision

The Appellant's appeal pursuant to Article 8 of the European Convention of Human Rights is dismissed.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed Date **15th April 2015**

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 **15th April 2015**

Deputy Upper Tribunal Judge D N Harris