IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/24852/2014
IA/24854/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 June 2015	**On 9 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MS MAGESWARY RAMAN
MISS THANUJA SRISATHKUNATHAS
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss A Seehra, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr N Bramble, Specialist Appeals Team

DECISION AND REASONS

1. The appellants have been granted permission to appeal to the Upper Tribunal for the reasons given by Judge Juliet Grant-Hutchison on 19 March 2015:

> "1. The Appellants seek permission out of time to appeal against a decision of the First-tier Tribunal (Judge Oakley) promulgated on 21 January, 2015 whereby it dismissed the Appellants' appeals against the Secretary of State's decision to

refuse the Appellants leave to remain as the post flight spouse and child of a Sri Lankan national who has status to remain in the UK as an asylum seeker and currently holds a travel document permitting him to travel anywhere other than to Sri Lanka. I am satisfied that there are special circumstances and accordingly I extend time and admit the application.

2. It is arguable that the Judge erred in law by misdirecting himself (a) in his assessment of whether the first Appellant's husband could accompany them to Malaysia as the spouse of a Malaysian national for although he may hold a Refugee Travel Document he does not have a Sri Lankan passport and it is unclear whether the Malaysian authorities would permit him entry or any entitlement to work or to remain in Malaysia on such a basis when the Judge; (b) in not considering the best interests of the child should the second Appellant be separated from her father should she be required to leave and (c) in not considering the interests of the Appellants' husband/father in terms of Beoku-Betts v SSHD [2008] UKHL 39 should the Appellants be required to leave."

The Background

2. The appellants are both nationals of Malaysia. The first appellant is the mother of the second appellant, whose date of birth is 26 February 2009. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants require to be accorded anonymity for these proceedings in the Upper Tribunal. As the first appellant is the main appellant, I shall hereafter refer to her simply as the appellant, save where the context otherwise requires.

3. The appellant, whose date of birth is 12 January 1982, is recorded as having entered the UK some time prior to 14 August 2004. On that day she made an application for leave to remain as a student, and was granted leave in that capacity from 30 November 2004 to 31 October 2005. On 12 November 2005 the appellant was granted an extension of stay as a student until 31 October 2006. On 28 August 2006 she was refused leave to enter as a returning student following a visit to Malaysia. She was granted temporary admission, and directed to report to the UK Immigration Service on 4 September 2006. In the meantime, her Malaysian passport was retained by the Immigration Officer who refused her leave to enter. The appellant failed to report because, she says, she became very ill before the reporting date. She also says that she subsequently requested her then solicitors to write to the UK Immigration Service requesting the return of her passport, as she wished to undertake a voluntary return to Malaysia. But there was no response to this request from UKIS, according to her then solicitors.

4. She then began a relationship with a Sri Lankan national by the name of Krishna Pillai Srisatkunathas, and so did not continue to contact her solicitors for news about her passport. They lived together, and eventually had a traditional wedding on 19 January 2008. Their child (the second appellant) was born on 26 February 2009.

5. Mr Srisatkunathas was born in Sri Lanka on 18 April 1975. He is an ethnic Tamil from Jaffna. He arrived in the United Kingdom with the assistance of an agent on 31 December 2000 and claimed asylum. The asylum application was refused on 22

February 2001, and his appeal against that decision was dismissed on 28 April 2003. He became appeal rights exhausted on 16 July 2003. On 5 May 2006 Mr Srisatkunathas was arrested while trying to board a plane for Canada, and was found to be in possession of a forged British passport. He was convicted of using a false instrument on 6 May 2006, and on 4 July 2006 he was sentenced to six months' imprisonment with a recommendation for deportation. He appealed against a subsequent decision to make a deportation order against him, but his appeal against that decision was dismissed. On 6 March 2007 a deportation order was signed against him, and served on him on 26 March 2007.

6. On 11 August 2010 he attended the UKBA Further Submissions Unit to make further representations as to why he should not be removed from the United Kingdom pursuant to the legacy programme. He relied on the fact that he was now in a relationship with the appellant and on the fact that they had had a child together.

7. On 21 February 2011 the then Secretary of State refused to revoke the deportation order which had been made against him. Mr Srisatkunathas appealed to the First-tier Tribunal, arguing that the refusal to revoke the deportation order was contrary to the United Kingdom's obligations under both the Refugee Convention and the Human Rights Convention.

8. Mr Srisatkunathas' appeal came before a panel chaired by Judge Rintoul sitting at Dorking Magistrates' Court on 29 March 2011. Mr Srisatkunathas was represented by Mr Waheed of Counsel.

9. Mr Srisatkunathas' case under Article 8 was that his wife could not accompany him to Malaysia, as her passport was still being held by the UK Immigration Service. He could not return to Sri Lanka with his wife and child due to the problems he faced there and because his wife would not be given entry clearance to join him with their daughter.

10. The respondent accepted that Mr Srisatkunathas had established a family life with his wife and daughter. But his wife had no legal basis to remain in the United Kingdom, a fact of which she should have been aware, and the child also had no right to remain in the United Kingdom as neither of her parents had permission to be here. There was no reason why the family could not relocate as a unit either to Malaysia or Sri Lanka. Given Mr Srisatkunathas' immigration history, the immigration history of his wife and Mr Srisatkunathas' criminal conviction, any interference with his rights, or those of his wife and child, was proportionate to the need to maintain immigration control and the prevention of crime and disorder.

11. On appeal, it was argued on Mr Srisatkunathas' behalf that he would not be permitted to settle in Malaysia due to immigration controls, and as a result the child would be separated from one parent or the other.

12. At the appeal hearing, Mr Waheed sought an adjournment inter alia on the ground that the appeal ought not to be determined until his instructing solicitors had completed enquiries with both the Sri Lankan and Malaysian High Commission in

London to determine what requirements would need to be met before Mr Srisatkunathas and his wife could settle together in either country.

13. The Tribunal refused to adjourn the hearing. They noted that copies of the questions that had been put to the various High Commissions were before them, and there was no indication of when if at all there would be any reply forthcoming.

14. In his evidence, as recorded by the Tribunal, Mr Srisatkunathas said that he knew after April 2007 that he and his partner had no status to be here. He had made some enquiries about getting a visa, but had not contacted the embassy. He and his partner had discussed going to live in Malaysia, but he was not sure that he would be able to get a visa and even then he would have to hide away from his in-laws who had threatened him, although there was nothing in writing. He did not know why there was no mention of threats from the in-laws in his witness statement. He had not worked in the United Kingdom, except occasionally to assist with painting and cleaning, as he was in no position to work legally.

15. The appellant was called as a witness, and was asked whether, apart from a lack of formal permission, there was any reason why they could not go to Malaysia. She said it was a Muslim dominated country and she was a Hindu. She said they had not registered as husband and wife, by which she meant that they had no legal document to show that they were married. She had returned to the UK in 2006 to be with her now husband, and prior to that she had been studying at West End College in Whitechapel. She had not been able to finish the course as her parents did not approve of her marriage, and refused to support her any longer. As her parents did not approve of the marriage, they did not talk to him, they only talked to her.

16. In their subsequent decision, the Tribunal allowed the husband's appeal on asylum grounds. They considered there was a significant risk of Mr Srisatkunathas being detained and ill-treated on return on account of his membership of the LTTE. As they allowed the appeal on asylum grounds, they said it was unnecessary to consider whether removing him from the United Kingdom would be in breach of his rights under Article 8 ECHR.

17. Following his successful appeal, the appellant's husband was granted limited leave to remain as a refugee. On 22 August 2012 the appellants applied for leave to remain as the dependants of Mr Srisatkunathas. The application was refused with no right of appeal on 11 April 2013. The appellants applied for judicial review, and the judicial review proceedings were compromised by a consent order whereby the respondent agreed to reconsider the application and to set removal directions if the decision was to be maintained.

18. On 28 May 2014 the Secretary of State gave her reasons for maintaining the refusal decisions, and for setting removal directions. The appellant and her daughter and her partner could return to Malaysia as a family unit and continue to enjoy their family life together there. It was accepted that the partner/father of the family unit had been granted asylum, and that he was a Sri Lankan national. But there was

nothing to suggest he could not reside in Malaysia with his partner and child and adapt to life there. Whilst this might involve a degree of disruption to the appellants' private lives, this was considered to the proportionate to the legitimate aim of maintaining effective immigration control and was in accordance with the Secretary of State's Section 55 duties.

19. Consideration had been given to paragraph 353B. Regard had been had to the appellant's compliance. She was refused leave to enter on 28 August 2006 as a returning student, following a visit to Malaysia, and she absconded from reporting restrictions. Her personal history, character, conduct and employment record were not sufficiently compelling to justify allowing her to remain here. After she absconded from reporting restrictions, she did not lodge an application for leave to remain to regularise her stay until 22 August 2012.

The Hearing before, and the Decision of, the First-tier Tribunal

20. The appellants' appeals came before Judge Oakley sitting at Hatton Cross in the First-tier Tribunal on 15 January 2015. Both parties were legally represented. Miss Anzani of Counsel appeared on behalf of the appellants. The judge received oral evidence from the appellant and her husband, and he said in his subsequent decision that he had taken into account the documents in the respective bundles.

21. In his subsequent decision, he found that the appellant had remained illegally in the United Kingdom from October 2006 and had done nothing to regularise her position until making her application in 2012. Her husband had status to remain in the United Kingdom, and currently held a travel document permitting him to travel anywhere other than to Sri Lanka. Their child Thanuja was in year 1 at school. The appellant was currently pregnant, and according to her GP, the due date for the birth of the child was 20 August 2015. The appellant also had a second child who was not the subject of the application, and he had been born on 12 February 2014.

22. At paragraph [18] of his decision, the judge set out the evidence relied on by the appellant as establishing that there were insurmountable obstacles to her husband accompanying her and the children to Malaysia. The judge continued:

> "20. I have considered the relevant document submitted but I am not in agreement with that conclusion of the Appellants' Representative.
>
> 21. It is specifically stated that an entry permit (EP) is a permit issued to foreigners who are not citizens of Malaysia entering to reside in the country, those who have been issued with EP are exempted from applying from any type of pass either for employment or other purposes and there are certain conditions laid down which I have referred to above and which in the aggregate total three.
>
> 22. What is significant is that the paragraph in question states that they are only exempt if they have got an EP pass but clearly they could apply for another type of pass for employment or other purpose.
>
> 23. There has been no evidence whatsoever adduced from the Malaysian immigration authorities or from any lawyer dealing with Malaysian Immigration

practice to state that the First Appellant's husband would not be in a position to accompany the First Appellant and her children back to Malaysia.

24. I accept that this is not something that might happen easily and clearly there would be conditions attached but for example if the First Appellant's husband obtains an offer of employment in Malaysia I cannot see that there should be any reason why a permit would not then be granted by the Malaysian authorities and this would be the type of situation envisage in the website document that has been produced which refers to applying for 'any type of pass.'

25. I have considered the First Appellant's husband's status in the United Kingdom as an asylum seeker at present but that status will be capable of being converted subject to certain conditions being satisfied to British citizenship which would afford the First Appellant's husband even better status for the Malaysian authorities. It may well be that the First Appellant's husband will have to satisfy certain conditions before being successful in an application to accompany his wife to Malaysia but that situation would be no different to satisfying conditions if he was coming to the United Kingdom.

26. In short I conclude that whilst there may be difficulties in satisfying the Malaysian authorities but there are not 'insurmountable obstacles' as I believe potential immigration obstacles will be capable of being surmounted and the evidence adduced does not suggest that a person in the situation of the First Appellant, who is a Malaysian citizen, could not have her husband accompany her back to Malaysia.

27. I have then considered 276ADE(vi) and have concluded that again there would not be significant obstacles to the First Appellant relocating back to Malaysia. She has family still living there and on her own admission is in regular contact with her mother. I cannot also accept that she would still not have friends and acquaintances still remaining in Malaysia who would be of some help to her. I therefore have determined that the Appellants cannot satisfy 276ADE(vi).

28. I then need to consider the Appellants' rights under Article 8 and I have firstly considered their rights under the Immigration rules Article 8 but I have also taken into account initially the position concerning the First Appellant's eldest child under Section 55 of the Borders Citizen and Immigration Act. This was considered by the Respondent and clearly the best place for this child is to be with the family unit namely with the First Appellant and her other child and her father and in the event that her mother is removed then clearly the Second Appellant would be removed with her mother as part of the family unit.

29. The Second Appellant has only recently started primary school in Year 1 and there should be nothing to stop her from entering the Malaysian education system. She speaks both English and some Tamil and given the age that she is she should be able to integrate in to the Malaysian primary school system. I also am mindful of the fact that I need to find that there are good reasons to consider Article 8 directly and in that instance whether there are exceptional circumstances.

30. I am minded in the case of **MM Lebanon –v- the Secretary of State for the Home Department** the Court stated

> "Nagre does not add anything to the debate save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a

preliminary to consideration outside the Rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules.

I cannot see much utility in imposing this further intermediary test. If the applicant cannot satisfy the rule, then there is either or there is not a further Article claim. That will have to be determined by the relevant decision maker."

31. The circumstances relating to both Appellants' case have been considered under the Rules and it has been concluded that they do not satisfy the Rules. The family will be returned as a family unit and I conclude therefore that there is no reason for me to consider the Appellants' position outside that framework and consequently I do not do so."

The Error of Law Hearing

23. At the hearing before me, Miss Seehra developed the arguments raised in the application for permission to appeal. She relied on **R (On the Application of HRP and Others) v Secretary of State for the Home Department IJR [2015] UKUT 00351 (IAC)** and on **JO and Others (Section 55 Duty) Nigeria [2014] UKUT 00517 (IAC)** and on **Singh v Secretary of State for the Home Department [2015] EWCA Civ 74**. She submitted that the judge had erred in law in not following a two stage approach. Ground 1 was that the judge had erred in law in not finding that there was an insurmountable legal obstacle to the family relocating as a unit to Malaysia. But if she was wrong about that, the appeal ought to be allowed on ground 2, as the judge had taken no account of the likely separation of the second appellant from her father, which was plainly contrary to her best interests.

24. In reply, Mr Bramble submitted the judge had given adequate reasons for finding that there were not insurmountable obstacles to the family relocating as a unit. Having made this finding, on the particular facts it was not necessary for the judge to conduct a conventional proportionality assessment outside the Rules.

Discussion

25. Ground 1 is that the judge's finding on insurmountable obstacles is speculative, insufficiently reasoned and not borne out by the objective evidence. Having considered the skeleton argument before the First-tier Tribunal, the bundle of objective evidence that was relied on before the First-tier Tribunal, and the judge's reasons, I am not persuaded that this ground is made out.

26. The necessary starting point, which is not disputed by Miss Seehra, is that the burden of proof rested with the appellant to show that there were insurmountable obstacles to her husband settling in Malaysia with her and the children.

27. One of the strands of objective evidence relied on by Counsel below is that Malaysia is not party to the 1951 Refugee Convention and lacks a legislative and administrative framework to address refugee matters. But the husband would not be going to Malaysia to claim asylum, and so this evidence does not lead anywhere.

28. The evidence principally relied on is summarised in paragraph [18] of the decision. It is derived from the website of the Malaysian High Commission in Australia:

> **I am not a Malaysian citizen but married to a Malaysian. What type of visa do I need to apply to live in Malaysia?**
>
> Answer: you can apply for entry permit to reside in Malaysia. Entry permit (EP) is a permit issued to foreigners who are not citizens of Malaysia entering to reside in this country. Those who have been issued with EP are exempted from applying for any type of pass either for employment or other purpose.
>
> Conditions:
>
> 1. Wife of Malaysian citizen residing in this country on long stay social visit pass/temporary employment pass/employment pass on a year to year renewable basis continuously for five years or more ...
>
> 2. Children of Malaysian citizen below 6 years old. Application can be made using an IM.4 pin 1/93 form sponsored by father/mother/close relative of applicant who is Malaysian citizen) permanent resident of Malaysia.
>
> 3. Spouse and children of Malaysian citizen who possess expertise/skills and overseas working experience, planning to return and work in Malaysia (under the programme to encourage Malaysian citizens with expertise residing overseas to return to Malaysia).
>
> Approval of this application will be given within six months from the date [of] submission to the Immigration Department.

29. The argument for the appellant was that her husband plainly did not meet any of these three conditions.

30. Since the appellant had studied in the United Kingdom, it would not necessarily follow that she would not qualify for consideration under the programme to encourage Malaysian citizens with expertise residing overseas to return to Malaysia. No enquiry had been made of the Malaysian Embassy in London as to whether the appellant, and hence her husband and children, could bring themselves within condition 3. It was clearly open to Judge Oakley to make the finding which he did at paragraph [23] of his decision, which was that no evidence whatsoever had been adduced from the Malaysian immigration authorities or from any lawyer dealing with Malaysian immigration practise, to state that her husband would not be in a position to accompany her and her children back to Malaysia. On that ground alone, the judge has provided a sufficient reason for finding that the appellant has not discharged the burden of proof.

31. The judge also reasonably drew a distinction between an entry permit and another type of pass that might enable a foreigner to reside in Malaysia. As the judge found at paragraph [22], the message of the website was that an entry permit was not the only means by which a foreigner could reside in Malaysia as the spouse of a Malaysian citizen. The thrust of the information on the website was that if condition

3 was met, the foreign spouse would be exempted from applying for "any type of pass either for employment or other purpose." So if condition 3 was not met, it did not follow that the foreign spouse could not reside in Malaysia. All it meant was that the foreign spouse did not qualify for an entry permit, but would have to apply for another type of permit to enable him/her to reside in Malaysia.

32. At paragraph [24], the judge accepted that if the husband had to go down this route, it might not happen easily. But, since the burden rested with the appellant, it was open to the judge to reach the conclusion, which he does at paragraph [26], that the potential immigration obstacles which the husband would face were capable of being surmounted; and the appellant had not discharged the burden of proving that she could not have her husband accompany her back to Malaysia with the children.

33. There is no appeal against the judge's finding at paragraph [27] that the appellant could not bring herself within the scope of Rule 276ADE(vi). This is significant when considering ground 2. By the end of paragraph [27], the judge has addressed the two potential avenues by which the appellant could qualify for Article 8 relief under either Appendix FM or Rule 276ADE. At paragraphs [26] to [31], the judge is ostensibly giving extended reasons as to why the children do not qualify for Article 8 relief under the Rules, and as to why it is not necessary to go on to stage 2, and to conduct a conventional proportionality assessment outside the Rules. But in fact the judge has gone on to conduct a stage 2 assessment, as the topics discussed in paragraphs [28] and [29] do not arise under the Rules, but can only arise as part of a conventional proportionality assessment, where the best interests of children are a primary consideration. The discussion in paragraphs [28] and [29] cannot arise under the Rules, as none of the children are qualifying children: that is to say, none of them are British citizens and none of them has accrued seven years' residence in the UK.

34. The judge needed to consider the best interests of the children, and he has done so. So I find there is no material error in the judge having considered the best interests of the children on a freestanding basis under Section 55 of Borders, Citizenship and Immigration Act, rather than at stage 5 of the **Razgar** test.

35. The main thrust of ground 2 is a criticism of substance, rather than a criticism of form. The alleged error is the judge's failure to take into account the likelihood of the eldest child being separated from her father, and the detrimental impact that would have on her wellbeing and development. But it is made clear in the refusal decision that what is in contemplation is the family being removed together as a unit. This would involve the husband's cooperation, as he is not himself liable to removal. He would have to accompany his wife and children voluntarily, having obtained the necessary permit from the Malaysian Embassy in London. While this would not be straightforward, it does not present an insurmountable obstacle. In the light of the finding at paragraph [26], which the judge reiterated at paragraph [31], there is no risk of the eldest child being separated from her father (or indeed of any child being separated from either parent). So it is not a threat which the judge needed to take into account when assessing the children's best interests. Separating the family was not,

and is not, in the Secretary of State's contemplation. Thus ground 2 is also not made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. These appeals to the Upper Tribunal are dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson