



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11739/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 3 March 2021

Decision & Reasons Promulgated
On 11 March 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**CHATHURI SUSANGIKA PEIRIS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellant: Mr S Bisson, Counsel, instructed by Lumbini Solicitors

For the respondent: Mr Diwnycz, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Lingam (“the judge”) promulgated on 15 April 2020 in which she dismissed the human rights appeal of Chathuri Susangika Peiris (“the appellant”) against a decision of the respondent dated 12 June 2019 refusing the appellant’s human rights claim (in the form of an application for entry clearance under the Immigration Rules dealing with refugee family reunion). A subsequent application made on 27 September 2019 was refused on 24 December 2019. The substance of both refusals was considered by the judge.
2. The appellant is a national of Sri Lanka who was born on 4 November 2001. At the date of the decision under challenged she was approximately 17 years and 7 months old. Her father, Lal Peiris (“the sponsor”), left Sri Lanka on 25 July 2009 owing to a well-founded fear of persecution for political reasons. The sponsor was granted asylum in the UK on 13 November 2015. His wife, Sunita Damayanthi Kotigalage, was issued with entry clearance under the refugee family reunion provisions on 20 July 2018.
3. On 29 November 2018 the appellant applied for entry clearance under paragraph 352D of the Immigration Rules. This paragraph sets out the requirements for leave to enter or remain as the child of a refugee. Paragraph 352D (iv) requires, in order to join a parent who currently has refugee status, that an applicant:

was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum;
4. The appellant’s application was based on an unusual set of circumstances. She and her sponsor maintained that, when he lived in Sri Lanka, and when he left that country, he had two separate and independent family units. The sponsor married Sunita Damayanthi Kotigalage on 25 February 1983 and they had two children, a son, Suresh, born in 1984, and a daughter, Chetana, born in 1988. In 1994 the sponsor met Renuka Chandrani Mendis and they formed a relationship. They never married. Renuka and the sponsor had three children together, twin boys born in 1995 and the appellant born in 2001. The sponsor maintained that he resided with both his wife for 3 or 4 days a week, and that he resided with Renuka for the remaining part of the week. Both sets of family were aware of the other and accepted the living arrangement.
5. The respondent, in both of her decisions refusing entry clearance, was not satisfied that the requirement in paragraph 352D (iv) was met. The respondent accepted that the appellant was the sponsor’s daughter, but noted that in his screening interview he listed the appellant’s mother as his partner and Sunita as his wife, suggesting to the respondent that the appellant was not part of the

sponsor's family unit when he left the country. In the second decision refusing entry clearance the respondent took issue with several of the documents provided by the appellant, particularly with Student Record Books relating to the appellant covering the periods 2004/05, 2005/06 and 2006/07, a Residency Report dated 2 September 2019, and a 'statement of account' relating to a joint bank statement held by the sponsor and the appellant's mother. The respondent was not satisfied that WhatsApp call logs and a spreadsheet of calls which commenced from May 2016 demonstrated that the appellant was part of the sponsor's family unit before he left Sri Lanka, and photographs provided were undated and were of little assistance in answering the same question.

6. The appellant appealed the respondent's decision of 12 June 2019 to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

7. The judge had before her, inter alia, a large bundle of documents produced by the appellant running to 308 pages which included statements from the appellant, the sponsor, the appellant's mother, the sponsor's wife, the appellant's maternal uncle, a neighbour of the appellant (Jayakodi Magerat) and a friend of the appellant's mother (Mr B. Karunapala). The bundle additionally contained the Student Record Books that accompanied the 2nd entry clearance application, the Residency report and the 'Statement of Account' in the joint names of the sponsor and the appellant's mother. The judge heard oral evidence from the sponsor, but the sponsor's wife did not attend due, it was claimed, to ill-health. The judge recorded the extensive cross-examination of the sponsor and recorded the parties' submissions.
8. In the section of her decision headed "Findings and Conclusions" the judge dealt with the concerns raised by the respondent. She considered the issues raised by the respondent relating to the Student Record Books at [31] to [34], the issues raised with the Residency Report at [35], and the respondent's concerns with the joint bank account statements at [36]. The judge concluded that the appellant and the sponsor had not adequately met these concerns and that the evidence adduced by the appellant did not support her claim to have been part of the sponsor's family unit when he left Sri Lanka. The absence of independent evidence of financial support for the appellant and her family and the absence of communication between the sponsor and the appellant until 2016 undermined the reliance the judge could attach to the statements from the appellant's neighbour, her mother's friend and the appellant's uncle. The photographic evidence provided by the appellant showing her and the sponsor did not support her claim, and the judge did not accept the sponsor's evidence that his wife was not medically fit to attend the hearing. the judge found that the requirement of paragraph 352D (iv) had not been made out and, in relation to the Article 8 outside the immigration rules, the refusal of entry clearance did

not constitute a disproportionate interference with Article 8 rights. The judge consequently dismissed the appeal on human rights grounds.

The challenge to the judge's decision

9. The grounds of appeal take issue with various aspects of the judge's decision. These include the judge's approach to the Student Record Book (specifically, the Book relating to 2006/07), the Residency Report and the joint bank account statement, the photographs and the written statements from various individuals. In granting permission to appeal Upper Tribunal Judge Blundell stated,

"... It may well be that the Upper Tribunal concludes, taking a step back from the forensic criticisms of [the judge's] analysis in the grounds of appeal, that the judge's ultimate conclusion was open to her on the totality of the evidence presented. At this stage, however, I am just satisfied that it is arguable that the judge erred in law in reaching that conclusion. There are many points raised in the grounds, two of which seem to be particularly arguable:

- (i) The appellant relied on bank statements which showed that her father and mother had a joint bank account in 2012 [AB/73-75]. If that were correct, it arguably militated in favour of a conclusion that the sponsor did indeed maintain two households (or family units) in Sri Lanka, one of which included the appl. The reason given by the judge for rejecting or attaching limited weight to that evidence is arguably unclear: "the type of evidence mentioned here is without the remit of the sponsor and [the appellant's mother]": [36]. This is the point made at [5] of the grounds.
- (ii) The appellant also relied on a residency report from the village headman, at [AB/92]. It seems that she might have been mistaken about the contents of the letter for the reasons given at [4] of the grounds, in that the address given was one address, not two, as the judge seemed to think.

The remaining grounds are less strong but may be argued."

10. The respondent provided a rule 24 response which I have considered. Mr Bisson adopted the grounds of appeal in his oral submissions. Mr Diwnycz adopted the rule 24 response and submitted that the judge was entitled to hold against the appellant the absence of evidence that could reasonably have been provided.

Discussion

11. It is readily apparent from the decision that the judge carefully considered the evidence adduced on the appellant's behalf. I am nevertheless persuaded that the decision does contain legal errors. At [31] the judge accurately set out the

sponsor's explanation as to why the 'father' column at page 89 of the bundle, which contains the 'Particulars of Student' section of the 2006/07 Student Record Book, was left blank in respect of the sponsor's home address. The sponsor asserted that it was not necessary to repeat the address twice as it had already been recorded in respect of the appellant's mother in the same document. At [33] the judge accurately described page 89, although she mistakenly stated that the appellant's mother had inserted her name in the 'Guardian' box for 2005/06 when in fact this occurred in the 2006/07 Student record Book. Then at [34] the judge stated:

"Based on what I have observed from the documents, I am satisfied that the sponsor's explanation fails to address the issues above. Hence, I am satisfied that the documents failed to show that the sponsor had lived in a *family unit* with the appellant and her other family members prior to his flight out of Sri Lanka."

12. The judge has clearly rejected the sponsor's explanation, but she had not given any reasons in support of her rejection. The sponsor's explanation was, to my mind, not inherently implausible. While it may well have been open to the judge to reject his explanation, it was incumbent on her to explain, if only in brief terms, why she did not accept that explanation as credible. The judge has failed to give legally adequate reasons for this conclusion.
13. At [35] the judge considered the Residency Report, the translation of which is found at page 92 of the appellant's bundle. This contained the following extract:

"I certify that according to documents available to me, LAL PEIRIS is a resident of No 56/3A, Halpe Mawatha, Kandana in the Grama Niladhari Division No 185/A, Hapugoda - West and his name has entered in Electoral Registry from 2004 to 2006 ..."

14. At [35] the judge stated:

"Regarding the third (3) concern of the sponsor's reliance on the Residency Report that was provided with the appellant's application: the respondent submitted that as the sponsor was only registered on the electoral poll at his unmarried partner's address from 2004-2006, he showed that the appellant did not live in a *family unit* with the sponsor when he left Sri Lanka in Jul 2009. His explanation is that in 2006, when he was appointed as a member of the Colombo Municipal Council, he had to use his official address in the Colombo District. For electoral purpose, he said he had to remove his name from the **address** '185/A Hapugado West Grama Niladhari Division'. However, the translated version of the Report Residency only confirms that the appellant was registered for Electoral Registry purpose [sic] from 2004-2006 at the above address. The same documents confirms the sponsor remained a resident of 56/3A from 2004-2009. If that were so, there is credible explanation [sic] why the appellant's school documents do not reflect the same." **[my emphasis]**

15. In the extract above the judge states "... there is credible explanation...", but she must be taken to have meant there is no credible explanation. The grounds contend that the judge appears to have believed that there were two addresses - '185/A Hapugado West Grama Niladhari Division' and '56/3A, Halpe Mawatha, Kandana', whereas in fact these composed a single address. The sponsor's evidence was that his name was removed from the electoral register of the relevant Division, not a separate address. On the basis that the judge appears to have considered the Residency Report as relating to two separate addresses, and to have held this against the appellant, she has taken into account an irrelevant matter.
16. The appellant relied on a joint bank account held by the sponsor and the appellant's mother. It was the appellant's evidence that the account had been closed for some time and that she had only been able to obtain 3 'Statement of Account' documents covering the periods 30 December 2011 to 5 January 2012, 30 March 2012 to 26 April 2012, and 30 April 2012 to 28 May 2012. At [36] the judge noted the sponsor's evidence at the hearing that he and the appellant's mother had not used the account often as they had their own separate accounts. The judge stated:

"Notwithstanding the above, I am satisfied the type of evidence mentioned here is without the remit of the sponsor and Ms Renuka."
17. It is, with respect, unclear what the judge meant. She appears to have rejected the evidence of the joint bank account which, as Judge Blundell pointed out, militated in favour of the appellant's claim, but she failed to give a clear or legally adequate explanation for doing so. Although the judge then noted that the appellant's mother had not verified the sponsor's explanation, and that there was no further evidence of funds remitted by the sponsor, these observations do not remedy the lack of clear reasoning.
18. At [48] the judge notes that, whilst the sponsor, the appellant and the appellant's mother claimed that the sponsor lived for 3-4 days a week with them, the statement from the sponsor's wife did not state the same in her statement. The judge does not expressly explain why this is relevant, but the natural inference from the paragraph is that the judge has drawn an adverse inference based on her view that the accounts are inconsistent. In her statement the sponsor's wife stated that the sponsor "...shared his time between each of his families." This evidence was not, on any rational view, inconsistent with that of the appellant, the sponsor or the appellant's mother. To the extent that the judge may have drawn an adverse inference based on an immaterial factor, she erred in law.
19. There is less merit in the remaining grounds. Whilst it is correct that the judge mistakenly stated at [30] that it was the 2nd refusal of entry clearance that was under appeal, she took full account of the evidence provided by the appellant in

response to the first decision of 12 July 2019 and the respondent, in any event, accepted that the sponsor had provided correct information relating to the appellant (by reference to the solicitor's letter dated 15 June 2011). The judge was fully entitled to consider with concern the absence of evidence of communication between the appellant and the sponsor following his flight from Sri Lanka in 2009 until 2016, and the absence of any financial support provided by the sponsor covering the same period. This fed into the central issue of whether, at the time the sponsor left Sri Lanka, he and the appellant were part of the same family unit. The grounds challenge the judge's assessment of the photographs noting that she does not claim to be an expert in the assessment of age. There is however no such thing as an expert in age assessments and the judge was entitled to form her own view as to the appellant's age from her appearance in the photographs, although she should perhaps have issued a self-direction as to the unreliability of judging age by purely physical appearance. The judge was right in pointing out that the photographs did not contain any dates. The photographs, in any event, are of limited evidential value as they are a snapshot of a moment and do not provide cogent evidence as to whether, when the sponsor left Sri Lanka, he and the appellant were part of the same family unit. The judge attached little weight to the statements from the appellant's neighbour, her mother's friend and her uncle because of the lack of independent supporting evidence that the sponsor provided financial support to the appellant's family after he left Sri Lanka. There was no opportunity to test the assertions made by the statements and the judge was rationally entitled to attach limited weight to those statements for the reasons given. The judge was also entitled to draw an adverse inference from the failure of the sponsor's wife to attend the hearing and give evidence for the reasons given.

20. I must determine whether, despite the errors of law identified above, the decision would inevitably have been the same. The rule 24 response from the respondent invites to so find. The judge has engaged in detail with the appellant's evidence and has provided a number of cogent reasons for rejecting the appellant's claim to have formed part of the sponsor's family unit when he left Sri Lanka. I am however persuaded, albeit by the narrowest of margins, that, had the errors of law not been committed, the judge may have reached a different conclusion.
21. There remain several concerns with the evidence provided on behalf of the appellant. Her Student Record Books only go up to the year 2006/07, there is no evidence of the contact and financial support the sponsor is claimed to have provided to the appellant and her family in the period after he left Sri Lanka in 2009 until relatively recently (the evidence of communication begins in 2016), and no adequate explanation has, to my mind, been provided to explain why such limited evidence has been provided of the joint bank account held by the sponsor and Renuka (there is, for example, no explanation as to why the bank has not been approached to obtain further evidence). There is also a relative dearth of other independent evidence of the sponsor's residence in the home

occupied by the appellant and her mother, although the sponsor's claim that his principle correspondence address was that he shared with his wife and their children must be borne in mind. These issues fall to be addressed at a further hearing to remake the decision.

Remittal to First-Tier Tribunal

22. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:
- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
23. Both parties were agreed that, were I to find an error of law requiring the decision to be set aside, that it would be appropriate to remit the case back to the First-tier Tribunal for a fresh hearing. The judge's errors included factual mistakes and the parties indicated that there was likely to be further evidence at a remade hearing. In these circumstances it is appropriate to remit the matter back to the First-tier Tribunal for a fresh (de novo) hearing.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh (de novo) by a judge other than judge of the First-tier Tribunal Lingam.

D. Blum

5 March 2021

Signed
Upper Tribunal Judge Blum

Date