



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-005481
UI-2024-000058
First-tier Tribunal Nos: HU/60033/2022
LH/01361/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 29th April 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GJ
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr Slatter, Counsel

Heard at Field House on 29 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Behan (“the Judge”). The Appellant is GJ and I make an anonymity direction. The appeal is

brought by the Secretary of State for the Home Department against the decision of the Judge dated 28 November 2023.

2. The grounds of appeal were granted in two parts firstly by the First-tier Tribunal and then the second ground was granted by Upper Tribunal Judge Gleeson. The first ground, as detailed in the IAF-T-4, is of failure to give adequate reasons, the Secretary of State effectively submits that the First-tier Tribunal Judge failed to provide adequate reasoning in finding that the GJ in the First-tier Tribunal, who I will refer to him as the Appellant for the remainder of the judgment, is a Sri Lankan national whereas he had previously been determined to be an Indian national by Judge O'Keefe in a separate First-tier Tribunal hearing. The second ground of appeal was a failure to give adequate reasons in relation to the Article 8 proportionality assessment, the Secretary of State submitted that the First-tier Tribunal Judge failed to carry out an adequate balancing exercise in respect of Article 8.
3. I have received a Rule 24 today from Mr Slatter and the Home Office is represented by Ms Isherwood.
4. The main issue in this case is whether or not the Judge applied correctly the case of **Devaseelan (Second Appeals-ECHR-Extra-Territorial Effect) [2002] UKIAT 00702** and took the findings of First-tier Tribunal Judge O'Keefe in the previous hearings as the starting point.
5. The appellant, who is said to be Sri Lankan national, and was found to be an Indian national by Judge O'Keefe in a previous case, appealed on human rights grounds against the Secretary of State's decision dated 29 November 2022 refusing his application for leave to remain dated 27 August 2021. This case only concerns the issue of Article 8, albeit there has been some discussion of protection issues and the Judge does refer to that in part. The judgment of Judge O'Keefe was 2 December 2019. In that judgment Judge O'Keefe considered the material before her in particular a document determination report which was not before Judge Behan. Judge O'Keefe found that the Appellant, on the evidence put before her, was an Indian national. The second hearing before Judge Behan is said to have not treated that finding as the **Devaseelan** starting point and is also said to have ignored **Devaseelan**. The judge is also said to have not examined the case of **Hussein and Anor (Status of passports: foreign law) [2020] UKUT 250**. In **Hussein** the Vice President said in short in the headnote:
 - "1. A person who holds a genuine passport, apparently issued to him, and not falsified or altered, has to be regarded as a national of the State that issued the passport.
 2. The burden of proving the contrary lies on the claimant in an asylum case.
 - 3 Foreign law (including nationality law) is a matter of evidence, to be proved by expert evidence directed specifically to the point in issue."
6. In my judgment in this particular case the key issue is whether or not the Appellant, in this case, is to be treated as an Indian national or a Sri Lankan national and the starting point for that is the decision of First-tier Tribunal Judge O'Keefe. So in this particular case the **Devaseelan** starting point of the

Appellant being an Indian national and the **Hussein** judgment are on all fours and effectively amount to the same thing.

7. So taking that as the starting point I have to decide whether or not First-tier Tribunal Judge Behan made an error of law when determining what the **Devaseelan** starting point was and whether they were allowed to depart from it.

8. The First-tier Tribunal Judge considers the evidence at paragraphs 13 through to 32 in particular, but I note as follows:

“13. The findings in the determination of the appellant’s appeal are my starting point, I am not deciding an appeal against that decision and I am not bound by it but I ought not depart from those findings unless there is good reason to do so. When considering this I take into account why evidence that could have been produced before the previous Tribunal was not submitted previously. I also take into account that it is easy to blame previous legal representatives for short comings and any such explanation should be considered with a degree of scepticism.”

9. In my judgment paragraph 13 and the remainder of the judgment set out clearly that the judge did take Judge O’Keefe’s decision that the Appellant was an Indian national as a starting point. However the Judge then went on to examine the evidence at the following paragraphs:

“14. It is not clear precisely what documents were before Judge O’Keefe. At paragraph 65 of her decision she refers to “a number of documents which [the appellant] says show he is a Sri Lankan National”. Judge O’Keefe then goes on to consider the appellant’s and his sister’s birth certificates.

15. There is no specific mention of a Sri Lankan passport, ID card or temporary passport, although Judge O’Keefe does refer to background evidence of how identity documents could be obtained with fraudulent documents. The appellant says he gave all these documents to his solicitors in 2012 and that he was told the Home Office had them, if they were not before the previous judge he does not know why.

16. Judge O’Keefe records that initially the Appellant was treated as an Indian national (paragraph 34), then In 2018 the respondent took the view that the appellant was a dual Indian and Sri Lankan national; it is not known on what basis the respondent reached the conclusion that the appellant was Sri Lankan as well as Indian, but it is reasonable to suppose that the respondent was in possession of one or more relevant Sri Lankan documents to which they attached some weight. By 19th August 2019 the respondent revised his position and asserted the appellant was an Indian not a Sri Lankan citizen.

17. In the reasons for refusal and review before me the respondent does not refer to the Sri Lankan documents submitted by the appellant and simply says there is no reason not to depart from the previous decision.

18. In all the circumstances I cannot be satisfied one way or the other whether the Sri Lankan passport, copy of the ID card and temporary travel document were before the previous Tribunal.”
10. The Judge had therefore outlined the evidence that they had before them and how that evidence, which was not clearly before Judge O’Keefe, should be examined and then the judge went on to decide whether or not that evidence was decisive or not. At paragraph 19 the Judge states the following:
- “19. The appellant has produced birth certificates, some of which were considered by Judge O’Keefe who found there were unexplained discrepancies. She also noted there was a lack of evidence of verification. There is now a report from Dr Smith who has asked a colleague in Sri Lanka to verify the birth certificates the appellant relies on. Dr Smith’s colleague in turn asked someone else to conduct the relevant enquiries. In general, the greater the number of people making an enquiry the greater the chance of an error occurring but there is no real reason to doubt the conclusion of the report which is that the birth certificates are genuine.”
11. The Judge has therefore examined the birth certificates and looked at the evidence of Dr Smith. It is worth pausing here to say that Dr Smith’s evidence is predicated on a second investigative journalist’s investigations which is also predicated on Sri Lankan officials providing the verification of the birth certificates, therefore any question about either Dr Smith’s or the investigative journalist’s expertise are immaterial because the Sri Lankan authorities have in fact confirmed that the birth certificates were genuine.
12. At paragraph 22 the Judge summarises Dr Smith’s report stating:
- “22. In my judgment the report from Dr Smith does give me give good reason to depart from the finding that that the appellant is an Indian citizen.”
13. The Judge then goes on to reason this further at paragraph 23 in which the Judge states:
- “23. I am satisfied that I can rely on the birth certificate produced by the appellant, which shows he was born in Batticaloa in Sri Lanka not in Chennai in India. I am satisfied that The assertion that the appellant is an Indian citizen is based on the passport which, following the report of Dr Smith, I find is not a reliable document. The appellant has produced other documents that indicated he is a Sri Lankan, if they were found to be unreliable by Judge O’Keefe that was in the context of there being a document that appeared to verify the appellant was Indian, this has now changed. Considering all of the evidence in the round I am satisfied it is more likely than not that the appellant is Sri Lankan citizen.”
14. It is worth noting here that the Appellant accepts that the Indian passport was obtained fraudulently but is a genuine passport.
15. The Secretary of State, using the **Husein** judgment, seemed to also accept that it was fraudulently obtained but is genuine and so seeks to rely on that as a means by which the Appellant could be returned to India. However more

concerning is that the Secretary of State has refused to take a position in relation to the Sri Lankan documents. I have asked the question today in relation to whether the Secretary of State has any submissions to make in relation to whether those documents are genuine or not and Ms Isherwood put it very fairly that the Secretary of State's position "is that the Appellant is an Indian national and not a Sri Lankan national". In those circumstances the Secretary of State is not really, it seems to me, challenging the veracity of the Sri Lankan documents. The Secretary of State seeks to make collateral attacks on Dr Smith's expertise, the investigative journalist's expertise but has not, in as far as I can see, attacked the Sri Lankan officials' certification of the birth certificate.

16. Therefore in my judgment the Judge was entitled to examine the case as they found it before them. In particular, taking Judge O'Keefe's finding that the appellant was an Indian national as the starting point, I can see no error of law in that finding. Whilst the judge has not explicitly referred to **Devaseelan** it is clear that the test is firmly in mind and outlined in the preceding paragraphs that I have quoted.
17. In my judgment the judge firmly took the **Devaseelan** starting point in mind, applied the criteria in **Hussein** even if not properly enunciated in terms of citing the case law but, as I have said, they are one and the same thing. The starting point is that this Appellant should have been treated as an Indian national and was. However Judge Behan then went on to analyse the evidence in particular the expert reports and the Sri Lankan documents which Judge Behan found were such as to displace the finding made by Judge O'Keefe that this Appellant was an Indian national and the judge found, on the balance of probabilities, having considered all of the documentary evidence and the verification reports of Dr Smith, the investigative journalist and the Sri Lankan official, that this Appellant was more likely than not to be a Sri Lankan. Therefore I find no error of law in relation to that issue.
18. The second ground of appeal was not entirely different from ground 1 and pleads a lack of reasoning for the Article 8 decision. The Judge found that the most important part of this case was the Appellant's wife has refugee status from Sri Lanka and that returning her to Sri Lanka would not be possible. The Judge found that that fact was a factor in favour of the Appellant being granted Article 8 protection in spite of the Appellant's admitted fraudulently obtaining a passport in India. In my judgment that is correct. A powerful piece of evidence in favour of the appellant is the fact that his wife has refugee status in Sri Lanka. I note that that the judge goes on to look at the case of **KK and RS** the country guidance case in Sri Lanka and finds that the appellant may well be on a watch list. That really relates to a protection claim rather than an Article 8 claim but nonetheless it is an unsurprising conclusion given the Appellant's wife is a refugee. In my judgment the judge examined the evidence carefully and clearly, took Judge O'Keefe's starting point correctly and looked at the evidence, which for the judge to make a balancing exercise as to whether Article 8 was met or not, I can see no error in that judgment or error in the balancing exercise despite of what the Secretary of State says.
19. The Secretary of State effectively relies on the fact that the admitted dishonesty in obtaining the Indian passport is a powerful factor that should be weighed in the balance, is of course a fact that must be weighed in the balance and an

important one but that balancing exercise has been found against the Secretary of State by Judge Behan and I see no reason to interfere with that determination and in any event there is certainly no error of law in that determination.

20. Therefore in my judgment the Secretary of State's grounds are not made out and I dismiss the Secretary of State's appeal on both grounds.

Ben Keith

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 January 2024