



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

Appeal Number: PA/09096/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 17th June 2019**

**Decision & Reasons Promulgated
On 15th July 2019**

Before

**UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**R A
(ANONYMITY DIRECTION MADE)**

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant (referred to as the Claimant in this decision) whose name has been initialised in this decision as R A. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Secretary of State: Ms J Isherwood, Senior Home Office Presenting Officer

For R A: Mr R Drabble, QC, Counsel, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

Introduction

- 1.—For ease of reference, we shall refer to the Appellant in the proceedings before the Upper Tribunal as the Secretary of State and to the Respondent as the Claimant.
- 2.—This is the remaking of the decision in the Claimant's case following the decision of Upper Tribunal Judge Coker, promulgated on 9 October 2018 and appended below, in which she found that the First-tier Tribunal had erred in law when allowing the Claimant's appeal against the Secretary of State's decision of 12 August 2016, refusing her protection and human rights claims. The allowance of the appeal by the First-tier Tribunal had related solely to the Claimant's human rights claim. Her protection claim was rejected and has not been the subject of any challenge to the Upper Tribunal.
- 3.—In summary, the First-tier Tribunal had erred in its approach to a medical report on the Claimant's mental health by failing to recognise that the account of claimed past experiences provided to the author had been disbelieved by a judge in a previous appeal. In addition, the First-tier Tribunal had erred in relation to the weight attributable to the public interest in deportation. The decision allowing the Claimant's appeal on human rights grounds was duly set aside and the matter set down for a resumed hearing, with accompanying directions to the parties.

Relevant immigration and procedural history

- 4.—The Claimant is a Sri Lankan national, born in April 1989, who entered the United Kingdom in January 2010 with entry clearance as a student. Having had her leave curtailed because of employment undertaken in breach of conditions, the Claimant was issued with a document notifying her of her liability to removal. In April 2011 she was arrested for the possession/control of a false identity document. On 3 May 2011 she was convicted and sentenced to 12 months' imprisonment. A claim for asylum was made shortly thereafter. The Secretary of State refused that claim and made a decision to deport the Claimant pursuant to section 32(5) of the UK Borders Act 2007. A deportation order was signed on 27 October 2011. An appeal to the First-tier Tribunal was unsuccessful, as were attempts to challenge that decision. In due course, the Claimant submitted further evidence, particularly in relation to her mental health. The Secretary of State accepted that the further representations constituted a fresh claim, but refused it. Her appeal against that decision was dismissed by the First-tier Tribunal and she became appeal rights exhausted on 19 February 2015.
- 5.—Following this, a number of further representations were put to the Secretary of State in 2015 and 2016. These led to the refusal of the

Claimant's latest protection and human rights claims, with that decision being the subject of the appeal before the latest First-tier Tribunal judge and now before us.

The issues arising in this appeal

- 6.—Whilst certain areas of dispute between the parties remain, there is an uncontroversial core to the scenario with which we are concerned when remaking the decision in this appeal. The Claimant is a “foreign criminal” within the meaning of section 117D(2) of the Nationality, Immigration and Asylum Act 2002, as amended (“NIAA 2002”) who is married to a Sri Lankan national, NK. NK is a recognised refugee and has limited leave to remain in the United Kingdom as a result (this is described as, “refugee leave to remain” on his residence permit). Until very recently, the couple had two children, born in April 2016 and October 2017, both of whom are Sri Lankan nationals and both of whom have limited leave to remain in the same terms as their father. In April 2019, the Claimant gave birth to the couple's youngest child. He too has Sri Lankan nationality. It does not appear as though he has been granted leave to remain as yet.
- 7.—As confirmed by the Presenting Officer before the First-tier Tribunal and by Ms Isherwood before us, it is not being asserted that either NK or the two older children can go with the Claimant to Sri Lanka. Notwithstanding what is stated in para. 16 of her skeleton argument to the effect that it was for the Claimant to prove that NK was “still in need of protection” (an assertion which we were told had been based upon an aspect of the Secretary of State's guidance on criminality in article 8 cases¹), Ms Isherwood quite rightly recognised the insuperable difficulties in the path of such an assertion. First, any guidance published by the Secretary of State is just that: it has no persuasive, let alone authoritative, value in respect of the question of NK's status. Second, and more importantly, NK status as a refugee under the Refugee Convention is ongoing unless and until revocation action is successfully taken against him. Ms Isherwood confirmed there was no question of any such action being contemplated by the Secretary of State in this case.
- 8.—Ms Isherwood also confirmed, again in our view quite rightly, that there is no question of the Claimant being separated from her baby whom, the evidence clearly shows, is currently being breastfed.
- 9.—Therefore, on the undisputed factual matrix set out above, this case brings into sharp relief the issue of the separation of a family unit. Here, it is (somewhat unusually) the mother of children who is to be deported. She would depart the United Kingdom with her baby, leaving behind her husband and two older children. It of course follows that the baby will be

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/801622/Article-8-criminality-cases-v8.0ext.pdf.

separated from his father and siblings for what will very probably be an indefinite period.

- 10.—The Claimant’s response to this scenario is, as clearly set out in the skeleton argument from Mr Drabble, QC, twofold. First, expressed here in summary form only, it is said that despite the fact that NK only has limited leave to remain in the United Kingdom, his refugee status has the effect that he is, or should be treated as if he is, “settled” in this country for the purposes of section 33(2A) of the Immigration Act 1971 and, in turn, section 117D(1)(b) NIAA 2002. This is because the declaratory nature of refugee status means that it is lost, or no longer prevents expulsion, only on very limited grounds set out in the 1951 Convention (i.e. Articles 1C and 33(2)). It follows, argues Mr Drabble, that absent the existence of such grounds, a refugee is permitted to remain in the country of refuge for an indefinite period. The term “settled” within the definition of “qualifying partner” in section 117D(1)(b) NIAA 2002 must be interpreted so as to reflect this state of affairs.
- 11.—The question of whether or not the two older children are “settled” does not come into play because such a status is not an ingredient in the definition of whether a child is “qualifying” or not under section 117D(1) NIAA 2002 or the Immigration Rules (“the Rules”).
- 12.—If the interpretive argument is wrong for whatever reason, and NK is not a “qualifying partner” for the purposes of section 117D(1) NIAA 2002 and thus section 117C, Mr Drabble submits that this case discloses “very compelling circumstances over and above” the two exceptions contained in section 117C(4) and (5) and paras. 399-399A of the Rules. On this alternative basis, it is said that the Claimant is entitled to succeed in her appeal.
- 13.—Without intending any disrespect to the potential merits of Mr Drabble’s primary submission, we took the view that, in the particular circumstances of this case, it would be appropriate to consider his second submission first. Depending on the view we took on this, we would receive oral submissions on the interpretive point.

The relevant legal framework

- 14.—The relevant provisions of Part 5 of the NIAA 2002 and paras. 398-399A of the Immigration Rules (“the Rules”) are by now very familiar and do not require setting out here.

The evidence before us

- 15.—In reaching our decision in this appeal we have had regard to the following sources of documentary evidence:
- i. the Secretary of State’s bundle prepared for the hearing before the First-tier Tribunal;

- ii. the Claimant's bundle, indexed and paginated 1-411, prepared for the hearing before us;
- iii. a "Response to an information request", dated 23 February 2018 and provided by the Secretary of State in relation to mental health treatment in Sri Lanka.

16.—We heard oral evidence from the Claimant and NK, both of whom used the independent Tamil interpreter arranged by the Upper Tribunal for the hearing. A full note of the oral evidence is contained in the record of proceedings. In summary, the Claimant and her husband adopted their respective witness statements and were questioned at some length by Ms Isherwood. They both provided additional information about their current circumstances, their view of what would happen if deportation occurred, and the extent of any familial connections with Sri Lanka.

Submissions of the parties

For the Claimant

17.—Mr Drabble relied on his skeleton argument. He placed particular emphasis on NK's refugee status and the refugee leave to remain enjoyed by the two older children. Whilst he accepted that every case is fact-specific, it was submitted that the accepted inability of NK and the two children to go to Sri Lanka was a powerful factor in favour of showing very compelling circumstances. Mr Drabble took us through the expert evidence, in particular that from Dr C Obuaya, Consultant Psychiatrist, and Ms N Newell, an Independent Social Worker, and submitted that the Claimant's already fragile family unit would completely fall apart were deportation to take place. The consequences for all concerned would, it was submitted, be very severe.

For the Secretary of State

18.—Ms Isherwood relied on her skeleton argument. She submitted that the medical evidence relating to the Claimant's scarring and mental health (at least the PTSD) predicated on an account of past events that have been disbelieved by the First-tier Tribunal in the past. This should reduce the weight attributable to the relevant reports.

19.—Whilst accepting that the family unit would be split, it was submitted that NK's refugee status was not of itself sufficient to show very compelling circumstances. When asked whether there were any specific challenges made to the Independent Social Worker's report, Ms Isherwood queried whether a single interview conducted with the Claimant and NK was sufficient for the author to know whether she was been told the truth. It was also noted that there were no reports from social services. She submitted that there was a lack of reasoning as to why NK would be unable to care for the two older children by himself. It is right to record that Ms Isherwood had at one stage during her submissions indicated that

she was “in difficulties” in seeking to resist the arguments and supporting evidence put forward on the Claimant’s behalf. Having said that, she did not concede the appeal, and we make it clear that we have taken all of her submissions into consideration.

Findings of fact

- 20.—There are a number of matters which are not in dispute between the parties and we are able to state them as representing our findings of fact in brief terms.
- 21.—The Claimant is, and has at all material times been, in a genuine and subsisting relationship with NK. NK is a recognised refugee with limited leave to remain in the United Kingdom until 20 January 2020. The couple’s two older children also have limited leave to remain until that same date. The children’s travel documents, like that of NK, are not valid for travel to Sri Lanka.
- 22.—The couple’s youngest child was born in April 2019. It is quite clear from the evidence as a whole that the Claimant is breastfeeding the baby.
- 23.—The Claimant and NK both accept that there has been a history of domestic violence within their relationship, with NK as the perpetrator. This fact had led to the entirely plausible intervention by social services and, as we find is the case, the two older children being made subject to a Child Protection Plan in 2018. In the absence of specific evidence, we are not in a position to find that this plan remains in place. However, it is highly likely (and Ms Isherwood has not suggested otherwise) that even if the plan has ceased, the family unit remain on the local authorities’ radar, as it were.
- 24.—The index offence in this case was committed on 24 April 2011. The Claimant had in her possession the identity document of another person and attempted to use it to leave the United Kingdom. She was convicted on 3 May 2011, having pleaded guilty at the earliest opportunity. She was sentenced to 12 months’ imprisonment. The Claimant has no other offences recorded against her.
- 25.—We turn now to matters which, to a greater or lesser extent, remain controversial.
- 26.—The question of the Claimant’s mental health is not an entirely straightforward one to answer. She has had three decisions from the First-tier Tribunal over the course of time. The first decision from 2012 rejected her credibility in robust terms. We note that there was no medical evidence before that judge. In the second appeal before Judge McIntosh in 2014, medical reports were produced relating to scarring and PTSD. Whilst dismissing the appeal on the basis that the Claimant’s overall profile did not disclose a well-founded fear of persecution, it is apparent to us that the judge broadly accepted the expert evidence, including the diagnosis of

PTSD. The latest decision of the First-tier Tribunal again rejected the Claimant's protection claim, concluding in the first instance that she should not be believed as to her account of past experiences, or alternatively that any such events did not place her at risk on return now. Having said that, Judge Aziz accepted that the Claimants mental health was "fragile", and did not go behind the diagnoses of PTSD, Recurrent Depressive Disorder, and a current episode of severe depression with psychotic features. We bear this history of findings in mind, as we do the conclusions of Upper Tribunal Judge Coker para. 10 of her error of law decision.

27.—We now have a fuller picture of the Claimant's mental health. This includes not only the 2017 report from Dr Obuaya, but his updated report from February 2019, the reports considered by Judge McIntosh in 2014, and, importantly, a good deal of additional evidence from the Claimant's local NHS mental health team, her GP, and printouts of her GP patient record. This body of evidence has not been the subject of specific challenge by the Secretary of State. We place significant weight upon it.

28.—Taking this evidence in the round and placing it in the context of the Claimant's overall procedural history, we find it to be more likely than not that she currently suffers from PTSD, and severe depression. She is on appropriate medication and remains under the care of her mental health team. We find that the Claimant has been seen by the mental health Crisis Team on several occasions as a result of her mental health conditions and domestic circumstances. On the medical evidence before us, we find that on 16 August 2016 the Claimant was admitted to hospital after taking an overdose of medication. She was discharged the following day. This incident led to a safeguarding referral being made to social services regarding her baby, then her only child. It is in our view significant that notwithstanding the presence of her baby, the Claimant took the action that she did.

29.—There is no protection claim before us and no suggestion that the Claimant has a well-founded fear of persecution or is at risk of serious harm on return to Sri Lanka. However, together with the rest of the evidence, her mental health history leads us to find that she in fact holds a genuine subjective fear of returning to her home country. This in turn goes to the likely impact that removal to Sri Lanka will have on her overall mental health, particularly in light of the undisputed fact that she would be separated from NK and her two older children.

30.—Anxiety and distress caused by separation from those children was the subject of what we consider to be credible oral evidence from the Claimant. Her evidence is firmly underpinned by the opinion of Dr Obuaya expressed in his report of 2017:

"...separation from her husband...or indeed her children, are likely to be interpreted by [RA] as significant losses and put her at risk of

experiencing a deterioration in her mental health i.e. worsening of her PTSD and depressive symptoms.”

31.—This opinion is re-stated in Dr Obuaya’s 2019 report.

32.—The effect of separation is also addressed by Dr Obuaya in the context of the risk of self-harm and suicide. In his 2017 report he states:

“Although the presence of suicidal thoughts is very common, a strong predictive factor for completed suicide is a serious past attempt, which [RA] has done. The perinatal period is a time of heightened risk in mothers with an established mental health diagnosis, which she has. She has identified her children as a protective factor against attempted suicide, but in my opinion that only reduces the risk from being very high to moderately high.”

33.—In his 2019 report, Dr Obuaya reduces the level of risk of suicide or self-harm in part because of the absence of further attempts, but also because the presence of the two children and the Claimant’s pregnancy continued to act as “protective factors.” Even then, Dr Obuaya was of the view that the risk would “increase significantly” were removal to take place. We find this to be important. The Claimant’s departure from the United Kingdom would involve separation from two of her children and thereby the removal of the “protective factor”. Whilst the presence of a new baby might in another case create an additional beneficial factor, this Claimant is mentally unwell, still within the perinatal period, and has taken an overdose in the past, all of which point strongly against a protective influence having a meaningful impact.

34.—Bringing all of the above together, we find that the fact of separation is, of itself, likely to have a very significant detrimental impact on the Claimant’s mental health.

35.—We turn to NK’s circumstances. In his most recent witness statement, NK acknowledges that he has used alcohol during difficult times over the last few years. There are numerous references to him abusing alcohol in the Independent Social Worker’s report and we take account of a comment within the Claimant’s GP patient record. This evidence is entirely consistent with the opinion of Dr Obuaya in his February 2019 report on NK’s mental health. He provides a diagnosis of “Harmful Use of Alcohol”, a condition falling below the threshold for “Alcohol Dependence Syndrome”. The author concludes as follows:

“[NK] is likely to perceive separation from his wife as a major loss. There is a high risk that his harmful use of alcohol would spiral out of control, were he to resort to alcohol as a coping mechanism against such a loss. In the short-term, this risk is high.”

36.— We place significant weight on Dr Obuaya’s unchallenged report. We find that there is indeed a high risk that NK would resort to greater, harmful

use of alcohol on a regular basis were he to be separated from the Claimant (and for that matter his new-born baby).

37.—In respect of the Independent Social Worker’s report, Ms Isherwood raised three concerns: first, that it was unclear what “social services report” was being referred to in Ms Newell’s report; second, that there was an apparent inconsistency regarding NK’s employment status; third, that there was inadequate explanation in Ms Newell’s report for the overall conclusion that NK would be unable to cope with caring for his children were the Claimant to leave the United Kingdom.

38.—As to the first point, we conclude by way of inference that the “social services report” was in fact the minutes taken at the Initial Child Protection Conference, held on 30 July 2018. These are specifically referred to in Ms Newell’s report as one of the sources of information of which she had sight when undertaking her assessment and they appear in the Claimant’s bundle. These minutes do, as stated in Ms Newell’s report, confirm the history of domestic violence within the family unit and the lasting negative impact this has had. Even if the author had had no information from social services before her, the occurrence of domestic violence is documented in the medical evidence and has not been disputed by the Secretary of State. For these reasons, Ms Isherwood’s first criticism falls away.

39.—The second point is misconceived. The reference in the report to NK’s unemployment is in the past tense, whereas it is clear that at the time of the assessment he was in work.

40.—We reject Ms Isherwood’s third and final criticism. No challenge has been made to the author’s experience and qualifications, and it is clear to us that she was eminently positioned to carry out the assessment and provide the opinions stated in her report. The assessment of NK’s ability to care for the children without the Claimant was carried out with reference to a variety of sources of evidence, including interviews with NK and the Claimant, the minutes of the social services conference in 2018, and medical reports, all of which went to the core issues of the domestic violence, NK’s use of alcohol, and the inter-dependency between him and the Claimant. That body of evidence fully supported Ms Newell’s well-reasoned conclusion that:

“Given the family’s history of DV, perpetuated by [NK] and his alcohol dependency, it is in (*sic*) my view that he would not be able to adequately care for the children without their mother’s support.”

41.—Having disposed of the criticisms levelled against this expert evidence, we now state our finding that Ms Newell’s report is a source of reliable evidence to which we attach very considerable weight.

42.—A particularly important aspect of this evidence is contained under the heading “Conclusion and Recommendations”. This states:

“The evidence suggests that the children’s basic needs are currently being met by both parents, despite the fact that [RA] suffers with mental health issues and [NK] is alcohol dependent. It is fair to say that the children’s emotional well-being has been affected by their parent issues, but it is in (sic) my view that the long-term outcomes for these children would be devastating if [RA] were removed from their lives, due to deportation.

It is clear that [NK] is not in a position to care for 3 small children independently of his partner. If they were left solely in his care the risk factors would increase drastically and the children are likely to be placed in local authority care, there does not appear to be any family members who could take care of them on a permanent basis.

...[RA’s] departure from the UK is likely to lead to devastating outcomes for her and the family.”

- 43.—We find that the passage quoted above represents an accurate picture of the likely factual consequences for NK and the children if the Claimant is deported. That only two of the three children would remain in the United Kingdom is, we find, immaterial: it remains unlikely that NK could adequately cope with their care.
- 44.—The final aspect of our findings relates to any support the Claimant may be able to access in Sri Lanka. This issue was the subject of many of the questions put to NK in oral evidence. We find that NK’s parents, who are relatively elderly and retired, live in a town on the Jaffna peninsula in the north of Sri Lanka. We find that they have their own property. We are willing to accept that they suffer from certain health conditions, although none of these are of particular severity. On the basis of the oral evidence from NK and the Claimant, we find that the latter has never met her husband’s parents. We find that NK has an aunt living on an island off the coast of northern Sri Lanka. Again, we find that the Claimant has never met this individual. We accept NK’s evidence that one of his brothers remains missing in Sri Lanka and that he has another residing in the United Kingdom. Although we have not been provided with details concerning the second brother, NK was not questioned on this and there is no evidence to suggest that he has played, or would play, any material part in assisting NK with the care of the children in this country. We find that NK has a sister in Sri Lanka who is married and with whom he has no contact. As with NK’s other relatives, we accept that the Claimant has never met the sister.
- 45.—In light of the above, it is unlikely that the Claimant would be provided with meaningful practical or emotional support from NK’s relatives. Further, the consequences for NK of the Claimant’s departure from the United Kingdom is likely to include a loss or decrease in his earning capacity on account of an increased reliance on alcohol. This in turn is likely to prevent him from being able to provide stable financial support to the Claimant and the baby in Sri Lanka.

46.—As to the Claimant’s family in Sri Lanka, we note her consistent evidence that her parents and siblings (save for the brother who relocated to Canada) went missing years ago, and that her aunt had been detained in 2015. However, in her three appeals, the judges have expressly found (or at least proceeded on the assumption) that there are family members in that country, and that contact could potentially be re-established. The Claimant was not cross-examined on this issue at the hearing and Ms Isherwood made no submissions on it.

47.—It is more likely than not that there are family members in Sri Lanka, specifically the Claimant’s parents and aunt. However, we are satisfied that the Claimant has had no contact with them for a considerable period of time now. Re-establishing communications must be a possibility, but at this point and in light of the Claimant’s circumstances, we find it to be remote.

Conclusions

48.—As stated earlier in our decision, we have proceeded to determine this appeal on the assumption that NK is not a “qualifying partner” for the purposes of either section 117C NIAA 2002 or para. 399(b) of the Rules, although we make it clear that we are not expressing any view on the merits of Mr Drabble’s primary submission.

49.—It is also the case that the two older children do not fall within the definition of “qualifying” children under section 117C and para. 399(a) because of their nationality and short residence in the United Kingdom.

50.—Thus, notwithstanding the fact that her sentence of imprisonment was less than 4 years, the Claimant cannot rely on Exception 2 under section 117C(5) or that under para. 399(a).

51.—It is clearly the case that the Claimant cannot rely on Exception 1 under section 117C(4) or para. 399A.

52.—Therefore, the Claimant needs to show that there are “very compelling circumstances, over and above those described in Exceptions 1 and 2”, with reference to section 117C(6) and the interpretation of this provision and guidance provided by the Court of Appeal in NA (Pakistan) [2017] 1 WLR 207, at paras. 24-32.

53.—The threshold of what constitutes “very compelling circumstances” is “extremely demanding” (RA (s.117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT 123 (IAC), at para. 22).

54.—In undertaking the assessment of whether such circumstances do exist in this case, we conduct a “wide-ranging evaluative exercise” (see para. 16 of MS (s. 117C (6): “very compelling circumstances”) Philippines [2019] UKUT 00122 (IAC)).

- 55.—On the Secretary of State’s side of the balance sheet, the first and most significant factor is the undoubtedly very powerful public interest, as expressed by the Executive in the Rules, through Parliament by virtue of section 32 of the UK Borders Act 2007 and section 117C(1) NIAA 2002, and emphasised by the higher courts in numerous cases over the course of time.
- 56.—One facet of the public interest is deterrence and we take it fully into account. The fact is that the Claimant has been convicted of an offence and there is a legitimate concern on the part of the public that appropriate action should be taken by the state against foreign nationals who break the law.
- 57.—Another issue is that of re-offending. We have no pre-sentence report or OASys report before us (it seems as though none were ever produced). The index offence is the Claimant’s sole conviction and the Secretary of State has never suggested that there was any material risk of any repetition of a similar offence, or indeed any other. We conclude that the risk of re-offending is negligible.
- 58.—We must, and do, consider the seriousness of the particular offence for which the Claimant was convicted in 2011. We take as our starting point the brief sentencing remarks of HHJ Williams. The Claimant had been provided with the identity card of her co-defendant’s wife in order to attempt to leave the United Kingdom and evade the attention of the authorities. The Judge viewed this as a “serious offence”, observing that identity theft was a “very serious matter”. In light of the early guilty plea and other mitigating factors, the “absolute minimum” sentence of 12 months’ imprisonment was imposed. Having regard to all the circumstances, we conclude that the particular facts of the Claimant’s offence do not significantly enhance the already strong public interest in deportation.
- 59.—We bear in mind relevant considerations under section 117B NIAA 2002. It is the case that the Claimant is, and has been since 2010, residing in the United Kingdom unlawfully. This brings into play the public interest in maintaining effective immigration controls. In addition, her relationship with NK was established and continued during a period of unlawful status. Although NK is not a “qualifying partner” for the purposes of our approach this appeal, the absence of lawful status is liable to have an effect on the weight attributable to the Claimant’s family life with her husband. Having said that, for reasons we set out below, there are particular circumstances in this case which strongly militate against any significant reduction in weight.
- 60.—Although the Claimant gave her oral evidence before us with the assistance of an interpreter, there are references in the GP patient record print outs to her being able to speak “good” English. We have no reason to doubt this; we regard the English language issue as a neutral factor. The same applies to the question of financial independence. There is no

evidence to suggest that the Claimant is reliant on public funds, although we take into account the fact that she has received treatment on the NHS over time.

- 61.—We now move across to the Claimant's side of the balance sheet. Under the approach set out in para. 36 of NA (Pakistan), in the case of a "medium offender" (i.e. those sentenced to a period of imprisonment of less than four years, as the Claimant was) it is ordinarily necessary to begin with an assessment of whether it would be unduly harsh for family members to follow the deportee out of United Kingdom or for the family unit to be split. As stated previously however, the Claimant is unable to rely on Exception 2.
- 62.—Even if reliance could be placed on Exception 2, there is in fact no assessment to be made as to whether it would be unduly harsh for NK and the two older children to leave the United Kingdom and follow the Claimant to Sri Lanka. NK's refugee status and the basis of the children's leave to remain precludes any possibility whatsoever of this occurring, whether it be unduly harsh or not, a reality recognised by the Secretary of State.
- 63.—This is a point worthy of note. In a case in which an individual can in principle rely on Exception 2 but is unable in fact to show undue harshness (either in respect of a "qualifying partner" or a "qualifying child") on the evidence put forward, there will in most cases be a residual choice, albeit often a very difficult one, for the family member(s) to follow the deportee to the country of origin. The same applies in a case in which an individual cannot rely on Exception 2 because of the length of their sentence or (as in this appeal) because the family member(s) are not "qualifying", but, following the recommended approach elucidated in para. 37 of NA (Pakistan), they have unsuccessfully sought to prove "undue harshness" as an indicator of "very compelling circumstances".
- 64.—The present case provides a concrete example of a scenario in which no such residual choice on relocation can be made, however difficult. There is simply no choice at all.
- 65.—That the absence of a choice arises because of a family member's refugee status is of significance in that it represents one of only a small number of reasons we can conceive of which would preclude any possibility of relocation.
- 66.—The issue discussed above is a factor of very considerable force in our assessment of whether "very compelling circumstances over and above those described in Exceptions 1 and 2" exist. It is not, however, determinative. We must now turn to the question of separation.
- 67.—The splitting up of the family unit would see the Claimant removed from her husband and two older children, and her baby separated from his

father and siblings. We conclude that the separation is likely to be for an indefinite period.

- 68.—We are fully cognisant of the fact that deportation proceedings may often result in family units being split up and that the relevant threshold for showing undue harshness is indeed high (KO (Nigeria) [2018] 1 WLR 5273, at paras. 23 and 27). On the particular facts of this case and for the reasons set out below, we have no hesitation in concluding that the consequences of separating NK from the Claimant and the two older children from their mother and baby brother would not simply be unduly harsh, but very significantly above and beyond the level of severity required to cross that particular threshold.
- 69.—In light of the evidence before us and our findings thereon, we conclude that the Claimant's departure with his baby son would result in NK's already harmful use of alcohol becoming significantly worse. His ability to adequately look after the children is in our view even now largely contingent on the Claimant's presence. It is close to inevitable that her absence will lead to NK being unable to provide stable and appropriate childcare for the two remaining children. This in turn is very likely to have what the Independent Social Worker described as "devastating outcomes" for the children, one of which is likely to be (given the family unit's history and NK's abuse of alcohol in the equation), care proceedings and consequent placement away from the family home. NK would then be left in the situation of having been deprived of his wife and all three of his children. The overwhelming severity of this scenario for NK and, more importantly, the two children, is self-evident.
- 70.—We conclude that on this basis alone, this is one of those rare cases in which it is shown that there are "very compelling circumstances over and above" those described in the two Exceptions under section 117C(4) and (5) and para. 399(a) and (b) of the Rules, the effect of this being that the very powerful public interest is outweighed.
- 71.—There are additional factors of very great force relating to the position of the Claimant and her baby if deportation occurs. First, it is highly likely that she will become aware of what will in effect be the disintegration of the already fragile familial situation in the United Kingdom. This in itself is extremely likely to have serious implications for her mental health. Second, her mental health is already precarious and, as we have found, removal is likely to result in a significant deterioration because of the separation from her husband and two older children. Third, NK's remaining relatives in Sri Lanka are strangers to her and the likelihood of practical assistance from her own family (even assuming that contact could be made) is remote, particularly in the short-term. Fourth, the preceding factors are all to be seen in the context of the Claimant being the sole carer for a baby. Taking these factors on a cumulative basis, there is a high risk not only of the Claimant's mental health significantly deteriorating, but, importantly, the best interests of the baby being severely compromised, both in terms of emotional and practical care.

72.—Even if relevant medical treatment was in theory available in Sri Lanka (as may be the case in light of the Secretary of State’s document of 23 February 2018), the cumulative effect of the circumstances in which the Claimant will find herself drives us to the conclusion that she is highly unlikely to access it (at least on a regular basis) or, if she did, that it would not significantly reduce the risk of a very serious impairment in her ability to provide adequate care for her baby, with all that entails.

73.—Although not strictly necessary for the purposes of this appeal, the strength of the circumstances relating to the Claimant’s situation on return to Sri Lanka goes to elevate our conclusion at para. 70 from the firm to close to the inevitable.

74.—Mr Drabble’s first submission, as set out in para. 10, above, gives rise to potentially significant questions of law. However, in light of our conclusion on the “very compelling circumstances” issue, we need not address it in this appeal.

Anonymity

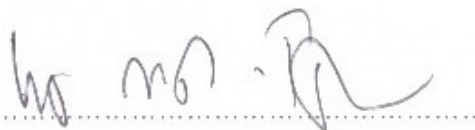
75.—The First-tier Tribunal made an anonymity order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. We continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

That decision has been set aside.

We re-make the decision by allowing R A’s appeal on the basis that the Secretary of State’s refusal of her human rights claim is unlawful under section 6 of the Human Rights Act 1998.



Signed

Date: 3 July 2019

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION



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

Appeal Number: PA/09096/2016

THE IMMIGRATION ACTS

Heard at Field House

**Determination
Promulgated**

On 5th October 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RA

Respondent

Representation:

For the Appellant: Ms Z Kiss Senior Home Office Presenting Officer

For the Respondent: Mr H Cheng, instructed by Duncan Lewis

ERROR OF LAW DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as RA. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. RA entered the UK on 26th January 2010 on a student visa valid until 31 December 2012. On 28th October 2010, having been encountered working in breach of conditions, her leave was cancelled, and she was served with removal papers. She claimed

asylum, that claim being refused on 24 November 2010. She absconded. On 24 April 2011 she was encountered attempting to embark on false documents. She was detained and on 3 May 2011 was convicted for possession/control of a false/improperly obtained identity document and sentenced to 12 months imprisonment.

2. Her asylum and human rights claims were refused on 27 October 2011 and a deportation order signed, in accordance with s32(5) UK Borders Act 2007, the same day. Her appeal against the refusal of her asylum and human rights claim was dismissed on 31 January 2012, applications for permission to appeal refused and she became appeal rights exhausted on 19th March 2012.
3. After submitting fresh evidence, removal directions were cancelled, and she was released from detention. Her submissions were treated as a fresh asylum and human rights claim and a decision to refuse the claim was made dated 10th January 2014; a decision refusing to revoke the deportation order was made on the same day. Her appeal was dismissed on all grounds by First-tier Tribunal Judge McIntosh for reasons set out in a decision promulgated on 5th September 2014.
4. RA made further submissions which were again treated as a fresh claim but refused with a right of appeal, for reasons set out in a letter dated 12th August 2016. Her human rights appeal was allowed, and her protection claim appeal dismissed by First-tier Tribunal Judge Aziz in a decision promulgated following a hearing on 5th June 2018.
5. The SSHD sought permission to appeal the decision of the First-tier Tribunal judge allowing the human rights claim appeal. He was granted permission on the grounds that it was arguable the First-tier Tribunal judge had failed to accord sufficient weight to or to take into account the relevant public interest in deportation and to take into account that her partner will be able to take care of her children in her absence. It was, he said, also arguable that the judge speculated as to the future deterioration of her mental health and the availability of mental health services in Sri Lanka.
6. There has been no Rule 24 response from RA's legal representatives.
7. RA married her husband in a religious ceremony on 6th July 2015, their relationship having commenced in January 2015. At the time of their marriage neither had leave to remain in the UK; her husband was, on 21 January 2015 recognised as a refugee and has leave to remain until 20 January 2020. They have two children. The first was born on 15th April 2016 and the second on

26th October 2017. At the date of the Tribunal hearing she was breast feeding the youngest child.

8. Regarding RA's mental health, the First-tier Tribunal judge found:
89. Finally, I factor into account [RA's] mental health. Whilst accepting [RA] has not been able to establish that she is a suicide risk, it is accepted by the respondent that her mental health has deteriorated since her last appeal hearing in 2014. I have had sight of Dr Chiedu Obuaya's psychiatric report dated 14 December 2017. He confirms at paragraphs 32 and 33 of the report that [RA] has PTSD and depression. At paragraph 35 he states that she also fulfils the criteria for Recurrent Depressive Disorder and Current Episode Severe Depression with psychotic features.
 90. During his submissions, Mr Dixon also asked me to take into account the likelihood of further deterioration that would most likely occur in circumstances where [RA] is separated from her husband and her two young children. I accept that being separated from her two young children and her husband is 'very likely' to exacerbate her mental health deterioration and I factor this into account.
 91. I also find the report to be helpful when assessing the alternative scenario of [RA's] two children accompanying her to Sri Lanka with her husband remaining here. Even in these circumstances, I still find that there is likely to be a material risk of deterioration in [RA's] mental health and this will inevitably impact upon her ability to raise her very young children, especially without the assistance of her husband.
 92. Even if I am wrong on this and there is no further deterioration in [RA's] mental health, the Tribunal is looking at the proportion of deporting [her] to Sri Lanka and of her returning to her country of birth with her two very young children. She would be without the assistance of her husband. She would have to rebuild her life in such circumstances. To do all this with her current mental health condition would be very difficult, even with the assistance of friends and family. Once again, this is clearly not in the children's best interests.
 93. Looking at all the factors in the round, I find that the appellant has been able to establish that there are very compelling circumstances. I fully take into account the strong public interest in deportation. As noted above, I also factor into account when assessing proportionality that the crime for which [RA] was convicted was non-violent and non-drug-related.
 94. I balance this against the fact that the Home Office is proposing to separate a mother from two very young children.....Their rights outweigh the strong public interest in deportation.
 95. Even if it were being suggested that the children could return to Sri Lanka with their mother (with [RA's] husband remaining in the United Kingdom), I would still find that proportionality should be exercised in [RA's] favour and that there are very compelling circumstances. [RA's] mental health is fragile. She has been diagnosed with PTSD, depression and fulfils the criteria for recurrent Depressive Disorder and Current Episode Severe Depression with psychotic features. [RA] is currently assisted by her husband in raising her two very young children. To have her removed to Sri Lanka with her two young children in her current condition and without the assistance of her husband, would have materially adverse impact upon her ability to raise her two young children, placing their safety and well-being at risk...
9. The First-tier Tribunal judge did not find that RA's mental health approached the Article 3 threshold. There are complex matters that are required to be taken into account when considering

Article 8 and mental health issues which were not adequately addressed by the First-tier Tribunal judge.

10. Dr Obuaya's report is predicated upon his understanding that RA had been detained and tortured in Sri Lanka and that her mental health problems stemmed from this. Although ably submitted by her counsel that the report's conclusions could and should be read as credible evidence of her health problems irrespective of the understanding by the Dr of her previous claimed mistreatment in Sri Lanka, I do not agree. The core tenet of his report comes from his understanding of her psychological history. He is not her treating doctor. The First-tier Tribunal judge relies upon that report to reach his findings which are predicated upon an unreliable report. Or at the very least a report which does not enable sustainable findings to be made as to future deterioration of mental health where it is acknowledged that RA has not been able to establish that she is a suicide risk and the evidence does not provide an opinion as to the consequences to her health upon separation from her children or her husband.
11. Furthermore, the First-tier Tribunal judge in assessing proportionality, although referring to the seriousness of the offence reflected in the sentence of 12 months imprisonment, in effect reduced the weight to be placed upon the public interest in deportation because of the nature of the offence which did not involve drugs or violence. He gave inadequate reasons for finding that this was permissible.
12. The First-tier Tribunal judge has erred in law in reaching his decision that the deportation of RA would be disproportionate.
13. I set aside the decision to be remade and make the following directions:

Directions

1. Both parties have leave to file further and updated documentary evidence, such evidence to be filed no later than 14 days prior to the resumed hearing. If witness evidence is filed, the witness statement must stand as evidence in chief.
2. RA, through her solicitors, to notify the Tribunal and the SSHD no later than 7 days prior to the hearing if it is intended to call oral evidence.
3. Both parties to file and serve skeleton arguments no later than 7 days prior to the hearing addressing, in particular, the following legal issues:

- (a) Can a refugee with limited leave to remain be treated for the purposes of Part V Nationality Immigration and Asylum Act 2002 and the Immigration Rules paragraphs A398 to 399D as a qualified person?
 - (b) To what extent, if any, does the fact that one parent is recognised as a refugee with limited leave to remain, impact upon whether it is unduly harsh and/or very compelling circumstances for the non-refugee spouse to be deported?
 - (c) Does the test of 'very compelling circumstances' have to be applied in determining whether deportation would be a breach of Article 8?
 - (d) Is there scope, within the legislative framework and the Immigration Rules, for consideration of the nature of the offence to be factored into the weight to be given to the public interest in deportation.
4. The matter to be relisted before Upper Tribunal Judge Coker on first available date after 7th January 2019, 2 hours, no interpreter.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision; to be relisted first available date after 7th January 2018.

Date 5th October 2018

Upper Tribunal Judge Coker