Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51774/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th April 2014	**On 25th April 2014**

Before

UPPER TRIBUNAL JUDGE COKER

Between

NARANJANA SHAMINDRA KODAGODA WIJESEKERA ARACHCHIGE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Anzani, counsel, instructed by Nag Law solicitors
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal a decision of the First-tier Tribunal which dismissed an appeal against a decision by the respondent dated 19th November 2013 to refuse him leave to remain as an adult dependant relative of his father and to remove him pursuant to s47 Immigration Asylum and Nationality Act 2006 was granted by First-tier Tribunal Judge Ransley on the grounds that it was arguable:

    a. The First-tier Tribunal judge erred in focussing too much on dependency resulting in further errors in assessing proportionality after the judge had accepted that the appellant enjoyed family life with his parents; that the judge

had employed phrases such as “unusual dependency” and “striking and unusual dependency” indicating that the judge applied a test which was unlawful; the wrong legal test was applied in his finding that “the relationship between the appellant and his parents does not have the striking and unusual features of dependency between parents and adult child”;

b. That the judge failed to correctly apply HK (Turkey) [2010] EWCA Civ 583 and overlooked an important factor that family life did not end on the claimant reaching the age of 18.

Background

2. The appellant came to the UK 6th January 2009 as a student and was granted extended periods of leave until 12 April 2013. He applied for leave to remain as an adult dependant relative on 5th April 2013, such application being refused, the refusal of which is the subject of this appeal.

3. The appellant’s father came to UK 31st October 2004; he claimed asylum in March 2005 and was refused although he was eventually granted indefinite leave to remain in 2010 under the legacy programme.

4. The First-tier Tribunal found:

i. The appellant’s father came to the UK in 2004 and applied for asylum, such application being refused but he was subsequently granted indefinite leave to remain in 2010.
ii. The appellant has lived with his father since his own arrival in the UK in January 2009 as a student.
iii. The appellant’s mother came to the UK in 2012 and since then they have lived as a family unit.
iv. Although the appellant’s mother has siblings in Sri Lanka (and they have families), there is no contact with them. His father has no siblings.
v. The appellant’s paternal grandmother lives in Sri Lanka in a care home; she has visited the UK and in October 2013 came and stayed for about 5 months.
vi. The appellant studied until April 2013 and during that time he worked as permitted (20 hours a week during term time and 30-40 hours a week during the holidays). He wishes to undertake media studies and set up a business with his father.
vii. The appellant has been and continues to be financially supported by his parents.
viii. The appellant has no health problems, no learning difficulties or disabilities.
ix. The appellant’s father is unwilling to and fears return to Sri Lanka and thus it would be unlikely that the appellant would see his father in Sri Lanka for some considerable time.

5. There is no challenge to those findings.

Error of law

6. The appellant accepts that he cannot meet the requirements of the Immigration Rules but asserts that because of his particular circumstances his case falls outwith the Rules and should therefore be considered under Article 8 outside the Rules. Although not expressed in those terms the First-tier Tribunal judge in effect undertook a separate Article 8 assessment.

7. The judge records that the respondent accepted that there was family life such as engages Article 8 but he then goes on to make an assessment of dependency, considers caselaw relevant to such an assessment and finds that the dependency is in essence financial. He also records submissions by the respondent to the effect that the ties between the appellant and his family are no more than the normal emotional ties between an adult child and his parents. He refers to the lack of evidence as to any psychological effect on either the appellant or his parents resulting from the family separation and refers to the lack of any evidence of any detrimental effect on any of them. It may be that another judge would not have reached the conclusion he did as to whether there was family life such as to engage Article 8 although of course he would in any event have taken account of the nature and extent of the family relationship in assessing potential removal in private life terms. Be that as it may, that is a finding which is not opposed by the respondent and one which, given the "robust family life" and the family circumstances is reasonable and sustainable.

8. Ms Anzani submits that the decision of the First-tier Tribunal is confused because it first of all accepts that family life is such as to engage Article 8 and yet then considers caselaw that goes to that issue such that the discussion in connection with that infects the assessment of proportionality. Although, as referred to above, there appears to be unnecessary consideration of caselaw given the finding that there is family life such as to engage Article 8, the finding of family life is unchallenged. The matters discussed and referred to by the judge form part of his consideration overall.

9. Ms Anzani accepts that the mere fact that family life exists for the purposes of Article 8 does not result in the decision to refuse/remove being disproportionate. She refers to paragraphs 11 and 12 of MT (Zimbabwe) [2007] EWCA Civ 455 essentially confirming that the issue of dependency is a matter for the decision maker and the relationship between a parent and child would not necessarily acquire the protection of the Convention without evidence of further elements involving more than normal emotional ties. It is difficult to understand the complaint made: the judge finds in favour of the appellant as to family life and there is nothing in his commentary upon the elements that make up that assessment that cannot, on his findings, be sustained.

10. The judge clearly identified that the significant issue at large was the proportionality of the decision.

11. The appellant takes issue with the use of phrases such as "unusual dependency" (paragraph 22) and the lack of "striking and unusual features of

dependency between his parents and an adult child" (paragraph 25) and submits that this approach tainted the proportionality assessment.

12. In oral submissions Ms Anzani referred to the judge incorrectly asserting that he was not aware of the nature of the appellant's father's asylum claim. This is not correct, the judge clearly states that he did not have full particulars (he did not). In any event this has not been held against the appellant, the judge clearly finding that he accepts that the father has a fear of return (albeit making no finding himself whether such fear was objectively sustainable) would impact on his willingness to return (paragraph 24). She asserted that the impact on the father of the son's removal had not been properly accounted for. This was not further developed and I note in any event that permission to appeal on that ground was specifically refused. Ms Anzani submitted that merely referring to particular issues was insufficient; they had not been properly accounted for although she accepts that had she been limiting her challenge to perversity or irrationality she would have been unlikely to succeed.

13. Ms Anzani expressed disquiet on the grounds, it seems, of lack of relevance, that the judge had referred to the lack of any evidence that the appellant or his parents had suffered any detriment (paragraph 21). The judge has assessed the evidence before him; his reference to the lack of evidence of detriment is valid as an element of his assessment, just as taking account of any such evidence if it had been produced would have been valid.

14. In so far as HK is concerned Ms Anzani stressed the need to recognise that dependency doesn't cease at age 18. This is clearly considered and taken on board by the judge for example, see his findings in paragraphs 16, 21 and 24. He specifically refers to HK in reaching his findings.

15. The grounds seeking permission to appeal attempt to incorporate into that assessment the observation by Lord Bingham EB (Kosovo) [2008] UKHL 41 that it would "*rarely be proportionate to uphold an order for removal …… if the effect of the order is to sever a genuine and subsisting relationship between parent and child*." Ms Anzani submitted that this highlighting of family life had to be an essential part of the proportionality assessment and as such in this appeal that had not been undertaken. Whilst child is not defined as other than an individual under the age of 18, the submission was that, given that dependency doesn't cease upon reaching the age of majority (as per HK) so the severance of the family bond was not usually permissible as per EB and that this had not been factored in to this determination. Attractive though this may appear at first blush, the combination of HK and EB does no more, in the context of this appeal, than set out the requirement for the decision maker to assess and reach findings on the evidence as a whole as to the import of the relationship between this appellant and his mother and father. It does not require greater weight to be placed upon the family life because Article 8 is engaged but it does require an assessment of all of the factors relevant to the appellant which includes the degree and nature of the dependency and the degree, nature and quality of the family life that exists.

16. In reaching his conclusions the judge has expressed his overall view of the evidence before him. His use of the words “unusual” and “striking” are no more than the description of the extent to which he considers the evidence discloses factors which would or could have resulted in a different conclusion. They are not evidence of an unacceptably high bar to cross or that factors have been given inadequate or perverse weight. He has clearly looked at the family circumstances as a whole, the appellant’s personal situation, the impact on his parents and on him of refusal and has considered the evidence overall. He has not restricted his conclusions to his findings on dependency but has factored such findings into his overall conclusion. The judge has clearly had great sympathy for this young man and his family situation but at the end of the day he concludes that there is nothing out of the ordinary or out of the usual which is of sufficient import to result in a finding that the decision to refuse to vary leave to remain and remove the appellant was disproportionate.

17. There is no error of law in the decision such as to result in the setting aside of the determination to be remade.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

Date 17th April 2014

Judge of the Upper Tribunal Coker