



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/14395/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 5th January 2015

Decision & Reasons Promulgated
On 9th January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE COATES

Between

A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Jegarajah instructed by Kanaga Solicitors
For the Respondent: Miss C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a Sri Lankan national born on 26th March 1994.
2. The Appellant and his sister, U N A, applied for entry clearance to join their parents in the United Kingdom under the family reunion provisions contained in paragraph

352D(iii) of the Immigration Rules. The Appellant's parents were granted refugee status in the UK after a successful appeal in November 2012.

3. Both applications were refused by the Respondent on 3rd June 2013 and there was an appeal hearing before Judge of the First-tier Tribunal Colvin at Taylor House on 29th July 2014. The Appellant's appeal was allowed on human rights grounds (Article 8) and his sister's appeal was allowed under the Immigration Rules (paragraph 352D). Both the Appellant and his sister were granted anonymity and I direct that this shall continue.
4. There has been no challenge by the Respondent to the decision by the First-tier Judge to allow the appeal by the Appellant's sister but the Respondent's representative applied for permission to appeal the decision to allow the Appellant's appeal under Article 8.
5. Permission to appeal was granted by a Designated Judge on 30th September 2014. The Designated Judge who granted permission considered it arguable that the First-tier Judge erred in law in that she took account of alleged danger to the Appellant from the Sri Lankan authorities, when recent country guidance indicated that this would not be the case, that she failed to follow the Razgar guidelines and factor in public interest when considering proportionality and, finally, that she failed to have regard to Section 117B of the Nationality, Immigration and Asylum Act 2002.
6. Thus the matter came before me for an error of law hearing on 5th January 2015. Representation was as mentioned above.
7. I heard submissions from both representatives. I have taken into account all the documents which were before the First-tier Tribunal. In addition I have taken into account the Entry Clearance Officers Grounds of Appeal in support of the application for permission to appeal and a Rule 24 response drafted by Miss Jegarajah. At the end of the hearing I reserved my decision which I now give with my reasons.
8. In submissions, Miss Johnstone replied upon the three grounds set out in the Entry Clearance Officer's Grounds of Appeal in support of the application for permission. The first ground submits that the First-tier Judge failed to have regard to the relevant country guidance case of GJ and Others (Post civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC) in finding at paragraph 20 of the determination that the Appellant may be at risk from the Sri Lankan authorities as a result of his father's activities. It is argued that the risk categories identified in GJ have not been addressed and therefore it was not open to the First-tier Judge to make the finding which was made in relation to current risk.
9. The second ground submits that the First-tier Judge failed to follow the Razgar guidance in her assessment of proportionality. Miss Johnstone pointed out that at the date of the appeal hearing the Appellant was not a child. He was a young adult with no form of disability.
10. The third and final ground submits that the First-tier Judge failed to have regard to public interest considerations in accordance with Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. Finally, the grounds submit that there was no evidence before the First-tier Tribunal of the second Appellant's proficiency in

the English language nor did the judge consider whether the Appellant would be financially independent upon entry to the UK.

11. In the light of these matters, Miss Johnstone submitted that the decision by the First-tier Judge should be set aside and re-made.
12. For the Appellant, Miss Jegarajah referred to the original Grounds of Appeal which refer to the fact that the Appellant's parents had recently been successful in their asylum appeal. In those circumstances, leaving a 19 year old to look after his 18 year old sister, when the parents would have a well-founded fear of persecution if they returned, is irrational. The Appellant and his sister would both face risk through association with their parents and ought to be granted entry clearance as a matter of urgency. That was because they were not safe in their home country. The grounds argued that it is deeply irresponsible where a child is concerned (a child applicant is treated as a child even if they attain their majority after the application) to fail to have any regard to the appeal determination that outlines the history of the family.
13. Miss Jegarajah further argued that the decision under appeal is in breach of Article 23 Council Directive 2004/83/EC of 29th April 2004 on minimum standards for the qualification status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted. With reference to maintaining family unit, the first principle set out in the Directive is that member states shall ensure that family unity can be maintained.
14. Miss Jegarajah referred to paragraphs 30 and 32 of the determination in respect of the appeal by the Appellant's parents. This is a determination issued by Judge of the First-tier Tribunal Gillespie on 27th November 2012 following an appeal hearing at Hatton Cross on 9th November 2012. The paragraphs referred to deal with the background of the Appellant's parents and the matters which would put them at risk in Sri Lanka. A copy of the determination is in the Respondent's bundle.
15. Miss Jegarajah submitted that the Appellant's parents are successful refugees. Therefore their son and daughter are part of their family and their situation must be considered as part of the assessment of proportionality.
16. Turning to Article 8, Miss Jegarajah referred to paragraph 16 of Judge Colvin's determination. She submitted that the Razgar methodology has clearly been accepted even though Razgar is not expressly referred to. The First-tier Judge has taken into account the Upper Tribunal's guidance in Shazad (Article 8: legitimate aim) [2014] UKUT 00085 where it was held –

“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”.

This guidance follows and affirms the guidance previously given in Gulshan.

17. Judge Colvin has applied this guidance in her findings relating to the second Appellant which are at paragraph 20 of the determination. The judge found that there are grounds for considering Article 8 outside of the new Immigration Rules on the basis that there are compelling circumstances that are not sufficiently recognised

under the Rules. The main one is the fact that the Appellant, like his sister, is effectively wishing to be reunited with his parents who are refugees in the UK and therefore the principles of family reunion need to be recognised as part of his claim which is not the situation under the new Rules as family reunion is not recognised per se. These principles include the Article 8 rights of all the members of the family to reunion when refugee status is conferred. Another factor is that the Appellant may well be at some risk from the Sri Lankan authorities on account of his father's reasons for seeking asylum – namely as a wanted LTTE suspect in Sri Lanka. The current risk to the Appellant's father therefore tips the case into being exceptional on the basis that the Appellant may also be at risk. Another factor is that the Appellant's parents cannot travel to Sri Lanka to visit him due to their refugee status.

18. A further matter which, in the judge's view, made the Appellant's case compelling and exceptional is the fact that he was only 18 when he applied for entry clearance and, like his sister, was not living an independent life. The fact that his sister is to be permitted to join her parents is an additional factor that might well lead to further instability for the Appellant. It was on this basis that the judge considered that it would be disproportionate to interfere with the reunion rights of the family, including that of the Appellant.
19. I am entirely satisfied that the reference in the Respondent's grounds to English language ability and financial independence are not material. They did not form part of the original refusal and were only raised by the Respondent for the first time in the application for permission to appeal. In any event, an educational certificate (which is not challenged) has now been produced which demonstrates that the Appellant has become proficient in the English language.
20. As the Rule 24 response drafted by Miss Jegarajah points out, the First-tier Judge took the issue of risk into account, but not in determining persecutory risk, but in relation to Article 8 and the proportionality assessment. The application of Section 117A NIAA 2002 to this appeal is misconceived because the application predates the commencement of the Act.
21. Having thought carefully about the submissions advanced for both sides, I have concluded that the First-tier Judge was justified in allowing this appeal under Article 8 for the reasons which have been clearly set out in the determination. The determination discloses no material error of law.

NOTICE OF DECISION

I uphold the determination and dismiss the Respondent's appeal.

Signed

Date 8th January 2015

Deputy Upper Tribunal Judge Coates