



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29344/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5 June 2015

Determination Promulgated
On 12 June 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Dammi Silip Kumara Rajapaksha Pedige
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant:

Mr M Kanangara, instructed by Jade Law Solicitors

For the respondent:

Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Dammi Dilip Kumara Rajapaksha Pedige, date of birth 16.1.86, is a citizen of Sri Lanka.
2. This is his appeal against the determination of First-tier Tribunal Judge Cary promulgated 9.10.14, dismissing on all grounds his appeal against the decisions of the Secretary of State to refuse his application made on 5.3.14 for leave to remain in the UK as a dependant partner of a Tier 1 General Migrant, pursuant to paragraph 319E of the Immigration Rules, and to remove him from the UK pursuant to section

47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 3.10.14.

3. First-tier Tribunal Judge Pooler refused permission to appeal on 27.11.14. However, when the application was renewed to the Upper Tribunal, on 31.3.15 Deputy Upper Tribunal Judge Sheridan granted permission to appeal, but on article 8 ECHR grounds only, on the basis that Judge Cary had failed to address the fact that a same sex relationship is not lawful in Sri Lanka.
4. The Rule 24 response, dated 21.4.15, points out that the appellant chose not to apply for leave to remain on the basis of a same sex relationship
5. Thus the matter came before me on 5.6.15 as an appeal in the Upper Tribunal.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Cary should be set aside. After hearing the submissions of the representatives of the parties I reached the conclusion that there is no material error in the decision of the First-tier Tribunal. I reserved my reasons, which I now give.
7. The appellant last entered the UK on 17.9.13, with limited leave to remain as the dependent partner of a Tier 1 migrant. The application which is the subject matter of this appeal, made on 5.3.14, was for indefinite leave to remain as the partner of a points based migrant (PBS).
8. It follows from the grant of permission that the judge's findings and conclusions in relation to paragraph 319E must stand. As Judge Sheridan pointed out, the First-tier Tribunal Judge found that the Secretary of State was entitled to rely on paragraph 319E(i) as the appellant had previously overstayed longer than 28 days. The grounds of application for permission to appeal did not challenge this finding and thus even if there were to be an error of law in respect of 319E(d), as claimed in the grounds, it was immaterial to the outcome of the appeal on immigration grounds.
9. In refusing permission to appeal, Judge Pooler had noted that the grounds did not address the final requirement in paragraph 319E(d)(ii)(c), and did not identify an arguable error of law in relation to the decision under the Immigration Rules. The application as made was doomed to failure on multiple grounds from the outset.
10. Of course, the appellant's failure to meet the requirements of the Rules for the application made is highly relevant to any article 8 assessment outside the Rules.
11. In granting permission to appeal, Judge Sheridan noted that the First-tier Tribunal Judge stated at §31 that there is nothing in the appellant's statement to suggest any compelling or exceptional circumstances. "However, the appellant's statement refers to him being in a same sex union that is not lawful in Sri Lanka... By failing to

address this issue, which is arguably material to the outcome of the article 8 assessment, it is arguable that the judge has erred in law.”

12. It is obvious from a reading of the First-tier Tribunal decision that Judge Cary did recognise and take into account that the appellant is in a same-sex relationship. At §27 the judge found that family life had been established by this relationship, together with a degree of private life. The judge also accepted that the consequences of the decision were of such gravity as to interfere with that private and family life, so as to engage article 8. The judge then went on to consider the crucial issue in the Razgar stepped approach, that of the proportionality balancing exercise between on the one hand the rights of the appellant and his partner, and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control.
13. As noted, the appellant made a particular application for indefinite leave to remain under specific provisions for which his circumstances did not qualify him. He could have but in fact made no application for leave to remain as a partner under Appendix FM. The refusal decision noted that the Secretary of State had not considered leave to remain under Appendix FM of the Immigration Rules, including EX1, as the appellant had made no such application. He was advised that if he wanted the Secretary of State to consider such an application, he must make a separate chargeable application on the specified form. Within his appeal to the First-tier Tribunal appeal hearing the appellant did not suggest that he could meet either Appendix FM in respect of family life, or paragraph 276ADE in respect of private life, although he raised the issue of article 8 ECHR private and family life. It follows that the appellant did not suggest to the Tribunal considering his appeal that there were any insurmountable obstacles to continuing family life with his partner outside the UK. The grounds of appeal do not make any such suggestion. At the request of the appellant, the appeal was dealt with as a paper case and there was no oral evidence; the judge had only the evidence then present on the case file on which to reach his decision.
14. It was open to the appellant to apply for leave to remain under Appendix FM, the Secretary of State’s response to article 8 family life rights. He did not do so. Neither did he raise it in his one-stop grounds of appeal. However, it remains open to him to do so. Even if he is unable to do so from within the UK, he can do what he did recently, return to Sri Lanka to make his application. There is nothing to suggest that this would be unreasonable or unduly harsh. This is not a Chikwamba situation, as it remains to be seen whether the appellant can demonstrate that all the requirements of Appendix FM are met. However, given that such an application, under the Rules, is open to the appellant, I fail to see how the decision of the Secretary of State to refuse the precise application made by him and to advise him to make a fresh application under the appropriate Rules if he wants family life to be considered, can be disproportionate. Article 8 is not a shortcut to compliance with the Immigration Rules. There is a route for settlement that is open to the appellant under the Rules and in those circumstances, there is no merit in the argument that failure to consider whether the appellant and his partner can continue family life in Sri Lanka amounts

to an error of law. Pending the outcome of an application under the Rules, such consideration outside the Rules is premature.

Conclusion & Decision:

15. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.



Signed
Deputy Upper Tribunal Judge Pickup

Dated **27 August 2015**

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed
Deputy Upper Tribunal Judge Pickup

Dated **27 August 2015**