



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/16411/2013

OA/16412/2013

**THE IMMIGRATION ACTS**

Heard at Field House

On 3 December 2014

Decision Promulgated

On 9 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

SUJEETHA URUTHIRASIKAMANI

MITHILAN URUTHIRASIKAMANI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms A walker counsel instructed by Ravi Solicitors

For the Respondent: Mr C Avery Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hodgkinson promulgated on 29 August 2014 which dismissed the Appellant's appeal on all grounds.

### Background

3. The Appellant are a mother and son born on 24 December 1980 and 24 May 2012 respectively and are citizens of Sri Lanka.
4. On 26 June 2013 the Secretary of State refused the Appellants application for entry clearance as the spouse and child of Mr Thilaimpalam Uruthirasikami, the child's application being refused in line with that of his mother and therefore I will refer to 'the Appellant' in the remainder of this decision meaning the first Appellant. The refusal letter gave a number of reasons:
  - (a) The Appellant did not meet the suitability requirements of Appendix FM as she failed to provide satisfactory evidence of her identity.
  - (b) The failure to satisfactorily establish her identity also meant the application fell to be refused under paragraph 320(3) of the Immigration Rules.
  - (c) The exclusion of the Appellant was conducive to the public good because the Appellant had been convicted of an offence and sentenced to a period of 8 months imprisonment in 2011 and therefore the application fell to be refused under paragraph EC-P1.1(c).
  - (d) The relationship between the Appellant and her partner was not genuine or subsisting.
  - (e) The application did not meet the financial requirements of the Rules as the Appellant had not established by mandatorily required evidence that her sponsor earned a gross income of £22,400.
  - (f) The application was considered by reference to Article 8 and there was no reason why the sponsor could not relocate to Sri Lanka to continue family life with his wife and child there.

### The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hodgkinson (“the Judge”) dismissed the appeal against the Respondent’s decision. The Judge found:
  - (a) That the relationship between the Appellant and the sponsor was genuine and subsisting.
  - (b) The Appellant had satisfactorily established her identity and the Respondent bore the burden of showing that her passport was false and had not done so.
  - (c) The Appellant was convicted of an offence in 2011 and sentenced to 8 months imprisonment and her exclusion was conducive to the public good although he identified that there was a ‘flexible element to the application of S-EC.1.4’ and he set out that provision noting that this required him to look at Article 8 as he found that it was ‘inextricably linked to the requirements of the above Rules.’
  - (d) He found that he was obliged to look at Article 8 outside the rules and consider the question of whether ‘there are any exceptional circumstances or applicable compelling factors.’
  - (e) He found at paragraph 34 that the Appellants could not meet the financial requirements of the Rules and could only ever succeed under Article 8.
  - (f) He then considered Article 8 by reference to Razgar taking into account the best interests of the second Appellant who is a child and found as a fact that family life could be pursued in Sri Lanka and therefore Article 8 was not engaged. However he then went on to consider, if he were wrong about that, the remaining questions posed in Razgar. He found that there were no exceptional or compelling circumstances and the decision was proportionate.
6. Grounds of appeal were lodged on the basis that the Judge had erred in his approach to the discretion afforded him under paragraph S-EC.1.4 of Appendix FM; in the alternative he had erred by imposing an intermediate hurdle of identifying ‘arguable grounds’ for departing from the rules; erred in his conclusion that Article 8; erred in his assessment of proportionality.
7. On 30 October 2014 First-tier Tribunal Judge Simpson gave permission to appeal stating that the grounds disclosed an arguable error of law

8. At the hearing I heard submissions from Ms Walker on behalf of the Appellant that :
- (a) She relied on her grounds of appeal.
  - (b) The approach to the exercise of the discretion in relation to the suitability requirements was flawed in that the Judge had erroneously found that the maintenance of a fair system of immigration control was a countervailing factor when the suitability requirements had an express provision for that particular provision to be waived if the exception as set out applied.
  - (c) What should have been undertaken was an assessment of the strength of family life against the nature of the criminality.
  - (d) The Judge applied the wrong test as to whether family life could continue in Sri Lanka.
9. On behalf of the Respondent Mr Avery submitted that :
- (a) He struggled to see any difference between the approach of the Judge and what was being argued by Ms Walker. The determination had to be looked at in the round and it was clear that the judge had considered all of the factors relevant to Article 8 and his decision was sustainable.

### **Finding on Material Error**

10. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.
11. The first challenge raised in the grounds of appeal are that the Judge materially erred in his approach to the discretion that was afforded to him under the suitability requirements as set out under S-EC1.4 of Appendix FM having found that the Appellant had been convicted of an offence and sentenced to a period of imprisonment that meant her exclusion was conducive to the public good.
12. The discretion which was recognised and set out by the Judge reads as follows:
- "Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and protocol Relating to the Status of*

*refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.”*

13. The Judge concluded correctly in my view that what was required was an assessment of the Appellant’s claim under Article 8 (paragraph 32) and that is what he did applying the guidance and structured approach set out in Razgar . It is alleged that the Judge erred by imposing an intermediate hurdle of identifying arguable grounds for departing from the Rules but I reject that submission as the Judge manifestly carried out a full separate assessment of the claim under Article 8 outside of Appendix FM and paragraph 276ADE by reference to Razgar in order to assess whether the Appellants should be granted leave outside the Rules. Again I note that there has been no argument advanced that the Rules do not adequately deal with the Appellants circumstances and that those factors would justify a grant of leave outside the rules
14. Paragraph 8 of the Grounds argue that the Judge then found that there were no arguable good grounds for granting leave to remain outside the rules applying the reasons set out in Gulshan and as such concluded that it was not appropriate to exercise the discretion under paragraph S-EC1.4. I am satisfied however that decision must be read as a whole and this ground misstates what the Judge has done. I am satisfied that the Judge started at paragraph 36 by summarising his conclusion at paragraph 51 that the case reflected no exceptional circumstances or compelling factors which would be required both by S-EC1.4 of Appendix FM to exercise a discretion and under Article 8 to grant leave outside the Rules and set out at paragraph 36-51 all of the facts of the case that he considered in reaching that conclusion.
15. Having reached the conclusion that there were no exceptional circumstances he was entitled to conclude that there was no reason that the public interest should be outweighed by compelling factors because again he found no such factors to exist. The existence of such factors was required for him to exercise the discretion in relation to the suitability requirements and in relation to granting leave outside the Rules under Article 8. I note moreover that there are no facts that it is suggested the Judge overlooked that might amount to exceptional circumstances or indeed compelling factors and I am satisfied that the Judge has

reached conclusions that were open to him and the matter of what weight he gives them is a matter for him unless perversity is alleged which it is not.

16. Ground 2 argues that the Judge was not entitled to conclude that Article 8 was not engaged. I remind myself that the House of Lords in Razgar stated that the ultimate question is, “*whether the refusal of leave to enter or remain in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.*”
17. The Judge in this appeal therefore considered whether the family life of the Appellants and the sponsor could reasonably be enjoyed in Sri Lanka. He found at paragraphs 39-43 that the sponsor was of Sri Lankan origin and was not granted refugee status and therefore on the face of it there was no reason he could not return to Sri Lanka. He had indeed returned to his home country for a month in 2012 and a month in 2013 without alleging any problems. He took into account that the sponsor had lived in the United Kingdom since 1999 and worked and was settled in the United Kingdom but concluded that they could enjoy family life together in Sri Lanka. I am satisfied this was a conclusion open to him on the facts and therefore he was entitled to conclude that Article 8 was not engaged. The grounds do not identify any factor overlooked by the Judge and merely constitute a disagreement with the conclusion he reached. However even if he was wrong in this approach he nevertheless went on to ask the remaining Razgar questions on the basis that Article 8 was engaged so any suggestion that his approach to whether Article 8 was engaged at this stage was not material given that he went on to ask the remaining questions.
18. In relation to the assessment of proportionality I am satisfied that the Judge properly weighed all of the competing factors into account and came to a conclusion as to proportionality that was open to him on the facts. Unless an Immigration Judge’s assessment of proportionality is arguable as being completely wrong, there is no error of law.

19. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent and careful reasoning.

## **CONCLUSION**

**20. I therefore found that no errors of law have been established and that the Judge's determination should stand.**

## **DECISION**

**21. The appeal is dismissed.**

Signed

Date 7.12.2014

Deputy Upper Tribunal Judge Birrell