



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

Appeal Number: HU/03784/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated  
On 17 July 2019**

**On 5 July 2019**

***Error of law decision given extempore at  
the hearing***

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**GA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr Philip Heywood, Counsel instructed by Kanaga Solicitors

For the Respondent: Ms S Cunha, Home Office Presenting Officer

**ERROR OF LAW DECISION AND REASONS**

1. An anonymity order was made in respect of the sponsor in these proceedings by Judge Munonyedi in a decision and reasons promulgated on 29 November 2016. That order remains in force and, to the extent necessary, I extend it to cover this decision.

2. The appellant, GA, is a citizen of Sri Lanka born 8 January 1936. He is 83 years old. He appeals against a decision of Judge Hussain of the First-tier Tribunal promulgated on 15 February 2019 dismissing his appeal against the respondent's decision of 4 January 2018 to refuse entry clearance for the purposes of family unification outside the Immigration Rules.

### *Background*

3. The appellant's son, GG, is a citizen of Sri Lanka born on 1 November 1975. He is the sponsor in these proceedings, and has "held" refugee status in this country since 27 February 2017, following a decision of Judge Munonyedi promulgated on 29 November 2016. Judge Munonyedi allowed the sponsor's appeal against an earlier decision of the respondent to refuse his asylum claim. The basis of the claim was that he was wanted by the Sri Lankan authorities for suspected LTTE links. The sponsor has resided here since 2009, having originally lived here as a student. During a return visit to Sri Lanka in 2012, he was detained by the authorities and tortured. He managed to return to the United Kingdom, and claimed asylum. His family remained in Sri Lanka. The continued attention they received, in his absence, at the hands of the authorities is the focus of this case.
4. The appellant applied for family unification with the sponsor, along with the sponsor's wife, JG, and the sponsor's son, AG (date of birth 15 May 2009), and daughter, KG (date of birth 21 October 1998). The sponsor's wife and son were successful in their family reunion applications. The sponsor's daughter was initially refused as, by the time the application was submitted, she was over the age of 18. Her appeal against that refusal decision was heard alongside that of the appellant in this matter, and she was successful. There has been no onward appeal by the respondent in relation to that decision.
5. Before Judge Hussain, the appellant accepted that, as the father of a person with refugee status, his situation was not covered by the Immigration Rules. Instead he appealed to the respondent's policy *Family reunion: for refugees and those with humanitarian protection*, which permits those who have other family relationships with the sponsoring refugee to be admitted provided there are exceptional or compassionate circumstances. The relevant guidance in force at the time, as quoted in the skeleton argument submitted to Judge Hussain at [18], provided as follows:

"... Where a family reunion application does not meet the requirements of the Immigration Rules, caseworkers must consider whether there are any exceptional circumstances or compassionate factors which may justify a grant of leave outside the Immigration Rules.

There may be exceptional circumstances raised in the application which make refusal of entry clearance a breach of ECHR Article 8 (the right to respect for family life) because refusal would result in unjustifiably harsh consequences for the applicant or their family. Compassionate factors are, broadly speaking, exceptional circumstances, which might mean that a refusal of leave to remain

would result in unjustifiably harsh consequences for the applicant or their family, but not constitute a breach of Article 8.”

The issue before Judge Hussain was, therefore, whether refusing the appellant’s application would result in unjustifiably harsh consequences either for him or for the sponsor and the wider family.

6. The case advanced before Judge Hussain on behalf of both of the then appellants was that they would not be able to cope on their own. The daughter had encountered a range of depressive illnesses and was deeply unhappy. She had to be cared for by her mother who, despite having entry clearance as the family member of a refugee here, was forced to remain in Sri Lanka caring for her and her father in law. The threat which had been manifested by the Sri Lankan Government towards the sponsor continued to face them. His wife was still required to report to the authorities, as she still does to this date, even though she has entry clearance for the United Kingdom, and the father had been harassed at the family home.
7. Judge Hussain accepted that the situation in relation to the sponsor’s daughter was such that she needed her mother’s help and that it would be unjustifiably harsh to keep her in Sri Lanka without the support of her mother, given her mother was entitled to reside in this country pursuant to the refugee family member leave she had been granted. At [32] Judge Hussain said,
 

“If [the daughter] is not allowed to join her family in this country then she remains a very vulnerably exposed person. In my view, having granted family reunion to her mother and young brother, it would not be reasonable to expect the mother to continue to remain there to guard her. That would then defeat the objective of her being admitted to this country on family reunion.”
8. In relation to the appellant in these proceedings (the second appellant before Judge Hussain) the position was less clear-cut, the judge found. At [34] he made the following findings, which I quote in full, with emphasis added:

“With regard to the second appellant, I accept that he too has been part and parcel of the sponsor’s family in Sri Lanka before he fled and since coming here, the sponsor has kept in contact with his father. However, whilst he is aged 83 years and appears to suffer from dementia, which would not be uncommon in a person of his age, the same considerations do not apply to him. At the hearing, the appellant’s counsel impressed on me his vulnerability by suggesting that having been the subject of an arrest, he would be of adverse interest to the authorities. The only evidence she could point to of this was references in the sponsor’s own evidence in his own appeal as recorded in the decision of the judge who tried his case. **It seems to me not sufficient to take passing comments of a judge recording proceedings before her as a basis on which to find as a matter of fact that he was arrested and still remains the subject of interest.** In fact, the sponsor in the hearing admitted that because of his age, his father was no longer required to report.”

9. Permission to appeal was granted by Judge Cruthers of the First-tier Tribunal on the basis that Judge Hussain did not give sufficient weight to the findings of Judge Munonyedi relating to the appellant. Secondly, Judge Hussain may not have sufficiently taken into consideration the medical evidence relating to the various health conditions of the appellant; and thirdly, that the judge may have erred in not giving sufficient weight to family unity/reunion principles when deciding that the appeal must be dismissed.

### *Analysis*

10. By the end of the hearing, it was common ground that Judge Hussain had erred in law. I am grateful to Ms Cunha for her realistic approach during submissions, which led to an understandable revision of her initial view, leading her to concede that the Judge had erred.
11. At the outset of my analysis, I note that judges of this Tribunal should exercise considerable caution before interfering in the decision of a judge below on the basis that the judge did not ascribe “sufficient weight” to a particular matter before him or her. For example, in the recently reported decision of Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC), this Tribunal noted that permission to appeal (and, therefore, by implication the substantive consideration of an appeal against a decision of the First-tier) should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can be properly said that, as a consequence, the judge who decided the appeal had arguably made an irrational decision. Indeed, Mr Heywood sought to distance himself from the characterisation of the grounds of appeal by Judge Cruthers in that way, and instead presented his case before me on the basis that Judge Hussain simply failed to take into account material evidence, either through overlooking it, or through mischaracterising it. There is considerable force in the submissions of Mr Heywood.
12. Turning to [34] in Judge Hussain’s decision, the judge has overlooked key elements of Judge Munonyedi’s decision. He dismissed the suggestion that the authorities are still playing an active interest in the family in Sri Lanka, on the basis that it was simply assertions made by the appellant before Judge Munonyedi (the sponsor in these proceedings) that the authorities were still interested in the family. Judge Hussain simply said that there were, “references in the appellant’s sponsor’s evidence in his own appeal as recorded in the decision of the judge who tried the case” and, by implication, that there was nothing more: see the text emphasised, above.
13. It is clear that there were references in Judge Munonyedi’s decision to the evidence that was advanced before her; for example, see [4], which records the sponsor giving evidence about the detention and interrogation

of his father (this appellant) and wife for two days. The sponsor also is recorded as having given evidence that both are required to report to the camp every week, and that neither are able to move from the family home without the permission of the authorities. Similarly, at [41] the judge described other evidence received in the case which gave a similar account. Judge Hussain's findings would have been sustainable had the paragraphs cited above been the only references in Judge Munonyedi's decision to the father and the wife of the appellant being detained or subject to continued reporting obligations.

14. However, Judge Munonyedi made substantive findings that such activity does, in fact, continue to take place. For example at [63] when addressing the timing of the sponsor's application for asylum, the judge stated this, "He [the sponsor] made an application when he discovered that the authorities were harassing his father and wife because of his previous involvement with the LTTE".
15. In addition, the judge made global findings at [85]:
 

"It is my finding that the authorities are interested in the appellant. They know that he had some form of involvement with the LTTE intelligence wing and that he escaped from custody in February 2012. The authorities have visited his family home asking his whereabouts. His wife and father have to sign on at the camp once a month and are asked about him on each visit. There are reasonable grounds for believing that he may have been identified by the authorities at any of the many demonstrations and pro Tamil activities that he has participated in, particularly his support of the TGTE and their aims."
16. There are parallels in the present scenario to Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka \* [2002] UKIAT 00702, although I consider that that case is not entirely on point. In Devaseelan, the then Immigration Appeal Tribunal considered the approach to be taken to an earlier decision of an adjudicator, in the event that the same appellant came before another adjudicator. The decision of the first adjudicator, held the IAT, must always be the "starting point" for the consideration of the second. The decision gave guidance as to the exceptions to the principle. Devaseelan is of some relevance, in the sense that an earlier finding of fact by a different judge cannot be ignored (or, as here, overlooked). But it is not entirely on point with the present matter for at least two reasons. First, the guidance in Devaseelan concerns the treatment of earlier decisions of different judges in relation to the same appellant. By contrast, whereas Judge Munonyedi was concerned with the risk faced by the sponsor, these proceedings concern the situation of a member of the sponsor's family. Secondly, and more significantly, Judge Munonyedi made findings to the lower standard applicable to protection appeals. As this is a human rights appeal, the balance of probabilities standard is engaged. It is not, therefore, possible automatically to adopt findings made in a protection appeal in a human rights appeal, without further analysis.

17. With those caveats in mind, however, the findings of Judge Munonyedi were – and are – highly relevant to these proceedings. They are material facts which must be taken into account, or, if they are not to be taken into account, good reasons must be provided for why a different approach must be adopted. The error Judge Hussain fell into was to overlook the potentially material findings of Judge Munonyedi, mischaracterising her decision as simply reciting evidence she heard, as though she did not make any findings.
18. That was a material error; Judge Munonyedi's findings were clearly highly relevant to the findings of fact Judge Hussain had to make, and yet his characterisation of her decision was as though she had made no such findings. By failing to engage with the significant findings reached by Judge Munonyedi, I consider Judge Hussain to have fallen into error by failing to take into account material evidence when reaching his findings of fact.
19. There are other reasons why the judge erred.
20. At page 133 of the appellant's bundle, there is a letter from a consultant psychiatrist in the mental health unit at the teaching hospital in Jaffna. This describes the appellant in these proceedings as presenting with symptoms of severe dementia and moderate dementia with co-morbid depressive disorder, moderate in severity, and that his dementia was objectively confirmed by a mini mental state examination in which he scored 19 out of 30. An MRI scan of his brain revealed cerebral atrophy with evidence of small vessel disease. The letter continues to state that dementia is a progressive illness and the appellant will have more deterioration in his memory, intellectual functions and personality in the future. He may need a care giver to support his daily activities and supervise his medications. Against that background I find that Judge Hussain erred in law by his characterisation of the appellant's mental state as merely that he "appears" to suffer from dementia. In my view the medical evidence demonstrates that the symptoms presented by the appellant are more than mere apparent dementia and instead amount to something which is capable of meriting a finding that dementia is present in the appellant.
21. In light of these findings, and bearing in mind the considerable hesitation that a judge of this Tribunal should exercise before interfering with a decision of fact in the Tribunal below, I find that Judge Hussain did materially err in law by failing to have regard to relevant evidence as described above. It follows that the decision of Judge Hussain is to be set aside. I will preserve some of Judge Hussain's findings, as set out in my error of law decision.

## **REMAKING DECISION**

22. I informed the parties that I would remake Judge Hussain's decision and that I would allow his appeal, with reasons to follow. I now give my reasons.

23. I have allowed the appeal because I consider there to be exceptional circumstances rendering a refusal of entry clearance unjustifiably harsh arising from the ongoing interest of the Sri Lankan authorities, his poor health, and the invidious choice that would face the wider household (as Judge Hussain found it to be) arising from his non-admission to this country. Either the sponsor's wife will have to continue to care for him, placing herself at further risk of harassment and depriving her and the sponsor of the family reunion to which the Secretary of State has already accepted she is entitled. Alternatively, the appellant will be without the care that he currently enjoys from his daughter in law, and will be potentially subject to the attention of the Sri Lankan authorities, in the absence of his daughter in law.
24. During the error of law hearing, Ms Cunha and Mr Heywood submitted that it would not be necessary for me to hear additional live evidence in order to dispose of the case.
25. I agree with the submissions of the parties on this point. I consider there to be sufficient material available to me in order to remake the decision for myself.
26. Judge Hussain, highlighted the presenting officer, did not make a finding that the sponsor was not credible. I agree. Judge Hussain ascribed less weight to the account the sponsor provided of the circumstances of the appellant in Sri Lanka on account of his misunderstanding of Judge Munonyedi's decision. In contrast to Judge Hussain's understanding of her judgment, rather than having simply recalled the evidence she heard, Judge Munonyedi reached positive findings, as set out at paragraphs 14 to 18, above. She did so without expressing significant reservations, nor emphasising that she only reached those findings as a result of being subject to the lower standard of proof applicable to protection appeals.
27. Certain of the findings of fact Judge Hussain were not tainted by the error of law outlined above. Those findings I can adopt. It was common ground at the hearing before the First-tier Tribunal that Article 8 was engaged as regards the sponsor and the appellant. I raised this issue with the parties, and both confirmed that no issue was taken with the question of whether Article 8 is engaged, either then or now. Judge Hussein's finding at [28] that the appellants were "part and parcel" of the sponsor's household before he left Sri Lanka was not impugned before me during the error of law hearing, and I see no reason to depart from it. Judge Hussain also made similar findings in relation to the appellant at [34]. As such, although the original refusal letter from the Entry Clearance Officer highlighted concerns about the absence of evidence concerning a familial relationship between the appellant and the sponsor, it is clear from the findings of fact made by Judge Hussain, which I preserve, that the appellant is related to the sponsor as claimed. Judge Hussain's operative reasoning for dismissing the appeal was not that family life for the purposes of Article 8 did not exist between the appellant and the sponsor, but that, despite the existence of family life, there were no exceptional

circumstances such that a refusal to grant entry clearance would be unjustifiably harsh.

28. In order to reach the finding that Article 8 was engaged, Judge Hussain would have to have been satisfied that the criteria for adult dependent relatives were met pursuant to Article 8 directly (see: Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31), rather than the narrower version of the doctrine articulated by the Immigration Rules.
29. It was also common ground that, if the appellant were to succeed, it could not be by reference to Article 8 as it is articulated by the Immigration Rules. The appellant does not meet the requirements of the rules, either on a family union basis (for his category of relationship is not catered for by the family reunion provisions of the rules), or as an adult dependent relative (in common with the position advanced before Judge Hussain – see [37] – the case was not put before me on the basis that the adult dependent relative provisions are met). Rather, the appellant could only succeed pursuant to an analysis of Article 8 outside the rules, initially in the context of the respondent's policy concerning family reunion, which does address this issue, as outlined in paragraph 5, above.
30. Judge Munonyedi's findings are significant to this remaking decision. Those findings were, of course, pursuant to the lower standard of proof applicable to asylum proceedings. This is an appeal brought under Article 8 ECHR, and so must be determined by reference to the civil standard of proof, namely the balance of probabilities. While that is a higher standard of proof than applied in the appellant's asylum appeal, the fact that Judge Munonyedi made findings in the context of a protection appeal that the Sri Lankan authorities retained an interest in the sponsor's wife, and would place his father and daughter at risk if his wife or to leave the country, represents a significant starting point for my assessment of the facts. I recall that Judge Munonyedi found that the appellant had been harassed by the authorities on account of his son (see [63]) and had required to report to the Sri Lankan authorities regularly, for the same reason (see [85]), although presently had a dispensation on account of his age. While I am not bound by those findings, it is open to me to adopt them.
31. Nothing submitted by the presenting officer at the hearing before me provided any basis to impugn Judge Munonyedi's findings, at all or to such an extent that it would not be possible for them to be adopted by me, given sufficient additional analysis, to the balance of probabilities standard. Given the clarity with which Judge Munonyedi reached her findings, I consider that it would take a significant amount of evidence to the contrary in order for me to reach findings at odds with them.
32. The sponsor's evidence before Judge Hussain, both in written form and orally as recorded by the judge, was that his father continues to experience difficulties at the hands of the authorities in Sri Lanka. Although his age means that, at present, he is not required to report to the authorities, the sponsor fears that, once his wife no longer continues to

tend to her father-in-law in the way that she is doing at the moment, his father will become the subject of the renewed attention of the authorities.

33. It is clear that Judge Hussain accepted a significant part of the sponsor's narrative about his daughter and father remaining of interest to the authorities in Sri Lanka. So much is clear from Judge Hussain's references at [30] to the likely vulnerability of his daughter, were she to remain, at the hands of the Sri Lankan authorities. At [32], Judge Hussain used the terminology of the sponsor's daughter needing her mother to "guard" her. The Judge accepted that it would not be "reasonable" to expect her mother, the appellant's wife, to remain in Sri Lanka, for to do so would defeat the object of family reunion.
34. Judge Munonyedi found the sponsor to be a credible and truthful witness (see [62] of her decision). The sponsor's credibility was not impugned before me and I have no reason other than to treat him as a credible witness.
35. I consider the evidence that was before Judge Hussain, taken with the findings of Judge Munonyedi, and the presenting officer's acceptance that it would be open to me to remake this decision without hearing live evidence, to merit the conclusion that the findings of Judge Munonyedi can be adopted for the purposes of these proceedings.
36. The medical conditions outlined at paragraph 20 of my error of law decision, above, demonstrate that the elderly appellant's health is in a poor state. While it has not been suggested that his health conditions are such as to engage Article 3 of the ECHR, such poor health can be a factor when assessing whether maintaining the refusal of entry clearance would be unjustifiably harsh, when taken with alongside the additional family life factors outlined above. Article 8 is not a proxy for Article 3 "near miss" cases, but, in the context of the wider family life which is present in this case, and the ongoing adverse attention of the authorities, the health of the appellant is a factor to be taken into consideration.
37. In light of the above, I find that the appellant in these proceedings is in need of the continued assistance of his daughter in law, the sponsor's wife, in order to avoid unjustifiably harsh consequences. I find for the purposes of these proceedings that the appellant has been cared for by the sponsor's wife in Sri Lanka, and that, but for him being granted entry clearance, that arrangement will have to continue indefinitely, subjecting the sponsor's wife to the likely threat of continued reporting requirements. Alternatively, the sponsor's wife will have to relocate permanently to this country, leaving the appellant in isolation. By definition, that would be unjustifiably harsh to the sponsor, as well as to the appellant. The sponsor's position is a relevant consideration: see the family unification guidance for Home Office staff; exceptional circumstances entail those in which it, "would result in unjustifiably harsh consequences for the applicant or their family" (emphasis added).
38. Drawing this analysis together, I find that there are compassionate factors within the meaning of the respondent's policy meriting the grant to the

appellant of family reunion leave outside the rules. In contrast to what judge Hussain observed at [35], this is not merely the consequence of “migration”. The sponsor did not have the choice as to whether to return to Sri Lanka; this was not a decision concerning “migration”.

39. The choice that awaits the wider family if the appellant is not granted entry clearance is an invidious one: either the appellant remains in Sri Lanka alone, without the assistance of his daughter in law, or his daughter in law must reside there with him, placing herself at continued risk of the authorities’ adverse attention. In these circumstances, what amounts to “unjustifiably” harsh must be calibrated by reference to the wider context of the scenario in which the appellant would find himself alone. The non-admission of the appellant would entail him having to endure the unjustifiably harsh consequences of spending his final days in the absence of all other former members of his household, who have been required to move to this country due to the well-founded fear of persecution held by the sponsor. Alternatively, it would require the sponsor’s wife’s continued presence in Sri Lanka, placing her at continued risk of harassment – or worse – at the hands of the authorities, thereby defeating the object of family unification being granted to those family members who have already succeeded in their applications.
40. If it were simply the case that the remainder of his family had chosen to pursue “migration”, to adopt judge Hussein’s terminology, any harshness which would flow would be “justifiable” for the purposes of Article 8. The same may not be said in the present situation; the sponsor has been forced to flee Sri Lanka; against that background, what amounts to an “undue” amount of harshness is a different consideration. I consider that the position recognised by the respondent’s family reunion policy articulates the requirements of Article 8 of the convention in the present circumstances; they are such that the members of sponsor’s household are entitled to relocate with him, given the unique circumstances of the family unit, the invidious choice outlined above, and the importance of family reunion to the Refugee Convention (see, for example, Article 23(1) of Directive 2004/83/EC). In the circumstances, were it not possible for the appellant to be admitted to the United Kingdom, the enforced separation which would flow from such a decision would be unjustifiably harsh.
41. In light of the fact that the appellant’s continued exclusion from the United Kingdom would have unjustifiably harsh consequences for the appellant, the sponsor, and the wider family, I find that the respondent’s policy on granting leave outside the rules in family unification cases is met.
42. That being so, the engagement of the policy is dispositive of the proportionality assessment for the fifth stage of the Razgar [2004] UKHL 27 reasoning. The continued refusal of entry clearance to the appellant would be a disproportionate interference with the Article 8 rights of the sponsor and the appellant.
43. I consider this resolution of the case to reflect the considerable public interest that lies in the maintenance of effective immigration controls

(section 117B(1), Nationality, Immigration and Asylum Act 2002). The Secretary of State's view as to where the balance lies between the public interest in the maintenance of effective immigration controls, on the one hand, and the rights of the individual, on the other, is a uniquely insightful view, informed by his special expertise and the constitutional responsibility with which he is charged in these matters. The Secretary of State's view as to where that balance lies is articulated both by his rules and by his policies; see *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at [3] and [4].

44. Resolving the case in this manner respects the policy of the respondent, as the approach I have adopted is taken directly from the relevant policy, as set out above.

45. This appeal is allowed.

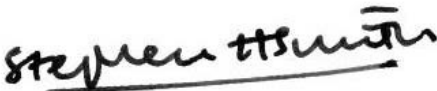
**Notice of decision**

Judge Hussain's decision is set aside, subject to the preserved findings of fact outlined above.

This appeal is allowed on human rights grounds.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

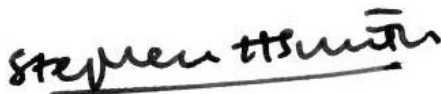
Signed   
Upper Tribunal Judge Stephen Smith

Date 11 July 2019

**Fee award**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. The appellant has been successful in the proceedings. Judge Munonyedi's decision was available to the respondent when the sponsor applied on his behalf for entry clearance, and that should have been a sufficient basis upon which to grant the application.

Signed

A handwritten signature in black ink, appearing to read 'Stephen Smith', written over a horizontal line.

Upper Tribunal Judge Stephen Smith

Date 11 July 2019