Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11759/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2021	**On 4 March 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RATHAKRISHNAN VELAUYTHAM
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr C Talacchi, Counsel, instructed by Waran & Co Solicitors

DECISION AND REASONS

1. This is an appeal against the decision issued on 27 November 2019 of First-tier Tribunal Judge Fitzgibbon QC which allowed the appeal of Mr Velauytham against the respondent's decision to refuse an Article 8 ECHR application.

2. For the purposes of this decision I will refer to the Secretary of State for the Home Department as the respondent and to Mr Velauytham as the appellant, reflecting their positions as they were before the First-tier Tribunal.

Background

3. The appellant is a national of Sri Lanka, born on 1 July 1955.

4. The appellant entered the UK illegally on 21 March 1998 and claimed asylum. On 16 July 1998 that claim was refused and certified under the Dublin Convention as the appellant had travelled to the UK via Belgium. In June 2000 the appellant was removed to Belgium. That was so notwithstanding that by then his son, Ragulan, a minor, had arrived in the UK and was living with the appellant and had made his own asylum application.

5. The appellant returned to the UK approximately a month later and was granted temporary admission. The appellant claimed asylum again but this claim was refused on 26 August 2000.

6. On 14 July 2006 the appellant attempted to enter France using a false passport. He was returned to the UK on the same day. He was charged with an offence concerning the use of the false passport and, after pleading guilty, he was sentenced to nine months' imprisonment. The appellant also made a further asylum claim on 14 July 2006 on return to the UK. That claim was refused on 27 April 2007.

7. The appellant made a number of further submissions all of which were rejected by the respondent and found not to give rise to an appeal right. On 15 November 2018 he made a further Article 8 ECHR on the basis of private life and this was refused by the respondent on 27 June 2019. The appellant appealed against that decision.

8. When the appeal came before the First-tier Tribunal on 27 November 2019, the appellant was permitted to vary his grounds to include a family life claim where he asserted family life with his son and his family. The appellant's son had been granted humanitarian protection on the basis of his health problems arising from mistreatment in Sri Lanka and had proceeded to obtain settlement and then British nationality.

First-tier Tribunal Decision

9. The First-tier Tribunal set out appellant's case in paragraphs 4 and 5 of the decision and the respondent's case in paragraph 6. The judge noted in paragraph 6:

> "6. The Secretary of State contends that his immigration history, specifically his criminal conviction, renders him unsuitable for a grant of leave under paragraph 276ADE of the Immigration Rules, as his presence is 'not conducive to the public good': paragraph S-LTR.1.6 of Appendix FM. He is said to be ineligible for the purposes of paragraph 276ADE because he failed to prove his continuous residence in the UK, and there are no very significant obstacles to his integration in Sri Lanka."

10. The oral evidence from the appellant and his son is recorded in paragraphs 11 to 17 of the decision. Paragraph 13 of the decision records the undisputed evidence that the appellant's son was recruited by the LTTE, contracted malaria whilst living in an

LTTE camp, was not properly treated and eventually suffered left-side hemiplegia as a result of cerebral malaria. He remains disabled, with partial paralysis on one side. Although he had tried to work in the UK he had eventually had to stop doing so and the evidence was that the appellant assisted his son's wife to run the family.

11. Paragraph 14 of the decision records the evidence that the appellant's son lived with the appellant when he first came to the UK. The appellant maintained that there were no other family members in the UK or in Sri Lanka. He and Ragulan had cohabited for periods on and off including periods after the son married and that they had remained very close whether living together or not. The appellant had moved to live with his son and his family in November 2018. Paragraph 15 records that the appellant and his father gave evidence that they had a particularly close relationship given the family history and their being the only family members in the UK.

12. The judge sets out his findings on the existence of family life in paragraphs 19 and 20 of the decision. In paragraph 19 the judge makes a correct self-direction to case law of Kugathas v SSHD [2003] EWCA Civ 31 and Rai v Entry Clearance Officer [2017] EWCA Civ 320 on the correct approach to an assessment of family life between an adult child and a parent. The judge concluded that the support offered to Ragulan by his father was significant and was emotional as well as physical (see paragraphs 19 and 26) and found that "I am also satisfied that the emotional bonds between them are and always have been exceptionally strong".

13. The judge then proceeded to consider proportionality and in paragraph 22 and 23 set out the different factors to be weighed on each side of the balance:

> "22. On the negative side, the respondent relies on the following:
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> - The appellant failed to comply with the Immigration Rules;
> - his immigration history is poor, in particular his conviction for a documents offence;
> - no enquiries have been made about alternative support for Ragulan and his family, which it is said makes it impossible to determine whether it is essential for him to remain in the UK;
> - they do not have abnormally close ties;
> - the appellant can integrate into Sri Lanka.
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> 23. The appellant asserts that
>
> - he has lived in the UK since 2000
> - he and Ragulan have an abnormally close bond
> - he has committed no offence since 2006
> - he has been out of Sri Lanka too long for him to be able to reintegrate."

14. Having set out the competing factors, the judge proceeded to make his assessment in paragraphs 24 to 27 as follows:

> "24. In considering whether the decision was proportionate, I must also take account of the factors in Section 117B of the 2002 Act, bearing in mind that it must be applied with 'a limited degree of flexibility' (**GM (Sri Lanka) [2019] EWCA 1630**, §§27 – 32, and **Rhuppiah [2018] UKSC 58**, §§38, 49).
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> 25. I recognise that the appellant is not financially independent, and that he has built up his private life while overstaying and is not fluent in English. I acknowledge that the points made by the respondent have force.
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> 26. Nevertheless (sic) consider the probable consequences of his separation from Ragulan will cause significant emotional hardship for each of them. I accept that the appellant has lived in the UK since 1998 (even though he cannot qualify for leave under paragraph 276ADE) and has been in close contact with Ragulan throughout the time since he came here in 2000 aged 16. The relationship has evolved: at the beginning, Ragulan was wholly dependent on his father; the emotional closeness remained when he married and moved in his own house with his wife, but in recent years due to his disability he has once again become highly dependent on his father for physical and practical support: this in turn has deepened the bonds between them. There is no evidence that Ragulan's condition will improve, so the dependency is likely to be indefinite. Even if alternative help were available, it would not replicate the combination of practical and emotional support that the appellant can offer. The history of their relationship, its genesis when Ragulan was a minor, and its present form show abnormally close ties between a father and his adult son.
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> 27. Looking at the evidence in the round, and balancing the competing factors, I conclude that the effect of the decision on the appellant and his son is unjustifiably harsh and outweighs the generic public interest in maintaining immigration control."

15. The First-tier Tribunal proceeded to allow the appeal under Article 8 ECHR.

Grounds of Appeal

16. The respondent's challenge was brought under two main headings, that the First-tier Tribunal had erred in finding family life existed between the appellant and his son and had failed to weigh the public interest correctly in the proportionality assessment.

17. The grounds maintained that "there was nothing beyond normal emotional ties established between the appellant and his adult son that would require the appellant to remain in the UK". Nothing showed that the appellant was the only person who could provide assistance to his son. The findings on family life were brief so as to be inadequate.

18. Regarding the proportionality assessment, the approach to the Section 117B considerations at paragraph 25 did not show the correct weight had been applied to the fact of the applicant not being financially independent and his private life having been established whilst the appellant was in the UK unlawfully. The First-tier Tribunal had also failed to weigh correctly the appellant's criminal conviction which

resulted in a custodial sentence and had led the respondent to apply paragraph S-LTR.1.6 of Appendix FM. The judge did not make a finding on whether paragraph S-LTR.1.6 was applied correctly by the respondent, merely stating in paragraph 18 that it was not disputed that the Immigration Rules could not be met. It had to be assumed, contended the respondent, that the judge had accepted that the respondent was correct to find that the appellant's presence in the UK was not conducive to the public good and this should have been weighed additionally in the proportionality assessment. The weight against the appellant as a result of the s.117B factors and paragraph S-LTR.1.6 showed that the public interest here was not merely "generic", as stated in paragraph 27 and the judge had not identified "unjustifiably harsh consequences" capable of defeating the additionally weighty public interest.

Discussion

19. It was undisputed before the First-tier Tribunal that the appellant's son had joined him in the UK after leaving Sri Lanka where he had been mistreated by the LTTE, leaving him with a permanent disability. They had lived together for extended periods of time including after Ragulan became an adult. There were no other relatives in the UK. Ragulan had been unable to work in recent years and his father had joined him and his wife and children in order to provide practical and emotional support his son and his family. His support was additionally needed as Ragulan's wife had a back problem and was under stress. That this history led to a particularly close relationship between the appellant and his son appeared to me to be uncontentious, even where Ragulan had married and had children. Read fairly, the evidence of the family history and relationship between the appellant and Ragulan set out in paragraphs 13 to 15 of the decision informs the findings in paragraph 19 and 26 on the existence and strength of family life. It is my conclusion that the decision shows sufficiently clearly that judge considered the material evidence against the principles identified in case law and that it was open to him to conclude that family life had been shown on the particular facts of this case.

20. After some consideration, it is also my judgment that the proportionality assessment was lawful. The judge specifically referred in paragraph 22 to the adverse factors which had to be weighed against the appellant in the proportionality assessment, including the inability to meet the Immigration Rules, the poor immigration history and the conviction. Indeed, the judge refers to the appellant's criminal conviction in paragraphs 2, 6, 16, 22 and 23. He was clearly aware of the paragraph S-LTR.1.6/not conducive to the public good factor; see paragraph 6 and the reference to being unable to meet the Immigration Rules in paragraph 22. The judge identified in paragraph 25 that the additional issue that the appellant's presence in the UK was not in the public interest where he was not financially independent and had established his private life whilst being in the UK without leave. He accepted that this meant that the respondent's case had "force". This is an indication that the judge appreciated that the inability to meet the Immigration Rules and the s.117B factors including private life being established when the appellant had no leave were additional factors weighing against him.

21. The judge clearly accepted the evidence of the appellant and his son, set out in paragraphs 13 and 14 and relied on in paragraph 26 that the appellant had been in the UK from 2000 onwards and that was also a conclusion open to him on the evidence.

22. It did not appear to me to sufficiently material so as to amount to material legal error that the appellant was referred to as an overstayer rather than as having been in the UK illegally at all times. There was no suggestion that the appellant had anything other than a poor immigration history and nothing indicates that the judge put particular weight on the applicant being someone who at one point had leave.

23. Reading the decision fairly and as a whole, it is my conclusion the judge did just enough to show that he took into account the material factors including all of those which weighed against the appellant but still found that the particular history of the appellant and his relationship with his son was "abnormally close", that Ragulan was "highly dependent on his father" and that this family life outweighed the public interest where separation would be unjustifiably harsh. The reference to the "generic public interest" in paragraph 27 belies the consideration of the additional adverse factors relied on by the respondent and taken into account by the First-tier Tribunal judge, as set out above.

24. For these reasons, I do not find that the decision of the First-tier Tribunal contains a material error on a point of law.

Decision

The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

Signed: *S Pitt* Date: 2 March 2021
Upper Tribunal Judge Pitt