

IN THE UPPER TRIBUNAL

JR/6309/2019

Field House,
Breems Buildings
London
EC4A 1WR

21 February 2020

**THE QUEEN
(ON THE APPLICATION OF)
SUDHARSAN IDHAYACHANDRAN**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

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Ms S Jegarajah, instructed by A and P Solicitors appeared on behalf of the Applicant.

Ms H Masood, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE ALLEN: The applicant has applied with permission for judicial review of the Secretary of State's decision of 29 May 2019 rejecting further submissions as not amounting to a fresh claim and maintaining a deportation order.

The Immigration History

1. The applicant claims to have come to the United Kingdom on 7 January 2010. He made an asylum claim later that month and the claim was refused in June. He appealed that decision, unsuccessfully, the appeal being dismissed on 9 August 2010 by a Judge of the First-tier Tribunal.
2. In 2011, having been marked as an absconder and being in breach of his reporting conditions he was charged with theft from his employer and fraud by false representation and convicted to twelve months' imprisonment in total for fraud, possession of an ID document with improper intention and theft.
3. On 25 September 2013 he was served with a decision notice and reasons for deportation letter and appealed that decision. His appeal was dismissed by the First-tier Tribunal in 2014 and he became appeal rights exhausted on 6 July 2015. An application for leave to remain under family/private life on the ten year route was rejected subsequently, further submissions were made in 2016 and further representations again in 2018. He appealed against the refusal of the application made on 28 February 2018 and his appeal was dismissed on 27 November 2018. On 29 May 2019 a deportation order was authorised and signed to facilitate his deportation. He was detained while reporting on 10 July 2019, and was served with removal directions on 23 July 2019. He made further submissions which were considered and rejected and he lodged a judicial review which led to removal directions being

cancelled. The judicial review permission was refused on the papers on 14 October 2019 and at an oral hearing on 19 November 2019. He made further submissions in December 2019 but these were rejected on 18 of that month and he was detained on 19 December upon a planned enforcement visit and on 24 December 2019 a stay of removal and permission were refused and he was removed from the United Kingdom. He filed an out of hours application renewing his claim which was refused as was a permission to appeal application the same day.

Judicial Consideration and Early Decisions

4. As the applicant's claim is in respect of private and family life, and has been refused on the basis that the requirements of paragraph 353 have not been satisfied, it is necessary to consider the earlier claims that were made and the earlier decisions as they form part of the context for the decision under challenge.
5. In the appeal in the First-tier Tribunal in 2014 which was an appeal against the deportation order, the applicant raised protection and human rights grounds. With regard to the family and private life issues, the Tribunal was satisfied that the applicant had established family life in the United Kingdom with his wife. The Tribunal noted that the applicant's wife, although born in Sri Lanka, had never lived there, did not speak the language well and had effectively lived in the United Kingdom all her life. She had her parents and family in the United Kingdom and had a small business. It was noted that she had a hearing problem. It was concluded that it would be a significant interference with the family and private life of the applicant and his wife if he were required to leave the United Kingdom and if his wife could not accompany him. It would be an inference with her private life

if she chose to go with him and was forced to leave her parents and her business behind.

6. However it was noted that there was family accommodation available to the couple in Colombo and they would not be destitute. It was clear that her parents visited Sri Lanka. It was concluded that the applicant's removal would not be in breach of Article 8 balancing the relevant factors together including the offence and the fact that the respondent was not proceeding under the automatic deportation provisions and the fact that the applicant had not committed further offences since his release. The appeal was dismissed.
7. The appeal in 2018 was, as noted above, against the decision by the respondent on 7 March 2018 to refuse an application for leave made on human rights grounds. The applicant was not represented at the hearing but appeared in person.
8. It was accepted on behalf of the respondent the applicant had a genuine and subsisting parental relationship with his children but the respondent was of the view that it would not be unduly harsh for the two children to live in Sri Lanka with their parents or for them to remain in the United Kingdom if the applicant were deported.
9. It was the clear evidence of the applicant's wife that she would not return to Sri Lanka with her husband should he be deported and hence the decision would separate the parents and the applicant from his children. The judge considered section 117C(v) of the 2002 Act. In particular he considered the meaning of the phrase "unduly harsh" which had recently been considered in KO (Nigeria) [2018] UKSC 53. He noted the endorsement by the Supreme Court in that case of what had been said by the Upper Tribunal in MK (Sierra Leone) [2015] UKUT 223 (IAC) that the phrase "unduly harsh" did not equate with uncomfortable, inconvenient, undesirable merely difficult but

posed a considerably more elevated threshold. "Harsh" in this context denoted something severe or bleak and the addition of the adverb "unduly" raised the already elevated standard still higher.

10. The judge went on to consider the best interests of the applicant's two children as being a primary though not a paramount consideration. The children were born respectively on 30 October 2014 and 16 December 2015 and were British nationals, aged 4 and 3 at the date of his decision.
11. The judge noted that the applicant's wife is hard of hearing but considered there was no obvious way in which that impediment would be exacerbated should the applicant be required to leave the United Kingdom and return to Sri Lanka. He found it would not be unduly harsh for the children to be separated from their father. They would remain in the full-time care of their mother with whom they currently resided and they had wider support from other family members. There was no question of any education or health requirements being disrupted. And the financial position would not be adversely affected because they were already dependent upon their mother since the applicant was not permitted to work. The judge quoted what had been said about undue harshness in KO (Nigeria) and considering the matter also outside the Rules concluded that the decision to refuse leave was not disproportionate and the appeal was dismissed.
12. As noted above, further submissions of 16 July 2019 were considered and rejected under paragraph 353 in a decision letter dated 25 July 2019. In that decision letter the respondent noted points made in the submissions letter dated 16 July 2019 including that the applicant's wife has hearing problems, that he provides care to his disabled father-in-law and brother-in-law, who has learning difficulties, that his

children are particularly dependent on him and that his children would have to leave the EU if he were removed.

13. He provided medical evidence in respect of his brother-in-law and the learning difficulties that he has, and evidence relating to disability living allowance for his father-in-law and other evidence in relation to him.
14. The decision-maker noted that the Article 8 rights of the applicant had been fully considered at the appeal hearing in November 2018. It was observed that at that hearing it was accepted that he had family life with his wife who has hearing difficulties, and with his children. It was noted that he had not referred to care he claimed to provide his disabled father-in-law and brother-in-law at the appeal hearing and nor had he provided supporting medical or social care expert evidence stating what care he provided to his father-in-law and brother-in-law, why that care needed to be provided by him and in his absence why that care could not be provided by other extended family members or UK public services. It was as a consequence not accepted that the applicant was required to remain in the United Kingdom for this reason. It was not accepted that the further representations contained significant evidence that would cause alternative findings to be made on the decisions already made with regard to his Article 8 rights. The relevant issues were considered in the context of the paragraph 353 test and it was concluded that the test was not met.
15. Further representations were made on behalf of the applicant on 3 December 2019, including an independent social worker report dated 25 September 2019, completed after an assessment with the family on 26 August 2019. In addition further witness statements were put in by the applicant and his wife.

16. The respondent noted what was said by the independent social worker in her report. The letter quotes in some detail also from the decision of the First-tier Tribunal of November 2018, and noting also judicial review proceedings brought in respect of the 25 July 2019 letter which among other things observed that the claimant's family and private life applications had already been considered and rejected and that his submissions on the family/private life issue had no bearing on the decisions challenged by that application for judicial review.
17. In the decision letter it was also noted that the applicant's wife would have access to help from local authorities and qualifying benefits as she would become a lone parent. It was said that there was no exceptional circumstance in which she could not bring up her children as a lone parent. It was recognised that she had been profoundly deaf since the age of 3 which she had proven herself to be very resourceful and hardworking and despite her disability she had successfully educated herself to degree level and started up and ran her own business from home since 2007, noting that this was a business she had run without the help of her husband for around five years. It was also noted that additional support might be given to her, given her disability. It was acknowledged that once her husband was deported she would face distress, upset and a period of adjustment within the family dynamic but this was not considered a very compelling circumstance that would prevent his removal.
18. The decision letter went on to note that the independent social worker's report described in full detail how the applicant's father-in-law and brother-in-law rely heavily on him for their physical needs. It was pointed out that however no details of the care and support provided specifically to those two individuals was mentioned during his appeal and only scant reference had been made to the support he offered. This

was summed up in the sentence: "The appellant has given practical help and support to the witness's father and brother". It was believed that he would have mentioned his role in full detail during his appeal since it appeared that the role described within the report appeared to have been ongoing since he joined the family in 2012.

19. The decision-maker then went on to set out the nature and extent of the applicant's father-in-law's disabilities, noting that he currently received disability living allowance and also met the eligibility criteria within the Care Act 2014 under section 9 of that Act for an assessment to be fully completed due to the level of his disability. Therefore if the applicant were deported his father-in-law would still have the support of his wife, his daughter, other extended family members and the support of the local authorities.
20. As regards the applicant's brother-in-law, he has a diagnosis of learning disabilities, but it was noted that he was able to support himself fully and worked five days a week as a cleaner in Nando's. It was noted that he also met the eligibility criteria under section 9 of the Care Act for an assessment to be fully completed due to the levels of his disability and therefore like his father he would have family support and the support of the local authorities. It was again said that it was not considered that the evidence provided evidence of any very compelling circumstances which outweighed the public interest in seeing the applicant deported.
21. Consideration was given to the application to revoke the deportation order but it was concluded that the necessary criteria were not met. There was then a consideration of paragraph 353 and the conclusion that the criteria set out there were not met.

22. In her report following an assessment dated 26 August 2019 the independent social worker Ms Khumalo having met the family at home and talked to them then carried out a social care assessment of needs including the best interests of the children, concluded that all the family members are heavily dependent upon the applicant and if he were removed from the family unit this would have a detrimental negative effect on everyone including the children. She considered that there was a significant risk of family breakdown, and psychological mental health deterioration for all those involved if he were to be deported to Sri Lanka. As regards the children's best interests, she considered they were most likely to experience a sense of loss if their current relationship with their father was disrupted and there was a possibility of them experiencing chronic long-term stress which she said differs from acute stress and that anxiety will be high due to change of environment, culture, language and social life. If the applicant were removed and separation from the children forced and also separation from his extended family, the children might endure long-term emotional psychological trauma if separated from their father at such a young age. During her assessment the two children appeared happy around their father and other family members. Children who had a father in a household were more likely to be emotionally secure, be confident to explore their surroundings and as they grow older they have better social connections. She also noted that the disabled family members would like the applicant to live with them and removing him from the family unit would have a significant impact on everyone's health and wellbeing.

The Proceedings

23. The original grounds were considered by Judge Blundell on an application for a stay of removal, which he considered on 23 December 2019. He refused the application for a stay on

removal and refused the application for permission on the papers. Among other things he noted grounds which appeared to relate to what was said to be any applicant's derivative right to reside in the United Kingdom were unarguable, and it does not appear that those matters were pursued. He found no arguable merit in the grounds and refused permission and refused a stay. There was an application to Mr Justice Murray in respect of the stay and that was refused as was an application to the Court of Appeal.

24. On 6 January 2020 there was a renewal hearing before Judge O'Callaghan at which he granted the applicant permission to rely upon the amended grounds and granted permission, bearing in mind the contents of the independent social worker's report, with respect to the position of the applicant's children, and consideration of the wrong test in the decision letter. He refused an application for an order requiring the respondent to bring the applicant back to the United Kingdom.
25. The amended grounds argue that the respondent had failed to consider the applicant should succeed under paragraph 399(a) (i)(a) and (b) and was in breach of section 55(1)(a) and (3) of the Borders, Citizenship and Immigration Act 2009. It was argued that the respondent erred in making no reference to section 55 or to the statutory guidance pursuant to section 55(3) of the Act. Reference was made to the guidance in Zoumbas [2013] 1WLR 3690 and the family circumstances and the impact of the applicant's removal. It was argued that the respondent had not considered whether it would be unduly harsh for the family to remain in the United Kingdom without the applicant.
26. I heard detailed oral submissions from Ms Jegarajah and Ms Masood. Rather than setting out those submissions in this decision, I shall endeavour to incorporate the essential

points made by both of them with regard to the issues in this application.

27. In essence the two central issues in this case are the absence as it is contended of a consideration of section 55 and the best interests of the children, and the Secretary of State's decision in that regard, and the use of the wrong test in the decision letter in referring to very compelling circumstances rather than, as should have been the case, undue harshness.
28. I have quoted above in some detail from the decision of the judge in November 2018. It is relevant of course to bear in mind that the applicant was unrepresented at that time. Clearly however the judge had reference to the best interests of the children, as can be seen for example from paragraph 40 of his decision. He went on to consider the impact on the children at paragraph 42 of the decision. The respondent referred back to this decision in the decision letter of 25 July 2019 noting that it had been accepted that the applicant had family life with his wife and children, and referring to relevant paragraphs of the appeal determination which concerned themselves with the circumstances of the children remaining in the United Kingdom with their mother on the applicant's removal. It was then said that the applicant had not provided any fresh compelling evidence with regard to his wife and children that was unable to be considered within his dismissed appeal and therefore no consideration could be given to this aspect of his claim. Indeed it appears that the further evidence provided was medical evidence in respect of his wife, his father-in-law and his brother-in-law and nothing further was provided with regard to the children.
29. Subsequently of course the respondent was provided with the independent social worker's report together with further witness statements from the applicant and his wife. I have

summarised the key conclusions of the independent social worker above. These matters were all noted by the decision-maker, who had particular reference to the report of the independent social worker at paragraphs 19 and 20.

30. It is correct that the decision letter does not refer to section 55. However it builds upon what had been concluded by the judge in November 2018 and the earlier decision letter in July 2019. It does not seem to me that the failure to refer specifically to section 55 is material. In many ways this is tied in with the issue of undue harshness to which I shall come on in a moment. But what was described by the independent social worker and the evidence that had been before the judge previously is in essence no more than what could be expected to be the normal consequences of deportation, sad and unfortunate for the family though they are likely to be. As is argued by the respondent, the further submissions rely on facts that are not materially different from those put to the First-tier Tribunal Judge in November 2018. Nor can it properly be said that there is an element of dependency by or impact on the children in respect of the applicant that comes out of the independent social worker's report that was not in essence part of the materials adjudicated upon by the First-tier Judge and considered in the two decision letters. It would have been preferable if the decision-maker had referred to section 55, as of course was done in the supplementary letter of January 2020, but in my view the respondent does not need that subsequent letter in order to cure the defects in the decision letter and the challenge. It has to be borne in mind that this is a fresh claims case, and that in a second appeal a First-tier Judge would, in accordance with the Devaseelan guidance, take the November 2018 decision as a starting point and the facts as relied on by the applicant in the first submissions are not

materially different from those put to the judge. Accordingly I see no materiality in the failure to refer specifically in the decision letter to section 55, which as I say, simply borrows from the conclusions in the earlier decision letters in this regard and therefore section 31(2A) of the Senior Courts' Act 1981 is applicable here.

31. Essentially in my view the same reasoning applies to the employment of the very compelling circumstances test rather than the undue harshness test in the decision letter. That was clearly wrong. But in my view it is not material. It is clear from KO (Nigeria) and subsequent cases such as PG (Jamaica) [2019] EWCA Civ 1213 that undue harshness poses a considerably more elevated threshold than uncomfortable or undesirable or difficult and denotes something severe or bleak and goes beyond that which would necessarily be involved for any child faced with the deportation of a parent. In my view had the respondent employed the correct test in the decision letter she could have come to no other conclusion than that the undue harshness test was not met in this case. The family all live together, and even if the applicant's wife considers that her deafness might preclude her from hearing an intruder in the house in the night for example, it is the case that of course her mother, her father and her brother are all living under the same roof. It was noted that social services support is available for her father and her brother, and that is not irrelevant in considering the undue harshness issues. No doubt the applicant's wife would miss her husband's support in respect of the business and the translation help that he is able to give her but it has not been shown that there is no-one else who would be able to provide that level of assistance for her. This is, sadly, a case where the harsh usual consequences of deportation are being experienced by this family and one can only have sympathy for them. But the law

sets the test at the high level at which it is set, and in my judgment there can be said to be no materiality to the error of the respondent in employing the wrong test in this regard since had she employed the correct test she would have inevitably come to the same conclusion.

32. It must follow from this that I see no relevance essentially to the January 2020 letter. There was an interesting and helpful discussion on the guidance in Caroopen in this regard at the hearing as to which of the categories set out in Caroopen that letter falls within. In my judgment it makes no difference, since that letter was as a matter of strict law unnecessary in light of the immateriality of the errors which it may have sought to cure in the earlier decision letter.

33. For all these reasons therefore I consider that the application in this case cannot succeed and it is refused.~~~~0~~~~



UTIJR6

JR/6309/2019

**Upper Tribunal
Immigration and Asylum Chamber
Judicial Review Decision Notice**

The Queen on the application of Sudharsan Idhayachandran

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Allen

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms S Jegarajah, instructed by A and P Solicitors, on behalf of the Applicant and Ms H Masood, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 21 February 2020.

Decision: the application for judicial review is refused

(1) For the reasons set out in the judgment, I order that the judicial review application be dismissed.

Order

(2) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

(3) **Any application for permission to appeal to the Court of Appeal must be made no later than 7 days after the date of the sending out of this Order.**

Costs

(4) The Respondent seeks her costs as set out in the schedule provided at the hearing. Any objection to the award of those costs is to be made no later than 7 days after the sending out of this Order.

David Allen

Signed: _____

Upper Tribunal Judge Allen

Dated:

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).