



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

Appeal Number: HU/23107/2018

THE IMMIGRATION ACTS

**On the papers
On 23 July 2020**

**Decision & Reasons Promulgated
On 4 August 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**SUGANYA CHANDRAKUMAR
(Anonymity direction not made)**

Appellant

and

ENTRY CLEARANCE OFFICER -SHEFFIELD

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge O’Keeffe promulgated on 3 December 2019 in which the Judge dismissed the appellant’s earlier appeal on human rights grounds.
2. Permission to appeal was granted by another judge the First-Tier Tribunal the operative part of the grant being in the following terms:
 - “2. The grounds argue that the Judge failed to adequately consider the living conditions for the Appellant in Sri Lanka and thereby failed to properly assess the Article 8 claim.
 3. In the decision the Judge made findings on many of the issues in the appeal but it is just about arguable that the decision failed to recognise the high level of risk that a single Christian girl like the Appellant faces in Sri Lanka.”

3. As a result of the Covid-19 pandemic and the practice directions issued in light of the need to take appropriate precautions directions were sent to the parties advising them of a provisional view of the Upper Tribunal that the question of whether the Judge had erred in law in a manner material to the decision to dismiss the appeal could be determined without a hearing and inviting the parties observations upon this proposal and providing the opportunity for further submissions to be made in support of their claim that the Judge had erred in law or otherwise.
4. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
5. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
6. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:
‘34.—
 - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
 - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
 - (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
 - (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
 - (a) strike out a party’s case, pursuant to rule 8(1)(b) or 8(2);
 - (b) consent to withdrawal, pursuant to rule 17;
 - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
 - (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.’
7. The appellant’s submissions dated 29 March 2020 rely upon the original Grounds dated 21 December 2019 and request that the Judge’s determination be set aside, and the appeal allowed or, alternatively, that there be an oral hearing for further oral submissions to be made. The respondent submissions dated 8 June 2020 comment upon the question of whether the Judge has erred in law but fails to make any comment concerning the method by which the Upper Tribunal is to determine this question.

8. The parties have been given the opportunity to comment upon whether the error of law issue can be determined on the papers and although the appellant seems to suggest that she is happy for this to occur provided the appeal is allowed but that if not an oral hearing is required, there is nothing on the facts or in law that makes consideration of the issues on the papers not in accordance with overriding objectives at this stage. The appellant fails to establish what will be said orally that has not been written down in the further submissions that have been provided. The appellant fails to deal adequately with the current state of the proceedings which relate to the question of whether a material error of law has been made. It is only if the same is found that the Upper Tribunal has any power to substitute a decision to either allow or dismiss the appeal. The directions sent by the Upper Tribunal clearly provide at [4] that "If this Tribunal decides to set aside the decision of the First-Tier Tribunal for error of law, further directions will accompany the notice of that decision".
9. I find it is appropriate in all the circumstances to exercise discretion provided by the Rules to determine the question of whether the Judge has made an error of law in a manner material to the decision to dismiss the appeal on the papers. Such a course of action has not been shown to be either unfair or contrary to the overriding objectives.

Background

10. The appellant is a citizen of Sri Lanka born on the 26 December 1993 who on 9 July 2018 made an application for entry clearance to the UK under paragraph 297 of the Immigration Rules.
11. The Judge, having considered the documentary evidence and having had the benefit of seeing and hearing oral evidence given by the appellant's mother her sponsor in the UK, sets out findings of fact from [20] of the decision under challenge.
12. The Judge noted a previous decision promulgated on 18 November 2014 which was taken as the starting point for determining the issues in this appeal and in which it was noted to previous Judge found no compelling circumstances let alone exceptional circumstances that applied to the appellant or the existence of insurmountable obstacles to her remaining in Sri Lanka.
13. The Judge considered the more recent decision of the Upper Tribunal of PP [2017] UKUT 00117.
14. The Judge notes it was not disputed the appellant is an unmarried female living in Trincomalee and noted the evidence of the appellant's mother that since 2010 she had been maintained in the Church of the Foursquare Gospel, the sponsor having made arrangements for the appellant's accommodation through the Church.
15. The Judge notes, however, that when the sponsor gave oral evidence it became apparent the appellant has accommodation available to her at the home of her paternal grandmother [24].
16. The Judge noted the claim the Reverend of the church had asked the appellant's mother to make arrangements for the appellant's accommodation as he could not deal with her needs. The Judge refers to

reference to something similar in 2014 and finds the appellant's sponsor's claim of the absence of family support in Sri Lanka inconsistent with the letter provided by the Emmanuel United Church dated 1 February 2017 in which the writer claimed that the appellants family members had been known for a considerable period and that her relatives informed the author of the letter that the appellant was suffering without her mother. The Judge noted the appellant has two brothers living in Sri Lanka. At [28] the Judge writes:

"28. For me as a whole, I find that I have not been presented with an accurate picture of the appellant's current living circumstances. There is an inconsistency as to whether or not Rev Jeyachandran is still responsible for the appellant or whether she lives alone. Although I was told that the appellant has no close relatives to whom she can turn, it is now apparent that her paternal grandmother continues to live in accommodation in Sri Lanka and the appellant is able to stay at that property. Documentary evidence shows that relatives of the appellant were known to the pastor of the Emanuel United Church at the time of her application."

17. At [30 - 31] the Judge writes:

"30. There is no up-to-date evidence to suggest that this appellant has any particular health needs. I accept that she suffered from Dengue fever at the end of 2018/beginning of 2019. The evidence demonstrates however that she received appropriate medical treatment in hospital. A letter from Dr Peieris dated 1 February 2017 said that the appellant suffered from headaches and was affected by depression. He said that she had been mentally affected by separation from her mother and this had caused her headaches and depression.

31. I was not provided with any up to date medical evidence to show the current position. The appellant said that she was undergoing a terrible physical and physiological (sic) ordeal in her daily life. She gave no details of how she was affected. The assertion that she felt she did not have anyone to protect her and her mother was the only person taking care of her is undermined by the discrepancies in the evidence to which I have referred. Ms Chandrakumar's oral evidence was that the appellant was not currently receiving any treatment either for depression or to treat her Dengue fever."

18. The Judge considered the position for females, particularly Tamil females in the former conflict zone in Sri Lanka and the positive risk and countervailing factors, before concluding at [33]:

"33. In this case I find that it has not been demonstrated that the appellant is living in isolation or that she has low socio economic status. There is no evidence that she is dependent on Government aid; she has access to financial support from her mother. There is no suggestion that she would be perceived as having LTTE membership, links or sympathies. For the reasons set out above, I find that I have not been presented with an accurate picture of her current circumstances in Sri Lanka. I find therefore that it has not been demonstrated she has no

support from male relatives or neighbours. She has managed to live in Sri Lanka for a number of years without apparently coming to any harm.”

19. The Judge’s conclusion is set out at [34 – 36] in the following terms:

“34. In considering the proportionality question I have to take into account the public interest considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. I take into account that the maintenance of immigration control is in the public interest. The appellant does not meet the requirements of the Immigration Rules for leave to enter the UK. I was told that the appellant could be maintained and accommodated by her mother and I have no reason to doubt that. I was not provided with any evidence to show that the appellant can speak English. In any event these two factors are neutral in the balancing exercise.

35. Balanced against that is the clearly loving relationship between the appellant and her mother. I accept that they would both prefer to live together rather than apart. There is nothing to stop them though continuing to maintain their family life as before by daily contact and by the sponsors visits back to Sri Lanka. The evidence before me considered as a whole, does not show that the appellant meets the risk factors set out in PP.

36. Considering the appellant’s case as a whole, I find that it has not been demonstrated that the appellant’s case is exceptional or that the decision would result in unduly harsh consequences for the appellant or her mother. I find that the refusal of the appellant’s application is proportionate and a fair balance between the competing interests. In balancing the private interests of the appellant as against the public interest, I find that the balance is in favour of refusal. The strength of the public policy in maintaining immigration control is not outweighed by the strength of the appellant’s Article 8 case.”

20. The appellant sought and was granted permission to appeal on two main grounds. Ground 1 asserts the Judge’s proportionality assessment is infected by legal error as there was no assessment by the Judge of the oral submissions that it was the respondent’s delay which led to the appellant being over 18 when the sponsor was granted ILR on 1 January 2011, notwithstanding that the Sponsor had been in the UK since 1999 and had claimed asylum due to persecution in Sri Lanka. The grounds assert that is a material error which affected the Judge’s assessment of the proportionality as the delay denied the appellant entry clearance as a minor under paragraph 297(i)(e) of HC 395. It is stated at that time the Sponsor had sole responsibility as the appellant’s father had been missing since the appellant was 2 years of age in 1995 and would therefore have been entitled to join her mother.

21. Ground 2 asserts it was not disputed by the Presenting Officer before the Judge at the appeal hearing that the appellant had been living in Four Squares Church since 2010 after her maternal grandmother died. It is alleged the Judge failed to take the sponsors evidence regarding this

- aspect into account when assessing proportionality, making findings that are unreasonable and flawed.
22. The Secretary of State asserts there is no legal error in the Judge's decision. The author of the respondent's grounds asserts the appellant's challenge appears to be solely on the basis the Judge's findings are Wednesbury unreasonable requiring it to be demonstrated that the decision under challenge is irrational or perverse.
 23. In relation to Ground 1 the respondent asserts that no evidence of the alleged delay, or evidence capable of proving that paragraph 297 would have been met is identified in the appellant's grounds and that the pleadings did not suggest the Judge had erred by failing to take such evidence into account. The respondent asserts there is no admissible evidence that the appellant relied upon any alleged delay as part of her case before the Judge. It is stated that whilst the grounds and further submissions make reference to the Judge's Record of Proceedings no application appears to have been made for that to be adduced and that it had not been seen by the respondent which would make it inappropriate for the Upper Tribunal to consider the same. The respondent asserts it has not been shown that the respondent delayed in granting ILR to the appellant's mother and it has not been shown that the alleged delay was argued before the Judge or that the Judge erred by failing to take the issue into account.
 24. In relation to Ground 2 the author of the respondent's reply argues there is no positive duty under Article 8 requiring the respondent to facilitate entry clearance of the appellant on the ground she claims to in fear for her safety in Sri Lanka. PP was an in-country asylum appeal where the potential risk faced by the appellant in that case do not form material considerations in the current case. It is argued the Judge was bound not have regard to the appellant's right to respect for private life in the context of an entry clearance application and that any alleged difficulties the appellant may face due to her particular personal characteristics have no bearing upon the family life with her sponsor.
 25. The respondent also notes the Judge found that as the sponsor had made repeated visits to Sri Lanka to see the appellant she can reasonably continue to do so and that an assertion at [12] of the appellants grounds that the Judge's analysis is 'unreasonable' amounts to mere disagreement in a case where there is no disproportionate interference with family life.
 26. Further submissions made in the grounds at [14 - 18] are said not to be admissible so far as they seek to give evidence and that it was open to the Judge to find that it and the tribunal below had not been given the full facts.

Error of law

27. The Judge's Record of Proceedings is within the file, is typed, and therefore clearly legible. Although the author of the respondent's grounds assert that it would be unfair for the Upper Tribunal to take notice of the same no unfairness is made out as no doubt the Presenting Officer would have made a note of the evidence given.

28. The Record of Proceedings shows that the appellant's representative, at the outset of the appeal, confirmed it was appeal on article 8 grounds outside the Rules. There is also reference to a skeleton argument having been handed in on the previous occasion the appeal was listed, dated 30 July 2019, which refers to the decision in PP and claims the appellant is in a highly vulnerable situation as she is in a church care home and is therefore in a single lone female headed household notwithstanding being in a church care home. The skeleton argument refers to the recent bombing of churches in Sri Lanka highlighting the vulnerability of Christian minorities in addition to the vulnerability of the appellant as a single female. The skeleton argument states there are highly exceptional and compelling circumstances such that the appellant's appeal should be allowed. It is maintained the appellant has family life with her mother and her emotional ties are above and beyond normal ties. There is reference to the appellant's mother giving oral evidence, to country information and a statement at [7] that the security situation has deteriorated in Tamil areas with increase searches since the 21 April 2019 bombings and that the appellant's situation is even more vulnerable due to the increased militarisation. What is not mentioned in the skeleton argument is any reference to the impact of any alleged delay in the respondent's decision regarding the appellant's mother's ILR.
29. In the Record of Proceedings, following the giving of evidence, the Judge sets out the submissions made by both advocates. So far as the appellant's representative is concerned the Judge records is being submitted: "The delay is because the SSHD did not grant status and sponsor was not naturalised until 2012. Consider under legacy. That delay is unacceptable because the children reached an age and turned over 18 when she received status. We are in a situation that if the sponsors application had been determined sooner than the children would have been minors and they would have come quite clearly under 297 in circumstances where the father had disappeared. Left with an application outside the rules. Has to be looked at compassionately." This was clearly a matter that was raised in the appellant's submissions but not on the basis of an assertion the delay in granting status to the appellant's mother was unlawful. There was and is no evidence to support such a claim. The appellant's representative stated to the Judge that the sponsor was not naturalised until 2012 and refers to the 'legacy scheme' but at no point is it made out that the appellant was entitled to the exercise of discretion on that basis sufficient to warrant a grant of leave. It also does not automatically follow that had an application been made by the appellant before she attained the age of 18 she would have succeeded. As noted at [5] of the respondent's submissions no evidence capable of proving that paragraph 297 would have been met is identified nor it suggested the Judge erred by failing to take any such evidence into account. Even though there is no specific reference by the Judge to this aspect it is not made out that the Judge has erred in a manner material to the decision to dismiss the appeal. The appellant's speculation that had something happen something else may have

resulted is not sufficient. It is not made out this is an aspect that is capable of tipping the balance in the appellant's favour as part of the proportionality assessment.

30. So far as Ground 2 is concerned the Judge clearly considered all the evidence with the required degree of anxious scrutiny and was fully aware that the appellant is a young single female of the Christian faith and also the case law relied upon by the appellant's representative. The Judge's findings in relation to that are set out above. The Judge had seen the earlier decision in 2014 in which it was noted the appellant in that appeal live together at accommodation arranged through the Church of the Four Square Gospel in Sri Lanka and where it was recorded by the judge on that occasion that the same Reverend referred to before the Judge in this appeal was said to have called upon the sponsor to take the necessary arrangements for the appellant's accommodation and care assistance as he could not provide the same any further due to work and other church commitments. The judge in the earlier proceedings, having considered all the evidence, found there were no compelling circumstances, let alone exceptional circumstances that applied or insurmountable obstacles to this appellant remaining in Sri Lanka. The evidence considered by the Judge was not found to change that position in this appeal which is a finding clearly within the range of those available to the Judge in light of the concerns recorded in the decision under challenge.
31. Repeating the basis of submissions made to the Judge regarding the appellant's alleged circumstances in Sri Lanka does not establish arguable legal error. The grounds assert the Home Office Presenting Officer did not dispute that the appellant had been living in the church after her maternal grandmother died. The Presenting Officer's submissions to the Judge as recorded in the Record of Proceedings are as follows:
- "Agree that Article 8 is engaged. Current living circumstances - unclear from sponsors evidence. Appellants evidence that she is living in a childcare home. She explains that to be a home for orphans however she returns home to the house of her mother in law. Sponsor unable to explain when the appellant began living in that accommodation. Paragraph 24 of the previous determination. Say sponsor has provided an unclear background to the appellant's living situation. When asked what current difficulties appellant faces, the sponsor explained they were perhaps emotional in terms of being left in Sri Lanka. Submit the appellant hasn't demonstrated exceptional circumstances in her case to warrant a grant outside the rules."
32. There is no evidence of the Judge going behind a concession made by the respondent or making a finding outside the range of those reasonably available to the Judge on the evidence when considered as a whole. There is nothing arguably irrational in the Judge concluding on the evidence to which weight could be placed that the respondent had established the decision is a proportionate interference in any protected right.
33. Whilst the appellant and UK based sponsor may wish she could move to the United Kingdom the grounds fail to establish arguable legal error

material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this decision on any of the pleaded grounds.

Decision

34. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 23 July 2020