



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

Appeal Number: IA/31494/2015

**THE IMMIGRATION ACTS**

**Heard at TAYLOR HOUSE  
On 24<sup>th</sup> April 2017**

**Decision & Reasons Promulgated  
On 5<sup>th</sup> May 2017**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL  
Ms. GA BLACK**

**Between**

**Mr Anis Jivinkumar Edward Nesakumar  
No anonymity order made**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Mr J Martin (Counsel instructed by Nag Law solicitors)

For the Respondent: Mr E Tufan (Home Office Presenting Office)

**DECISION AND REASONS**

1. I shall refer to the parties in these proceedings as “the Appellant “ and “the Respondent” who is the Secretary of State. This matter comes before me for consideration as to whether or not there is a material error of law in the decision and reasons of the First-tier Tribunal (Judge C. Buckwell)(“FTT”) promulgated on 7<sup>th</sup> October 2016 , in which he dismissed the appeal under the Immigration Rules and under Article 8 ECHR outside of the Rules.

## **Background**

2. The Appellant is a citizen of Sri Lanka whose date of birth is 6th October 1995 . He entered the UK lawfully as a minor with his mother with whom he had formed a strong relationship. His application for further leave to remain was delayed pending his mother's obtaining her English language certificate. By the time the application was made the appellant was an adult and at the date of hearing was aged 20 years. Further changes in circumstances took place such that the Appellant's father had been sentenced to imprisonment and as a consequence the Appellant had taken on the role of father to his young 5 year old brother and of provider for his mother. It was argued that the Appellant had established family life in the UK as a young adult with his mother and brother (following **Kugathas, Ghising and Beoku Betts [2008] UKHL 39**), and further that it would be a disproportionate interference with family life to remove him. It was contended that Article 8 family life outside of the Rules was established as there were compelling circumstances and the decision made was a disproportionate interference with family/private life.

## **First -tier decision**

3. The FTT found that the Appellant failed to meet the requirements of the Immigration Rules with reference to Paragraph 276ADE(1) [23]. The FTT went on to consider if there were arguable grounds outside of the Rules to justify consideration of Article 8 ECHR [24]. Following **SS(Congo) & others [2015] EWCA Civ 387** the FTT concluded that there was no gap in the Rules to show that they failed to cater for applications made by an adult claiming family life dependency, as this was permissible. At [25 ] the FTT relied on **Kugathas [2003] EWCA Civ 31** and found that there needed to be particular factors applicable so as to engage Article 8 family life. The FTT concluded that the Rules adequately covered the position of an applicant who reaches adulthood in the UK and that the Secretary of State was entitled to distinguish between minors and adults in the legislation [26].

## **Grounds of appeal**

4. In grounds of appeal it was argued that the FTT erred by failing to consider the particular factual circumstances of the Article 8 claim in order to reach a decision as to whether or not there were compelling circumstances not covered by the Rules as per **Kugathas and Ghising(family life -adults- Gurkha policy) [2012] UKUT 00160.**

## **Permission to appeal**

5. Permission to appeal was granted by UTJ O'Connor who found an arguable error in that the FTT erred by concluding that because the requirements of the Rules were not met, that Article 8 family life could not be considered.

## **Discussion and decision**

6. I heard submissions from both representatives, the details of which are set out in the record of proceedings. Mr Martin relied on the arguments as put before the FTT summarised above. Mr Tufan relied on **Singh and Khalid** and **Agyarko & Ikuga (R(on the application of) v SSHD [2017] UKSC 11** with reference to the need for exceptional circumstances to be identified. He emphasised that the precarious immigration status of the Appellant was a major factor and that there were no compelling circumstances. In the event that the 5 stages of **Razgar** were to be followed, it would necessitate reference to section 117B Nationality, Immigration & Asylum Act 2002 as amended (“2002 Act”) to public interest factors and there was no prospect of success for this appellant.

7. Mr Martin responded that the FTT had limited its consideration to the existence of a gap in the rules and failed to make findings of fact as to the existence of family life in the light of the Appellant’s role as quasi parent for his brother. Also relevant was the issue of section 117B(6) 2002 Act as the brother was a British citizen child.

8. At the end of the hearing I announced my decision that I find a material error in law and I set aside the FTT decision and reasons. I am satisfied that the FTT failed to follow the correct approach outlined in **SS (Congo) [33]**, in considering if there were arguable grounds and compelling circumstances to justify consideration of Article 8 out with the Rules. The Rules do not fully consider the position of young adults in accordance with caselaw on Article 8. The FTT failed to consider the particular facts and circumstances as to the existence of family life, did not follow the **Razgar** stages and ultimately did not assess whether there existed compelling circumstances such that the public interest in removal of the Appellant was outweighed by his family life in the UK. In view of the fact that the FTT stopped short its analysis by concluding that there was no arguable grounds for consideration of Article 8 and made no findings of fact as to family life or any assessment of proportionality, I am persuaded that the matter ought to be remitted for hearing afresh before the FTT at Taylor House (excluding Judge Buckwell).

9. **There is a material error in law and I set aside the decision and reasons. The Article 8 appeal is to be listed for rehearing at Taylor House (not before Judge Buckwell), with a Tamil interpreter and for two witnesses to be called.**

Signed                      Date 3.5.2017  
GA Black  
Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER MADE  
NO AWARD FOR COSTS

Signed            Date 3.5.2017  
GA Black  
Deputy Judge of the Upper Tribunal