



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case Nos: UI-2023-003246
UI-2023-003250

First-tier Tribunal Nos:
HU/59590/2022; LH/00328/2023
HU/59588/2022;
LH/01144/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 20th February 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

**PARATHALINGAM MURUGESU
YASOTHA PARATHALINGAM
(NO ANONYMITY ORDERS MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A. Pipe, Counsel instructed by MTC Solicitors

For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 6 February 2024

DECISION AND REASONS

Introduction

1. This is the remaking decision of the appeals of Parathalingam Murugesu (Appellant 1) and Yasotha Parathalingam (Appellant 2) - both are Sri Lankan nationals born on 14 June 1948 (Appellant 1 is 75 at the date of the hearing) and 16 August 1960 (Appellant 2 is 63 at the date of the hearing) respectively.

The relevant background

2. The Appellants both entered the United Kingdom on 22 January 2020 with visit visas; they were later granted Exceptional Assurances under the coronavirus policy at that time, until 11 January 2022. The Appellants then made applications for Leave to Remain on 10 January 2022 before the expiry of those Exceptional Assurances.
3. These applications were refused by the Respondent on 30 November 2022. The Appellants appealed to the First-tier Tribunal which was dismissed by a panel on 4 July 2023.
4. The appeal to the Upper Tribunal against the First-tier Tribunal's decision came before me on 3 October 2023. I concluded that the First-tier Tribunal panel had materially erred by failing to engage with the evidence and submissions in respect of the Appellants' daughter, Karthiga: see §23.
5. I therefore set aside the First-tier Tribunal's decision but maintained the panel's conclusion that the relationship between the Appellants and one of their other daughters (Sahana) constituted part of their Article 8(1) ECHR private life rather than amounting to family life.

The remaking hearing

6. In the remaking hearing, Appellant 1 gave his oral evidence in English (albeit a Tamil interpreter was available should he have needed it). I also heard evidence from the Appellants' son, Mr Mayuran Parathalingam and their daughter, Karthiga.
7. Mr Pipe indicated that he would not be calling Appellant 2 on the basis that she had found the First-tier Tribunal hearing to be very emotionally distressing and because the nature of the remaking hearing was really to update the Tribunal. There was no objection to this from Ms Isherwood although she properly indicated that it was for the Appellants to decide who should give evidence.
8. I note for completeness that the Appellants' son and daughter also gave evidence in English. At the end of the evidence, I heard oral submissions from both representatives of which I have kept my own note and at the end of the hearing I formally reserved my decision.

Findings and reasons

9. In coming to my conclusions, I have had very careful regard to the consolidated bundle of 248 PDF pages, as well as the original stitched bundle for the error of law hearing of 345 PDF pages.

10. In assessing the evidence, I have considered both the oral and documentary evidence before me in the round whilst applying the balance of probabilities.

Article 8 ECHR

11. In assessing the Article 8 ECHR appeal, I have kept in mind the following findings of the First-tier Tribunal which were not disturbed by my decision to set aside the decision:

- a. Prior to 22 January 2020, the Appellants had been frequent visitors to the United Kingdom (since 2008) and had always returned as required within the conditions of their visas.
- b. The Appellants have been living with their son Mayuran since their entry in January 2020 and therefore have been living in a family unit with him, his wife and their children. There is therefore an Article 8(1) family life between the Appellants and their son.
- c. There is no Article 8(1) family life between the Appellants, their grandchildren and their other adult children in the UK with whom they do not live - subject of course to the Upper Tribunal's assessment of the nature of the relationship between the Appellants and their daughter Karthiga.

The Appellants' medical conditions

12. I also add that the documentary evidence before me is clear in showing that Appellant 1 had a hip operation whilst he was in Sri Lanka on 22 October 2018 and was also admitted to hospital for a small bowel obstruction on 17 September 2021 in the UK. Additionally Appellant 1 underwent a micro laryngoscopy of his left vocal cord due to a cyst on 14 November 2022.

13. The uncontested evidence also shows that Appellant 2 has suffered with a frozen right shoulder for which she has received some treatment in the United Kingdom. There is ample documentary evidence before me to show that the Appellants (and no doubt their families) have paid for all of their treatment in the United Kingdom whether provided privately or through the NHS.

14. There was equally no dispute from Ms Isherwood as to the up-to-date medical evidence which shows that Appellant 1's mobility has seriously deteriorated - this was also apparent when Appellant 1 entered the hearing room and mobilised around it in some discomfort with the aid of two sticks.

The report of Dr Galappathie

15. Equally Ms Isherwood did not really challenge the opinion of Dr Galappathie as expressed in his 22 November 2023 report in respect of

Appellant 1, that, as a provisional diagnosis due to the absence of any GP medical records, Appellant 1 was suffering with general anxiety disorder and was experiencing a moderate episode of depression.

16. Ms Isherwood did raise the provisional nature of the diagnosis in her submissions but did not say very much more and I take into account that the Appellants have in general sought medical treatment privately and therefore have sufficiently explained the absence of the usual form of GP medical records. I therefore find that the doctor's findings in this report are not undermined by the failure to have regard to records which do not, as such, exist.
17. At paragraph 15 of the doctor's report, he reflects upon the serious criticisms of a report which he drafted in 2020 in a different Upper Tribunal appeal (unreported) and acknowledges some of the criticisms. At paragraph 16, the doctor also asserts that he approached Appellant 1's assessment with an appropriate degree of scepticism bearing in mind the potential incentive for Appellant 1 to self-present in a way that portrays him to be unwell as he wishes to avoid being returned with his wife to Sri Lanka. The doctor nonetheless concluded that there were no clinical reasons for finding that Appellant 1 was malingering.
18. I have looked at the report carefully and consider it to be worthy of some weight.

Dr Gunaskera's letter

19. Appellant 1's mental health difficulties are also corroborated in the letter of Dr Gunaskera (dated 29 November 2023) in which he or she records that on examination Appellant 1 appeared very anxious and withdrawn with low mood. This letter, and the additional documentary evidence, shows that Appellant 1 has been prescribed a starting dose of 10 mg of citalopram for his depression and the doctor recommended him to have regular counselling sessions.

Appellant 1's overall condition

20. For completeness, I accept the truthfulness of the evidence of Appellant 1 and the additional witnesses that Appellant 1's deteriorating mobility has had a serious impact on him. Appellant 1 was formerly a very mobile, busy and independent man but, certainly in the period since the independent social worker's report (23 February 2022), he has withdrawn both in terms of his interaction with his broader family but also, to some extent, emotionally.
21. I find that Appellant 1 no longer assists his son with taking or picking up his grandchildren because of the deterioration in his physical health but I accept the evidence which shows that Appellant 1 and Appellant 2 spend time with their grandchildren after school speaking to them about their day. Appellant 2 cooks for them and they also both tell the children Sri Lankan stories and teach them Tamil.

22. Whilst Ms Isherwood seemed to submit that this may have reduced the strength of the relationship between Appellant 1 and his family (with whom he resides), I conclude that in fact this increases the intensity of the reciprocal nature of the family life relationship between them. Appellant 1's deterioration in respect of his mobility, independence and mental health means that he now requires more support from his son, daughter-in-law and, to some extent, grandchildren.

Karthiga's circumstances and her relationship with the Appellants

23. Firstly, in respect of Karthiga's health problems, I accept that she has been suffering with a migraine-related balance disorder for some years and has been subject to treatment by a consultant neuro-otologist.

24. Ms Isherwood pointed out in her submissions that the medical evidence provided did not expressly record that Karthiga was suffering with 2 to 3 episodes of ill-health per month. There is certainly merit in the submission, but I accept the witness's evidence that the medical documents had not been supplied in full. Karthiga explained that she had stopped taking her medication during her pregnancy (she gave birth to her son on 24 September 2019) but had eventually re-engaged with her treatment under specialist supervision. I am prepared to accept her evidence, which was consistent with that of Appellant 1 and her brother, that she is still experiencing episodes every month and that they can last for up to 4 to 5 days.

25. I accept that during those more serious episodes, Appellant 2 travels to reside with her in order to assist with the care of Karthiga's child. I accept the evidence that the impact of Karthiga's condition upon her, when it is at its worst, is that she is effectively bedridden. I also accept from the oral and documentary evidence that these serious episodes can be triggered by relatively everyday events like Karthiga looking down for too long when cooking, or driving at a speed which causes the surrounding landscape to move too quickly through her depth of vision.

26. I find that Karthiga's husband does provide her with assistance on days when he works at home but that he is the only breadwinner in the household and often has to go out of the home for field visits and is therefore not generally available to assist his wife when she is seriously unwell.

27. Whilst the evidence from Appellant 1 was very candid in that he now does not see Karthiga often because of his mobility restrictions and his low mood, I nonetheless accept that he does speak to Karthiga regularly on the telephone.

28. Drawing the threads together, I find that there is an Article 8(1) family life between Appellant 2 and Karthiga and I conclude that the relationship between Karthiga and Appellant 1 forms a developed part of his private life.

Exceptional circumstances

29. In assessing the proportionality question under Article 8(2), I start by applying the mandatory considerations in s. 117B of the NIAA 2002.
30. In respect of Appellant 1, I find that he does take the neutral benefit of s. 117B(2) & (3) in that he speaks English sufficiently well and all of his financial costs including his medical treatment in the United Kingdom have been paid for by him and his family.
31. In respect of Appellant 2, I find that she does not take the neutral benefit (and therefore the public interest is heightened to some degree) of s. 117B(2) on the basis that she does not speak English but she does take the neutral benefit of s. 117B(3).
32. I also find that little weight is to be given to the Appellants' private lives in the United Kingdom as their immigration statuses have always been precarious. It is clear however that this provision does not apply to family life.
33. It is also important to bear in mind, when assessing the overall proportionality picture, that there is no indication at all that the Appellants entered the United Kingdom in 2020 with the intention of making a claim under Article 8. I conclude that the immigration histories of the Appellants show clearly that they had previously entered the United Kingdom lawfully and left when expected to do so. In this case the Appellants entered as visitors just at the point when Covid 19 came sharply into the world's consciousness. It must also be remembered that the Respondent gave the Appellants Exceptional Assurances which, albeit not technically constituting leave to remain under the 1971 Immigration Act, meant that their residence was formally tolerated and they were given the opportunity to make an in-country application.
34. I therefore conclude that this is not the kind of case in which the Appellants have deliberately sought to circumvent immigration control and therefore present the Respondent with a *fait accompli*.
35. I also must consider the Immigration Rules as the starting point for my assessment of proportionality.

Very significant obstacles

36. I have taken into account Mr Pipe's submissions (and the accompanying evidence) in respect of Appellant 1's mobility difficulties, his moderate depression and Appellant 2's problems with her right shoulder but I have concluded that these difficulties would not seriously obstruct them reintegrating in Sri Lanka.

37. I have taken into account the background material in the consolidated bundle about the economic problems in Sri Lanka. I find that it is relevant evidence, but it must also be recorded that the Appellants' family in the United Kingdom are clearly hard working and successful professional people who have already shown significant financial capacity to pay for the Appellants' private treatment in the United Kingdom.
38. In my view, there is nothing in the background material to support the contention that the Appellants' children in the UK could not equally financially assist them in Sri Lanka; Appellant 1 also has a pension which he could access.
39. In respect of the claim that there would be material difficulties caused by the fact that Appellant 2 only speaks Tamil and not Sinhalese and therefore that she would not be able to assist Appellant 1 in interacting with formal institutions in Colombo, I find that the evidence does not meet the balance of probabilities in establishing this. In my judgement, it is difficult to understand how there would be no facility to assist those speaking Tamil bearing in mind the significant population of Tamil people both in Sri Lanka and in Colombo itself.
40. Mr Pipe helpfully clarified that the Appellants were not arguing that they could not return to the family property in Colombo and, whilst I accept that Appellant 1 and Appellant 2 would find life more challenging in Sri Lanka, I do not accept that this would amount to very significant obstacles. I find that the Appellants (with the help of their family in the United Kingdom) could arrange for a maid/carer to assist around the home if it was needed bearing in mind that Appellant 2 is able to cook and to assist Appellant 1 despite her previous difficulties with her right shoulder.
41. There is no good reason why the Appellants could also not benefit from a private carer/helper when Appellant 1 has to travel for medical treatment in Colombo, should that be needed.
42. Equally there is no background evidence to make out the suggestion that Appellant 1 could not obtain citalopram or counselling in Sri Lanka if needed.

The Adult Dependent Relative route

43. It is also clear that the Appellants cannot take the benefit of the Adult Dependent Relative route in the Immigration Rules. The rules require the relevant application to be made outside of the United Kingdom, which is not the case here. It was not argued orally before me that the terms of the Exceptional Assurance policy meant that this requirement would be waived by a person making an in-country application to remain within the currency of such an Exceptional Assurance.
44. I also note that some of the more demanding evidential aspects of the Adult Dependent Relative rules are not met, including the absence of

evidence from a medical practitioner in Sri Lanka as to the lack of adequate care facilities in that country.

45. The long and short then is that the public interest is added to by the failure of the Appellants to meet the full, substantive requirements of the Immigration Rules.

Unjustifiably harsh consequences

46. I conclude by assessing whether there are otherwise exceptional circumstances in this case which amounts to an enquiry as to whether maintaining the appealed refusals would lead to unjustifiably harsh consequences.
47. Despite the weight to be given to the public interest as I have laid out above, I conclude that there are exceptional circumstances in this case.
48. Firstly, I should record that the Respondent did not argue in the hearing that it would be reasonable for the Appellants' son, wife and children to relocate with them to Sri Lanka. In any event I find it would not be reasonable: the children are British citizens and it is not in their best interests to have their education interrupted by relocation. This is not determinative but, in my view, it is a weighty matter.
49. In terms of unjustifiably harsh consequences, I find there are such consequences in the case of Appellant 2. I have found that Appellant 2 is materially supporting her daughter (Karthiga) in the management of a very serious illness which has yet to be properly controlled by medication.
50. In my view Appellant 2 provides invaluable emotional and personal support to Karthiga, her husband and her son especially during times when Karthiga is bedridden because of her condition.
51. The expectation that Karthiga's husband should effectively end his own employment in order to be available to care for his wife is, in the circumstances of this case, an unreasonable one. I also note that Ms Isherwood did not expressly argue that Karthiga could receive adequate assistance from social services in place of the particular personal nature of Appellant 2's care. Even if that argument had been made, I would have rejected it. On the presumption that a local authority could provide assistance to Karthiga in the circumstances, I find that the familial dimension of the support provided by Appellant 2 both to her daughter and her grandchild is not something which could be replicated by social services and would not be a reasonable alternative. This is also not determinative of the issue but is a materially weighty aspect of the Appellants' case.
52. I also add in that Appellant 2 is not a burden upon the public purse as her expenses (including medical appointments and so on) are entirely funded by the family.

53. Whilst the Respondent is correct to say that the medical opinion of the consultant involved in Karthiga's care (that she requires the presence of her parents to assist) is no doubt largely predicated upon Karthiga's own account to that consultant, I nonetheless conclude that some limited weight can be added to the importance of the Appellants' role in Karthiga's life from that professional view.
54. The corollary of this is that I find that it would be unjustifiably harsh to expect Appellant 1 to return to Sri Lanka on his own. Whilst I have already indicated that there would not be very significant obstacles to the Appellants' conjoined integration into Sri Lanka, I nonetheless find that if Appellant 1 was expected to return to Sri Lanka on his own that there would be such obstacles.
55. In the context of the Article 8(2) assessment, I find that it would be disproportionate to expect Appellant 1 to cope with separation from his long-term wife whilst also coping with the impact of attempting to rebuild his life in Sri Lanka with his particular physical and mental health challenges despite some financial/emotional support from his children in the UK and assistance from locally sourced helpers.
56. I also find that such a separation would have a profoundly negative impact upon Appellant 2.
57. Overall I find that the balancing act in this appeal tips in favour of the Appellants for the reasons which I have laid out above.

Notice of Decision

The Article 8 ECHR appeals are allowed.

To the Respondent

Fee award

I have considered whether to give a fee award and have decided that no such award should be given. This is on the basis that the appeal has been allowed predominantly on the basis of evidence which post-dates the decision of the Respondent.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Appeal Numbers: UI-2023-003246
UI-2023-003250

17 February 2024