



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

Appeal Number: IA/06499/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15 December 2014**

**Determination
Promulgated
On 22 January 2015**

Before

**UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE RINTOUL**

Between

**J A
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Cronin, Counsel, instructed by Birnberg Peirce & Partners

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Pacey, promulgated on 9 July 2014, dismissing her appeal against the decision of the respondent made on 13 January 2014 to refuse her leave to remain on human rights grounds and to remove her from the United Kingdom.

2. The appellant is a citizen of Sri Lanka. She has lived in the United Kingdom since she arrived in 2001 with entry clearance as a visitor to see her husband who unfortunately died the day after her arrival. Shortly thereafter she was diagnosed as HIV positive and on 14 February 2002 she applied in time for leave to remain on compassionate grounds, an application refused on 25 November 2005. The appeal against that decision was dismissed on 27 February 2006; permission to appeal those decisions was refused.
3. The appellant became extremely unwell owing to TB and complications arising therefrom in 2009; she also had a severe adverse reaction to her multiple drug therapy for treatment of her HIV status.
4. On 14 July 2009 a fresh claim for leave to remain on the basis of human rights was submitted by the appellant's solicitors but no decision thereon was made until 13 January 2014. This decision was only made after judicial review proceedings to challenge the delay had been brought.
5. The appellant's case is that her removal to Sri Lanka would be a breach of Articles 3 and/or 8 of the Human Rights Convention on the basis that:
 - (i) she has established a family life in the United Kingdom with her late husband's brothers and sister-in-law upon whom she is wholly dependent for emotional and practical support;
 - (ii) she would be without any family emotional or other support in Sri Lanka on return; and, would not be accommodated;
 - (iii) given her illness, she would be at risk of significant discrimination and hostility, effectively ostracising her; and, her position would be further exacerbated as a result of the discrimination she faces as a Tamil woman;
 - (iv) given the particular difficulties arising from her sensitivity towards most of the medication and the fact that her immune system was still compromised (despite medication), she is at significant risk on return to Sri Lanka; that in light of these factors and taking into account the delay arising in this case to remove her to Sri Lanka would be disproportionate.
6. The respondent's case as set out in the refusal letter of 13 January 2014 is that:-
 - (v) the appellant had not established a family life in the United Kingdom;
 - (vi) she did not meet the requirements of paragraph 276ADE of the Immigration Rules given that she had been here less than twenty years and had not provided evidence to suggest she had no remaining ties with Sri Lanka;

- (vii) antiretroviral treatment would be available in Sri Lanka and that her state of health was not so great so as that Article 3 would be engaged;
 - (viii) although invited to do so, the appellant had chosen not to make an asylum claim on the basis that she would be subject to stigma and discrimination but had not done so;
 - (ix) there were no compelling or compassionate issues such that she should be given discretionary leave.
7. When the matter came before Judge Pacey she heard evidence from the appellant, her brother-in-law M T and her brother-in-law's wife Mrs M T. She also had before her statements from another brother-in-law, A T and a nephew, R A, (son of her deceased sister). In addition, there were numerous medical reports before her from Dr McSorley, the appellant's treating physician, and a report from Dr Widger (a sociologist) on the difficulties she would face in Sri Lanka owing to the stigma attached to those with HIV.
8. Judge Pacey found that:-
- (x) the appellant was an adult, not severely disabled and although the health system in Sri Lanka fell short of that provided in the United Kingdom, it could not be said that there was no appropriate treatment available [20]. The judge noted that Dr Widger did not in his report state in terms that the appellant would die if deprived of the treatment which she currently enjoys and thus the appeal on Article 3 grounds failed [22];
 - (xi) the appellant has a family life with her brothers and all their family there existing between them more than the normal ties [26];
 - (xii) the removal would interfere with her right to respect for her family life because given that all that they do for her on a day-to-day basis she would not be able to enjoy family life from Sri Lanka [28];
 - (xiii) the interference was of such gravity to engage Article 8, as she would be deprived of the physical and emotional support from family arising because of her medical condition [29];
 - (xiv) nonetheless, the interference would be proportionate, the appellant's case not falling within the small minority of health cases which could fail under Article 3 but might succeed under Article 8 [35, 36];
 - (xv) the decisions of the Upper Tribunal in **Akhalu (Health claim: ECHR Article 8)** [2013] UKUT 00400 and **Okonkwo (Legacy/Hakemi; health claim)** [2013] UKUT 00401 could be distinguished on the basis that the disparity of healthcare facilities did not weigh heavily in the claimant's favour [37, 38] and on the basis that the appellant had come to the United Kingdom as a visitor with a six months visa [40]

her only lawful period of residence being administrative rather than on substantive grounds;

2. Judge Pacey, in reaching her conclusions, took into account that:
 - (i) the appellant had lived in the United Kingdom for thirteen years and had developed strong family and private life ties [42] being supported by her husband's two brothers;
 - (ii) the evidence of M T and Mrs M T concerning the implications of the applicant returning to Sri Lanka [44] noting also the lack of relatives in Sri Lanka [43].

9. The appellant sought permission to appeal on the grounds that:-
 - (iii) Judge Pacey erred in considering the applicant's circumstances only in comparison to other reported decisions but not, as is required by *AE (Algeria)* in a careful and structured way [7]; had misapplied *MM (Zimbabwe) v SSHD* [2012] EWCA Civ 279 [9] by failing to note that at paragraph [23] the exception identified by Moses LJ was pertinent given this appellant's family and private life claim;
 - (iv) the Article 8 evaluation is manifestly inadequate, there being no proper consideration of the appellant's longstanding total dependency on her British family; her serious and volatile physical and mental health; the absence of a home or family in Sri Lanka; that she will face stigma, shame and imputed discrimination on return [12]; and, the judge had failed to give reasons why the factors did not render the applicant's removal a disproportionate interference;
 - (v) Judge Pacey [15] failed to take proper account of the opinion of Dr Widger, unreasonably citing a lack of medical diagnosis, incorrectly treating him as an anthropologist not a physician; and, failed to take into account the expert testimony of Dr McSorley as to the significant risks to this appellant were her treatment to be interrupted;
 - (vi) Judge Pacey failed to give weight to the appellant's residence in the UK including the length of her lawful residence and failed to give proper regard to the delay in this case.

10. We commence our analysis by considering Judge Pacey's approach to article 3. We are satisfied that the judge directed herself properly as to the test applicable to Article 3 health cases. She properly directed herself in accordance with the decisions in **GS (India)** [2011] UKUT 35 and **D v UK** [1997] 24 EHRR 43. It is not the appellant's case as set out either in the grounds of appeal to the Tribunal that the treatment that she would receive as a Tamil woman with HIV would reach sufficient severity to engage Article 3.

11. Whilst the judge's comments at [21] with regard to the report of Dr Widger could have been better expressed, it cannot reasonably be inferred from

these that the judge expected from it a medical diagnosis; it was open to her to note that this report, which dealt in detail with the treatment available and the manner in which people with HIV are treated in Sri Lanka was not sufficient to show that there would be a lack of treatment such that she would die. The comparison being made was clearly directed towards the situations where there would be no treatment available at all; that is clear from the context of the cases being discussed in the judge's consideration of Article 3. It cannot be inferred that the judge was looking for a diagnosis, simply that she was making findings on the availability of treatment for the appellant's condition, and it was open to her to conclude that the evidence did not show treatment would not be available.

12. We turn next to the findings with respect to article 8. This is a case in which the judge found, unusually, that the appellant who is an adult had established a family life with her brothers-in-law and their families. This is in addition to the finding of a private life in the United Kingdom.
13. The challenge with regard to article 8 is, in summary, that the judge misdirected herself as in law; and, assessing whether removal was proportionate, failed to take into account factors in the appellant's favour in the context of this being a "family life" case.
14. Ms Cronin submitted that this latter point is implicit in the grounds; Mr Whitwell argued that it was not raised and had not formed part of the challenge to the decision of the First-tier Tribunal. Having considered the grounds in detail, we note that it is averred at paragraph [12] that there was no proper consideration of the appellant's longstanding total dependency on her British family and at paragraph [9] that the judge had failed properly to engage with Moses LJ's observations at paragraph 23 of his decision in **MM**. Accordingly, we accept that, although it could have been more clearly pleaded, Ms Cronin's point can properly be developed from the grounds as pleaded.
15. Judge Pacey sets out in detail the relevant case law in her determination. It is not contended that the cases to which she referred are not good law. The challenge to her application of the case law is two-fold: that she did not consider the appellant's circumstances in a proper and structured way; and, further, failed to take into account relevant factors, or, in the alternative, failed to give proper reasons for the finding that removal was proportionate.
16. We consider that whilst the findings may have been adequate had this been simply a private life case, there is insufficient indication in Judge Pacey's determination that she considered the nature of the interference with the family life she found had been established. It is not clear from paragraph [42] that she had taken family life into account; what weight she had attached to it; or, whether she took this factor into account as a matter in favour of the appellant or otherwise. This aspect is significant; if it is not clear on what side a factor was weighed, if at all, it is not possible to discern whether the judge properly weighed the existence of family life

in the appellant's favour; nor is it clear what interference to the established family life she considered would flow from the appellant's removal. The reasoning at [44] is inadequate.

17. For these reasons, we consider that the decision of the First-tier Tribunal did involve the making of a material error of law and we set it aside.
18. We consider that that the finding that family life in this case is to be preserved, but that there will of necessity need to be a further fact-finding exercise as to the effect on that family life of removing the appellant, and to what extent that interference will be proportionate. The judge's determination does not set out in any detail the evidence she heard on the family life aspect and there is an absence of clear findings on what she appears to have been told. Such matters will of necessity require a consideration of section 117B of the 2002 Act.
19. In the circumstances, we consider that it would be appropriate to remit the appeal to the First-tier Tribunal for a fresh decision, albeit that the finding that family life exists between the appellant and her brothers-in-law is preserved. We maintain the anonymity order made by the First-tier Tribunal.

Signed

Date 21/01/2015

Upper Tribunal Judge Rintoul