



Upper Tribunal
Asylum and Immigration Tribunal

Appeal Number: HU/26359/2016

THE IMMIGRATION ACTS

Decided at Field House
On 10 August 2018

Decision & Reasons Promulgated
On 03 September 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR BARATH BASKARAN
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Mr N O'Brien of Counsel

For the respondent: Ms A Fujiwala, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Sri Lanka, born on 20 November 1992 appealed to the First-tier Tribunal against the decision of the respondent dated 8 November 2016 to refuse his application for leave to remain in the United Kingdom outside the Immigration Rules and based on his family and private life in this country.
2. First-tier Tribunal Judge Traynor initially allowed the appeal. First-tier Tribunal Judge Talbot dismissed the appellant's appeal on 11 October 2016.

3. Permission to appeal that decision was given by First-tier Tribunal Judge PJM Hollingworth on 22 June 2018 who found that the Judge arguably erred in not taking the findings of Judge Traynor as the starting point in accordance with the principle set out in Devaseelan [2002] UKAIT 00702. He said that it is arguable that the attribution of weight to the finding of Judge Traynor in the context of the improvement of the appellant's condition is insufficient and that in insufficient analysis has been set out the basis of the findings of Judge Traynor in relation to subsequent developments in applying Devaseelan. He also stated that the Judge set out an insufficient analysis of the impact upon the appellant's mental health of removal Sri Lanka at the present time. It is arguable that the proportionality exercise has been affected.

4. Thus, the appeal came before me.

The First-tier Tribunal Judge's findings

5. The First-tier Tribunal Judge Talbot made the following findings which I summarise. The Judge stated that he has before him the decision of First-tier Tribunal Judge Traynor on 9 November 2013 who heard the appeal of the appellant against the respondent's decision made on 10 May 2012 to refuse his asylum appeal and human rights claim. The appeal was dismissed on asylum grounds but was allowed on human rights grounds. Amongst the evidence considered by Judge Traynor was a medical report from Dr Ghosh dated 30 August 2013.

6. Judge Traynor accepted the findings of Dr Ghosh that there is a lack of psychiatric care in Sri Lanka. The appellant argues that his PDST is not likely to have gone away since 2014 and the appellant would be re-traumatised by having to return to Sri Lanka.

7. Judge Talbot stated that the evidence before him differs in substantial aspects from the evidence when the matter was considered by Judge Traynor. Judge Traynor considered the appeal on the basis of a medical report referring to the appellant being in a very poor physical and mental health. This is not apparent with regards to his current position. At the previous hearing the appellant was not in a fit state to give oral evidence. By contrast he did give evidence at the hearing before me and there was no indication that he was unfit to do so.

8. The appellant also confirmed that is having no medical treatment either for physical or mental health issues. This may be in part due to his inability to register with a GP since he has lost his immigration status. However if he had been acutely unwell he would no doubt have to have been admitted to hospital. In fact the appellant's evidence was that even before the loss of his immigration status he had not received any psychiatric or psychological treatment apart from having chats to his GP. He could not recall having had any medication. The only current health problem mentioned by the appellant was in relation to his poor sleep. It is also noted that the appellant is capable of working for 30 hours per week. The Judge concluded that

whilst the appellant may feel highly insecure and anxious because of his lack of immigration status in the United Kingdom and the prospect of his. Removal to Sri Lanka, his health is currently much better than the state of health described in the report of Dr Ghosh in 2013.

9. The judge stated that another element of the evidence which differs from that before Judge Traynor concerns the appellant family in Sri Lanka. Judge Traynor had been told that the whereabouts of the appellant's mother and sister were unknown. Whether or not that was true at the time, the appellant has now confirmed that he is in telephone contact with his mother who remains in the north of Sri Lanka. This is significant in that the appellant would not be returning to Sri Lanka without any prospect of re-joining his family life there.
10. In respect of the two letters from a Sri Lankan attorney and a parish priest the appellant has not explained these two letters to be sent to him. Furthermore, the contents of the letter do not wholly correspond with the appellant's own evidence before Judge Traynor and therefore Little weight is given to either of these letters and there are concerns about their authenticity and the truth of their contents.
11. The Judge concluded by stating that the provision of professional psychiatric care and treatment may well remain very poor in Sri Lanka. However, the appellant's current state of health is not as poor as that described by Dr Ghosh in 2013. The appellant has been well enough to manage without significant medical treatment in the United Kingdom even during the period when he was able to register with a GP. He is currently fit enough to maintain the job. The judge stated that he accepts that his mental health may deteriorate if he is forced to return to Sri Lanka against his wishes, the Judge was not satisfied that the appellant genuinely believes that he would currently be of interest to the Sri Lanka authorities. Furthermore, the Judge stated that the appellant would have the benefit of re-joining family members. The appellant does not meet the high threshold required for a successful human right claim under Article 3 of the European Convention on Human Rights on the grounds of ill-health.
12. In respect of Article 8 careful attention is paid to the Judgement of Lord Reed in the Supreme Court decision of **Agyarko [2017] UKSC** concerning the relationship in human rights appeals between article 8 of the immigration rules which essentially states that the Secretary of State's policy must be taken into account and to attach considerable weight to wait at the general level as well as considering all the factors which are relevant in the particular case.
13. The appellant does not meet the requirements Appendix FM on the basis of his family life. With regard to his private life rights, under the immigration rules the appellant would have to establish very significant obstacles to his integration back into Sri Lanka under paragraph 276 ADE (vi). The appellant has lived in Sri Lanka for the majority of his life and is familiar with the language and culture. The appellant has resided in this country for seven years and his removal would amount

to an interference efficient to engage the convention. However, there is little evidence of the strong ties to the United Kingdom in terms of social other connections. There are no very compassionate circumstances at play particularly as he has family members in Sri Lanka that he could re-join. His removal would not be disproportionate and would not amount to a violation of Article 8.

Grounds of appeal

14. As the appellant has succeeded in his previous appeal and the principle set out in Devasaleen apply. While the appellant's condition might have improved there was still the underlying condition. The appellant's condition has improved because he had permission to be in the United Kingdom and felt protected by that. He had also been able to find constructive employment which acted as therapy for him and took his mind off what he had suffered previously and of what he feared would happen to him if he was removed. Judge Traynor in his decision quoted from significant parts of the medical evidence which had identified the threat of removal would result in a significant deterioration of his mental health which would increase the risk of self-harm and suicide. In paragraph 72 Judge Traynor noted that the medical report showed that the appellant had been exposed to the trauma and fighting in 2009 and there was a lack of adequate care in Sri Lanka.
15. Judge Talbot by departing from these findings did not give sufficient reasons as he accepted that the provision of professional psychiatric care remains very poor in Sri Lanka in paragraph 19 of his decision. The whereabouts of the appellant's family in Sri Lanka was not a central factor for Judge Traynor's decision. As the appellant would need professional care if his health deteriorated and his family were in the North and he would be returned to the south that it is not clear what material difference knowing there is family were would make. In respect of his lack of treatment and his improvement these are two sides of the same coin. He has improved because there was no threat of return and this took his mind off the problem. However, if removed and his strongly held subjective fears based on being a teenager in the civil war in 2009 because a significant deterioration. That was the position when his appeal was allowed and that is what he would be returned to if he was removed.

The hearing

16. At the hearing, I heard submissions from both parties. Mr Brian submitted that there is no evidence to dispute the fundamental findings of risk on return for the appellant. The threat to the appellant's health is still a problem for the appellant.
17. Ms Fujiwala submitted that the appellant's appeal is a disagreement with the decision of Judge Traynor. The medical report was made in 2013 and this is five years later, and the appellant is much better. The Judge took into account the evidence as of the date of the hearing. No medical report has been provided as to the appellant's current medical position. The appellant is working on two jobs and does

not appear to have any psychological treatment. The facts were before the Judge made the correct decision

Findings as to whether there is a material error of law in the determination.

18. Essentially, the point been taken by Mr O'Brien on behalf of the appellant is that the First-tier Tribunal Judge Traynor allowed the appellant's appeal based on the medical evidence before him which was a report by Dr gosh. It is argued that in line with the principle set out in **Devasaleen** that should have been the starting point of Judge Talbots decision. The respondent's position is that the Judge was entitled to make findings on the new facts available to him at the time of the hearing which were different to those before Judge Traynor. The appellant had demonstrated that he is now well enough, has family in Sri Lanka and therefore the facts have changed and the decision is safe.
19. In **Justin Surendran Devaseelan v SSHD [2002] UKIAT 00702** ('Devaseelan') guidelines were given on how a second adjudicator should approach the determination of another adjudicator who has previously heard an appeal by the same appellant. It was stated at paragraph 39:
 - (1) **The first Adjudicator's determination should always be the starting-point.** It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
 - (2) **Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
 - (3) **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.** The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.'
20. The basis of the appellant's claim before Judge Traynor was that his exclusion from the United Kingdom would breach his rights under Article 8 of the European Convention on Human Rights. This was the very same claim before the First-tier Tribunal Judge Talbot who was the second decision maker in his appeal. It was not disputed at the hearing that the second First-tier Tribunal Judge must take Judge

Traynor decision as the starting point and that it is the authoritative assessment of the appellant's status on the date it was made, which in this case was in 2013.

21. That would therefore remain as the authoritative assessment unless and until there was further cogent oral or documentary evidence which suggest that the decision of Judge Traynor is no longer safe and based on the additional evidence, which was not before the original decision maker, a different decision is merited.
22. The First-tier Tribunal Judge Traynor found that the situation has changed for the appellant since his last appeal in 2013. The Judge argued that the appellant was much better, holding a job in this country and his family had been found in Sri Lanka. He found that these three factors entitled him to depart from the decision of Judge Talbot and it would be safe to return the appellant to Sri Lanka.
23. The Judge however did not give proper reasons for finding that the appellant's health has improved did not consider the reason for why it has improved. It is argued on behalf of the appellant that his health has improved because he has been allowed to live in this country and therefore his fear of return was neutralised. The fact that the appellant's health has improved cannot not be considered as a new fact before Judge Traynor. The Judge did not consider how it would impact the appellant if he was now told that he is going to be removed to Sri Lanka. The Judge didn't acknowledge at paragraph 19 of the decision that the appellant's mental health may deteriorate if the appellant was forced to return to Sri Lanka. This shows that the Judge did realise that the appellant's mental health would go back to the condition that it was as stated in the group medical report of 2013.
24. Furthermore, Judge Traynor dismissed the appellant's appeal on the evidence that his family has been found. It was not the fact that the appellant's family was had not been found in Sri Lanka but the fact of the appellant's mental health which was the basis of Judge Traynor's decision allowing the appellant's appeal. The starting point, as he accepted, was the decision of Judge Traynor allowing the appellant's claim that he cannot return to Sri Lanka. Therefore, the fact that the appellant's family has been found in the North of Sri Lanka, should not have made a material difference to the outcome.
25. I find that there is a material error of law in the decision of the First-tier Tribunal based on the guidance given in the case of Devaseelan as to how a second decision maker should approach the decision of a previous decision maker in respect of the same appellant and the same claim. The Judge should have found that the decision of Judge Traynor was an authoritative assessment of the appellant's circumstances at the date of that decision it 2013 which should remain the same unless and until some other evidence is provided for the Judge to depart from the decision made by Judge Traynor. The Judge present a material error by finding that the findings of Judge Traynor are to be disturbed without giving good reasons for his findings. I find that the appellant's removal would impact the appellant's mental health.

26. I therefore set aside the decision of Judge Talbot, and I remake the decision and allow the appellant's appeal.
27. This disposes of the appeal.

DECISION

First-tier Tribunal's decision is set aside.

The appellant's appeal is allowed pursuant to Article 8 of the European Convention on Human Rights.

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana

Dated this 23rd day of August 2018