



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07045/2014
OA/07050/2014
OA/07052/2014
OA/07053/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 28th January 2016

Decision & Reasons Promulgated
On 12th February 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

(1) MRS PONROSE ANTON GUNARATNAM
(2) RAJKUMAR ANTON GUNARATNAM
3) MARY SINTHUJA ANTON GUNARATNAM
(4) THARSIKA ANTON GUNARATNAM

Appellants

AND

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr Rai (Counsel)
For the Entry Clearance Officer: Miss Willocks-Briscoe (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellants' appeal against the decision of First-tier Tribunal Judge Malcolm dated the 23rd April 2015, following a hearing at Hatton Cross, London on the 25th March

2015 in which he dismissed the Appellants' appeal under the Immigration Rules and under Article 8.

Background

2. By means of an application dated the 13th March 2014, the First Appellant Mrs Ponrose Anton Gunaratnam applied for entry clearance as a partner under Appendix FM of the Immigration Rules, in order to join her husband Mr Pakkiyanathan Anton Gunaratnam. He had been in the UK since 2001 and had been granted indefinite leave to remain under the Legacy Scheme in January 2011. The Second, Third and Fourth Appellants are the children of Mrs Ponrose Anton Gunaratnam and her husband, Rajkumar having been born on the 28th March 1996, Mary having being born on the 19th March 1998 and Tharsika having been born on the 20th June 2000. They applied for entry clearance as children under Appendix FM of the Immigration Rules. All four of the Appellants' applications were refused on the 12th May 2014, and they sought to appeal that decision to the First-Tier Tribunal, which the appeal was heard by First-tier Tribunal Judge Malcolm on the 25th March 2015. He having dismissed the appeal under the Immigration Rules and on Human Rights grounds, they appealed that decision to the Upper Tribunal.

3. Within the original Grounds of Appeal, it was further argued that in relation to the evidential requirements of Appendix FM, the sponsor was only unable to satisfy the evidential criteria in respect of three salary payments, one payment of £1083.87, a further salary payment of £1080.87 and a salary payment of £743.74 totalling £2911.48, but that there has been sufficient evidence and documents to prove the remainder of his income and that the documentary evidence showed that he had an income over of £27,321.74, out of his total gross income of £30,233.22, which it was argued was in excess of the requisite £27,200 necessary under the Immigration Rules. It is further argued that First-tier Judge erred in requiring exceptional and/or compelling circumstances to be proved within the proportionality assessment. It is further argued that the First-Tier Tribunal Judge erred in failing to take account of the best interests of the Second, Third and

Fourth Appellants, given that three of the Appellants were under the age of 18 as at the date of the application.

4. Within the Grounds of Appeal it is argued that the First-Tier Tribunal Judge erred at paragraph 55 of the decision when he found that it was open to all four Appellants to simply reapply under Appendix FM producing the correct evidence under Appendix FMSE. However, it was argued that the Second Appellant, Rajkumar, had already turned 18 by the date of the hearing and was therefore ineligible to make a new application under Appendix FM as a dependent of the sponsor. It is argued that the dismissal of his appeal under Article 8 removed any prospect of the family being reunited in the United Kingdom, since the Second Appellant would not be able to accompany his mother and sisters to join the sponsor in the UK and that in circumstances where family life extant between all four Appellants and the sponsor, this was the factual nexus against which the severity and consequences or interference with family life should have been measured. It is further argued that the First-Tier Tribunal did not adequately explore or assess the nature and strengthen of the family bond, nor consider the genuineness of the sponsor's and Appellants' evidence in respect of their family life and the problems that the sponsor would have in returning to Sri Lanka and obtaining a job there and the depression and anxiety that the First Appellant suffered from.

5. Permission to appeal has been granted by Upper Tribunal Judge Kopiczek on the 14th September 2015, in which he extended time for making the application for permission to appeal to the date of receipt and went on to state that "whilst the First-tier Judge found that the Appellants are not able to meet the Immigration Rules in terms of specified evidence, I consider it arguable the Judge erred in law in the Article 8 assessment in taking into account that the Appellants would be able to make a fresh application for entry clearance, when the Second Appellant was already over the age of 18 when the appeal was heard by First-Tier Tribunal. I also consider that the First-tier Judge arguably erred in failing to have regard to the best interests of the minor Appellants. I do not rule out the other grounds".

6. In his oral submissions on behalf of the Appellants, Mr Rai relied upon the Skeleton argument. However he stated that he was only relying upon grounds B, C and D of the new grounds of appeal drafted by him on the 17th August 2015, and was therefore not relying upon the argument that the Appellants had produced sufficient evidential documentary proof to satisfy the evidential requirements of Appendix FM of the Immigration Rules in respect of the sponsor's income. He argued that the First-Tier Tribunal Judge had materially misdirected himself when looking at the case under Article 8 outside of the Immigration Rules at [54] and [55] of the determination and had failed to consider the fact that the Second Appellant was over the age of 18 as at the date of the decision before the First-Tier Tribunal Judge and had failed to take into account the best interests of the minor children. He asked me to find that there was a material error of law in this regard and to remit the case back to the First-Tier Tribunal for remaking.

7. Miss Willocks-Briscoe, on behalf of the Respondent, argued that the Judge had properly considered the case outside of the Immigration Rules. She argued that the Second Appellant may not be able to apply as a child, but could have applied under the Rules as an adult dependent relative under Appendix FM and that the Judge properly stated that the decision was not disproportionate as the status was simply being maintained. She argued that there was no material error of law, but that if despite her submissions a material error was found, that she agreed that the case should be remitted back to the First-Tier Tribunal for remaking.

My Findings on Error of Law and Materiality

8. First-Tier Tribunal Judge Malcolm, when considering the case originally under the Immigration Rules, properly found that the requirements of the Immigration Rules were not met, given that the specified evidence in respect of the sponsor's employment in respect of both of his employments had not been submitted and that there had been a failure to meet the evidential requirements of Appendix FMSE, as the Appellants had failed to provide bank statements in respect of the sponsor's bank account showing all

salary payments for the required period of 6 months prior to the date of the application.

9. However, on this footing, the First-Tier Tribunal Judge at [55], in considering whether or not the decisions taken was proportionate for the purpose of Article 8 outside of the Immigration Rules, appears to have considered it to be a relevant factor that "in this case it is open for the Appellants to apply for entry clearance under Appendix FM and produce the required evidence". However, in this regard, it appears that the Judge has failed to take into account a relevant consideration in that Rajkumar, who was born on the 28th March 1996, was over the age of 18 as at the date of First-tier Tribunal Judge Malcolm's decision. Rajkumar would therefore have to apply as an adult dependent relative, rather than as a child, and yet there was no consideration of this given by First-Tier Tribunal Judge Malcolm at [55] of his decision. Clearly, different criteria apply for entry clearance as children and as adult dependent relatives and it would not therefore be simply a case of the Appellants' reapplying on exactly the same basis as they had previously applied, together with the requisite evidence. There is no consideration given by First-Tier Tribunal Judge Malcolm of the fact that the application by Rajkumar would have to be on a different basis, with different criteria applying as to whether or not this had any effect on the question as to whether or not the decision taken, in circumstances when he had originally applied as a child, but was then an adult as at the date of the decision before the First-Tier Tribunal Judge, was proportionate or not. The Judge's reasoning in this regard is inadequate, and clearly appears to have failed to take account of a relevant consideration in this regard. There is therefore a material error of law in this regard.

10. Further, the First-Tier Tribunal Judge has erred in not considering, as he is required to do, the best interests of the minor children Tharsika and Mary, in his consideration of proportionality under Article 8 outside of the Immigration Rules. The Court of Appeal case of the Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387, made it clear that Article 8 had to be interpreted and applied in light of the UN Convention on the Rights of the Child and although the best interests of the children do not provide a trump card, they are nevertheless a primary consideration, in

terms of being an important matter, even though not the "primary consideration" and that the rights of the children were a relevant factor to the fair balance between the individual and the general community, which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. It was stated in that case that the age of the child, the closeness of their relationship with other members of the family in the United Kingdom and whether the family could live together elsewhere would likely to be important factors which should be borne in mind. However, the First-Tier Tribunal Judge Malcolm has not turned his mind to the best interests of the children in considering the case outside of the Immigration Rules, and clearly there is also a material error of law in this regard.

11. I therefore set aside the decision of First-Tier Tribunal Judge Malcolm in respect of his consideration of the appeal outside of the Immigration Rules, and remit the case back to the First-Tier Tribunal from rehearing on this issue.

Notice of Decision

The decision of First-Tier Tribunal Judge Malcolm containing a material error of law in respect of his assessment of Article 8 outside of the Immigration Rules, I set aside his decision in respect of his consideration of Article 8 outside of the Immigration Rules;

I remit the case back to the First-tier Tribunal for reconsideration of the appeal on this point, to be heard before any First-Tier Tribunal Judge, except First-Tier Tribunal judge Malcolm;

No application was made before the First-tier Tribunal for any anonymity order and no such application was made before me. I therefore do not make an anonymity order.

Signed

Dated 30th January 2016

Rob McGinty

Deputy Judge of the Upper Tribunal McGinty