



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

Appeal Number: HU/21489/2016  
HU/21490/2016

**THE IMMIGRATION ACTS**

**Heard at: Field house  
On 13 March 2018**

**Decision and Reasons  
Promulgated  
On 28 March 2019**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

**Between**

**DEWNI [S]  
DULITHA [S]  
(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellant: Mr T Lay of Counsel

For the Respondent: Ms Jones, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellants are citizens of Sri Lanka born on 10 July 1992 and 4 April 1994 respectively. They are siblings. They appealed to the First-tier Tribunal against the decisions of the respondent dated 12 August 2016 to refuse their applications for entry clearance pursuant to Article 8 of the European Convention on Human Rights.

2. First-tier Tribunal Judge Fox dismissed the appellants appeals in a decision promulgated on 19 March 2018. Permission to appeal was granted by First-tier Tribunal Judge Chohan on 19 March 2018 who stated that it is arguable that the Judge erred by failing to take into account the positive credibility findings of a previous Judge in respect of the appellants' sponsor's asylum claim and therefore possibly erred in the Article 8 assessment.
3. Thus, the appeal came before me.

### **First-tier Tribunal's decision**

4. The First-tier Tribunal dismissed the appellant's appeal, concluding that the appellants have failed to satisfy the burden upon them to the relevant standard that the respondent's decision will breach their rights under Article 8 of the European Convention on Human Rights. There is no reliable evidence to demonstrate family life for the purpose of Article 8. There is no evidence of family life between the appellant's and their parents beyond normal emotional ties along with an effective in France of imputed political opinion.
5. The medical evidence provided has been considered in accordance with **JL (medical reports - ability) China [2013] UKUT 00145 (IAC)** and no weight can be placed upon it because there are absences of relevant evidence in the reports. In the sponsor's medical report which was drafted on 13 November 2014, there is no reference to the alleged trauma experienced by the appellants following the sponsor's arrest in 2006 despite the appellants assertion that they began counselling in 2011 due to the adverse interest from the authorities which began in 2006. There is no reference of the potential mental anguish in either medical report that may potentially flow from a parent whose circumstances caused the appellants to require mental health services from 2011. Nor is there any reference to the historic and ongoing mental health consequences to the appellants.
6. The medical reports dated 20 August 2017 were compiled on the express instructions of the appellants. There is no reference of the first appellant's current dilemma which specifically arose in January 2017 which is seven months before the report was written. The report is focused exclusively upon the first appellant's separation which is inconsistent with the remaining evidence that the first appellant's needs have evolved since January 2017. The report concludes that there is no evidence of active suicidal ideation and that the first appellant is in receipt of adequate medical care.
7. In the report there appears to be no meaningful analysis of the subjective account provided by the first appellant. The author of the report relies exclusively upon one remote meeting with the first appellant despite the sponsor's oral evidence that he exerts a positive influence above the appellant's behaviour to control the potential for

self-harm. It is reasonable to expect the author of the report to be made aware of the coping mechanisms available to the first appellant and how this is applied as part of the expert's overall assessment. The absence of such evidence does not assist the weight to be placed above the evidence.

8. The report states that the expert assessed the first appellant need to reside with her parents in the United Kingdom as exceptional. There is no reliable evidence which demonstrates this conclusion. Nor is there any meaningful analysis of the potential alternatives available to the first appellant in Sri Lanka and why settlement of the United Kingdom is the only viable option. The conclusion of chronic and enduring mental illness is unsustainable when considered in light of the report's contents.
9. There is no discernible analysis in the report of the first appellant's condition arrived at this stage or how she remained effectively within the education system and labour market and all the circumstances that caused her to leave the labour market. The same author who compiled the first appellant's report compiled in identical terms a report on behalf of the second appellant. The second appellant report is of limited probative value for the same reasons as stated for the first appellant. It carries the same defects in terms of meaningful analysis and inconsistency with the sponsor's evidence.
10. The sponsor claims that a dependency by the appellants upon their parents is because the appellants have come to the adverse attention of the Sri Lankan authorities. This is inconsistent with the medical reports.
11. The appellant's eldest son is in the United Kingdom. Despite the sponsor's personal experience of the asylum process and the appellant's alleged fear of harm the sponsor's older son has failed to avail himself of legal representations and persists in his status as an illegal immigrant in the United Kingdom.
12. The sponsor left Sri Lanka in 2006 and the appellants completed their education under the supervision of the sponsor's wife. After the appellants completed their education and became adults, the sponsor's wife left Sri Lanka and went to the United Kingdom to join the sponsor. The available evidence taken at its highest demonstrates that the appellants have access to adequate medical services for any support that they require. There is no reliable evidence of suicidal ideation for the same reasons.
13. There is no reliable evidence to demonstrate that the appellants do not have access to accommodation or other forms of support to assist with the pursuit of independent life as adults. The sponsor provided evidence of an extended family in Sri Lanka and there is no reliable evidence to demonstrate that this no longer exists. There are therefore no

exceptional circumstances for the purposes of Article 8 outside the immigration rules. The Judge dismissed both the appellants appeals.

14. The grounds of appeal state the following which I summarise. The appellants case is that after their sponsor left Sri Lanka 2006, the authorities started harassing the appellants and his wife and that this caused his children to suffer from mental health problems, requiring counselling and medication. The appellant's wife was granted entry clearance to the United Kingdom which caused her great dilemma as the adult children were still highly dependent on her. Nevertheless, she opted to join the sponsor in the United Kingdom and had to leave the appellants in a safe place as arranged with the sponsor. Since their mother left in November 2016, the appellant's mental health deteriorated further, and they have lived in fear of the authorities. Their mother had to return to Sri Lanka from the United Kingdom in February 2017 and stayed there until April 2017 to look after the appellants and since she has come back to the United Kingdom their mental health has got worse, they are suicidal and have been living in hiding from the authorities.
15. In legal terms despite the appellants being adults, they both have a high level of dependency on their parents over and above the normal emotional ties which exist between adult children and their parents. Theirs is a sufficiently compelling case and in effect meets the Home Office own policy guidance on the asylum policy instruction on family reunion for refugees and those granted humanitarian protection.
16. The Judge erred by not taking into account the positive credibility findings of the First-tier Tribunal Judge who heard and allowed the sponsor's appeal for asylum. The Judge's decision in respect of the sponsor, should have been considered the starting point in positive credibility findings should have been taken into account by the Judge who heard the appellants' appeals. The Judge who decided the sponsor's asylum claim, accepted as credible the sponsor's evidence that after he left Sri Lanka the authorities kept coming to his home and because of that his family had to move home and that there has been ongoing harassment of his family by the authorities in Sri Lanka.
17. The Judge did not take into account these earlier positive findings of the sponsor which make his own adverse findings and credibility and thus it is submitted has materially flawed in law. Reference was made to the case of **AA Somalia the SS HD [2007] EWCA 1040 Civ.**
18. The next ground is that the adverse findings by the First Tribunal Judge who states in his decision that the sponsor in his oral evidence claimed that the appellants went into hiding in November 2016 before his wife came to the United Kingdom. However, the sponsor stated in his written statement that they went into hiding following information provided by a neighbour in January 2017. It was only in January 2017 when the appellants went to visit their former house that they were warned by

their neighbour that the authorities had come looking for them. Therefore, there is no factual discrepancy in the sponsor's written and oral evidence in this regard.

19. The next ground of appeal is that the Judge misdirected himself and gave inadequate reasons as to the correct approach to apply to Article 8 claims for entry clearance outside of the immigration rules. The case of **P G (USA) v SSHD [2015] EWCA Civ 118** applies because the Judge failed to make clear which **Razgar** questions he is finding against the appellants. The Judge in addressing the proportionality question fails to make clear whether he is applying the correct compelling circumstances test and or an incorrect exceptionality and very compelling circumstances test.
20. The respondent in his rule 24 response stated that the Judge of the First-tier Tribunal directed himself appropriately. He considered all the evidence and gave adequate reasons for dismissing the appeals on human rights grounds. The Judge considered all the medical evidence and gave adequate reasons for finding that the medical reports were of little assistance in supporting the appellants claim. Although it was accepted that the sponsor had been granted refugee status, the Judge of the First-tier Tribunal was entitled to take into account the fact that the appellants were able to receive government funding for counselling and were able to travel to different locations for counselling sessions. The decision discloses no material error of law and the grounds of appeal amount to a mere disagreement with the Judge's findings.
21. At the hearing I heard submissions from both parties. Mr Lay submitted that the sponsor's family has been harassed in Sri Lanka. He further submitted that if the First-tier Tribunal Judge had considered the positive credibility findings made about the sponsor at his appeal hearing for asylum, he would have come to a different conclusion. He referred me to page 69 of **AS** in that there was a material overlap of evidence in this appeal. In the sponsor's decision allowing his appeal, the Judge accepted that the sponsor's children had been harassed by the authorities. The Judge simply ignored this evidence. The Judge was obliged to have regard to the earlier decision which would be material for his decision under Article 8.
22. Miss Jones on behalf of the respondent accepted that the previous Judge's decision with regard to the sponsor's asylum appeal, was the starting point and although the Judge had not specifically stated that in his decision, it was not material and no error of law has been occasioned thereby. She further submitted that the appellants are two adults and not children. She said that the Judge considered that the appellant's wife went back to Sri Lanka in 2017 and returned without any adverse consequences. She also referred to the fact that the appellant's medical counselling was funded by the government and that it is not credible that the authorities would do so and at the same time harass the appellants.

**Error of law decision.**

23. This appeal therefore involves two steps, the first being to determine whether there is an error of law in the decision of First-tier Tribunal Judge and the second, if I find there was an error of law, either remit it to the First-tier Tribunal for a rehearing remake the decision myself.
24. I have paid careful attention to the decision of the First-tier Tribunal Judge to ascertain whether there is a material error of law. The Judge having considered the evidence concluded that the appellants are adults and who have lived in Sri Lanka since 2006 which was when their sponsor left Sri Lanka and came to the United Kingdom and subsequently granted asylum.
25. The main ground of appeal and the ground upon which permission was granted, is that the First-tier Tribunal Judge did not take into account the case of **Justin Surendran Devaseelan v SSHD [2002] UKIAT 00702** guidelines which were given on how a second adjudicator should approach the determination of another adjudicator who has previously heard an appeal and when there is a material overlap in the evidence as stated in **AS**. I accept the proposition that the material overlap in evidence should be taken into account. Therefore, the starting point as the authoritative assessment of the appellant's status at the time of the First-tier Tribunal's decision which was in 2006.
26. I however find that the Judge was aware that the appellants sponsor has been granted protection in the United Kingdom on the bases of his narrative as of 2006. I do not accept that the fact that he was found credible to the lower standard of proof in his asylum appeal, demonstrates that he should be found credible in all subsequent hearings. It depends on the evidence given.
27. The question for the Judge to decide was whether, at the present point in time, the respondent's decision to exclude the appellants from the United Kingdom would be in breach of its obligations under Article 8 of the European Convention on human rights. The Judge was clear that that is the issue that was before him to decide.
28. The Judge found at paragraph 33 that "there is no reliable evidence to demonstrate family life for the purpose of Article 8 of the European Convention on Human Rights. Although in the same sentence he said that the sponsor is not a reliable witness, that does not mean that he decided the appeal on the basis that the sponsor was not credible. The Judge decided the appeal based on the evidence before him about the appellants circumstances after 2006.
29. The 5-step approach under the European Convention on human rights is set out in **Razgar 2004 UKHL 27** where the House of Lords set out five steps to follow when determining Article 8 outside of the Rules. (i) Does family life, private life, home or correspondence exist within the

meaning of Article 8 (ii) If so, has or will the right to respect for this been interfered with (iii) If so, is the interference in accordance with the law (iv) If so, is the interference in pursuit of one of the legitimate aims set out in Article 8(2); and (v) If so, is the interference proportionate to the pursuit of the legitimate aim. Lord Bingham indicated that if the first question, whether removal would interfere with private or family life, was answered in the affirmative, the second question would be whether such interference would have “consequences of such gravity as potentially to engage the operation of Article 8”.

30. The Judge having found that there is no family life between the appellants and their sponsor such as to engage Article 8 should have ended the decision there. The First- Tier Tribunal Judge misunderstood that it is only once the material interference with family life is established that the issue of proportionality and whether there are any exceptional circumstances arises. If there is no family life, there cannot be a breach of Article 8 in respect of family life.
31. The Judge found that there was no family life between the appellants and their parents in the United Kingdom, a finding that he was entitled to make on the evidence in the appeal.
32. The appellants case was that Sri Lankan authorities’ adverse interest in them makes their case exceptional for the purposes of Article 8. The Judge did not accept this evidence and gave cogent reasons and these were as follows.
  - There was a consistency as to when the appellant went into hiding. They could not have been in fear prior to January 2017 as they were willing to return to their family home. The sponsor’s evidence was that the appellants went into hiding in November 2016 before the sponsor’s wife left for the United Kingdom to join him in the United Kingdom.
  - The sponsor left Sri Lanka in 2006 and their mother left Sri Lanka in 2016 and experienced no difficulties leaving the airport. This demonstrates that the authorities had no interest in her so there would be no reason for them to be adversely interested in the appellants.
  - The appellants evidence in their witness statement was that they were subject to adverse attention from the authorities following the sponsor’s departure in 2006. This is not credible because their evidence also was that they were hiding in a safe place from January 2016. In the interim they lived safely in Sri Lanka.
  - Despite the appellant’s claim that the Sri Lankan authorities have and had an adverse interest in them which necessitated them living in hiding, they were issued with Sri Lankan passports on 10 March 2016. The appellants mother did not give evidence at the hearing about these matters which did not assist their appeal.

- The sponsor who claims to have access to corrupt officials in Sri Lanka approached the Sri Lankan officials on the appellants behalf, but no reason has been given for why he waited for 11 years before to facilitate the appellant's departure from Sri Lanka, as he claims to have continued access to corrupt officials. The sponsor also failed to employ this alleged corrupt contact with the officials to keep the appellants safe but only bring these influences to bear for them to leave the country.
- The appellant's mother who claims that she and her children were at risk from the Sri Lankan authorities yet returned to Sri Lanka from the safety of the United Kingdom to visit the appellants. She did not give evidence where she could have been asked questions about the alleged harassment and questioning by the authorities that she alleges, and these allegations are self-serving and unsubstantiated. She and the appellants did not come to the adverse attention of the authorities during her visit to Sri Lanka which was from 5 February 2017 to 23 April 2017. There was no evidence that the sponsor needed to employ a corrupt official to facilitate his wife's passage to and from Sri Lanka for her visit.
- Despite the appellants claim that the Sri Lankan authorities have an adverse interest in them they claim that the government has funded their counselling since 2011. There is a potential conflict in this evidence that they fear the government who are their benefactors.
- The appellant sponsor left Sri Lanka in 2006 which was some 13 years ago. The appellants have lived apart from their sponsor without adverse consequences in Sri Lanka.
- The medical evidence was considered in accordance with **JL (medical reports - ability) China [2013] UKUT 00145 (IAC)**. The sponsor in his medical report drafted on 13 November 2014, there is no reference to the alleged trauma experienced by the appellants following the sponsor's arrest in 2006 despite the appellants assertion that they began counselling in 2011 and that an adverse interest from the authorities began in 2006. The sponsor also does not refer to the adverse consequences of his circumstances upon the appellants when he presented himself for a medical examination which resulted in a report dated 20 December 2013. There is no reference of the potential mental anguish in either report that may potentially flow from a parent whose circumstances caused the appellants to require mental health services from 2011. Nor is there any reference to the historic and ongoing mental health consequences to the appellants.
- The medical reports were compiled on the express instructions of the appellants dated 20 August 2017. However, there is no reference in the report of the first appellant's current dilemma which specifically arose in January 2017 which is seven months before the report was written.



- The medical report has no meaningful analysis of the subjective account provided by the first appellant. The author of the report relies exclusively upon one remote meeting with the first appellant despite the sponsor's oral evidence that he exerts a positive influence above the appellants behaviour to control the potential for self-harm. The report does not refer to the coping mechanisms available to the appellants in the overall assessment. The report does not assist the weight to be placed above the evidence.
33. In **S v UK [1984] 40 DR 196** Sedley LJ made it clear that "Neither blood ties nor the concern and affection that ordinarily go with them are, by themselves altogether, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we have a family life with them in any sense capable of coming within the meaning and purpose of Article 8
34. In **ZB (Pakistan) v SSHD 2009 EWCA Civ 834** the Court of Appeal said that when considering whether, for Article 8 purposes, family life existed between a parent and adult children, account must be taken of the parents need for the children and the totality of the family relationships must be considered
35. The Judge was entitled to find on the evidence that the appellant's exclusion from the United Kingdom not breach their rights under Article 8 of the European Convention on Human Rights and that there were no exceptional circumstances where they should be granted leave to enter when they cannot meet the requirements of the immigration rules.
36. There has been time-lapse of some 13 years since 2006 when the sponsor was granted asylum. The Judge took into account the evidence subsequent to 2006 and was entitled to come to the conclusion that he did on the evidence that the appellants exclusion from the United Kingdom would not breach their rights under Article 8 of the European Convention on Human Rights and that there was nothing exceptional or compassionate in their cases and that they can continue to live in Sri Lanka as adults. The Judge was also entitled to find that the emotional ties between them and their parents are normal emotional ties expected between as parents and adult children. This was an obvious finding given that the appellants have lived apart from their father for nearly 13 years.
37. I therefore uphold the decision of the First-tier Tribunal.

## **DECISION**

Both appellant's appeals are dismissed.

Signed by

A Deputy Judge of the Upper Tribunal  
Ms S Chana

Date: 25 March 2019