



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/08335/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 12 March 2018**

**Decision &  
Promulgated  
On 3 April 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**INDRANI BHASKARAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr D Bazini, Counsel instructed by Jein Solicitors

For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Sri Lanka, born on 4 October 1941. She applied for leave to remain in the UK on the basis of her private and family life with her daughter, son-in-law and grandchildren. This application was refused in a decision dated 23 January 2016 and the appellant appealed to the First-tier Tribunal. Her appeal came before First-tier Tribunal Judge Amin on 11 April 2017 at Harmondsworth. In a decision and reasons promulgated on 20 June 2017 the appeal was dismissed.

2. The appellant sought permission to appeal in-time to the Upper Tribunal on the basis of six grounds of appeal. Permission to appeal was granted by Judge of the First-tier Tribunal Scott-Baker in a decision dated 15 January 2018 in the following terms:-

- “2. The grounds assert that the First-tier Tribunal judge had erred in law as she had failed to remain impartial in entering into the arena; material errors had been made in the fact finding which amounted to an error of law and which had tainted the credibility findings; and failed to put points to the appellant which she subsequently held against her.*
- 3. The appellant herself did not give evidence at the hearing but oral evidence was given by her son in law and daughter. There was no Home Office Presenting Officer present.*
- 4. The issues raised by the appellant had not been before the respondent at the time of application and therefore the issues relating to her treatment in Sri Lanka from the authorities should have been referred to the respondent as a new matter. Findings were made at [21] of the judgement but such findings are insufficiently reasoned. The comment at [25] that the appellant’s daughter had returned in 2014, a fact not volunteered but “extracted in cross examination” does give some substance to the grounds.*
- 5. Accordingly the decision and reasons document disclose an arguable error of law.”*

#### *Hearing*

3. At the hearing before me I heard submissions from Mr Bazini on behalf of the appellant. He sought to rely predominantly but not exclusively on grounds 1 and 5 of the grounds of appeal. In respect of ground 1, Mr Bazini’s central point is that the judge had behaved unfairly and had entered into the arena contrary to the judgment in MNM (Surendran guidelines for Adjudicators) Kenya [2000] UKIAT 00005 which appends the Surendran Guidelines. He submitted that it is clear that it is not rare that the Home Office was not represented. It is clear from [5] of those guidelines that if there are matters of credibility these matters should be pointed out to the representative and asked that they be dealt with either in examination-in-chief or in submissions. [6] and [7] of the guidelines state:-

- “6. It is our view that it is not the function of a Special Adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the Special Adjudicator is an impartial judge and assessor of the evidence before him.*
- 7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the*

*representatives, the Special Adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present."*

4. Mr Bazini submitted that it is clear from [25] and [27] of the determination that the judge considered his questioning to constitute cross-examination.

*"25. I reject that evidence completely. The fact is that the Appellant's daughter has returned to Sri Lanka in 2014 (a fact not mentioned in her evidence in chief but was extracted in cross examination).*

*27. Only in cross examination, the daughter elaborated that her mother had threatened to take an overdose of tablets if she is returned. There is no mention of this in the expert report."*

And also at [16]:-

*"16. I am conscious that the Appellant's evidence has not been tested in cross examination as she chose not to give evidence, relying on a conclusion reached by the expert that she was unfit to give evidence."*

5. Mr Bazini submitted that at no point was it appropriate for the judge to refer to cross-examination and that it raises issues of apparent bias and unfairness of which there was a real danger in this particular case. Moreover a medical expert had found the appellant not to be fit to give evidence; therefore it was not her choice not to do so.
6. In respect of ground 5, this ground of appeal asserts that the judge materially erred in that his assessment of Article 8 outside the Rules was fatally flawed by failure to make any reference to or consideration of the best interests of the appellant's minor granddaughter pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009.
7. Mr Bazini submitted that at [11] of the judge's decision the judge noted that there was a witness statement from BS (granddaughter of the appellant) dated 5 January 2017 but stated that neither she nor the grandson gave evidence but had provided written statements. That is factually incorrect in that, in fact, the appellant's granddaughter did give evidence.
8. At [37] the judge accepted that there was family life between the appellant, her daughter, son-in-law and grandchildren but failed when assessing proportionality to give any consideration to the granddaughter's best interests which were clearly engaged given that the granddaughter and grandmother share a room and have lived together for the last ten years and the granddaughter assists in looking after her grandmother.
9. Mr Bazini submitted that the proportionality assessment was fundamentally flawed as a consequence of these errors. He further sought

briefly to rely on the further grounds of appeal viz the judge's approach to the psychiatric evidence, the judge's approach to the risk on return to Sri Lanka of the son-in-law in light of the newspaper report at page 28 of the supplementary bundle and the failure to take account of material considerations in respect of the visit by the appellant's daughter Sri Lanka on her British passport in 2014.

- 10.** In her submissions, Ms Ahmad accepted that it is clear from the judge's decision that he referred to his questions to the appellant as cross-examination but sought to rely on the judgment of the court in SW (Adjudicator's questions) Somalia [2005] UKIAT 00037 at [30] to [36] where the Upper Tribunal found that the root question was whether the hearing was unfair. She submitted that new issues had been raised by the appellant i.e. any risk on return to Sri Lanka at the appeal hearing and it was open to the judge to ask questions in order to clarify those issues. She made the same point in essence that it was open to the judge to seek clarification in relation to the issue of apparent bias and referred to [29] of the judgment of the Court of Appeal in CD (DRC) [2011] EWCA Civ 1425 which provides:-

*“Lord Bingham said that the test was whether all the circumstances of the case would lead a fair minded and informed observer to conclude that there a real possibility that the Tribunal was bias.”*

- 11.** In respect of ground 5, Ms Ahmad accepted that the judge did not make any specific findings on Section 55 of the BCIA 2009 and the best interests of the appellant's minor granddaughter.
- 12.** In his reply, Mr Bazini accepted that it was open to the judge to seek clarification but what is quite clear from the jurisprudence is that the judge is not entitled to cross-examine because in so doing he stepped into the arena and the judge expressly framed his questions as cross-examination and therefore there was no debate about his actions in this particular case.

*My findings*

- 13.** I find material errors of law in the decision of First-tier Tribunal Judge Amin such that the decision cannot stand. This is for the reasons set out in the extensive grounds of appeal particularly ground 1, which concerned the approach of the judge to the appeal in the absence of a Home Office Presenting Officer and procedural fairness. There are a number of errors in the decision highlighted by Mr Bazini. Whilst I do not go so far as to say that the faint assertion of apparent bias is made out I do find that there was both procedural and substantive unfairness for the following reasons:-
- (i) The judge's reference at [16] to the appellant's choice not to give evidence and the fact that any evidence had not been tested in cross examination given (a) the absence of a Presenting Officer and (b) a psychiatric report from Dr Dhumad saying that the appellant was not fit to give evidence due to her mental health condition.

- (ii) In asserting at [11] that the appellant's granddaughter did not give evidence but had only provided a statement when it is clear from the judge's record of proceedings that he heard oral evidence from the appellant's granddaughter but failed to determine or make any findings of fact in respect of that evidence which was clearly material to the proportionality assessment and the granddaughter's best interests.
- (iii) In making further references to cross-examination at [25] and [27] which I find was a consequence of the judge clearly stepping into the arena in contravention of the Surendran Guidelines appended to the judgment in MNM (op cit).

**14.** Whilst the additional grounds of appeal i.e. 2, 3, 4 and 6 raised further arguable errors, in light of my findings in respect of grounds 1 and 5, it is not necessary for me to determine those and I did not hear full argument from the parties upon them. I accept Mr Bazini's submission that the matters raised in ground 1 of the grounds of appeal are fatal.

## **15. Decision**

I set aside the decision of First-tier Tribunal Judge Amin and remit the appeal for a hearing *de novo* before a different judge.

No anonymity direction is made.

Signed: Rebecca Chapman

Date: 29 March 2018

Deputy Upper Tribunal Judge Chapman