



IAC-FH-AR-V1

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

Appeal Number: VA/19520/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 October 2015**

**Decision & Reasons Promulgated
On 15 October 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

Entry Clearance Officer

Appellant

and

**PRADEEPA RAMYA SAMANMALI FARTHING
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: No representation

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of Judge of the First-tier Tribunal Pullig promulgated on 22 May 2015 allowing the appeal of Mrs Farthing against a decision by the ECO in refusing her entry clearance as a visitor in order for her to visit her husband. For the sake of convenience I will refer to the appellant before the First-tier Tribunal as the claimant and the respondent before the First-tier Tribunal as the Entry Clearance Officer.

2. The claimant is a national of Sri Lanka. Her date of birth is 18 November 1967. She had been granted indefinite leave to remain in the United Kingdom on 14 June 1990 but she and her husband returned to Sri Lanka in 1991 where they ran a hotel. Some time in 2012 Mr Farthing, the claimant's husband, underwent surgery in this country for a brain tumour. He is a British citizen. Prior to that the claimant had visited the United Kingdom in 1997 and 1998, then in 1999 and again in 2004. She had always left the United Kingdom before the expiry of her leave to enter. In October 2013 the claimant sought to enter the United Kingdom to visit her husband.
3. The Entry Clearance Officer was not satisfied that the claimant genuinely intended to seek entry as a visitor for a period not exceeding six months. The Entry Clearance Officer noted the links that the claimant had to Thailand which included the running of the hotel, the fact that her daughter lived there and another business. The Entry Clearance Officer was not however satisfied, given that her husband had been unwell for an extended period, that she would in fact leave at the end of her proposed visit.
4. The claimant appealed that decision to the First-tier Tribunal. Since 25 June 2013 she could only appeal on limited grounds including human rights grounds. At a hearing on 1 December 2014 the judge heard evidence from the sponsor, who was also cross-examined, and considered various documents relating to the claimant's links with Sri Lanka. The judge set out the relevant Immigration Rules, paragraph 41, and then considered the relevant principles and authorities relating to Article 8 assessments. The judge additionally made reference to paragraphs 117A and 117B of the Nationality, Immigration and Asylum Act 2002.
5. In the section entitled "Conclusions" beginning at paragraph 30, judge stated:

"I find that there is family life between the appellant and Mr Farthing. Of necessity that family life has to be pursued at a distance because of Mr Farthing's ill health. It matters not whether he is medically unfit to fly in the sense that it would have an adverse effect of his physical health. Anyone who goes through what he has gone through would really understand how he would be extremely fearful of travelling long distances particularly by air, where he would be away from the medical services that have supported him following his treatment for his brain tumour. The decision under appeal does interfere with his right to family life with his wife."
6. At paragraph 32 the judge found that the refusal of entry clearance was not proportionate under Article 8. In his reasoning the judge noted that the assessment of whether the decision under appeal was proportionate may depend particularly upon whether or not the claimant met the requirements of the Immigration Rules.
7. At paragraph 33 the judge gave full reasons for his conclusion that the claimant only intended to enter the United Kingdom as a visitor and that

she would return to Sri Lanka at the end of her stay. He noted that the fact that her husband lives in the UK and that she has two children who were British citizens did not lead to the reasonable inference, in light of all the other evidence, that she had an intention of settling or staying beyond the period of proposed stay. At paragraph 35 the judge then considered the various factors identified in Section 117B of the 2002 Act. Having regard to all these factors, and approaching the evidence holistically, the judge was of the view that proportionality fell firmly in favour of the claimant.

8. The Entry Clearance Officer sought to appeal on the basis that the judge made a material misdirection of law. The grounds stated that the proportionality assessment was inadequate. It was claimed the judge did not make a finding whether there were insurmountable difficulties preventing the sponsor from visiting the claimant and the grounds generally, and vaguely, attacked the judge's proportionality assessment.
9. There was no appearance by the sponsor at the appeal hearing. I received a letter from Jade Law Solicitors indicating that they were no longer instructed in this matter and that they would not be appearing on behalf of the claimant. I satisfied myself that the sponsor and the claimant had been informed by first-class post dispatched on 23 September 2015 of the time, place and date of this appeal hearing. I considered that it was in the interests of justice to proceed with the hearing pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
10. I heard brief submissions from Mr Duffy. I had indicated earlier to Mr Duffy that I would take into account the authority of **Mostafa (Article 8 and entry clearance) [2015] UKUT 00112 (IAC)** and the authority of **Kaur (Visitor appeals; Article 8) [2015] UKUT 00487**. Mr Duffy very fairly indicated that he faced difficulty in light of **Mostafa** in seeking to undermine the lawfulness of the judge's decision. Mr Duffy noted that, as with **Mostafa**, it was clear that a family life relationship existed between the sponsor and the claimant. Mr Duffy accepted that there was no legal test requiring the judge to make a finding as to whether there were insurmountable difficulties preventing the sponsor from visiting the claimant as suggested in the grounds of appeal.
11. I read firstly from the head note of **Mostafa**:

"In the case of appeals brought against refusal of entry clearance under Article 8 ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control."
12. I read also briefly from the head note of **Kaur**:

"In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. The starting-point for deciding that must be the state of the

evidence about the appellant's ability to meet the requirements of paragraph 41 of the Immigration Rules."

13. Having regard to the principles enunciated in both authorities I am satisfied the judge did not make an error of law. The judge first considered whether there was in fact family life between the claimant and his wife. Given that they are spouses, and given the very legitimate reasons why the sponsor remains in the UK separated from his partner (as a result of his previous brain tumour and the medical treatment he received for it) I am entirely satisfied that the judge was entitled to find that not only was there family life but that the refusal of entry clearance constitute a breach with that family life.
14. The judge went on to consider whether the breach was lawful and then considered whether the refusal was proportionate in all the circumstances. In considering proportionality the judge specifically found that the claimant had met all the requirements of the Immigration Rules. The judge gave sustainable reasons for his conclusion that the claimant only intended to enter the United Kingdom as a visitor, having regard to the substantial links that she maintained with Sri Lanka.
15. Having thus found that the Immigration Rules were met the judge went on to consider the relevant factors in Section 117B of the 2002 Act. The judge gave appropriate weight to those factors and, noting that the requirements of the immigration rules were met, concluded that the decision to refuse entry clearance was disproportionate. This was a decision that was open to the judge on the evidence before him and for the reasons that he gave. In these circumstances I can identify no material error of law and I dismiss the Entry Clearance Officer's appeal and uphold the initial decision by the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contained no error of law.

The decision of the First-tier Tribunal allowing the appeal stands.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Blum