Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02700/2011

THE IMMIGRATION ACTS

Heard at Glasgow
on 17th September 2013

Determination Sent
On 23rd September 2013

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANIKSTALA ROBERT

Appellant

and

ENTRY CLEARANCE OFFICER, COLOMBO

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Quinn, Martin & Langan, Solicitors
For the Respondent: Mrs M O'Brien, Senior Presenting Officer

DETERMINATION AND REASONS

Case history.

1. The Appellant is a citizen of Sri Lanka, born on 20th September 1992. Under cover of a letter from her solicitors dated 30th August 2010 she submitted an application to enter the UK on the basis of family reunion outwith the requirements of the Immigration Rules, based on compelling and compassionate circumstances.

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2. The Respondent refused the Appellant's application by notice dated 14th December 2010. First-tier Tribunal Judge Mozolowski dismissed her appeal by determination promulgated on 13th December 2011, and Upper Tribunal Judge Deans dismissed her further appeal by determination promulgated on 23rd October 2012.

3. The Court of Session remitted the appeal to the Upper Tribunal by interlocutor dated 28th June 2013, pursuant to a joint minute. The material part of the minute is as follows:

> The Respondent accepts that the First-tier Tribunal Judge did not … state whether she considered it … in the best interests of the applicant's brothers, who reside in the UK, for the applicant to be admitted to the UK or not. The applicant's brothers are both children. Their best interests are accordingly a 'primary consideration'. The [First-tier Tribunal] Judge has failed to consider [a] whether it is in the 'best interests' of these children to live with the consequences of the exclusion of the applicant. [b] If the [First-tier Tribunal] Judge considered it was not in the children's 'best interests' for the applicant to be allowed to reside in the UK, she has failed to state why this is the case. [c] If she considered that it was in the children's 'best interests' for the applicant to reside in the UK, but that there were countervailing considerations that outweighed the 'best interests' of the children, she has failed to state what matters outweighed the best interests of the children.

4. I have added the identifiers [a], [b] and [c] to show the three questions which parties agreed to be points for further decision. (The application for permission to appeal to the Court acknowledged that these were not issues previously raised in the Upper Tribunal; and they appear to have been raised only faintly in the First-tier Tribunal.)

<u>Background history</u>.

5. The Appellant's mother (referred to at some stages of these proceedings as "the Sponsor") is Mary Helen Yanci Rani Robert, a citizen of Sri Lanka, born on 18th December 1971. Her husband died in Sri Lanka on 10th April 2001. They had three children – the Appellant; Robinraj Robert, born on 6th November 1994; and Velindraj Robert, born on 15th July 1997.

6. The immigration history of the Appellant's mother has not been presented in detail but does not appear to be in significant dispute. She came to the UK with her brother in August 2001, leaving the three children with her sister in Sri Lanka. She sought asylum unsuccessfully, but did not leave the UK. She lived with, or was supported by, a brother in London who did obtain asylum.

7. The Appellant's brothers travelled from Sri Lanka to the UK via Malaysia in 2008. They were treated as unaccompanied asylum seeking minors and accommodated in Glasgow. According to a letter dated 30th August 2010 from Social Work Services in Glasgow, the boys had believed that their mother was missing and that their sister was travelling on another flight to the UK. They were reunited with their mother on 9th September 2009 in Glasgow. They were granted discretionary leave to remain until 11th April 2011, apparently being treated as unaccompanied asylum seeking minors – notwithstanding which, the Sponsor was granted discretionary leave to remain as their carer until the same date. (The grants seem to have been on the basis of three years from the children's arrival, which would thus have been in April 2008.)

All three applied, in time, for an extension of their leave. Those applications have been outstanding before the Respondent for two and a half years. Their leave continues in the meantime.

8. The ECO's reasons for refusing the Appellant's application included the following. On 11th April 2008 she submitted an application in another identity, based on a forged marriage certificate, to join a spouse in the UK. That would lead to mandatory refusal of any application under the Rules. She did not mention that earlier application when making her present application.

Further evidence put before the Upper Tribunal on 17th September 2013.

9. The Respondent had no objection to admission of the further evidence.

10. An affidavit by a translator clears up discrepancies arising from earlier mistranslations of certain documents from Sri Lanka provided on the Appellant's behalf. There was no further reference to this matter, and nothing contentious arises from the corrections.

11. The Appellant's mother provides a further statement dated 5th September 2013. She speaks further to how much she and her sons miss the presence of the Appellant. She dismisses the option of the family's return to Sri Lanka, because her sons can barely read or write in Tamil, cannot understand Singhalese, would lose the opportunities they have here, would find it difficult to readjust, and there is a lack of safety and a risk of kidnapping.

12. In a statement dated 5th September 2013, Robinraj Robert speaks to similar matters and to the upsetting effects of the separation on all the family members. A statement from Velindraj Robert dated 4th September 2013 is along the same lines.

13. Mr Caskie indicated he had no further examination-in-chief of the witnesses, and their statements were all deemed to be adopted into evidence.

14. Cross-examined for the Respondent, the Appellant's mother said that she left Sri Lanka in 2001 and was not in contact with her children again until 2009, when they were reunited in Glasgow through the assistance of Social Services. After that reunion, she also re-established contact with her daughter. When she left Sri Lanka the children were in the care of her sister and her mother. She speaks to the Appellant by telephone daily, and so do her sons. Their telephone calls are emotional, with all the family members crying. She came to the UK in 2001 leaving her children because her life was in danger and so there is no chance for her to go back. She and her boys speak Tamil at home.

15. Re-examined by Mr Caskie, the witness said that her mother has died and the Appellant is still living with her (the Appellant's) aunt. In February this year she asked their lawyer to chase with the Home Office the applications for extension of the three years' discretionary leave granted in 2008. There has been no reply.

16. Cross-examined by the Presenting Officer, Robinraj Robert said that in Sri Lanka, after his mother left, he lived with his brother, sister and his aunt and not with any other relative. (In answer to my question, he said that his grandmother lived in a house about one minute's walk away.) Although their aunt was their main carer, his younger brother was particularly close to their sister. He speaks and understands but does not write Tamil. He is presently attending a one year college course in sport and fitness. He speaks to his sister almost daily by telephone and Skype.

17. Re-examined by Mr Caskie, the witness said that he had no knowledge of an aunt of his mother (his great-aunt). When he finishes his education he would like to become a police officer. He chose a sport and fitness course as useful preparation. He speaks no Singhalese.

18. No questions further to his statement were put to Velindraj Robert.

Submissions.

19. The Presenting Officer said that the findings reached previously in the First-tier Tribunal, as upheld in the Upper Tribunal, stand for present purposes, and these included findings of the use of deception in previous applications. That was to be given some adverse weight. While the family might see the ideal situation as having all members living together, the fact was that they have not all lived together for a long time. The history of deception, the fact that they had not lived as a family unit, and the extended past separation from their mother was significant. Their mother failed to gain refugee recognition, and then remained without any status. While it appeared anomalous that she was granted leave in line with the two children as unaccompanied asylum seeking children, after it turned out that they had a parent in the UK, matters had to be dealt with as they now stood. The further leave sought was also on a discretionary basis. No reason could be offered for the applications not yet being dealt with. It was accepted that the delay might tend in favour of the Appellant. Nevertheless, the Appellant could not meet the Immigration Rules in respect of Article 8, and outside the Rules it was not disproportionate to refuse her application. The Appellant could not be seen as a *de facto* parent to her two brothers, because they had all been in care of other relatives. It was accepted that given the family history the protective attitude of an elder sister towards younger brothers might be enhanced. The parties in the UK did not have any settled status, but it would be little to the point if they did, because there was nothing to show that the family could not choose to live in Sri Lanka.

20. Mr Caskie submitted that by April 2014 the brothers of the Appellant would have spent six years in the UK, and one of them would still be under 18. The older brother, as was clear from his evidence, has already become an "integrated alien". He has had all his secondary education here and has begun tertiary education with a view to a career in the Scottish police. Even if the Respondent were to make the decision on the outstanding applications by the Appellant's relatives without further delay, and if that were to be negative and to be appealed, the practical outcome is that the family is in the near future likely to place its residence in the UK on a firm

legal footing. The Respondent referred to deception by the Appellant, but the significant deception occurred when she was aged only 15 and the subsequent non-disclosure when she was aged only 17. She was in the hands of others in those matters. The Respondent's case was based on the good administration of the immigration system, yet there was an unexplained delay on outstanding applications of two and a half years. The past reality of a fractured family had led to the Appellant's brothers living very closely with her, in the absence of both parents, throughout their tender years. While there were other caring family members, no doubt there would lead to a particularly protective attitude by the older sister. That was why all the parties spoke so strongly to the strength of their relationship. It was clearly true, from the way it emerged in evidence, that the parties speak daily by telephone. Although the Appellant is an adult, an 18th birthday does not draw a bright line, and she is a single young female in a patriarchal society. The question was not whether, as posed by the Presenting Officer, Article 8 demanded that she be allowed entry but whether on balance, with the interests of the children treated as a primary consideration, there was any interest in immigration control and in penalising failure to comply with the Rules such as to justify her exclusion.

Conclusions.

21. I find that the Appellant and her brothers have particularly strong sibling bonds, and that it would bring much emotional satisfaction and relief to both brothers if she were to join them in the UK. That would be in their best interests. No reason has been suggested why it might be against their interests. Issues [a] and [b] are both easily resolved to the Appellant's advantage.

22. The decisive issue is [c], whether there are countervailing considerations that outweigh the best interests of the children.

23. It is relevant to assess just how far the children's best interests (not the Appellant's) would be promoted by entry of their sister. They would feel much better for having the Appellant here, but it has not been suggested that it would make a great difference to their prospects in life. While preparing this determination I notice that although both sides referred to the interests of "the children", the older brother is no longer legally a child. He had his 18th birthday on 6 November 2012, soon after the previous decision in the Upper Tribunal and prior to the Court's interlocutor. The younger brother will have his 18th birthday on 15 July 2015, under two years from now. The case does not affect best interests during early childhood years, and there is only a short period of childhood left.

24. It was not explored in evidence or submissions how family life might be carried on, short of reunion in the UK. I find that regular communication would continue. It is probably not realistic to expect the Appellant to be granted entry clearance to visit the UK, failing success in these proceedings. If her mother and brothers continue to live in the UK, it might be possible for them in time to meet on visits to Sri Lanka or in a third country. I accept that all family members would regard such communications and visits as of much lower value than living together, or close to

each other, in the UK, and it is seems unlikely that such a visit might happen during the little that remains of childhood years.

25. The Appellant's mother claims to have had no contact with her children or knowledge of their circumstances for many years, but they were at home with close relatives, and elaborate, deceptive, and obviously quite expensive mechanisms were deployed in hope of bringing them all to the UK. Her version does not sound likely. She failed to establish any asylum claim. While she is determinedly against return to Sri Lanka, there is no reason to think that any family member has a valid basis for refugee or humanitarian protection. Even if it is unlikely to happen, it can be given a little weight that there is no barrier to return to Sri Lanka, and that the family could voluntarily reunite there.

26. The Appellant claims to have had no knowledge of her previous visa application. That was not previously accepted, and it does not stand up well to examination. She was taken to Malaysia with an agent and the deception included dressing her up and photographing her at a false wedding ceremony. She must have had a good idea what was going on. However, I accept that both applications were prepared not directly by her but on her behalf. Although she was the intended beneficiary, she was not the prime mover. The matter is adverse in the proportionality balance, but it is capable of being outweighed.

27. The bad features of the immigration history do not count in assessing the children's best interests, but do weigh in the proportionality balance. The adverse weight is diminished by firstly the actions and later the inaction of the Respondent (or rather, of the Secretary of State, but that makes no practical difference). The family here was granted three years leave, for obscure reasons, and there is no reason why the applications for extension should have remained outstanding for so long. In the meantime the Appellant's brothers, as is to be expected, have gone a long way towards becoming integrated aliens. The older of the Appellant's brothers left a good impression as a witness. I find force in Mr Caskie's submission that in reality the family is rather more likely to move towards recognition as settled migrants than to be removed.

28. Neither party referred to any case on when Article 8 may require departure from the Immigration Rules, or to any case involving the best interests of children. It is accepted that the case involves the interests of the child as a primary consideration, and that it reaches the ultimate proportionality question. There is the usual public interest in effective immigration control (<u>Huang v SSHD</u>, [2007] UKHL 11, [2007] 2 AC 167, paragraph 16). Although there was no delay by the ECO, the actions and inaction of the SSHD towards the Appellant's relatives tend to weaken the weight to be given to that interest (<u>EB Kosovo v SSHD</u> [2008] UKHL 41).

29. The ideal of all family members is that they should live together in the UK. Not all such wishes should be granted, when the Immigration Rules are against them. To live in a family unit with an adult older sibling is not the most powerful type of case under Article 8. It does not equate to cases of parent and children (particularly very

young children), or of spouses. There is a strong sympathetic aspect to the appellant's situation. However, drawing all the strands together, I find that the case involves a relatively small disadvantage to the best interests of a 16 year old child, and even allowing for features which diminish the public interest in upholding the Rules, that interest is not outweighed on the facts of this case.

30. The determination of the First-tier Tribunal is **set aside**, for error of law as identified by parties in their joint minute. The following decision is substituted: the Appellant's appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

31. No order for anonymity has been requested or made.

20 September 2013
Upper Tribunal Judge Macleman