



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

Appeal Number: UI-2022-000223
PA/50029/2021
LP/00205/2021

THE IMMIGRATION ACTS

**Heard at Field House, London
On Monday 6 June 2022**

**Decision & Reasons Promulgated
On Friday 22 July 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

**C M
[ANONYMITY ORDER MADE]**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this involves an appeal on protection grounds, and although the Appellant no longer pursues that ground, I continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant [CM] is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Ms S Anzani, Counsel instructed by Reeves and Co solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ennals dated 17 January 2022 (“the Decision”). By the Decision, Judge Ennals dismissed the Appellant’s appeal against the Respondent’s decision dated 16 November 2020 refusing her protection and human rights claims. This is the second such appeal, the Appellant’s first appeal having been dismissed on 13 February 2017.
2. The Appellant is a national of Sri Lanka. She claims to be at risk as a result of her relationship with “V” – a man she says was believed by the authorities to have been working with the LTTE in 2009. She claimed that she had been detained and abused by the authorities on two occasions in 2009. She came to the UK in 2010 as a student. She returned to Sri Lanka in 2013 when her mother was ill and claimed that she had been detained again. She returned to the UK in September 2013. She did not claim asylum for a further two years. Her refused claim was dismissed on appeal as I have already noted.
3. The Appellant also relied on her Article 8 rights based on her relationship with a British citizen – Mr A - and his son. His son does not live with them but Mr A still has ongoing contact and the Appellant is said to have formed a relationship with him. It is asserted that Mr A cannot return to Sri Lanka with her due to his relationship with his son. His son is on the autistic spectrum.
4. The Judge considered the protection appeal by reference to the previous Judge’s findings (as he was bound to do in accordance with the Devaseelan guidance). The previous Judge found the protection claim not to be credible. Having considered the further evidence, Judge Ennals also found the claim not to be credible. He therefore upheld the previous findings. The Appellant has not challenged the dismissal of her appeal on this basis.
5. In relation to Article 8 ECHR, it was accepted that the Appellant could not meet the Immigration Rules (“the Rules”), specifically Appendix FM to the Rules (“Appendix FM”). This was not solely on the basis of her immigration status but also because she did not meet the financial requirements. Although there was evidence that Mr A had secured a new job on a salary exceeding the income threshold, he had not started that job as at the date of the hearing.
6. The Judge also did not accept that the Appellant could satisfy paragraph EX.1. of Appendix FM (“EX.1”) which she would have to meet in order to succeed within the Rules due to her immigration status as an overstayer. The Judge accepted that Mr A could not return to Sri Lanka. He found that this was not “practical” because of Mr A’s relationship with his son.

Nonetheless, he found that the Appellant could be expected to return to Sri Lanka without Mr A for a temporary period whilst she sought entry clearance once the financial requirements of Appendix FM were met. He therefore concluded that removal would not be disproportionate.

7. The Appellant appeals on two grounds. Broadly, those are a challenge to the Judge's findings in relation to EX.1 (ground one) and to the finding that section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") was relevant where the requirements of EX.1 were otherwise met.
8. Permission to appeal was granted by First-tier Tribunal Judge Oxlade on 3 March 2022 in the following terms:
 - “1. The Appellant's in-time grounds of appeal do not challenge the findings material to the dismissal of the Appellant's asylum claim, nor the decision. Accordingly, permission to appeal is neither sought nor granted against the decision to dismiss the claim for asylum.
 2. The Appellant's application for permission to appeal is against the refusal of the Appellant's Article 8 ECHR claim, which the Respondent conceded in the review should be considered as a new matter, and was fully argued at the hearing before IJ Ennals.
 3. The core complaint relates to the Judge's assessment and consideration of the Appellant's and British Citizen partner's family life, through EX1 of the Immigration Rules. The complaint is two-fold: firstly, to find that the insurmountable obstacles test was not met was incompatible with a finding [26] that the partner has a genuine and subsisting relationship with his autistic son living in the UK and with whom the partner has fortnightly contact, which relationship would end if the partner emigrated to Sri Lanka with the Appellant. Secondly, the Judge found [27] that even if EX1 had been met, he was required to undertake a proportionality assessment, and so introduced an additional test, rather than simply allow the appeal. Both points are arguably material errors of law.
 4. There are additional grounds, which can be argued, but the above points are arguable.
 5. The application for permission to appeal is granted.”
9. The Respondent filed a Rule 24 reply on 23 March 2022 seeking to uphold the Decision. Although the Respondent says that the Judge was wrong to say that he needed to go on to consider proportionality in the event that the Rules were met, she submits that the error is immaterial in circumstances where the Judge did not accept that the Rules were met.
10. The appeal comes before me to decide whether there is an error of law in the Decision and if I so conclude to either re-make the decision or remit the appeal to the First-tier Tribunal for it to do so.

11. I had before me a core bundle of documents relating to the appeal, the Respondent's bundle, the Appellant's bundle before the First-tier Tribunal and two supplementary bundles for the Appellant which were also before the First-tier Tribunal.

DISCUSSION AND CONCLUSIONS

12. I begin by noting that the Appellant has not challenged the dismissal of her protection claim (as confirmed by Judge Oxlade when granting permission on the human rights grounds). Paragraphs [14] to [20] of the Decision are not impugned by the grounds. The dismissal of the protection claim therefore stands.
13. In relation to the Article 8 claim, the Appellant accepts that she is unable to meet the Rules on account of her relationship with Mr A unless she meets EX.1. That is not only because she has no lawful immigration status (she is an overstayer) but also because she cannot meet the financial eligibility requirements. Mr A does not have a sufficient income (or did not do so at the date of the hearing on the evidence).
14. At [25] to [26] of the Decision, the Judge made the following findings about the relationship between the Appellant and Mr A and Mr A and his son:

"25. Evidence was supplied in relation to the child, and I accept that he exists, and has the health problems that have been described. I accept that Mr [A] currently has fortnightly contact with his son, and that the appellant plays a role in this, and has developed a relationship with the child. I have no difficulty accepting that the best interests of the child are to continue his relationship with his father. I am not so clear that his relationship with the appellant has become so significant that her departure would be seriously disruptive for him.

26.If the Appellant was required to leave the UK Mr [A] talked of her having to apply for a visa to return to live with him as a married couple. The appellant did not appear to have thought through what might happen. She maintained that Mr [A] could not come and live with her in Sri Lanka, due to his relationship with his son, who lived with his mother in the UK. I accept that Mr [A] moving to Sri Lanka moving to Sri Lanka was not practical, as clearly his relationship with his young son was important, and would not survive his father emigrating. Clearly having to return to Sri Lanka without her husband would be a very significant interference with family life. People manage to maintain family relationships by means of telephone and video contact, as well as correspondence and with his well-paid job shortly to start Mr [A] would be able to travel to see the appellant from time to time. As Mr [A] noted, such a separation would not necessarily be permanent, as the appellant could apply for a visa to return, once the requirements of App FM could be met."

15. The Judge began the next paragraph with the words “[e]ven if the requirements of EX.1 were met”. It appears therefore that he saw the previous paragraph of the Decision as his finding that EX.1 was not met. However, if that is so, the Judge adopted the wrong test. As the Judge noted at [23] of the Decision when setting out the submissions for the Appellant, the issue is whether there are insurmountable obstacles to family life with Mr [A] continuing outside the UK. The assessment made at [26] of the Decision in that regard does not reflect that test.
16. In response to a question from me at the outset of the hearing, Mr Tufan accepted that the Judge had made an error when considering whether EX.1 was met. I agree with and accept that concession for the following reasons.
17. The Judge considers whether the Appellant could go to Sri Lanka alone and maintain her relationship with Mr [A] in the short term via remote means and visits until she was able to satisfy the Rules. That is not the test. The test is whether the relationship can be continued outside the UK. In other words, could Mr [A] be expected to relocate to Sri Lanka permanently with the Appellant? Whilst the couple might later decide to return to the UK if the Appellant could satisfy the Rules at that stage, the question is whether family life could continue outside the UK on a permanent basis. That is because couples are not entitled to rely on their choice of where to continue family life. However, if they are unable to continue their family life in another country, then the Rules permit them to remain (based on EX.1).
18. For those reasons, the Judge made an error of law by applying the wrong legal test to the question he had to answer.
19. I agree with the Respondent that the Judge’s error as pleaded by the second ground would be immaterial if the Judge had made a legally sound finding in relation to EX.1. However, since I have concluded that the Judge erred in his assessment of EX.1, the Decision insofar as it deals with the Article 8 claim falls to be set aside.
20. The next issue is what should follow. Mr Tufan invited me to set aside [25] to [27] of the Decision and to direct a resumed hearing to reassess the Article 8 claim. Ms Anzani submitted that I could and should re-make the decision applying the findings made by the Judge and should on that basis allow the appeal. She also submitted that, if I were not with her on her primary submission, I should preserve the positive factual findings made by the Judge at [25] and [26] of the Decision in particular. She pointed out that the Respondent had not challenged those findings.
21. I have carefully considered the appropriate course. As Ms Anzani conceded, the use of the word “practical” at [26] of the Decision does not reflect the correct legal test. However, as paragraph EX.2 of Appendix FM makes clear, when considering whether there are insurmountable obstacles to the Appellant and Mr A enjoying family life together in Sri

Lanka, the meaning of that phrase is whether there are "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner" (my emphasis).

22. I have concluded that the combined effect of the factual findings made at [25] and [26] of the Decision (which are not challenged by the Respondent) is that the best interests of Mr A's child are for Mr A to remain in the UK and that, if Mr A were to return to Sri Lanka to live with the Appellant, the relationship between Mr A and his child would "not survive". That cannot be described other than as very serious hardship for Mr A (and indeed for his son).
23. Put another way, if I were to preserve the positive factual findings made by the Judge as Ms Anzani invited me to do (in the absence of any challenge to those findings by the Respondent), the inevitable conclusion reached is that there would be insurmountable obstacles to Mr A going to live in Sri Lanka with the Appellant as his relationship with his son would be permanently severed.
24. For those reasons, I am satisfied that the impact of the factual findings made by the Judge is that EX.1 is met by the Appellant. As I have already pointed out, and the Respondent concedes, consideration of the Article 8 claim outside the Rules is not relevant if the Appellant is able to succeed within the Rules (albeit on the basis that EX.1 is met).
25. I therefore allow the appeal on human rights (Article 8 ECHR) grounds. The appeal on protection grounds remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge Ennals dated 17 January 2022 involves the making of an error on a point of law. I therefore set aside the Decision insofar as it determines the Article 8 claim. I preserve paragraphs [14] to [20] of the Decision and the dismissal of the appeal on protection grounds.

I re-make the decision by allowing the appeal on human rights (Article 8 ECHR) grounds for the reasons given above.

The appeal on protection grounds remains dismissed.

Signed: L K Smith
Upper Tribunal Judge Smith

Dated: 6 June 2022