Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/20442/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2018	**On 8 October 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Dickinson, Counsel instructed by Fursdon Knapper Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/291)

I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. I have anonymised the Appellant and witnesses to protect her son who is a minor.

2. The Appellant is a citizen of Sir Lanka. Her date of birth is 7th April 1970. She made an application for entry clearance to join her spouse, SM, under the Immigration Rules relating to family reunion. SM has been granted refugee status here. The

application was refused by the ECO on 28th July 2016 and maintained by an Entry Clearance Manager on 5th December 2016. The Appellant's appeal was allowed by First-tier Tribunal Judge O'Brien in a decision that was promulgated on 3rd October 2017. I found a material error of law in Judge O'Brien's decision and set aside his decision to allow the appeal. If my decision of 3 July 2018 does not make it clear, I confirm that the decision of Judge O'Brien to allow the appeal is set aside. The matter came before me before a re-hearing on 19 September 2018.

3. The Appellant and SM were married in 1991. They have two children. D, their eldest child was born on 3rd July 1997. Their youngest child, A, was born on 26th May 2002. SM came to the UK on 3rd May 2009. He was granted leave to remain on protection grounds on 10th May 2013, having made an application in 2011. On 4th June 2010 the Appellant made an application to come to the UK as the spouse of another man, S. S had been granted settlement here. Her application was granted. In support of that application it is not in dispute that the Appellant used a false document to establish that she was married to SM. She also produced a divorce certificate relating to her marriage to SM. It is the Appellant's case that this was also false. The Appellant's case is that this was a false document. The application was granted by the ECO. The Appellant came to the UK with D and A in 2010. On 1st March 2011 she made an application to remain here as a victim of domestic violence at the hands of her husband. This application was unsuccessful. Following an unsuccessful appeal, the Appellant and children were removed to Sri Lanka on 28th October 2011.

4. The Appellant made an application under 23rd November 2014 to join SM under the Rules relating to family re-union. This application was refused on 11th February 2015. The applications in relation to A and D were granted and they are now here in the UK with their father SM. They came here in 2015. My understanding is that they have now been granted ILR. The Appellant appealed against the decision and her appeal was dismissed by First-tier Tribunal Judge Solly, following a hearing on 14 January 2016. Judge Solly did not accept that there was a genuine and subsisting marriage or that the parties intended to live together. The Appellant made a second application which was refused on 28 July 2016 by the ECO and which is the subject of this appeal.

5. The ECO was not satisfied that there was a genuine and subsisting relationship between the Appellant and the Sponsor. The ECO was not satisfied that they were still married considering the history. The ECO relied on what the Appellant stated in her application for entry clearance in 2010 to join S and the divorce certificate she submitted in support of that application to establish that she was no longer married to SM.

The error of law

6. I found an error of law in the decision of Judge O'Brien for the reasons that I gave at paragraph 11 of my error of law decision. This reads as follows: -

> "The Application on domestic violence grounds was an issue that was raised by the Respondent and the reasons for refusal decision. It was not a matter on which the Appellant gave evidence. It was an arguably a material issue in assessing the credibility of the witnesses and the context of whether the marriage between the Appellant and the Sponsor is genuine and subsisting. It is also a material factor in the proportionality assessment it was accepted that the Appellant had used deception and submitted false documents with an application in the past. The Judge took this into account but did not resolve the issue whether the Appellant had made a claim to be the victim of domestic violence at the hands of S and if so, the impact of this on the credibility of the witnesses and the assessment of proportionality. There are inevitably strong public interest features to the case in light of the deception and more so if the extent of it was greater than the Judge appreciated".

The evidence

7. At the resumed hearing the Appellant relied on two bundles (AB1 and AB2). I heard evidence from SM and D. The Respondent submitted a bundle (RB) which contained written submissions in accordance with my directions and material relating to the Appellant's claim in 2011 (the determination of Immigration Judge CA James and the evidence that the Appellant submitted in support of that appeal). Almost at the conclusion of evidence SM raised a problem with interpretation; however, the matter was resolved when the question that he was being asked was clarified.

SM's evidence

8. SM's evidence is contained in his witness statements of 1st September 2017 and 30 August 2018 which he adopted as evidence-in-chief. The latter statement he made in response to the Respondent's written submissions. His evidence can be summarised.

9. The Appellant and SM have been married since 31st May 1991. They are still married.

10. The Appellant and the children came to the UK as the spouse and dependents of S to gain entry to the UK to join SM. The family sold their home in Sri Lanka to pay an agent. They regret their actions. They were desperate to be reunited. They have lived apart since SM fled Sri Lanka on 2nd May 2009. SM and the Appellant have shared responsibility for the children whilst they have been living apart. There was a delay of four years in the processing of his asylum application. He was granted refugee status on 10th May 2013 until 10th May 2018.

11. SM kept in regular contact with his wife and children after he came to the UK. D arrived in the UK in April 2015. A arrived here on 29th September 2015. They have been living together in the UK since their arrival. SM has remained in regular contact with the Appellant in Sri Lanka. He sends her money and speaks to her.

12. SM is unable to return to Sri Lanka because he will be persecuted there. It is very difficult for the family to be separated. SM suffers from post traumatic stress disorder following his experiences in Sri Lanka.

13. The Appellant and the children cannot contemplate the future living apart from the Appellant and they desperately seek to be reunited. A needs the support of both his parents. SM works four days a week and A is alone when he returns from school.

14. SM expressed concerns at the hearing about A's welfare in the absence of his mother. He described him as angry and withdrawn. The family attempted to move to Bristol because D has started a University course there. They were unable to because of rent arrears. SM did not support the Appellant's appeal in 2011. He was living with friends at the time.

D's evidence

15. D's evidence is contained in his witness statements of 1st September 2017 and 30th August 2018 which he adopted as his evidence-in-chief. His evidence can be summarised.

16. His parent's marriage has never broken down. It was falsely stated in the domestic violence claim made by the Appellant. Since D and his brother arrived in the UK his father has continued to support the Appellant and contact her on a regular basis. A cannot be expected to choose between living with his mother or father. He is now only aged sixteen and he needs his mother. He has now been living apart from her for a period of four years which has greatly affected him. He has been diagnosed with depression and offered counselling.

17. A does not speak very much and this has been the case for about two years. He does not leave home or socialise with friends. He used to be outgoing. His personality has changed. He has strong temper tantrums.

Other evidence

18. There are documents in support of the appeal in AB1 (pages 27 to 35) including correspondence from Susie Dent, a member of the START Management Team. She has known SM for five years. She supports the marriage between the Appellant and SM to be genuine and subsisting. She states that separation from their wife/mother has caused considerable problems for the children, particularly A who has not seen his mother for nearly three years and continues to be distressed with sleeping difficulties. The Appellant was A's sole carer for four years whilst in Sri Lanka and has a close relationship with her. Separation is causing considerable anxiety and distress for all family members.

19. There is correspondence from Rupert Blomfield of 19th July 2017. His evidence summarised is that there has been deterioration in SM's physical and mental health. There are serious concerns about A's mental health and wellbeing a result of the

continued separation. There are several other letters in support of the appeal. There is photographic evidence and evidence of money transfers.

Submissions

20. The Respondent submitted written submissions and Mr Bramble made oral submissions. The Respondent relies on evidence relating to the Appellant's application in 2010 and appeal in 2011. She appealed against the decision of the Secretary of State to refuse to grant her and her children leave to remain on the basis that she was the victim of domestic violence. Her appeal came before Immigration Judge CJ James. It was the Appellant's case before Judge James that her relationship with her spouse had broken down. The judge heard evidence from the Appellant. The Appellant's case was that her husband had been abusive to her and her children. The Appellant's oral evidence was that her husband had forced her to sell her property in Sri Lanka. The Appellant contacted the police in December 2010 about it. The police arranged accommodation for the Appellant and children following her husband having thrown them out of their home. She sought help from the Social Services and they were rehoused.

21. Judge James considered evidence from Oxfordshire County Council and accepted that the Appellant probably did go to the police in 2010. The Appellant gave an account of financial abuse which was rejected by the judge. During the appeal the Appellant gave a detailed account of the abuse she suffered at the hands of her husband and the impact that had on her children. Whilst it was found that the evidence from the Social Services indicated that the Appellant made complaints about difficulties within the marriage, it was not accepted that the marriage broken down because of domestic violence. The judge found that the Appellant's case was unsupported and that she was not credible

22. The Respondent submitted the Appellant's witness statements on which she relied at the hearing before Judge James and a chronology. It was her case that in 2005 her marriage to SM broke down and their divorce was finalised in 2009.

23. The Respondent's position before me was that the Appellant and SM were divorced in 2009. The decision of Ft-TJ Solly is relied on. Judge Solly accepted that SM and the Appellant married in 1991. She found that they did not live together save for a short time in 2010, after arrival here. He found that the marriage was not subsisting and has not been for many years, they did not intend to live together in the UK and, there was no family life between SM and the Appellant. The Appellant and SM conspired to produce false documents in applications and have given seriously conflicting evidence which damages credibility.

24. In respect of the Appellant's marriage to S, the Respondent submits that the Appellant's entry to the UK was based on this marriage subsisting. Considerable documentation was produced in support of the domestic violence claim. The police, local authorities and social services were involved. There has been considerable public express expense.

25. There is still no reason why SM did not claim asylum until 2011, after the Appellant's appeal was dismissed. There is no good reason why having been granted asylum on 10 May 2013, no application was made for entry clearance until 10th August 2014. The Appellant and SM accept that they submitted false documents. The credibility of the Appellant and SM is seriously damaged.

26. The Appellant has had care of the children since 2005 when the marriage broke down. The Respondent does not accept that SM and the Appellant are married. The Respondent is not willing to accept that relationship subsisting or that it has subsisted since 2005.

27. The appeal cannot succeed under paragraph 352 of the immigration rules.

28. Ms Dickinson submitted that the Appellant and SM have been candid about previous applications. It was accepted by the Respondent that the Appellant and SM were married in 1991 as claimed. Judge Solly found that the relationship was not genuine and subsisting. She did not have before her the evidence that is now available. She submitted that in her view the best interests of A outweigh the public interest maintenance of immigration control.

Conclusions

29. The starting point is the decision of Judge Solly. This is an entry clearance case and I must consider the position the date of the decision. There is a considerable amount of evidence before me that was not before Judge Solly in respect of the Appellant and SM's relationship which arguably casts light on the position at the date of the decision.

30. I am not impressed by SM's evidence. Considering the evidence in the round I find him not credible. There was regrettably no evidence from the Appellant before me. The evidence of SM must be treated with caution in the light of the couple's immigration history. It is accepted by the Respondent that they were married in 1991. The Appellant and SM seek to persuade me that their marriage continues. I have considered the evidence of D. His evidence is that his parents have always been married. He was born in 1997. He was a minor in 2011. He did not refer to the events of 2011 in his evidence. Inevitably I conclude that in the light of the evidence before me, his evidence cannot be relied on.

31. Ms Dickinson stated in submissions that SM and the Appellant had been candid about their immigration history. However, SM did not make any reference to the 2010 application and 2011 appeal in his first witness statement. I accept that he addressed it in his second witness statement, but it is hardly surprising considering the error of law decision.

32. I accept that at the date of the decision there was some relationship between the Appellant and SM. I do not accept that the evidence establishes that at the date of the

decision they were still married. SM sends the Appellant money and they have contact. Both matters I have taken into account.

33. If it is the case that the Appellant and SM are still married as they claim to be this means that they fabricated the application for entry clearance in 2010 relying on a false divorce certificate. If accepted it puts them in a very bad light. I can understand the level of desperation a spouse and children may feel being separated from their father who sought refuge in another country. However, the Appellant's case as advanced by SM, goes far beyond the use of deception in an application for entry clearance. The Appellant did not come clean once here in the UK. The evidence is that she did not even live with SM here in 2010 save for a very short period. She made another application on a wholly false basis. She gave evidence before a judge which explained in detail that she was the victim of domestic abuse at the hands of her husband (S), following a successful application for entry clearance. The Appellant gave oral evidence giving a detailed account of the abuse and how it impacted on the children, particularly A. Her case was advanced on the basis that she and SM divorced in 2009 and that their marriage broke down in 2005. On the Appellant's own case, the degree of deception is very significant and serious. The Appellant's case is that it was all done in an act of desperation to keep the family together. However, there is no satisfactory or credible explanation given by SM which would explain why he did not make a claim for asylum until 2011 and why the Appellant and SM did not live together as a family when they came here. SM has attempted to explain this in his evidence at various stages, but he has not advanced a credible or plausible explanation why it was necessary to go to such great lengths to deceive the Home Office. I do not accept the Appellant's case as advanced before me.

34. The alternative scenario which is more likely, in my view, is that the marriage broke down in 2005 and was dissolved in 2009. This would fit with the Appellant's chronology which she relied on in 2011. The Appellant's marriage to SM may or may not have been genuine, however, that came to an end (I believe that there is evidence that he returned to Sri Lanka). The Appellant may have been the victim of domestic abuse here. She did not come to the UK to be with SM because they were married or in a relationship, but SM was no doubt keen for his children to be in the UK. Whatever the position with S, I find that there was not a genuine or subsisting relationship between the Appellant and SM at this time. The Appellant and SM resumed a relationship of a kind more recently to facilitate entry clearance. They have decided to advance a case on the basis that they are still lawfully married in the knowledge that if this is not the case then they would be unlikely to meet the requirements of the Rules. I do not need to seek the truth which would be an impossible task on the evidence in this case. I must decide whether the Appellant has established on the balance of probabilities that she and SM are married for the purposes of para 352A of the Rules. She has not done so by a large margin.

35. There are further issues which give rise to concerns about credibility and the continuation of the marriage. SM accepted that not only did the Appellant rely on a false marriage certificate and divorce certificate in 2010, but that the marriage

certificate now relied on which was submitted with the application for entry clearance had been altered. His occupation was changed. His evidence is that this was done so that when his family returned to Sri Lanka in 2010 they could receive funding. When SM made an application for asylum in 2011 he declared that he was divorced. His evidence before Judge Solly was that this was to protect his family in Sri Lanka. After the grant of asylum in 2013, there was no application for family reunion until 2014. Various explanations have been given for this behaviour which are not individually implausible; however, when looked at in the round against the background, they further undermine the credibility of the Appellant and SM. There are photographs of the Appellant and SM together in 2010, but considered in the round they are not sufficient to establish that SM and the Appellant are still married.

36. Having considered the evidence before me, I accept that at the date of the decision there was a relationship of sorts between and the Appellant and SM. However, the Appellant has not established on the balance of probabilities that she and SM are still lawfully married or that they have a relationship akin to marriage. The Appellant has not established that they have been in a genuine and subsisting relationship since 2005. They have a relationship of sorts because the Appellant is the mother of their children. He sends her money and they are in contact. It is likely he feels a sense of responsibility towards her. This is not surprising because she remains in Sri Lanka without her children. The Appellant is not able to establish that she meets the requirements of the Rules. She cannot establish that she is still married to SM. She has not established that the relationship/marriage existed before SM left Sri Lanka in 2009. She has not established that there is a genuine and subsisting relationship akin to marriage between her and SM.

37. I go on to consider proportionality under article 8 of 1950 Convention on Human Rights on the basis that the decision interferes with the Appellant's family life with D and A. The appeal turns on proportionality, with particular emphasis on A. D was an adult at the material time, but the impact of the decision on him is a material factor to consider.

38. There is considerable evidence before me about A. However, it postdates the date of the decision and is of limited evidential value. He was, at the date of the decision, aged 14. He was already in the UK and had been separated from his mother for 10 months. He probably delayed coming to the UK until September 2015 because he did not want to leave his mother. There is no evidence from A about whether he wishes to stay here or return to be with his mother. The family chose for him to come here. There was no guarantee that she would be granted entry clearance at that time. In the light of the Appellant's immigration history, this may not have been a sound decision for the family to make. It may not have been in A's best interests to leave his mother at that stage.

39. It could be argued that it was the decision of the family in September 2015 that A should join his father here in September that interfered with A's family life with his mother. However, I accept that the decision is a further interference. A's best interests are to be with both his parents and this can only be achieved if his mother is

granted entry clearance. This is a primary factor to put into the balance. Neither D nor A is in any way to blame for their parents' behaviour. The issue is whether the interference is proportionate taking into account A's best interests. I have considered that D would also be negatively impacted by the decision. He is a young adult currently at University.

40. The outcome of a negative decision will be that A is unable to live in the same country as both his parents. However, I find that his father and mother's marriage broke down in 2005 and he was not living with his father from 2005 onwards. He lived with his mother until 2015 when he came here to join his father. If his mother is granted entry clearance, I am not satisfied that the relationship between her and SM is such that they will live together. They did not do so in 2010. The Appellant gave evidence at the hearing in 2011 about A and the impact of domestic violence on him. I do not know whether the Appellant and her children have been victims of domestic abuse or whether this was a complete fabrication. If the family choses, it is open to A to return to Sri Lanka to be reunited with his mother. I can understand that SM is keen that the Appellant is here because there are childcare issues arising from his need to work. It is of course natural that he wants his children to be with him in the UK. A's brother is now studying and has left the family home. It will cause A further distress to be separated from his father, but he had not lived with him for many years prior to coming to the UK.

41. A's best interests are a weighty factor in favour of the Appellant. They are a primary consideration; however, they are outweighed by the public interest in the maintenance of immigration control in the light of the serious and sustained dishonest behaviour of the Appellant and SM. There are no compelling circumstances so as this appeal should be allowed outside of the Rules. The maintenance of immigration control is in the public interest. The Appellant has gone to considerable lengths to deceive the Home Office and the Tribunal including submitting false documents. SM has been complicit. The level of deceit is such that the scales tip overwhelmingly in favour of the Respondent.

42. I have considered what the House of Lords said in **Huang and Secretary of State for the Home Department of [2007] UK HL11** when the House acknowledged the need to give weight to the established regime of immigration control and stated as follows: -

> "The Authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under Article 8(2). There will, in almost any case, be certain general considerations to bear in mind; the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is deceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the

need to discourage fraud, deception and deliberate breaches of the law; and so on"

43. The appeal is dismissed under article 8.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam* Date 6 October 2018

Upper Tribunal Judge McWilliam