



IAC-TH-WYL-V1

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

Appeal Number: VA/02868/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 21<sup>st</sup> December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**MISS NIROMI PERPETUA FERDINANDO  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs Shiranthie De Silva (Sponsor)

For the Respondent: Mr S Kotas (Home Office Presenting Officer)

**DECISION AND REASONS**

1. The appellant's appeal against a decision to refuse her entry clearance as a visitor was dismissed by First-tier Tribunal Judge Gillespie ("the judge") in a decision promulgated on 14<sup>th</sup> May 2015. The judge found that the requirements of the Immigration Rules ("the rules") were met but, in the light of the limited grounds of appeal available, went on to dismiss the appeal. Permission to appeal was sought by the appellant, through her sister and sponsor, Mrs Shiranthie De Silva ("Mrs De Silva") and permission was granted by a First-tier Tribunal Judge on 10<sup>th</sup> August 2015.

2. Mr Kotas, on behalf of the Secretary of State, accepted that the decision contained an error of law. In the light of recent authority, the judge was obliged to determine the Article 8 case raised in the grounds of appeal, that assessment being separate from any rules assessment.
3. The decision is concise and has been prepared by a very experienced judge. He recorded the evidence given by Mrs De Silva and concluded that the requirements of the rules contained in paragraph 41, and particularly those put directly in issue (contained in sub-paragraphs (i) and (ii)) were all met. At paragraphs 6 to 9 the judge went on to consider whether Article 8 of the Human Rights Convention was engaged, setting out matters of relevant principle. Paragraphs 6 and 7 summarised the 'Razgar questions' and touched on public interest considerations stipulated in statute. It is clear that the judge here had in mind section 117A to D of the 2002 Act. The judge identifies a substantial public interest in upholding the effectiveness of immigration control at paragraph 8 and then returns, in paragraph 9, to consider whether factual error on the part of the overseas post, no doubt meaning here error in relation to the assessment of the genuineness of the visit and the likelihood that the appellant would return, reveals or amounts to an unlawful interference with human rights. He observes that an appropriate remedy might be a fresh application for entry clearance, likely to be quicker than waiting for an appeal on human rights grounds to run its course. The judge concludes, at paragraph 10, that the appeal must be dismissed but makes a clear finding that the application for entry clearance had all the hallmarks of genuineness. With very great respect to the judge, I find that Mr Kotas is right to submit that the decision does not contain an engagement with the human rights case advanced by the appellant, in the light of recent authority which includes Adjei [2015] UKUT 261 (IAC). The findings recorded at paragraphs 4 and 5 appear not to have been taken into account in an express weighing of the competing interests. There are very few findings regarding the relationship between the appellant and her sponsor and it is not clear whether the judge found that family life exists between them or, rather, that their relationship constitutes an important private life element for each of them, Article 8 not being engaged (in the light of Mostafa [2015] UKUT 112 (IAC)).
4. In these circumstances, the decision of the First-tier Tribunal is set aside. Both parties were anxious to proceed with remaking the decision.

### **Remaking the Decision**

5. I explained the procedure to be followed to Mrs De Silva. Mr Kotas suggested, helpfully and sensibly, that the judge's finding that all the requirements of paragraph 41 of the rules were met should be preserved. The scope of the remaking of the decision would be confined to the human rights ground of appeal.
6. Mrs De Silva then gave evidence. She said that the appellant, her sister, wished to visit for four weeks to celebrate Mrs De Silva's 50<sup>th</sup> birthday, her

son's 18<sup>th</sup> birthday and a significant wedding anniversary. The appellant has a learning disability. Sadly, she believes at present that she cannot come to the United Kingdom for this reason. She was looking forward to the visit and would only travel in the spring and summer because the weather in the United Kingdom is otherwise too cold. The appellant has not visited the United Kingdom before.

7. The appellant lives with an older relative and Mrs De Silva's cousin also provides support, such as filling out forms for her. Mrs De Silva said that her sister is unable to read or write. Mrs De Silva visited Sri Lanka for her sister's 50<sup>th</sup> birthday recently, travelling there on 2<sup>nd</sup> November 2015. The birthday was on 4<sup>th</sup> November and Mrs De Silva then returned to the United Kingdom on 18<sup>th</sup> November.
8. In cross-examination, Mrs De Silva said that her sister receives a pension which is sufficient to meet all her financial needs. Mrs De Silva sends gifts from time to time but her sister does not require other financial support. She has made visits to see the appellant almost every other year. However, Mrs De Silva has her own family, consisting of her husband and two boys and she works full-time, as was the case when entry clearance was refused in May 2014. She would telephone her sister about once a week.
9. Mr Kotas asked whether the appellant considered making a fresh application for entry clearance. Mrs De Silva said that the cousin would help but there was a cost to bear in mind, which would have to be met from her sister's pension. If that were the only option, the appellant would make a fresh application.
10. In submissions, Mr Kotas said that the Tribunal should accept Mrs De Silva as an entirely credible witness. The issue was whether Article 8 of the Human Rights Convention was engaged by refusal of entry clearance in May 2014. As was clear from Adjei, the first question was whether human rights were engaged. The evidence showed that there was no dependency between the appellant and her sponsor sufficient to show family between adult siblings. There was no reason to doubt the closeness of the relationship, however. An appropriate way forward would be a fresh application for entry clearance, with the decision of the First-tier Tribunal Judge and in due course the decision of the Upper Tribunal being available to be placed before the Entry Clearance Officer.
11. Mrs De Silva made a brief response in which she indicated that the appellant would take the best course and would still like to visit the United Kingdom.

### **Findings and Conclusions**

12. In this appeal, the burden of proof lies with the appellant to prove the facts and matters she relies upon and the standard of proof is that of a balance

of probabilities. As this is an entry clearance appeal, the date of assessment is the date of the adverse decision, in May 2014.

13. I am grateful to Mr Kotas for the careful way in which he put the Secretary of State's case. The findings of fact made by the judge were not subject to any challenge. In remaking the decision, the evidence which emerged showed that those findings were clearly justified. In particular, the concerns raised by the overseas post regarding paragraph 41(i) and (ii) of the rules were fully met. In other words, no doubt remains regarding the genuineness of the proposed visit or the intention of the appellant to return to Sri Lanka at the end of it.
14. Those are not, of course, the critical questions in this appeal. As is clear from Mostafa and Adjei, the first question is whether Article 8 is engaged at all. In the latter decision, the Upper Tribunal drew attention to part of the former, indicating that in practical terms, the category of relationships in which refusal of entry clearance is likely to show engagement is narrow. Examples were given of husband and wife or other close life partners or parent and minor child.
15. There is no reason to doubt the closeness of the appellant and her sponsor but the evidence shows that each of them has established a successful, independent and separate family life, the appellant in Sri Lanka and Mrs De Silva in the United Kingdom. They maintain contact with each other, as one would expect between sisters. However, Mr Kotas was correct in his submission that there is an absence of financial or other dependency showing family life for Article 8 purposes. The appellant and Mrs De Silva are close adult siblings and the relationship between them is, I have no doubt, an extremely important component in their private lives. Contact is successfully maintained by means of weekly telephone calls and the regular visits to Sri Lanka undertaken by Mrs De Silva. The extent of contact tends to show that the interference resulting from refusal of entry clearance is rather modest. Overall, I conclude that Article 8 is not engaged and so the human rights ground of appeal is not made out. Even if wrong on that, and if an assessment were required on the basis that Article 8 is engaged, I would conclude that refusal of entry clearance was a proportionate response.
16. Finally, it is appropriate to observe that both the First-tier Tribunal and the Upper Tribunal have found that all the requirements of paragraph 41 of the rules were met. Mrs De Silva gave clear evidence that the appellant still wishes to visit the United Kingdom. This decision, and the earlier decision of the judge, will be available to be placed before the overseas post and the Entry Clearance Officer, in support of any further application for entry clearance that may be made.

### **Notice of Decision**

The appeal is dismissed.

**Anonymity**

There has been no application for anonymity and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

**TO THE RESPONDENT  
FEE AWARD**

As the appeal has been dismissed, no fee award may be made.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell