**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/02411/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 30 January 2018** | **On 21 February 2018** |

**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**NIROSHA [P]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr J Martin of Counsel, instructed by Indra Sebastian Solicitors
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Sri Lanka born on 22 May 1972. He arrived in this country on 6 May 2010 as a dependant of his ex-partner and their daughter. His ex-partner was in the UK on a Tier 4 (General) Student visa valid until 18 September 2012. The appellant was granted further leave to remain as a dependant until 29 February 2016. However his leave was curtailed and expired on 19 December 2015. The appellant applied on 8 December 2015 for leave to remain on the basis of family life as a parent and private life. The application was refused as the appellant's child was

not a British citizen and was not settled in the UK and had not lived in the UK continuously for at least seven years immediately preceding the date of the application. There were no very significant obstacles to the appellant's integration into Sri Lanka and the appellant could not make out a case under the Immigration Rules. In considering exceptional circumstances the respondent took into account the need to safeguard and promote the welfare of children in accordance with her duty under Section 55 of the Borders, Citizenship and Immigration Act 2009. It was however considered reasonable to expect the appellant to leave the UK. His daughter could continue to rely on the support of her mother. She was not on a direct route to settlement and could maintain contact by modern means of communication. The appellant could apply for entry clearance as a visitor. His daughter was a Sri Lankan national and could be expected to reside there in the future. Although the appellant claimed to wish to continue to support his wife the application was not apparently supported by her and the couple on his account had "a domestic issue". It was not accepted that the appellant was any longer in a subsisting relationship with his wife. In addition he could provide financial assistance from Sri Lanka where he would be able to gain employment. It was considered to be reasonable to expect him to return to Sri Lanka despite a degree of disruption that might be involved. There were no exceptional circumstances in the appellant's case. There would be no unjustifiably harsh consequences arising from the decision.

2. The appellant appealed against the decision and his appeal came before a First-tier Judge on 23 March 2017. At that hearing the appellant filed a court order relating to the Family Court proceedings that had been issued by District Judge Capon dated 22 March 2017.

3. The First-tier Judge noted the absence of any reference to the appellant's immigration status in the order.

4. The judge concluded that the appellant had failed to satisfy the burden on him under the Immigration Rules and in relation to Article 8 he found there was no evidence of family life with the appellant's ex-partner and it was not disputed that he was estranged from her. The determination concludes as follows:

> "36. There is evidence of limited family life with the child on the basis of the order which grants the appellant restricted access to the child. However I note that there is no reliable evidence to demonstrate that the appellant, ex-partner or child are entitled to reside in the UK. To the appellant's current knowledge the ex-partner's leave has been curtailed. It is therefore follows that the child's leave has also been curtailed.
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> 37. I do not accept that the family court has been made aware of the immigration status of interested parties. The appellant initially stated that the family court is aware of his immigration status. He then amended this evidence as recorded above. I also note that the family court made an order that the child was not to be removed from the UK. It is not credible that the family court

would restrict the child's cross-border movement in these circumstances.

38. It is reasonable to conclude that the appellant's presence in the UK is not required as the issues surrounding the family ties can continue in Sri Lanka. I do not accept the appellant's assertion that he requires continued access to the UK labour market to maintain his financial contribution to the child.

39. The appellant's right to access the UK labour market was curtailed along with his visa. There is no reliable evidence to demonstrate why the appellant should be entitled to effectively circumvent the Immigration Rules to preserve access to the UK labour market.

40. The appellant's allegations of ex-partner's misconduct are of no probative value. The family court was satisfied that the ex-partner is suitable to maintain custody of the child. The appellant's uncorroborated allegations serve no purpose other than to demonstrate the continued animosity that the appellant holds towards the ex-partner.

41. I also note that the order places significant restrictions upon the appellant. The appellant's assertion of active participation in the child's welfare is unsustainable in these circumstances.

42. I do not accept the appellant's bank statement as evidence of financial contributions towards the child. During cross-examination, when asked for documentary evidence of his financial contribution to the child, the appellant spent a considerable amount of time scrutinising a large number of bank statements. His reliance upon a credit to his bank account dated 17 September 2016 does not assist in the appeal.

43. For these reasons there is no reliable evidence of exceptional circumstances. As stated above there is no reliable evidence to demonstrate that the ex-partner and child are lawfully resident in the UK. The appellant expressly stated that he had no reason than access to the child to resist return to Sri Lanka.

44. It is reasonable to conclude that the appellant, ex-partner and child entered the UK as temporary migrants. They have no expectation of continued residence in the UK without the respondent's permission. They are free to continue with negotiations relating to their domestic issues upon return to Sri Lanka.

45. There is no reliable evidence to demonstrate that the child's best interests are served by remaining in the UK. As stated above the appellant, ex-partner and child are free to return to Sri Lanka. The child's best interests are served by remaining with the ex-partner who is expected to return to Sri Lanka upon the available evidence. The appellant is also expected to return to Sri Lanka.

46. The order leads to the reasonable conclusion that the family court has found the ex-partner to be a fit and appropriate guardian for the child. There is no reliable evidence to demonstrate why this arrangement cannot continue upon return to Sri Lanka.

> 47. For all the reasons stated it follows that any interference with Article 8 ECHR is proportionate to the legitimate aim pursued; economic well-being of the country when expressed as effective immigration control."

5. Grounds of appeal were settled against the decision on 11 April 2017 but replacement grounds were filed on 12 June 2017, settled by Mr Martin. It was submitted that the previous representatives had erred in failing to challenge "the most obvious flaw in the determination" because the appellant's wife and daughter in fact still had leave to remain in the UK. This should have been put in evidence by the previous representatives and should have been confirmed by the respondent. It was submitted that the only reason the judge dismissed the appeal was because he did not have evidence about the appellant's wife and daughter's position in the UK. Had they had permission it would have been a breach of Article 8 to remove the appellant. The appellant had parental responsibility for his daughter. The previous representatives should have properly advanced the case and provided evidence of the appellant's position and in accordance with the decision of **BT (Nepal) [2004] UKIAT 311** it was hoped to get a response from them "about their mistake". Permission to appeal was granted on 13 December 2017 by the First-tier Tribunal.

6. Mr Martin submitted that there was no dispute about the immigration history. The appellant's leave had been curtailed but he had made an application in time on 8 December 2015. Because of the difficulties between him and his wife he had been disadvantaged in getting information about her immigration status. Reference was made to paragraph 36 of the decision and there was no reason to suppose that the position of the wife and child was not similar to the appellant's following the curtailment of leave – if that correctly stated the position. The respondent could have confirmed the immigration status of the parties although it was for the appellant to prove his case. The parties had arrived in May 2010 and the child would have been in the United Kingdom in May 2017. There was a material error of law in view of the uncertainty about the position of the wife and daughter. It was acknowledged that no further evidence on the matter had been adduced.

7. Ms Ahmad referred to **AH (Sudan) [2007] UKHL 49** at paragraph 30. It was said that the judge should have sought clarification about the status of the parties. The appellant was represented by Counsel and there had been discussion between the representatives as appeared from paragraphs 13 to 14 of the determination. It would have been open to Counsel to raise the issue of the status of the wife and child with the Presenting Officer. The judge was fully entitled to proceed with the appeal upon the basis of the evidence before him. The submissions made were essentially an expression of disagreement. There was still no evidence about the status of the appellant's wife and daughter and what the judge said in paragraph 36 of the decision was a finding open to him.

8. In reply Counsel submitted that while the judge had to determine appeals on the evidence it was also incumbent on him to use general knowledge.

Reference was made to the appellant's witness statement in which it was apparent that his wife had refused to make an application along with the appellant following the expiry of the visa on 19 December 2015. The judge had erred in paragraph 36 in simply referring to the curtailment of leave.

9. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the determination of the First-tier Judge if it was materially flawed in law. Ms Ahmad submits that there was no evidence of the status of the parties before the First-tier Judge. This is not a case where the appellant was unrepresented at the hearing – Counsel appeared for him and as Mr Ahmad points out there was some discussion between him and the Presenting Officer at the hearing. Furthermore there is still no evidence about the position. Counsel in the grounds at paragraph 10 stated it was hoped to get a response from the previous representatives "about their mistake" in not lodging proper evidence of the appellant's position. However Mr Martin said there was no further evidence and indeed none has been lodged. In all the circumstances I cannot see that the judge can be criticised for determining matters as he did on what was put before him. There has been ample time since the judge's decision and since the application for permission to appeal in June 2017 for enquiries to have been made. No further evidence has been submitted on the issue.

10. I accept the submissions made on behalf of the Secretary of State by Ms Ahmad. The grounds amount to a factual disagreement. They raise no material error of law in the decision of the First-tier Tribunal. Accordingly the appeal is dismissed and the decision of the First-tier Judge stands.

**ANONYMITY ORDER**

The First-tier Judge made no anonymity order and I make none.

**TO THE RESPONDENT**
**FEE AWARD**

The First-tier Judge made no fee award and I make none.

Signed Date 15 February 2018

G Warr, Judge of the Upper Tribunal