



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/15356/2018

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 8<sup>th</sup> August 2019

Decision & Reasons Promulgated  
On 11<sup>th</sup> September 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MANJULA [A]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr R. Ahmed (Counsel)  
For the Respondent: Mr McVeety (Senior HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Herbert OBE, promulgated on 6<sup>th</sup> March 2019, following a hearing at Hendon Magistrates' Court on 25<sup>th</sup> February 2019. In the determination, the judge dismissed the appeal of the

Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Sri Lanka, and was born on 25<sup>th</sup> February 1979. He appealed against the decision of the Respondent, dated 6<sup>th</sup> July 2018 refusing his application for leave to remain in the United Kingdom on the basis of his human rights.

### **The Appellant's Claim**

3. The essence of the Appellant's claim is that, although he entered the UK as a visitor, he has subsequently developed private life rights, particularly following activities of providing care for a [DR], over a period of ten years.

### **The Judge's Decision**

4. The judge considered the Appellant's evidence that "he has effectively become full-time carer" of [DR] since September 2008 (paragraph 13). [DR] suffers from a number of mental health issues, including paranoia and serious depression, as well as PTSD. The Appellant provided a degree of care, such as help "with his daily activities, prepares his meals, cleans his room, and if he has any medical appointments, arranges his transport to and from hospital" (paragraph 15). So much so, that, when the Appellant had discussed the fact that he might have to leave the United Kingdom "[DR] was deeply upset and said that he will be traumatised if he did so" (paragraph 17).
5. [DR] is a British citizen living in the UK on a permanent basis. He "rarely has any visitors" (paragraph 19). The Appellant's evidence was that "there was a very close relationship as a carer and a person who is clearly in need of significant physical and emotional support" and that "if he did return that [DR] would effectively be lost without him" (paragraph 22).
6. Against this background, the judge concluded that, "I find that the Appellant has established a significant family and private life both in his own right as well as an individual in the ten years he has been in the United Kingdom but also with a person that he cares for, [DR]" (paragraph 49). The judge observed that "[DR] is very reliant upon the Appellant" (paragraph 50).
7. He accepted that the person cared for "was registered disabled" and that "there is no official confirmation" (paragraph 51). It was also observed by the judge that the need of [DR] fell into two categories "the physical needs and the emotional needs of a caregiver with whom he has lived since 2008" (paragraph 52). I
8. In the end, it was the judge's view that "this is a finely balanced case" but where "there are not very compelling circumstances of a compassionate nature which

undermine the presumption that the public policy immigration control must be maintained” (paragraph 55). The appeal was dismissed.

### **Grounds of Application**

9. The grounds of application state that the judge had erred in law because he had recognised that the Appellant had established a significant family and private life (paragraph 49) in his own right as an individual, as well as by living with [DR]. The judge had also found the case to be finely balanced. His conclusion that there were no very compelling circumstances was not well-founded.
10. On 14<sup>th</sup> May 2019 permission to appeal was granted on the basis of a range of reasons, (but on the principle that “it is arguable that the proportionality exercise has been affected”).

### **Submissions**

11. At the hearing before me on 8<sup>th</sup> August 2019, Mr Ahmed, appearing on behalf of the Appellant went through the findings of the judge and concluded that the decision could not be sustainable given that the judge had accepted early on that the Appellant “has established a significant family and private life both in his own right as an individual ... but also with the person that he cares for, [DR]” (paragraph 49). The judge had then gone on to make the point that the relationship between the two of them could be split up into “the physical needs and the emotional needs of a caregiver” (paragraph 52).
12. That being so, the standard in **Kugathas** had been satisfied, of there being “more than normal emotional ties” between them. It was on that basis, that the judge had concluded that a family relationship existed between the two of them. If that was the case then it was difficult to see why, with the satisfaction of such a high standard of proof, there would not also be reason to hold that there were “compelling reasons” to allow the appeal on Article 8 grounds. Second, whilst the judge had recognised the private life rights of the Appellant, he had failed to attach due weight, on the **Boku-Betts** principles, to the rights of the British citizen, [DR]. There was after all, a positive duty to ensure that private life rights were not infringed (see **EB (Kosovo)** at paragraph 18).
13. For his part, Mr McVeety submitted that the judge’s decision was confused. There was no familial relationship between the Appellant and [DR]. That being so, the only relationship that could exist between the two of them would be that of “private life” rights. It was wrong for the judge to conclude that there was a family life between them. Even so, the judge had concluded that “this is a finely balanced case” (paragraph 55). He had then gone on to undertake the “balancing exercise” (paragraph 58). Thereafter there followed seven sub-paragraphs to paragraph 58, at the end of which, the judge concluded that the Appellant’s decision to overstay was done at a time when he knew that his status was precarious, and that he had to

regularise his stay, and any rights developed had been on that basis, such that the public interest lay in requiring him to return to Sri Lanka.

14. In reply, Mr Ahmed submitted that the Appellant was living under the same roof as [DR], had provided him with ten years of care services, and had effectively become part of his family, and the judge's conclusion was correct in this respect.

### **Error of Law**

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. My reasons are as follows. These are that the judge's determination is confused in a number of respects. Although it is comprehensive and overarching and sets out to take every aspect of the claim into account, it reaches conflicting conclusions in a number of respects. Thus, under the heading "my findings of fact", the judge early states that "the Appellant relies solely on the establishment of his private life under Article 8 based in part on the time he has spent in the United Kingdom" (paragraph 39).
16. The judge then analyses the particular constituent requirements of establishing a private life right. There is reference to **SS (Congo)** and the need to demonstrate "compelling circumstances" (paragraph 40). The Section 117B consideration is properly taken into account, and it is particularly importantly recognised that the court in **Rhuppiah [2018] UKSC 58**, had made it clear that "Section 117B cannot put decision makers in a straightjacket" (paragraph 45). Nevertheless, despite starting off on the premise that the Appellant "relies solely on the establishment of his private life" (at paragraph 39), the judge then proceeds to make findings in relation to the Appellant having "established a significant family and private life" (paragraph 49).
17. That conclusion is not only erroneous insofar as it suggests that a family life could exist between the Appellant and [DR], with whom he has no familial relationship, and with respect to whom there are no clear findings as to how the family unit comes into being, but it is also inconsistent with what the judge had started off with, which was that "the Appellant relies solely on the establishment of his private life" (paragraph 39).
18. Not only this, the judge's final conclusion after undertaking a "balancing exercise" (at paragraph 58), is that "this is an adult relationship between a carer and a person requiring ongoing treatment and support and it is not a family relationship or anything akin to that" (see paragraph 58(v)). Therefore, there is an inconsistency here once again between this conclusion and the conclusion at paragraph 49 where it was said that "the Appellant has established a significant family and private life".
19. Second, however, that is not to say that the judge's conclusion in other respects was not one that was open to him. When the judge observes that "[DR] is very reliant upon the Appellant" (paragraph 50); and observes that "he was registered disabled" (paragraph 51); and that there exists "the physical needs and the emotional needs of a caregiver with whom he has lived since 2008" (paragraph 52), these findings were open to the judge to make, however, in so doing, the judge has not considered the

Article 8 rights, particularly in relation to the right to a private life, of the British citizen, [DR].

20. This should have been done for at least two reasons. First, the Appellant had confirmed during questioning at the hearing that, when he has told [DR] that he may have to leave the United Kingdom, [DR] “was deeply upset and said that he would be traumatised if he did so” (paragraph 17). He could not turn to his daughter who “also had serious mental health problems and had attempted to take her own life on more than one occasion” (paragraph 18). Indeed, he “rarely has any visitors” (paragraph 19) and that it is the Appellant who takes [DR] who takes, “[DR] to events within the Sri Lankan community on one or two occasions out of the five or six that he organises in Birmingham for the Buddhist community” (paragraph 20).
21. Indeed, he “helps him with his daily activities, prepares his meals, cleans his room” and so forth (paragraph 15). Second, the judge does not reject the evidence that “there was a very close relationship as a carer and a person who is clearly in need of significant physical and emotional support”; so much so that if the Appellant were to return back to Sri Lanka “that [DR] would effectively be lost without him” (paragraph 22).
22. In these circumstances, the statement that ultimately, “this is a finely balanced case”, but one where “there are not very compelling circumstances of a compassionate nature” (paragraph 55) could not be made out, given the errors I have identified above. Whilst it is true that the Appellant himself would have known “for a considerable period of time that his immigration status has been precarious” it does not follow that “that is also something [DR] would have been aware of as well” (see paragraph 58(iii)).
23. In the same manner, given the vulnerability and disability that [DR] suffers from, such that it can be said that the balance of considerations would fall against the Appellant and in favour of immigration control. This is particularly important given that the judge at the end recognised the seriousness of [DR]’s condition and observing that “nothing in this decision is a criticism of the Appellant nor seeks to undermine the seriousness of [DR]’s condition” (paragraph 59).

### **Remaking the Decision**

24. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons. This is a case where the Appellant’s Article 8 rights to a private life have been accepted as having been established. That being so, the question is whether he can succeed on that basis. I have given careful consideration to the documents before me and to the evidence and submissions. With regards to Article 8 ECHR, the protection of these rights is principally now contained in paragraph 276ADE of HC 395 (as amended). The relevant Rules required that a claimant has spent twenty years in the UK. This is not the case with this Appellant. Accordingly, the Rules are not met.

25. However, there is an alternative basis to the application of paragraph 276ADE which is that there are “very significant obstacles to the applicant’s integration into the country to which he would have to go”. In this case, the Appellant speaks the relevant language of his country of origin and has continuing ties and connections there. There is nothing to suggest he has lost those ties. He can return. The question that then remains is whether the Appellant can succeed under freestanding Article 8 jurisprudence. The question here is whether there are “exceptional circumstances” to the Appellant’s claim. I find that he does.
26. This is because of the decision in **Agyarko [2017] UKSC 1**, which explains that “the European Court’s views of the phrase “exceptional circumstances” in this context was considered by the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192** (at paragraph 56). The Supreme Court goes on to say that, “ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life.” (Paragraph 57).
27. The Supreme Court goes on to state that, “the Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the tests of proportionality. On the contrary, she had defined the word ‘exceptional’, as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate” (paragraph 60).
28. In the circumstances, I am satisfied that the Appellant’s removal would mean that it would be unjustifiably harsh to expect him to return to Sri Lanka, given the close relationship that he has developed with [DR], and the dependency that the latter also has on the Appellant, to the extent that he would be “traumatised”, if the Appellant were to be removed.
29. The rights of [DR], as a British citizen, must also be taken into account and, I am satisfied that he cannot be blamed to the same extent as the Appellant, for availing himself of the support of the Appellant, during the time that the Appellant has been in the UK outside the law. Section 117B does express the public interest in immigration control but I find that there would be a disproportionality in requiring the Appellant to leave, given what rights are at stake here, and the manner in which they interact between the Appellant and [DR].
30. After all, the Appellant has provided ten years of solid care for [DR], helping him with his daily activities, preparing his meals, and cleaning his room, and arranging for his medical appointments. There is no evidence here that NHS support can be a substitute, because, of the finding by Judge Herbert OBE below, that this was a case where the “need falls into two categories, the physical needs and the emotional needs of a caregiver with whom he has lived since 2008.” (Paragraph 52).

## Decision

31. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed for the reasons I have given above.
32. No anonymity direction is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

10<sup>th</sup> September 2019

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed

Dated

Deputy Upper Tribunal Judge Juss

10<sup>th</sup> September 2019