Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/08269/2015**

IA/08279/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2016	**On 22 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DHARMATHILAKA NAYANANDA SIRESENA
VISHVAMITTHA MUTHUKUMARANA
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondents: Mr R Soloman, Counsel instructed by Shanthi & Co Solicitors

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State and the Respondents were the Appellants before the First-tier Tribunal. In this decision I shall be referring to the Appellant in this appeal as the Secretary of State and to the Respondents as the Claimants.

2. The Claimants applied for indefinite leave to remain as they wished to live with their daughter so that she could look after them due to their ill-health. They arrived in the United Kingdom as visitors on 2 May 2014 with entry

clearance valid until 2 November 2014. An application for further leave to remain was made on 13 October 2014 on compassionate grounds due to ill-health. The application was refused by the Secretary of State in a decision dated 12 February 2015 on the basis they did not meet the requirements of the Immigration Rules for family life under Appendix FM and that there were no exceptional circumstances requiring consideration of their case under Article 8 of the European Court of Human Rights outside the Rules (ECHR). The Claimants appealed against that decision and their appeal was allowed by First-tier Tribunal Judge Heatherington in a decision promulgated on 20 July 2015. He allowed their appeal outside the Immigration Rules under Article 8 ECHR.

3. The Secretary of State sought permission to appeal that decision and permission was granted by First-tier Tribunal Judge Holmes on 2 November 2015 on the basis that the Judge's whole approach to Article 8 was arguably flawed. He arguably failed to take as a starting point that the Claimants did not meet the requirements of the Immigration Rules for a variation of their leave and there was a serious evidential issue over whether they would meet the requirements of the Immigration Rules for a grant of entry clearance as adult dependent relatives since their case before him would appear to conflict with the evidence relied on in their applications as visitors. Further, the family life relied upon could only have been of short duration since in its current form it could only have been created since the arrival of the Claimants as short-term visitors and arguably that this had been overlooked. Moreover the ability of the extended family to care for the first Claimant in Sri Lanka was arguably flawed as was the approach to the availability of medical care in Sri Lanka. Moreover paragraph 42 of the First-tier Tribunal's decision demonstrated a failure to adequately engage with Section 117A-D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and the guidance to be found in **AM (Malawi) v SSHD** [2015] UKUT 0260 (IAC). Overall he concluded it was arguable that the decision displayed a freewheeling approach to Article 8 and a failure to adequately apply existing jurisprudence. He concluded that all grounds could be argued.

4. The Secretary of State drafted grounds as follows. The first ground is that the First-tier Tribunal failed to give any consideration to the public interest.

5. The second ground was that his consideration of Section 117 was incomplete and inadequate.

6. The third ground was a finding that there was a protected family life between the Claimants and sponsor prior to the entry of the Claimants as visitors in 2014 was unreasoned and unsustainable given that any protected family life was voluntarily surrendered when the sponsor relocated to the United Kingdom.

7. Ground 4 asserts that his finding that the difference in medical treatment between the United Kingdom and Sri Lanka engaged Article 8 was legally

unsound. Inadequacy of medical treatment was incapable of engaging Article 8 and the case of **GS (India) & Others v Secretary of State for the Home Department** [2015] EWCA Civ 40 is relied on.

8. Ground 5 is that the finding that the Claimants met the requirements of the Rules for an out-of-country application was inadequately reasoned. The First-tier Tribunal would have had to have been satisfied that there was no access to the required care in the country of origin even with the practical and financial help of the sponsor in the United Kingdom and he had not properly reasoned or applied his mind in relation to this. Likewise his findings that there were unacceptable risks in returning to Sri Lanka to make an application had failed to take into account any assistance, practical or financial from the sponsor.

9. The Claimants filed a Rule 24 response in which it is asserted that the First-tier Tribunal did not err in the decision, considered adequately the public interest in the Article 8 assessment and directed itself properly in law. It is also submitted that the First-tier Tribunal considered and directed itself in relation to Section 117 appropriately at paragraph 42 of the decision and found on the evidence that the family life between the Claimants and sponsor pre-existed the Claimants' arrival in the UK. Further, the finding that the support and treatment was available to the Claimants in the United Kingdom compared to what was available in Sri Lanka was serious enough to engage Article 8 was made after consideration of evidence relating to support and assistance from the sponsor in the United Kingdom and was not limited to an assessment of the medical care in Sri Lanka and the United Kingdom. It is submitted that evidence had been submitted in relation to the Claimants' ability to satisfy the requirements in relation to adult dependent relatives and none of this was challenged by the Secretary of State and the First-tier Tribunal made positive credibility findings on all of the written and oral evidence. It was implicit that all of the requirements of E-ECDR save for the out-of-country requirement were met. In summary it submitted that the First-tier Tribunal conducted a thorough and reasoned assessment of the appeal, considered the challenges of the Secretary of State who was not represented at the hearing, and also directed itself properly.

The Hearing

10. At the hearing before the Upper Tribunal I heard representations from Mr Kotas in the following terms. He submitted on behalf of the Secretary of State that he challenged the Judge's finding that the application would succeed under the Rules. In his approach to family life and in finding that there were more than normal emotional ties there had been a conflation of two tests. He had not made a finding in relation to the adult dependent relative Rules that there was no person who could have provided care. There was a list of family members in the United Kingdom and there had been no consideration as to whether there would be private support available to the Claimants in Sri Lanka. Whilst there had been no recourse

to public funds that had to be fed into the question of whether private support was available in Sri Lanka.

11. The first point in his consideration of Article 8 was that there was no express consideration of the public interest in immigration control and he had not grappled with the fact that they arrived on visit visas in relation to Section 117 of the 2002 Act. There were no minor children in this case and family life here was established whilst their stay was precarious. There was no "**Nagre"** exceptionality identified. The First-tier Tribunal also made a comparison with regard to the disparity in medical treatment between the United Kingdom and Sri Lanka and Mr Kotas referred me to the case of **Akhalu v SSHD (health claim: ECHR Article 8**) [2013] UKUT 400 (IAC**)**, paragraph 40 which was endorsed in the case of **GS** where it was said that where an Article 8 health case may succeed it was only in cases where there was another relevant factor, for example firm family ties where there was dependence on family life coupled with medical evidence. The family arrived on a visit visa and family life was in fact established in the UK rather than prior to their arrival.

12. Mr Solomon relied on the Rule 24 response. The First-tier Tribunal had given full consideration to the public interest. In paragraph 34 he referred to Section 117 and he set out in an annex to the decision the relevant requirements of that Section. In paragraph 38 of the decision again he addressed the public interest and adequately addressed at paragraph 42 and at page 7 the financial requirements. Whilst there was no reference to English language it was not material as it did not apply to those over 65. The Claimants were not here unlawfully and the lack of reference was not material because Section 117B(4) applied to private rather than family life and the appeal was allowed on the basis of family life. The considerations in relation to precariousness applied only to private life and therefore the absence of findings was not material.

13. With regard to the Secretary of State's ground 3 the finding on family life was well-reasoned and sustainable and the judge correctly directed himself on the law and continued into paragraph 41 and on page 7 of the decision to conclude that it was a close-knit family and that the Claimants depended upon the UK sponsors. The Claimants' daughter was their main carer and the First-tier Tribunal had found that she had made a contribution to their improvement in terms of health. The First-tier Tribunal concluded that the relationship between the Claimants and their daughter was more akin to that of child and parent and those findings were sustainable as well as the findings in relation to the disease and the physical and emotional care that was provided. He had made findings in relation to pre-existing family life and that financial support was provided since arrival to the United Kingdom and there was regular Skype contact whilst the Claimants were in Sri Lanka and therefore a pre-existing family life. What was important to note was the decline in the medical condition of the first Claimant. Mr Solomon invited me to agree that there was no error with regard to the finding in terms of the pre-existence of family life.

14. In relation to **GS (India)** it was wrong to say that that case decided that inadequacy of medical treatment could never engage Article 8. I was referred to paragraphs 86 and 87 of that decision and Mr Solomon submitted what we had not had in the instant case were clear findings in terms of family life. The Judge was not wrong to take account of that and he did so holistically. The Judge clearly had very much in mind the adult dependent relative provisions of the Rules and there were two limbs in those provisions namely the requirement of long-term personal care and the requirement that care was not affordable but that was a matter that could be put aside. The First-tier Tribunal gave adequate reasons as to why care was not available at paragraph 42 of the decision and as to the fact the first Claimant rebelled against medical care and could only be managed by his daughter and would not engage with strangers. That adequately dealt with the potential of domestic workers being available for support.

15. He also dealt with the availability of care in Colombo and the fact that there were no other family members available to look after the Claimants and therefore adequately reasoned why he concluded apart from the requirements of entry clearance that the adult dependent relative provisions could be met. He had **Chikwamba v SSHD [2008] UKHL 40** in mind and applied the proposition correctly. There was no material error of law.

16. In reply Mr Kotas said that at paragraph 43 of the decision the findings may have been predominantly in relation to family life but there was also private life and therefore those sections of Section 117 were engaged.

17. I raised the issue of the Judge's failure to engage with the provisions of Appendix FM-SE. Mr Solomon submitted that the situation was different with regard to partners where explicit evidence was required under that Appendix. With regard to adult dependent relatives there was no challenge in the grounds in relation to that Appendix and clear findings were made by the judge. This part of the Rules was met.

18. With regard to the "through the lens argument" the Judge took account of why the claim did not succeed under the Rules and earlier on in his determination set out the reasons for the decision. He honed in on paragraph 23 and reached his findings in the context of the Rules. The assessment through the lens of the Rules was more appropriate in relation to cases where the Rules were a complete code. He submitted that even if there was an error in terms of private life there were clear findings regarding family life and this was a family life case. Both representatives agreed that if I were to find an error of law depending on whether there were findings preserved, the matter should be remitted to the First-tier Tribunal if the hearing were to be de novo. If there were limited findings of fact required the hearing should be in the Upper Tribunal.

Discussion and Findings

19. I consider that the Respondent's first ground, namely that the First-tier Tribunal failed to give any consideration to the public interest, is not made out. The First-tier Tribunal Judge directed himself at paragraph 37 that he was required to have regard to the requirements of section 117 of the Immigration and Asylum Act 2002. He also stated at in the same paragraph:

> If applicants do not qualify under the Rules or outside the Rules on a genuinely exceptional basis they will not receive any form of leave and be expected to leave the UK.

20. He directed himself at paragraph 38 that:

> The failure to qualify for leave to remain under the Immigration Rules tends to suggest that the public interest requires refusal of leave to vary, unless some counterveiling factors are present which are not already taken into account under the Rules.

21. That statement of the public interest was taken directly from the case of **Sunasse, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor, [2015] EWHC 1604.** It is clear that the First-tier Tribunal appreciated that the public interest was expressed in the Immigration Rules as he quotes the relevant passage from the above Judgment at paragraph 38 of the decision.

22. However, although appreciating the weight to be given to the Immigration Rules as an expression of the public interest, he failed to adequately reason his finding that the Claimants met all of the requirements for an out of country application as adult dependant relatives at paragraph 42 (vii) of the decision. He finds at paragraph 42 (vii) that the second Claimant would be unable to cope with the first Claimant on the flights and generally with his care; that the first Claimant had rebelled against seeking medical help in Sri Lanka, that the only available support in Sri Lanka for Alzheimer's is in Colombo which is a round trip of 190 miles and that in Sri Lanka the Claimants have no family member able to assist them. Although he has made factual findings he failed to address or give reasons why these factual findings lead to a conclusion that the Claimants are unable, even with the practical and financial help of the sponsor, to obtain the required level of care in Sri Lanka because it is either not available and there is no person who can reasonably provide it or it is not affordable (E-ECDR.2.5).

23. The First-tier Tribunal made no findings on the whether the required level of care could, with the financial assistance of the sponsor be obtained or as to its affordability or availability. Although support for Alzheimer's sufferers may have only been available in Colombo the first Claimant was living at home and the First-tier Tribunal did not consider the availability of paid domestic assistance. I do not accept Mr Solomon's submission that it follows from the First-tier Tribunal's findings that the first Claimant had

rebelled against medical help in Sri Lanka that it could be characterised as unavailable.

24. As the First-tier Tribunal's finding that the Claimants met the requirements of the Rules (save for the entry clearance requirement) was inadequately reasoned it follows his conclusion as to the weight to be attached, or not attached, to the public interest in removing the Claimants which led from this finding must be flawed.

25. The grounds also argue that the First-tier Tribunal's finding that there was a protected family between the Claimants and sponsor predating the entry of the Claimants as visitors in 2014 was unreasoned and unsustainable given that any protected family life was surrendered when the sponsor re-located to the UK. The First-tier Tribunal found, at paragraph 42 (viii) (b) in his consideration of the requirements of section 117B of the 2002 Act that family life between the Claimants and the sponsors was not established in the UK. He repeated that finding at paragraph 43. He gave no reasons for that finding. According to the Claimants' daughter's statement she came to the UK in 2006 as an adult. The First-tier Tribunal does not set out what evidence was relied on to conclude that more than the normal emotional ties existed between the adult sponsor and her adult parents between her departure in 2006 and their arrival in 2014. In the absence of evidence and reasoning the finding is not sustainable. It is clear that this finding was material as it affected the weight which he gave to the strength of family life ties in assessing the proportionality of the Respondent's decision.

26. The First-tier Tribunal made the following finding at paragraph 43 of the decision:

> I find that the support and also the treatment available to the appellants in the United Kingdom, compared to what is available in Sri Lanka, is sufficiently serious to engage Article 8.

27. The Respondent argues that that finding is unsound because the difference in medical treatment between the United Kingdom and the United Kingdom is incapable of engaging Article 8. The Respondent relies on paragraph 111 of **GS (India) v SSHD** [2015] EWCA Civ 40**.** Mr Solomon argued that it was wrong to say that that case decided that inadequacy of medical treatment could never engage Article 8 and relied on paragraphs 86 and 87 of the same judgment.

28. Mr Solomon is right to say that the Court of Appeal concluded in **GS,** having discussed previous jurisprudence on the point, that it is not the case that Article 8 can never be engaged by the health consequences of removal from the UK. However, the Court concluded that the absence or inadequacy of medical treatment in the country of return cannot be relied on to engage Article 8. However, where Article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a

factor in the proportionality exercise; but that factor cannot be treated by itself giving rise to a breach since that would contravene the "no obligation to treat" principle (paragraph 111).

29. It is clear from the finding of the First-tier Tribunal set out above that he found that it was the absence of treatment in Sri Lanka which *engaged* Article 8. He says so in terms. That was therefore clearly a misdirection. Although Mr Solomon argues that it was a factor that he took account of in the proportionality exercise that is not the manner in which he directed himself.

30. In any event, it is also clear, that having found that the Claimants' removal would interfere with their family *and private life* (paragraph 43), he was obliged to have regard to section 117 B because their private life was established here whilst their status was precarious (**AM (S 117B) Malawi v SSHD** [2015] UKUT 0260 (IAC)). He did not have regard to this factor and this was a material error of law.

31. In the circumstances therefore I find that there are material errors of law in the decision of the First-tier Tribunal. Having regard to Part 7.2 (a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper-Tier Tribunal, the extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for rehearing.

Conclusions:
The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set the decision aside.

I remit the matter to the First-tier Tribunal for rehearing.

Anonymity
The First-tier Tribunal did not make an order for anonymity and no application has been made for such an order.

Signed Date

Deputy Upper Tribunal Judge L J Murray