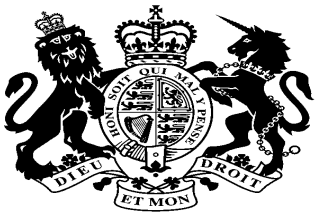

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12718/2016

THE IMMIGRATION ACTS

Decision made on the papers
13th May 2019

Decisions and Reasons Promulgated
On 15th May 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

PATHRANAGE [R]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION TO REMIT APPEAL

1. By a decision promulgated on 9 July 2018, I (sitting with Mrs Justice Moulder) found an error of law in the decision of Judge Metzer promulgated on 6 March 2018, allowing the Appellant's appeal. We therefore set aside that decision and gave directions for a resumed hearing to re-make the decision. Our error of law decision is annexed hereto at Appendix A for ease of reference.

2. Since then, this appeal has come back before me on no less than three occasions, on 24 September 2018, 16 January 2019 and 21 March 2019. My decisions on those occasions, adjourning the resumed hearing are at Appendix B for ease of reference.

3. In short summary, the re-hearing of this appeal has been rendered more complicated by two matters. First, the Appellant has already been deported to Sri Lanka following a certification under section 94B Nationality, Immigration and Asylum Act 2002. He remains in that country. Although he was initially content to give his evidence by Skype (as he had done in the First-tier Tribunal), efforts to take evidence in that way failed at the hearing in January 2019. That

led to the making of a direction to the Respondent to arrange for the Appellant to give evidence via a video-link from Sri Lanka. The Respondent has put arrangements in place (see case management decision dated 21 March 2019).

4. The second issue concerns the position of the Appellant's wife and child who remain in the UK but without leave to remain here. Their lack of status was one of the factors leading to the finding of an error of law in Judge Metzer's decision. The Appellant's wife is a failed asylum seeker. However, she had made further submissions on 5 September 2018. The Respondent had stayed consideration of those submissions pending the outcome of the Appellant's appeal. By my directions given on 16 January 2019, I requested the Respondent to make a decision on those by 16 April 2019. Although the Respondent contended that I could not compel the making of a decision in that regard (which I accept) and although the Respondent has failed to comply with the direction made on 21 March 2019 to file a copy of any decision made, the Tribunal has been informed by letter dated 9 May 2019, that a decision was made and served on the Appellant's wife on 24 April 2019. Although that decision refused the Appellant's wife's protection claim, it gave her a further right of appeal. That appeal has been lodged (appeal reference: PA/04216/2019).

5. In light of the above developments and as canvassed in my case management decision dated 21 March 2019 (at [5]), it is more appropriate for the Appellant's appeal to be remitted to the First-tier Tribunal for re-hearing and for that to be linked with his wife's appeal for that purpose. As the Appellant's solicitor submits in his letter dated 9 May 2019, there is a significant degree of evidential and legal overlap between the two cases.

6. For those reasons, this appeal is remitted to the First-tier Tribunal for the re-making of the decision in this appeal. The appeal is to be linked to that of the Appellant's wife (PA/04216/2019) and both are to be heard together at Taylor House to allow the Appellant to give evidence from Sri Lanka by way of video-link.

DECISION

I direct that this appeal be remitted to the First-tier Tribunal for re-making of the decision following the setting aside of the decision of First-tier Tribunal Judge Metzer promulgated on 6 March 2018. This appeal should be linked with the appeal of the Appellant's wife (PA/04216/2019) and both shall be heard at Taylor House to allow the Appellant to give evidence by way of video-link from Sri Lanka.

Signed Dated: 13 May 2019
Upper Tribunal Judge Smith

APPENDIX A: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12718/2016

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 19 June 2018

Determination Promulgated

……9 July 2018……

Before

THE HONOURABLE MRS JUSTICE MOULDER
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PATHRANAGE [R]

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, Counsel instructed by Lawland solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, we refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State for the Home Department is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge Metzer promulgated on 6 March 2018 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 21 July 2015 refusing the Appellant's human rights claim in the context of

a decision to deport the Appellant to Sri Lanka. The Appellant was in fact deported to Sri Lanka on 6 May 2016 albeit his wife and child remain in the UK.

2. Although mention is made in the Decision of the Appellant's claim to fear return to Sri Lanka, that is only by way of a recitation of the Appellant's evidence, the Appellant did not ask the Judge to make any findings on that evidence and did not pursue a further claim for protection. The appeal and the challenge thereto focus only on the Appellant's Article 8 rights.

3. The Appellant is a national of Sri Lanka. The Appellant came to the UK in 1994 and claimed asylum following arrival. His asylum claim was refused but on 9 November 1999 he was granted exceptional leave to remain until 9 November 2003.

4. On 20 September 2002, the Appellant was arrested on suspicion of helping prostitution and on 30 April 2003, he was prosecuted for living off the earnings of prostitution. He pleaded guilty to that charge and on 3 June 2003, he was sentenced to a period of two years' imprisonment. The details of the offence are set out fully at [2] of the Decision and we need say no more about that save to note that it was a very serious offence as the Judge recognised at [15] of the Decision.

5. On 20 August 2003, the Appellant was served with notice of intention to deport him which he appealed. He also applied on 14 November 2003 for indefinite leave to remain, his exceptional leave having expired. His appeal against the decision to deport him was dismissed in a determination promulgated on 13 March 2006. The Appellant has had no leave to remain in the UK since at the latest that date.

6. The Appellant met his wife in the UK and they began living together in 2006. They married on 20 December 2011. Their son was born on 5 February 2013. The Appellant's wife and child are also nationals of Sri Lanka. His child was born in the UK but is not a British citizen. The Appellant's wife is currently challenging the Respondent's refusal to grant her and her son leave to remain on human rights and/or protection grounds. It appears from the Respondent's decision letter that her asylum claim was refused in 2011 and she unsuccessfully appealed that decision. It appears that she made (or intended to make) further submissions in this regard in December 2017.

7. On 22 September 2013, the Appellant was arrested and detained. Following the making of the decision now under appeal and certification of the human rights claim under section 94B Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the Appellant was deported to Sri Lanka.

8. The Judge allowed the appeal, finding that there were compelling circumstances which outweighed the public interest.

9. Permission to appeal that decision was granted by First-tier Tribunal Judge Lambert on 4 April 2018 in the following terms (so far as relevant):-

> "… [2] The grounds contend cumulative failures to have proper regard to matters relevant to the public interest in deportation and to S117C, particularly in the light of the very serious offence for which the Appellant had been convicted. The very limited content of the findings made by the judge at paragraphs 15-17 may amount to lack of adequate evidence based reasoning and renders the grounds arguable."

Grounds of appeal

10. The Respondent's grounds of appeal are that the judge has misapplied the "unduly harsh" test. The Respondent submits that the Judge has failed to take account of certain factors namely the status of the Appellant's wife and child, has failed to have proper regard to section 117C of the 2002 Act which is a complete code ("Section 117C") and failed to identify any exceptional circumstances in the Appellant's family life which might outweigh the very compelling public interest in deportation. Further, the Respondent submits that the Judge has ignored case law (NE – A (Nigeria) v SSHD [2017] EWCA Civ 239 – "N E-A (Nigeria")) which states that the best interests of the child cannot always take precedence over the wider public interest and that the Judge incorrectly attributed significant weight to the Appellant's rehabilitation (Danso v Secretary of State for the Home Department [2015] EWCA 596).

11. In oral submissions the Secretary of State pointed out that the Appellant did not meet Exception 2 in section 117 C (5) as neither the Appellant's partner nor the Appellant's child were a qualifying partner or qualifying child respectively within the meaning of that section and accordingly the question for this court is whether the Judge fell into error in concluding that there were very compelling circumstances over and above those described in Exception 2 to outweigh the public interest which requires deportation. Section 117C itself does not provide for an exception for very compelling circumstances over and above the exceptions in relation to an offender sentenced to less than four years (as here). However, the exception of "very compelling circumstances over and above the exceptions" in subparagraph (6) is to be read into section 117 C (3) following the decision in NA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 662 in particular at [24] to [28]. No objection was taken on behalf of the Appellant to this modification of the grounds and we approach the appeal on this basis.

12. The matter comes before us to decide whether the Decision contains a material error of law. Both parties accepted that, if we found there to be an error of law in the Decision, given the basis of the challenge, the appeal could remain in this Tribunal for re-hearing. We agreed with the representatives that if we found a material error of law, we would give directions for further evidence.

Decision and Reasons

13. The findings which led the Judge to his conclusions are to be found at [15] to [17] of the Decision as follows:

> "[15] In reaching my decision, I need to recognise that there is a very strong public interest in deportation given that the Appellant was convicted of a very serious offence. I also take into account Section 117B and C of the 2002 Act as amended by the Immigration Act 2014 which again makes reference to the public interest and immigration control and I recognise that the case involves deportation of a foreign criminal who has been convicted on his own plea of a very serious offence and received a custodial sentence of two years' imprisonment. As I indicated above, the test for "very high compelling circumstances" is a high one: see Hesham Ali [2016] UKSC 60 at Paragraph 50.
>
> [16] However, as Mr Bose accepted, the Respondent failed to enforce immigration control which could have occurred much earlier. The Appellant was convicted in 2003 and the Deportation order was only some twelve years later. The Appellant has been in the United Kingdom since 1994 and although the offence itself was, as I have indicated, a serious one, he has kept out of trouble ever since, a period now of over fourteen years. I accept his remorse and rehabilitation and do not consider that he can properly be described as a risk to the public now. I also take into account the impact of the Appellant's deportation on his wife and child in the United Kingdom reflected in the psychological report and that removal would be contrary to the best interests of the Appellant's son under Section 55 of the Borders Act albeit that the wife and child do not have settled status in the United Kingdom. I am entitled to take into account the issue of delay which appears to be solely the Respondent's responsibility: see EB (Kosovo) [2008] UKHL 41; I need to take into account all the relevant factors in balancing the strength of the public interest in the removal of the Appellant against the impact on private and family life: see Agyarko [2017] UKSC 11 at Paragraph 57.
>
> [17] I accept, as here, that in cases concerned with precarious family life, it is necessary for there to be a very strong or compelling claim required to outweigh the public interest in immigration control. Having given the matter careful consideration recognising the high threshold test or "very compelling circumstances" and taking into account the test under Paragraph 398 of the Immigration Rules and Section 117 of the 2002 Act as amended, given the very substantial delay in the Respondent failing to enforce immigration control; the length of residence of the Appellant in the United Kingdom of well over twenty years; the length of time since the offending behaviour complained about and the fact that although it was a serious matter it is the only offence and the effect that that conviction had upon the Appellant and the impact upon his wife and child who was born in the United Kingdom and his best interests, I find that the Appellant has satisfied me that there are very compelling circumstances over and above those described in Paragraphs 399 and 399A such that the public interest in deportation is outweighed in the present case."

Failure to have proper regard to section 117C of the 2002 Act

14. It was submitted that the Judge has not taken proper account of Section 117C. The assessment to be carried out is not a simple balancing between the factors forming part of the Appellant's private and family life (and interference

therewith) and the public interest, but, having regard to Section 117, consideration of whether there are "very compelling circumstances" which outweigh the public interest which requires deportation.

15. The Judge has regard at [15] of the Decision to the Supreme Court's judgment in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. However, the judge has failed to acknowledge subsequent case law in particular NE-A (Nigeria):

> "[14] … The focus in *Hesham Ali*, as is conceded, was on the Rules. … integral to Lord Reed's reasoning was that the rules "are not law … but a statement of the Secretary of State's administrative practice". … Part 5A of the 2002 Act, by contrast, is primary legislation directed to tribunals and governing their decision-making in relation to Article 8 claims in the context of appeals under the Immigration Acts. … sections 117 A – 117 D, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8. In particular, if in working through the structured approach one gets to section 117 C (6), the proper application of that provision produces a final result compatible with Article 8 in all cases to which it applies. The provision contains more than a statement of policy to which regard must be had as a relevant consideration. Parliament's assessment that "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is one to which the tribunal is bound by law to give effect.
>
> [15] … Of course, the provision to that effect in section 117 C (6) must not be applied as if it contained some abstract statutory formula. The context is that of the balancing exercise under Article 8, and the "very compelling circumstances" required are circumstances sufficient to outweigh the strong public interest in the deportation of the foreign criminals concerned. Provided that a tribunal has that context in mind, however a finding that "very compelling circumstances" do not exist in the case to which section 117 C (6) applies will produce a final result, compatible with Article 8, that the public interest requires deportation. There is no room for any additional element in the proportionality balancing exercise under Article 8." [Emphasis added]

16. It was submitted for the Respondent that the Judge appeared to minimise the Appellant's crime and failed to consider it as part of his overall assessment. In our view, the Judge clearly had regard to the nature of the offence and described it as very serious. He also had regard to the stated public interest generally in deporting those who commit offences (paragraph [15]).

17. However, it was further submitted for the Respondent that the Judge had failed to identify any exceptional circumstances in the Appellant's family life and failed to recognise that the children's best interests cannot always take precedence.

18. Having regard to what is said by the Judge at [16] and [17] of the Decision, it appears to us that there are three factors which lay behind the Judge's

conclusion. First, the impact of the Appellant's deportation on his family life and particularly the effect on his wife and child. Second, the Respondent's delay in taking deportation action and the lack of any reoffending in the meanwhile. Third, the Appellant's length of residence in the UK.

19. Although there is limited evidence about what the interests of the Appellant's child require and little reasoning provided by the Judge, the psychological report of Dr Halari does provide some support for a finding that the best interests of the Appellant's child are to remain in the UK. However, it is well recognised in case law that a child's best interests can be outweighed by other factors, particularly in deportation cases.

20. The Appellant is unable to meet Exception 2 because his wife and child are not a "qualifying" partner and child for the purposes of the statute. His wife is not settled or a British citizen. His child is not a British citizen and has not been living in the UK for seven years. However, whilst the Judge notes the lack of status of the Appellant's wife and child at [14] of the Decision, there is no reflection of the fact that they are entirely without status in the Judge's reasoning on this aspect. He notes at [16] of the Decision that they do not have settled status. However, they have no basis of stay at all. At present, they are in the UK unlawfully. At the date of the hearing, the Appellant's wife's appeal on protection and human rights grounds had been dismissed and she had yet to make any further submissions (she said that she intended to do so in December 2017).

21. As to delay, the Respondent did not "delay" in the taking of deportation action against the Appellant. He gave the Appellant notice of his intention to deport the Appellant in 2003 at the time of the offence. The Appellant appealed that decision unsuccessfully. True it is that the Respondent did not thereafter seek to physically remove the Appellant for reasons which are not entirely clear. It is also right to note that the Respondent made a further deportation order in 2015 under the automatic deportation provisions in the UK Borders Act 2007 (not in existence at the time of the first deportation decision). However, this case is not in the same category as cases like EB (Kosovo) where the Respondent delayed unreasonably in making a decision on an application for leave to remain. Nor is it a case where the Appellant has strengthened (qualifying) family or private life ties in reliance on the Respondent's failure to physically remove him in the period.

22. The Judge appears to attribute responsibility to the Respondent for failing to physically remove the Appellant without any recognition that the Appellant is someone who is subject to deportation and has been since 2003. As a person with no basis of stay and indeed with a positive decision against him in relation to deportation, the Appellant should have left the UK. The Judge does not recognise this lack of status or requirement to leave when placing weight on the Appellant's length of residence. The Appellant's presence in the UK has been unlawful now for at least twelve years. That too is a factor which the Judge has failed to take into account.

23. Accordingly, in our view in relying on these factors, the Judge fell into error in concluding that there were "very compelling circumstances" which outweighed the strong public interest in deportation.

24. For those reasons, we are satisfied that the Decision discloses a material error of law and we set aside the Decision. We give directions below for the re-making of the decision. We have provided an extended period for the filing and service of further evidence, mindful of the fact that the Appellant is currently living in Sri Lanka and therefore more time may be needed to obtain instructions and evidence from him.

DECISION

We are satisfied that the Decision contains a material error of law. We set aside the decision of First-tier Tribunal Judge Metzer promulgated on 6 March 2018. We make the following directions for the re-making of the decision:

DIRECTIONS

1. **Within 42 days from the date when this decision is promulgated, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he relies. In particular, the Tribunal would be assisted by updated evidence as to the Appellant's wife's position including but not limited to a copy of any appeal decision in relation to her (and the Appellant's child's) status, a copy of any further submissions made by them or on their behalf and any decision in response to those further submissions.**

2. **If the Appellant wishes to give further evidence he must file and serve a written witness statement within the time limit at [1] above.**

3. **Within 60 days from the date when this decision is promulgated, the Respondent shall indicate to the Tribunal and the Appellant whether he wishes to cross-examine the Appellant.**

4. **The appeal will be listed for a case management review on the first available date after 60 days from the date when this decision is sent to consider in particular whether oral evidence is required from the Appellant and, if so, what arrangements need to be put in place to enable him to give that evidence. Time estimate one hour.**

Signed Dated: 5 July 2018
Upper Tribunal Judge Smith

APPENDIX B: ADJOURNMENT/CASE MANAGEMENT DECISIONS

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12718/2016

THE IMMIGRATION ACTS

Heard at Field House
On Monday 24 September 2018

Determination Promulgated

……

Before

UPPER TRIBUNAL JUDGE SMITH

Between

PATHRANAGE [R]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gaston, Counsel instructed by Lawland solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

CASE MANAGEMENT DIRECTIONS

1. **The hearing of this appeal shall be listed on the first available date after 17 December 2018 with a time estimate of ½ day. The hearing is to start at 10am due to the time difference between the UK and Sri Lanka. The hearing is to be listed in conjunction with the clerk to Mr Richard Singer of Counsel, Goldsmith Chambers to Mr Singer's convenience. A Sinhalese interpreter is to be booked for the hearing.**

2. **Any further evidence on which either party wishes to rely at the hearing is to be filed with the Tribunal and served on the other party by no later than 4pm on Monday 3 December 2018.**

3. **If the Appellant wishes to give oral evidence and/or the Respondent wishes to cross-examine the Appellant (who currently resides in Sri Lanka), the parties are to notify the Tribunal by no later than 28 days before the date fixed for the hearing with confirmation of the arrangements made in order to receive such evidence. If such evidence is to be given, the parties are to make arrangements directly with the Tribunal as to the facilities required and such facilities as are necessary will be provided by and at the expense of the parties.**

REASONS

1. The CMR for this appeal hearing was listed with the intention of considering whether oral evidence would be required from the Appellant depending on the nature of any evidence contained in any further witness statement to be filed and served in accordance with the directions made in my earlier decision promulgated on 9 July 2018. That decision also envisaged that the Respondent would have the prior opportunity to consider whether he wished to cross-examine the Appellant.

2. As it was, the Appellant's further witness statement and additional evidence was not filed until 21 September and not received by the Respondent until the CMR hearing. The Respondent did not therefore have the opportunity to consider how to respond to the evidence or whether oral evidence would be required. Both parties agreed though that such evidence could be given by Skype (as it was before the First-tier Tribunal) particularly since the Presenting Officer thought it unlikely that video-link arrangements were yet available from Sri Lanka. I have made plain in the directions that if evidence is to be given via Skype, arrangements must be made by the parties with the Tribunal in advance of the hearing and such facilities as are required must be provided by the parties at their expense. I have also given a direction that this appeal must be listed at 10am to account for the time difference between the UK and Sri Lanka. I have also agreed that the hearing should be relisted to the convenience of Mr R Singer of Counsel who represented the Appellant before the First-tier Tribunal. The potential need for the Appellant to give oral evidence remotely is good reason why there should be continuity of representation due to the enhanced difficulties of taking and receiving evidence via electronic means.

3. A further reason for the delay in the submission of the Appellant's evidence is that his wife has made further submissions (on 6 September 2018 and notwithstanding what I was told at the error of law hearing that such submissions were made in December 2017). Those remain outstanding and whilst it is the case that the Appellant's appeal hearing does not need to await the outcome of those submissions, nonetheless some of the evidence on which the Appellant relies (in particular the two letters from a Sri Lankan Attorney in relation to risk to the Appellant's wife on return) will need to be considered in the context of this appeal as well as those further submissions. I have therefore given a longer period for the submission of further evidence as the Respondent

may wish to make further enquiries about those letters or the content of those letters.

Signed Dated: 24 September 2018
Upper Tribunal Judge Smith

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12718/2016

THE IMMIGRATION ACTS

Heard at Field House
On Wednesday 16 January 2019

Determination Promulgated

…**17 January 2019**……

Before

UPPER TRIBUNAL JUDGE SMITH

Between

PATHRANAGE [R]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Singer, Counsel instructed by Lawland solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

ADJOURNMENT DECISION AND DIRECTIONS

1. This appeal came before me for re-hearing following the decision which I made when sitting with Mrs Justice Moulder and promulgated on 9 July 2018 finding an error of law in the decision of the First-tier Tribunal promulgated on 6 March 2018 and setting that aside. The hearing also follows case management directions made at a hearing on 24 September 2018 to canvas with the parties the need for special arrangements to be made to hear the Appellant's evidence (if he wished to give oral evidence and/or the Respondent wished to cross-examine him) as the Appellant is in Sri Lanka following a certification under section 94B Nationality, Immigration and Asylum Act 2002.

2. Under cover of a letter dated 17 December 2018, the Appellant's solicitors filed further evidence. By a letter dated 27 November 2018, the Respondent also made written submissions. In those submissions, he indicated that he wished to cross-examine the Appellant and that the Appellant's solicitors were content to arrange a video-link by Skype as had been done at the First-tier Tribunal. The Respondent also notified the Tribunal that the Appellant's wife, [RH], had made further submissions dated 5 September 2018 but that a decision had been taken not to consider those until the Appellant's appeal was determined as the further submissions noted that her position depended on that of the Appellant.

3. The first difficulty which arose at the start of the hearing before me today was that of establishing contact with the Appellant. The Appellant's solicitors were advised by the Tribunal on Friday 11 January 2019 how to contact the bridging company to arrange a video-link with the Tribunal but had not followed up on that advice. It was proposed that the Appellant should give his evidence, viewed on a laptop screen by me, both parties' representatives and the interpreter booked by the Tribunal at the Appellant's request. I was prepared to make necessary practical adjustments to take evidence in that way although there were clearly some logistical problems which arose with that proposal. However, as it transpired, Mr Singer was unable to contact the Appellant via Skype either using his own log-in details or those of the Appellant's wife and it was not therefore possible for the Appellant to give evidence in that way at all.

4. The second difficulty arose due to the uncertainty in relation to the Appellant's wife's current position. As I observed in exchanges with Mr Tarlow, rather than the Appellant's wife's case turning on the Appellant's, the position is in fact the opposite. Although Mr Singer accepted that the Appellant's case now cannot amount to a protection claim as he is outside the UK (and therefore no issue of requiring the Respondent's consent can arise), his case that he should be allowed to return to the UK (and that his wife and child should be allowed to remain here) turns largely on the risk which she asserts that she faces on return to Sri Lanka. Her appeal has been dismissed (I assume on credibility grounds although I have none of the documents relating to her case in evidence in this case). Her further submissions in this regard turn mainly on two letters from a person said to be a lawyer in Sri Lanka (which the Respondent disputes) attesting to an arrest warrant in place against her (which I do not have) and a few further documents about what is said to have happened to the Appellant at the hands of the authorities following his return in 2016 due to interest in his wife. In dealing with the Appellant's case, it will be necessary to deal with what that evidence shows (as Mr Singer acknowledged) which will entail me making findings as a primary decision maker on matters raised in the Appellant's wife's submissions. Whilst that would not have been a reason to adjourn in itself, the position is unsatisfactory (as Mr Tarlow acknowledged). Since I considered it necessary in the interests of justice to adjourn in any event due to the difficulties with taking the Appellant's evidence, I directed (without dissent from Mr Tarlow) that a decision should be taken on the outstanding submissions within a three month period so that the Respondent's views about

the further evidence in relation to risk in the Appellant's wife's case can be taken into account.

5. Although Mr Singer did not formally apply to adjourn because his clients are privately-paying and the Appellant's wife would have wished to proceed, the Appellant wishes to give oral evidence and the Respondent wishes to cross-examine him. As such, in the interests of justice, I decided of my own motion that, in fairness to the Appellant, there was no option but to adjourn to allow him to give live evidence as he wishes to do. I recognise that a further adjournment in this case is not ideal, but this is a Section 94B case and it is necessary to ensure that the Appellant be given a fair hearing of his out of country appeal: AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC)). If the practical obstacles to the Appellant giving live evidence cannot be resolved by the time of the CMR, I will give consideration to further conduct of the appeal in accordance with any submissions the Appellant wishes to make based on that case.

6. I have given directions leading to a further CMR on 12 March 2019 to ensure that, if possible, the outstanding evidential and practical problems are overcome by the time the appeal is re-listed after 29 April 2019

DIRECTIONS

1. By 4pm on 13 February 2019, the Respondent is to file with the Tribunal and serve on the Appellant written proposals as to the practicalities of providing a video-link or other facilities to enable the Appellant to give live evidence from Sri Lanka.

2. By 4pm on 27 February 2019, the Appellant's solicitors are to file with the Tribunal and serve on the Respondent their written response to those proposals.

3. The appeal is listed for a case management hearing before me on Tuesday 12 March 2019 (time estimate 1 hour)

4. By no later than 16 April 2019, the Respondent shall make a decision on the further submissions of [RH] (HO number H1221748) dated 5 September 2018.

5. By 4pm on 18 April 2019, the Respondent shall serve on the Appellant's solicitors (who are the same as acting for [RH]) and file with the Tribunal a copy of the decision letter in relation to [RH]'s further submissions.

6. By 4pm on 18 April 2019, the Appellant's solicitors are to file with the Tribunal and serve on the Respondent a bundle containing the following documents relating to [RH]:

a. The Respondent's decision providing reasons for refusing her initial asylum claim in 2011;

b. The appeal decision in her case (appeal reference AA/02033/2011) and refusals of permission to appeal;

c. A full copy of the further submissions made with enclosures.

7. **Any further evidence on which either party wishes to rely at the hearing is to be filed with the Tribunal and served on the other party by no later than 4pm on 18 April 2019.**

8. **The hearing of this appeal is to be listed before me on the first available date after 29 April 2019 (time estimate ½ day).**

Signed Dated: 16 January 2019
Upper Tribunal Judge Smith

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12718/2016

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 12 March 2019

Promulgated

…25 March 2019……

Before

UPPER TRIBUNAL JUDGE SMITH

Between

PATHRANAGE [R]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Jayakody of Lawland solicitors
For the Respondent: Mr S Kandola Senior Home Office Presenting Officer

CASE MANAGEMENT REVIEW DECISION AND FURTHER DIRECTIONS

1. This appeal came before me last on 16 January 2019 for re-hearing when I was obliged to adjourn it because it was not possible to receive evidence from the Appellant who remains in Sri Lanka. My adjournment decision on that occasion promulgated on 17 January 2019 is annexed hereto for ease of reference. I gave various directions for the onward procedural steps and directed a case management review on 12 March 2019.

2. The Respondent failed to comply with the first of my directions to provide written proposals as to the practicalities of hearing evidence via video-link from Sri Lanka. Accordingly, the Appellant was unable to respond in that regard. However, at the hearing, Mr Kandola was able to inform the Tribunal and the

Appellant's representative of the progress made in this regard. I was informed that a period of ten weeks is required to set up the video-link facilities in Sri Lanka and steps are already in train. Ideally, the hearing in the UK should take place at Taylor House (to avoid the need to move the equipment from there). That can now be agreed. The video-link in Sri Lanka will be set up at the British High Commission in Colombo. The equipment has already been delivered there. Mr Jayakody confirmed that the Appellant is able to attend there as he lives just outside Colombo.

3. I have therefore given a direction below for the hearing to be listed at Taylor House after 29 April 2019. The date will be agreed by the Tribunal's listing team in conjunction with Taylor House and the representatives on both sides. The hearing is to be listed to fit in with their convenience and also that of the British High Commission. A Sinhalese interpreter will be required for the hearing. It was agreed that two days should be set aside as it will only be possible to hear evidence from the Appellant in the morning in order to accommodate time differences between Sri Lanka and the UK. It was agreed that it would be sensible to avoid a hearing on a Friday.

4. In relation to direction [4] of my decision promulgated on 17 January 2019, Mr Kandola informed me that the casework team dealing with the Appellant's wife's further submissions are aware of the direction. Whilst he submitted (and I accept) that I cannot compel the caseworker to make a decision in that case, he indicated that the caseworker appears willing to comply with the direction.

5. A discussion took place about the possible implications for this appeal in the event that the Respondent refuses the further submissions but gives the Appellant's wife a further right of appeal. If that were the position, the parties agreed that it may be more appropriate to remit this appeal to the First-tier Tribunal to be linked for hearing with that appeal. I do not make a decision in this regard at present. That must await the outcome of the consideration of the Appellant's wife's further submissions. Directions [4] and [5] of my previous decision remain in force.

6. Likewise, directions [6] and [7] remain in force in relation to the filing by the Appellant's solicitors of a bundle containing documents relating to the Appellant's wife's case and the filing of any further evidence on which either party relies.

DIRECTIONS

1. **Directions [4] to [7] as set out in my decision dated 16 January 2019 continue in force**.

2. **The hearing of the appeal is to be listed at Taylor House on the first available date after 29 April 2019 which date is to be agreed between the listing teams to the convenience of the parties and the British High Commission in Colombo from where the Appellant is to give evidence via video-link. Time**

estimate for the hearing is two days. The hearing is to be listed to start promptly at 10am. A Sinhalese interpreter will be required for the hearing.

Signed Dated: 21 March 2019
Upper Tribunal Judge Smith