Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18062/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 July 2021	**On 16 August 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SUSITA BALASUBRAMANIAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Deborah Revill, instructed by MTC & Co Solicitors
For the Respondent: Stephen Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. On 16 March 2021, I issued a decision in which I found (with the consent of the parties) that the First-tier Tribunal had erred in law in its decision to dismiss the appellant's appeal on Article 8 ECHR grounds. I set that decision aside in part and ordered that the decision on the appeal would be remade following a further hearing. The finding made by the FtT in respect of the Immigration Rules (that the appellant could not establish that there were insurmountable obstacles to family life with her husband continuing in Sri Lanka) was preserved, also with the consent of the

parties. This is my decision following the resumed hearing which took place on 16 July 2021.

Background

2. I am able to take much of what follows from the concise and helpful skeleton prepared by Ms Revill of counsel, who has represented the appellant throughout the life of this appeal.

3. The appellant is a Sri Lankan national who was born on 26 February 1956. She is therefore 65 years old. She has been married to Balasubramaniam Shanmugham, a Sri Lankan national with Indefinite Leave to Remain ("ILR") in the UK, since 1977. They have four adult children, all of whom live in the United Kingdom. Three of those children are British citizens. The fourth has ILR.

4. The sponsor came to the United Kingdom in 1994. It is agreed on all sides that an asylum claim was made by him at some point and that it was refused. Ms Revill and Mr Whitwell were also prepared to agree that he was granted ILR in 2010 under the Legacy Programme and not as a result of an entitlement to refugee status or another status under the Immigration Rules.

5. The appellant entered the UK holding entry clearance as a spouse on 6 March 2014. She made an in-time application for further leave in that capacity on 18 October 2016. The application was refused on 28 January 2017 and the respondent certified the claim as clearly unfounded. Judicial review proceedings followed. Those proceedings were resolved by consent, with the respondent agreeing to pay the appellant's costs.

6. The application was reconsidered and refused again on 14 May 2018. The respondent considered that the sponsor was unable to meet the Financial Requirements in Appendix FM of the Immigration Rules and that there were no insurmountable obstacles to their relationship continuing in Sri Lanka.

7. The appellant appealed and her appeal was heard by Judge Andrew, sitting in Birmingham on 19 November 2018. It was common ground that the appellant could not meet the Financial Requirements of the Immigration Rules. It was argued that the FtT should nevertheless take into account the support available to the appellant from her son Mohanathas, with whom she and her husband have lived for some years (and continue to do so to date). The judge rejected that argument, finding that there was no credible or sufficient evidence to establish Mohanathas' ability to support his parents to the extent required. The judge concluded that there was nothing to prevent the appellant and the sponsor living

together in Sri Lanka and there was no reason that the children could not visit them there. Considering the public interest in the maintenance of immigration control, the judge concluded that it was proportionate to remove the appellant from the United Kingdom.

8. Permission to appeal to the Upper Tribunal against Judge Andrew's decision was refused on 7 March 2019. On 23 March 2019, she made another application for leave to remain. The claim was presented in an admirably concise letter from her current solicitors. It was said that the appellant and the sponsor were financially self-sufficient in that they depended on their son Mohanathas, who had an income of approximately £45,000 per annum. The difficulties in the couple relocating to Sri Lanka were highlighted, not least their separation from their children and British grandchildren in the UK. It was submitted that the appellant's removal would be contrary to section 55 of the Borders, Citizenship and Immigration Act 2009 and disproportionate under Article 8 ECHR.

9. The application was refused by letter dated 25 October 2019. The respondent did not accept that there were insurmountable obstacles to family life between the appellant and the sponsor continuing in Sri Lanka. She did not accept that there would be very significant obstacles to the appellant reintegrating to Sri Lanka. Nor did she accept that there were exceptional circumstances which warranted a grant of leave to remain outside the Immigration Rules with reference to Article 8 ECHR.

10. On appeal, First-tier Tribunal Judge Butler found that there were no insurmountable obstacles and that the appellant's removal would not be contrary to Article 8 ECHR. Permission to appeal was sought and granted in respect of only the latter conclusion. Before me on 4 March 2021, it was agreed between the parties that the judge had erred in her conclusion that the appellant was not financially independent for the purposes of s117B(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The respondent felt unable to submit that this error was immaterial to the outcome of the appeal and was content for the decision to be set aside and remade on Article 8 ECHR grounds, with the judge's finding on paragraph EX1 preserved.

The Resumed Hearing

11. In preparation for the resumed hearing, the appellant's solicitors had filed and served a consolidated bundle of 155 pages. I was also assisted by Ms Revill's skeleton argument.

12. I heard oral evidence from the appellant and her son Mohanathas. Both required the assistance of the court-appointed Tamil interpreter, whom they confirmed they could understand before giving evidence. There were

no difficulties of translation noted during the hearing although Mohanathas opted to give some of his evidence in English, in which he is clearly fluent. I do not propose to rehearse the oral evidence in this decision. There is a full note of it in the Record of Proceedings and I shall refer to it insofar as it is necessary to do so to explain my findings of fact.

13. Mr Whitwell relied on the respondent's decision and the submissions he had previously made in writing in the response to the grounds of appeal under rule 24. He accepted that there was a family life in existence between the members of Mohanathas' household and that the appellant was likely to have a private life with her other children. The question, he submitted, was whether there would be unjustifiably harsh consequences brought about by the appellant's removal. It was well established that that was a stringent test: *R (Agyarko) v SSHD* [2017] UKSC 11; [2017] Imm AR 764.

14. Mr Whitwell submitted that the starting point for the Tribunal's analysis should be Judge Andrew's decision from 2018, particularly as regards the question of third party support being provided from Mohanathas. When the third party support was considered in more detail, it was far from clear that Mohanathas had enough money to keep his found his parents to the extent which would be required by the Immigration Rules. His basic salary was in the region of £42,000 and he had his own family to support. There were significant outgoings, as was clear from his bank statements.

15. It was clear from the decisions of the FtT that the sponsor had returned to Sri Lanka repeatedly, hence the concession made by Ms Revill that she was unable to criticise the conclusion reached by the FtT as regards the existence of insurmountable obstacles. It was also to be recalled that neither the appellant nor the sponsor would have any language issues there; that she had received medical treatment there; and that there were family members in Sri Lanka, including siblings in Colombo. There was also no reason to think that the appellant's children in the UK would be unable to provide financial support. The absence of insurmountable obstacles was an important consideration in the assessment of proportionality.

16. It was incorrect and unhelpfully emotive to say that the sponsor was a refugee. In any event, the appellant and the sponsor had lived apart for many years whilst he was without status in the UK. The appellant asked the Tribunal to attach significance to the fact that she would be separated from her grandchildren but they would be remaining with their parents and it could not realistically be submitted that there would be a serious impact on their best interests. She did not think that they would be able to visit her in Sri Lanka but the sponsor said that they had visited his parents-in law with and without the children. Whilst there were family

relationships at stake in this case, there was nothing which sufficed to overcome the public interest in immigration control.

17. Mr Whitwell submitted that the appellant's presence in the UK had caused a significant burden on the NHS. She had not been entitled to surgery, or to inpatient treatment for one and a half months thereafter, or to the list of medication she now received. She might properly be able to submit that she was independent of the state without reference to this cost but not when it was taken properly into account. If she was nevertheless financially independent, it was clear that this was merely a neutral point in the assessment of proportionality: *Rhuppiah v SSHD* [2018] UKSC 58; [2019] Imm AR 452. There was no reason that such support could not continue whilst she was out of the UK.

18. Ultimately, submitted Mr Whitwell, the case was one in which the appellant sought to choose the country in which she would pursue her family life. It was understandable that she wanted to be in the UK, surrounded by her family, but the ECHR did not give her the right to choose. Properly analysed, there was a plethora of reasons why she should not remain in the UK. There was nothing to show that an entry clearance application would be bound to succeed, whether as a spouse or as an Adult Dependent Relative. An application on the latter basis would be particularly unmeritorious, given that it was said that she looked after he grandchildren in the UK.

19. For the appellant, Ms Revill relied on her skeleton argument and invited me to allow the appeal. She accepted, as she had since the first hearing before the Upper Tribunal, that the finding regarding insurmountable obstacles should stand; it was not suggested that the appellant and the sponsor could not live there. It remained to consider whether it was proportionate to expect them to do so, however. What was at issue, Ms Revill submitted, was the accepted family life between all members of Mohanathas' house and the private life between the appellant and her other children and other grandchildren in the UK.

20. Ms Revill submitted that the question was proportionality and the starting point in assessing the 'cons' which fell to be weighed against the appellant was s117B of the 2002 Act. It was well established, however, that the weight which was to be given to the maintenance of lawful immigration control could vary depending on the facts. The proper course was to consider the Immigration Rules and the extent to which the appellant fell short of them. The absence of insurmountable obstacles was not the end of the enquiry. There was demonstrable third party support although, as Mr Whitwell had submitted, the existence of genuine and reliable third party support was a neutral point in the assessment of proportionality. What the appellant was required to show was an income of more than £18,600 and Mohanathas was able to show that his income was more than

adequate to cover that sum and his own family's requirements. His income was higher than his basic salary and he would be permitted to count his overtime under paragraph 18 of Appendix FM-SE. The availability of that funding actively reduced the public interest in the appellant's removal.

21. Ms Revill submitted that the Adult Dependent Relative rules were irrelevant to the assessment, since the closer rule and the one under which the appellant would be expected to apply, was the spouse rule.

22. Turning to the appellant's treatment on the NHS, Ms Revill submitted that the NHS would be entitled to claim the cost of the appellant's treatment and that it was a matter for the NHS as to whether it chose to do so. The appellant had accessed treatment quite innocently believing that she was entitled to it; there was no suggestion of deceit or of health tourism. If she was granted leave, she would have to pay the Immigration Health Surcharge again and would be entitled to receive treatment during the currency of her leave.

23. It had been submitted that the appellant's children and grandchildren could visit her in Sri Lanka but that was very different from living with her. The assessment of a child's best interests was a broad one and it would be in the best interests of the grandchildren for the appellant to remain in the UK. The family would do their best to support her in Sri Lanka but sending money did not compensate for family life. The appellant and her husband were getting no younger and wished to be with their family in the UK. Significant weight should be attached to the relationships described in the evidence. It was relevant to consider the circumstances in which the appellant became an overstayer. She had come with entry clearance as spouse but the sponsor had retired before she made her application for further leave, with the result that the Rules were no longer met. The appellant did not seek to present the respondent or the Tribunal with a *fait accompli.*

24. The sponsor had resided in the UK for a significant period and it was to be recalled that twenty years was thought in the Immigration Rules to represent a relevant threshold in terms of unlawful residence. He had also been receiving treatment in the UK and was entitled to continue to depend on the NHS.

25. There were, Ms Revill submitted, various disparate factors which were all relevant to the assessment of proportionality. None of those factors would suffice on their own to render the appellant's removal disproportionate but when combined, those factors sufficed to overcome the public interest in the appellant's removal.

26. I reserved my decision at the conclusion of the submissions.

Analysis

27. It is now accepted that the appellant cannot satisfy the Immigration Rules. She does not have current leave to enter or remain and is therefore ineligible for leave to remain as a spouse under the Ten Year Route in Appendix FM. She is not able, in any event, to meet the Financial Requirements set out in Appendices FM and FM-SE. As a result of the preserved findings from the FtT, she is unable to satisfy the requirements of the Ten Year Route, in that she cannot show that there are insurmountable obstacles to the relocation of her husband to Zimbabwe (paragraph EX1 of Appendix FM refers).

28. The FtT's finding that there were no insurmountable obstacles to the couple's relocation to Sri Lanka had the most solid of foundations. As Judge Butler noted at [11] and [19], the sponsor has returned to Sri Lanka four or five times since receiving ILR and he and the appellant referred to Sri Lanka as their Motherland before the FtT. For similar reasons, no sensible argument could be made (nor does Ms Revill attempt to submit) that there would be very significant obstacles to the appellant's reintegration to Sri Lanka so as to satisfy paragraph 276ADE(1)(vi) of the Immigration Rules. She has returned to Sri Lanka since coming to the UK, she speaks the language and she has close relatives living in Colombo. The appellant cannot succeed in her appeal on the basis contemplated by the Court of Appeal at [34] of *TZ (Pakistan) v SSHD* [2018] EWCA Civ 1109; [2018] Imm AR 1301 (ie that satisfaction of the Rules is positively determinative of the appeal on Article 8 ECHR grounds).

29. Ms Revill therefore submits that the appellant's removal would be unlawful under section 6 of the Human Rights Act 1998 as being a breach of Article 8 ECHR. In order to succeed in that submission, what Ms Revill must establish is that the interference with the Article 8 ECHR rights in question will give rise to unjustifiably harsh consequences. In order to decide whether the consequences will be unjustifiably harsh, I shall set out my findings of fact before undertaking a balance sheet assessment of the 'pros' in favour of family and private life and the 'cons' which weigh in favour of immigration control: *TZ (Pakistan)* refers, at [35], citing *Hesham Ali v SSHD* [2016] UKSC 60; [2016] 1 WLR 4799.

30. The only real dispute as to the facts concerns financial matters. Leaving those matters to one side for the time being, I find that the appellant's personal and family circumstances are essentially as claimed in the witness statements before me. The key elements are as follows.

31. The appellant and her husband have been married for 44 years. They have four adult children, all of whom live in the UK. They live in Bedfordshire with their son Mohanathas, his wife and their children, who are aged six

and four. Mohanathas and his family are British citizens. Two of the appellant's other children are British and one has settled status. The other children live nearby and the appellant and the sponsor spend time with them and with their other four grandchildren. The appellant and the sponsor assist around Mohanathas' house and with his children. The family is mutually supportive and the appellant will have benefitted from the support of her son, particularly whilst she recovered from the surgical procedure she underwent at the end of 2020 (as described below).

32. Mr Whitwell expressly accepted Ms Revill's submission, made at [10] of her skeleton argument, that Article 8 ECHR is engaged in its family life aspect in relation to each member of Mohanathas' household. In light of *Mobeen v SSHD* [2021] EWCA Civ 886, that was a proper concession. At [11] of her skeleton argument, Ms Revill suggested that she might argue that Article 8 ECHR was also engaged in its family life aspect between the appellant, her other children and her other grandchildren. That submission was not pursued orally, however, and it was ultimately agreed between the advocates that these relationships instead formed part of the appellant's private life in the United Kingdom.

33. The appellant has been significantly unwell in recent years. She was diagnosed with non-alcoholic liver cirrhosis in March 2019. On 15 December 2020, she underwent a whole liver transplant at Cambridge University Hospital. She remained in hospital for six weeks after the operation, during which time she required ventilator support via a tracheostomy, antibiotic treatment for pyrexia and reassurance from staff who were able to speak to her in Tamil when she was agitated and confused. The appellant currently receives twelve different types of medication on prescription.

34. The appellant's husband has been in the UK since 1994. He was here for sixteen years without status until he was granted ILR under the Legacy Programme in 2010. He is said to have medical conditions including asthma and high blood pressure. He is in receipt of a state pension which currently amounts to £144.69 per week. He and the appellant have returned to Sri Lanka three times since she arrived in the UK. There was one visit in 2014 and a further two in 2016. He has also been to Sri Lanka without the appellant, although it is not clear whether there were one or two additional visits. The appellant received medical treatment on one of the occasions that she travelled to Sri Lanka. She and the sponsor remained in the country for three months or so for this visit.

35. The appellant stated in her application form that she had no family in Sri Lanka and that her entire family was in the UK. The sponsor told Judge Butler that the appellant had no siblings in Sri Lanka. That was not correct. The appellant's evidence at the hearing was that she was one of five siblings, the oldest of whom is two years her senior, the youngest of

whom is five years her junior. Three of those siblings live in Colombo. The other one lives in Switzerland. The sponsor also has siblings living in Sri Lanka. Whilst I heard no evidence on the point, I consider it more likely than not that the appellant and the sponsor stayed with these family members for some or all of the time they have spent in Sri Lanka since 2014.

36. In my judgment, the personal and family consequences of the appellant being removed to Sri Lanka will be as follows.

37. The appellant's children and her grandchildren will remain in the UK and she will lose regular face-to-face contact with them. Insofar as it was suggested that the appellant's husband would not relocate to Sri Lanka with her, I do not accept that evidence. He has strong ties to the UK and is supported in this country by his four children. There is no evidence in the consolidated bundle to establish that he suffers ill health which necessitates his remaining in the UK to receive treatment on the NHS. There is evidence to suggest that he has asthma and high blood pressure but there is no evidence to suggest that he could not receive adequate treatment for these common conditions in Colombo.

38. In his witness statement, the sponsor expresses a fear of returning to Sri Lanka as a result of the change in the government there. Having considered the recent country guidance in *KK & RS (Sri Lanka) CG* [2021] UKUT 130 (IAC), I do not consider that the election of President Gotabaya has brought about such changes that the sponsor – who has returned there on four or five occasions without incident – would be at any greater risk.

39. The sponsor is in receipt of the state pension in the UK. He can continue to draw that pension in Sri Lanka. His ILR would lapse if he was outside the UK for more than two years but he would wish to return to the UK to visit his children and grandchildren in any event. Equally, the family in the UK would wish to visit the family in Sri Lanka, as Mohanathas confirmed they had done in the past. Ms Revill also accepted that it was likely that Mohanathas would support his parents financially in the event that they returned to Sri Lanka. That was a proper concession in the light of the oral evidence that Mohanathas supports his parents-in-law, who live in Vavuniya in Sri Lanka.

40. The appellant has her siblings in Sri Lanka. They live in different places in Colombo and it is more likely than not that the appellant and her husband would be able to stay with family upon return. I do not accept that the appellant's husband (who did not give evidence before me) values his ties to the UK more highly than he values his relationship with his wife. It is established by the preserved findings that there are no insurmountable obstacles to their relocating to Sri Lanka and I consider, on balance, that

the most likely 'real world' outcome in the event of the appellant's removal is that the sponsor would relocate to Sri Lanka.

41. Ms Revill submitted that it was a matter of significance that the sponsor has been in the UK for more than twenty years, that being the threshold in paragraph 276ADE(1)(iii) of the Immigration Rules. I take his length of residence into account but I do not accept that it has the effect for which Ms Revill appears to contend. The threshold in paragraph 276ADE(1)(vi) is not – as is sometimes suggested – an acceptance by the respondent that a person will inevitably have accrued such Article 8 ECHR rights by this stage that their removal would be a breach of that article. It is, instead, an administrative convenience – a pragmatic watershed – which recognises that there comes a point at which regularisation is likely to be the fairest course to the individual concerned.

42. I think it likely that the departure of the appellant and her husband would be very upsetting for the appellant, her husband and their children. They would be able to maintain communication by telephone and possibly by more modern means but the reality (as stated in authorities from the Upper Tribunal and the Court of Appeal which I need not mention) is that this is no real substitute for the family life which is currently enjoyed by the members of Mohanathas' household. Nor would occasional visits serve to replicate the family life which is currently enjoyed in the UK in any meaningful way.

43. It was not submitted by Ms Revill that the appellant's health is a matter which weighs in her favour in the scales of proportionality. She was correct not to make that submission. The appellant's treatment was successful and although she will certainly require indefinite immunosuppressant treatment to prevent her body rejecting the transplanted liver, there is no evidence to suggest that this medication or anything else which she presently receives from the NHS is not available and accessible to her in Colombo.

44. The appellant's grandchildren, all six of whom are under ten years old, would also be upset by the removal of the appellant and the departure of their grandfather. Although she cited *Dasgupta* [2016] UKUT 28 (IAC) in her skeleton argument, Ms Revill's submission about these relationships was characteristically measured. She submitted that there would be some impact on the best interests of the grandchildren if one or both of the grandparents were no longer physically present in their lives. I am prepared to accept that this is correct but the submission can go no further than that.

45. This is not a case in which the removal of the appellant will have a serious impact on Mohanathas' children (or, for that matter, on the appellant's other grandchildren). They have loving and supportive parents who are

able to provide for them. They have a stable home life. They have an education. There is no indication in the evidence that they are other than mentally and physically well. The departure of the appellant and her husband from their lives will upset them greatly but their essential needs will continue to be met and it must be remembered that these are young children who adapt quickly to changed circumstances. There will be an impact on their best interests but not one which adds significantly to the appellant's side of the 'balance sheet' assessment which I am required to undertake.

46. Clear 'pros' weighing in favour of the appellant are therefore the effective separation of the appellant from her close family members in the UK; the impact on the best interests of her grandchildren; and the disruption which will be caused to the appellant's husband's settled family and private life, including his right to access the NHS, as a result of his likely decision to return to Sri Lanka to be with his wife. Those consequences will be mitigated to an extent by the availability of telephone and other contact, the possibility of visits, and the support from which the appellant and her husband can benefit in Colombo. Those points in mitigation serve only marginally to reduce the real emotional consequences of the appellant's enforced departure, however.

47. Turning to the financial considerations, it is necessary to consider where on the balance sheet of proportionality they should feature, since it was an important part of Ms Revill's argument that Mohanathas's willingness and ability to support his parents positively reduces the public interest in the appellant's removal. His willingness to do so is not in dispute. There is disagreement between the parties as regards his ability to do so in the sums required by the Immigration Rules.

48. It is not in dispute that Mohanathas is employed by a food wholesale business. He is a production manager and is responsible, he explained at the hearing, for ensuring that the foodstuffs are produced to the requisite standard. He was asked a number of questions about his income and his outgoings. He stated in his most recent witness statement that his annual salary is £60,000 *plus* overtime. I do not think that is correct and Ms Revill did not attempt to suggest that it was after considering the payslips. There is no contract of employment before me. The payslips show that Mohanathas is paid a basic hourly rate of £20 per hour. He said that this had recently risen to £20.60 per hour. He explained that he is expected to work 40 hours per week. At the higher rate (which Mr Whitwell did not seek to dispute), his annual income without overtime is just under £43,000 per annum.

49. Mohanathas also receives overtime, and he explained in evidence that he is expected to do overtime to ensure that productions runs are properly supervised. Overtime is paid at a rate of time and a half: £30 per hour.

The amount of overtime he does varies widely, from 3.5 hours in the weekly payslip at page 28 of the consolidated bundle (a week in January 2021) to 45 hours in the payslip which appears at page 33 (the week before Christmas in December 2020).

50. The income which is recorded on Mohanathas' P60 for the year ending 5 April 2020 (£60,145) reflects his basic pay and his overtime. His final payslip for the year ending April 2021 shows an income of over £67,000 for the year. There was some debate before me over whether I should take into account only his basic pay or whether the composite sum should be taken as his income. I am grateful to Ms Revill for reminding me that paragraph 18(b) of Appendix FM-SE of the Immigration Rules permits overtime to be taken into account in calculating income from salaried employment. I do not consider Mohanathas' employment to be 'salaried'. There is no definition of that term in paragraph 6 of the Immigration Rules but what is said in paragraph 18(d) of Appendix FM-SE corresponds with the ordinary usage of that word:

> (d) Gross income from non-salaried employment will be calculated on the same basis as income from salaried employment, except as provided in paragraph 18(e) and 18(f), and the requirements of this Appendix for specified evidence relating to salaried employment shall apply as if references to salary were references to income from non-salaried employment. Non-salaried employment includes that paid at an hourly or other rate (and the number and/or pattern of hours required to be worked may vary), or paid an amount which varies according to the work undertaken, whereas salaried employment includes that paid at a minimum fixed rate (usually annual) and is subject usually to a contractual minimum number of hours to be worked. [emphasis added]

51. Ultimately, it makes no real difference whether Mohanathas' employment is salaried or non-salaried. Either way, the respondent's policy as expressed in Appendix FM-SE is that his overtime may be taken into account for the purpose of calculating his income. I am satisfied that he is required to work a certain amount of overtime as a result of his role. I am satisfied that his total income, taking account of that overtime, is in the region of £60,000 per annum.

52. In reliance on Mohanathas' income and the sponsor's pension income (which amounts to just over £7500 per annum), Ms Revill does not merely submit that the appellant is financially independent, as that statutory term is defined in *Rhuppiah v SSHD*. She has also submitted throughout the life of this appeal that the appellant and the sponsor would be able to meet the Minimum Income Requirement (of £18,600 per annum) if proper account is taken of the support available from Mohanathas. That submission takes as its foundation what was said by Lady Hale and Lord Carnwath (with

whom the rest of the Justices agreed) at [99]-[101] of *R (MM (Lebanon) & Ors) v SSHD* [2017] UKSC 10; [2017] Imm AR 729.

53. I am not able to accept that submission. In order to establish it evidentially, what Ms Revill must show is that there is a credible source of funding which suffices to meet the shortfall under the Immigration Rules. She cannot do so, in my judgment, merely by showing that Mohanathas' income exceeds the sum required in Appendix FM for a family of four (£24,800) plus the sum required by a couple (£18,600). Appendix FM itself mandates no such consideration in these circumstances and Article 8 ECHR requires that I must look to the reality of the situation, as stated in *MM (Lebanon)*. It would be unrealistic simply to overlook Mohanathas' outgoings and the balances in his bank statements and to do so would necessarily risk a situation in which the appellant and her husband have available to them a sum which falls well short of the Minimum Income Requirement despite Mohanathas' income. What the appellant must show, therefore, is that Mohanathas has residual disposable income which makes up the shortfall in the £18,600 required by Appendix FM.

54. The shortfall in question is £18600 less the sponsor's pension of £7500, so something in the region of £11,000 per annum. The appellant and her husband live with Mohanathas and eat their meals with his family. They are not required to contribute to the mortgage or the bills. Mohanathas says in his statement that he also gives them between £200 and £400 per month for sundry expenses. There was sensibly no suggestion on Mr Whitwell's part that this claim was untrue, and it chimes with the general thrust of the evidence, which is that Mohanathas is only too pleased to be able to support his mother and father as they grow older as a part of the family unit he has established in Dunstable.

55. In *MM (Lebanon) v SSHD*, however, the Supreme Court underlined the importance of what had been said by Collins J in *R (Arman Ali) v SSHD* [1999] EWHC 830 (Admin); [2000] Imm AR 134 and by Lords Brown and Kerr in *Mahad v ECO* [2009] UKSC 16; [2010] 1 WLR 48. Those comments related specifically to promises of long-term third party support which might suffice to meet the requirements of the Immigration Rules prior to the introduction of Appendices FM and FM-SE. Applied to the submission made by Ms Revill, those *dicta* underline the caution with which I should approach the suggestion that Mohanathas can make up the shortfall in the sum required by the Minimum Income Requirement. There is no schedule of his outgoings. It is clear from his bank statements that he is a man who is living within his means. On occasion, as Mr Whitwell established by reference to one bank statement, he has fallen into his overdraft facility. Whilst he able to maintain and accommodate his parents without difficulty, there is no proper evidential basis upon which to conclude that he has a spare £11,000 per annum with which to make up the shortfall under the Immigration Rules.

56. It is for those reasons that I do not accept Ms Revill's submission that the public interest in the maintenance of an effective immigration control is reduced because Mohanathas and her husband are able to support the appellant to the extent required by the Minimum Income Requirement in Appendix FM. The evidence does not support that submission and I weigh against the appellant her inability to meet the Immigration Rules, which are statements of policy to which proper weight must be accorded at a general level, whilst always ensuring that the end result is consistent with Article 8 ECHR: *GM (Sri Lanka) v SSHD* [2019] EWCA Civ 1630; [2020] INLR 32, at [28].

57. I accept Ms Revill's submissions that the appellant entered lawfully; that her inability to meet the Financial Requirements stems from her husband's retirement; and that she does not seek to present the respondent with a *fait accompli* of the type encountered in some of the reported decisions. The public interest in the maintenance of an effective immigration control might not sound against her as loudly as it would in such a case but it is nevertheless a matter to which I attach weight.

58. Ms Revill also submits that the appellant is financially independent for the purposes of s117B(3) of the 2002 Act. In *Rhuppiah v SSHD*, it was agreed between the parties, as a result of the decision in *MM (Lebanon) v SSHD*, that this provision referred to an absence of financial dependence upon the state: [55].

59. It is necessary when considering that submission to have regard to the whole of s117B(3), which states that:

> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.

60. Ms Revill submits that the appellant has never drawn on public funds and that she and her husband are fully maintained by Mohanathas. Insofar as that submission concerns the appellant's need for food, clothing and accommodation, I have no difficulty with it at all. Although Mohanathas cannot demonstrate that he has a spare £11,000 so as to make good the shortfall under the Financial Requirements of Appendix FM, he is plainly able to feed, clothe and accommodate his parents. The difficulty which Ms Revill faces in this submission is with reference to the appellant's recourse to the NHS.

61. I spent some time with the advocates at the hearing considering the appellant's entitlement to access free treatment on the NHS. As I have

recorded above, she entered the UK with leave to enter as a spouse. It was common ground that she would have been entitled to free treatment on the NHS whilst she held leave in that capacity. Her leave to enter was extended by operation of statute (section 3C of the Immigration Act 1971) whilst her in-time application for further leave as a spouse was under consideration. Ms Revill initially submitted that this entitlement came to an end when the appellant received a refusal which was certified under s94 of the 2002 Act, which did not attract an in-country right of appeal.

62. In exploring the chronology a little further, however, it was finally agreed between the advocates that the position was as follows. The appellant's leave did come to an end when the respondent refused her application and certified it as clearly unfounded on 28 January 2017. The application for judicial review which followed obviously did not have the effect of extending the applicant's leave under section 3C. The application for judicial review was settled by consent, however, with the respondent agreeing to reconsider the certified decision and to pay the costs of the application. Mr Whitwell was constrained to accept, in those circumstances, that the decision of 28 January 2017 had been withdrawn and that the application for further leave was consequently pending before the respondent until it was refused on 14 May 2018. The appellant's was extended to that point, and whilst her appeal was pending thereafter. It was therefore accepted on all sides that the appellant should be treated as having had valid leave to enter as a spouse from her entry in 2014 until she exhausted her rights of appeal against the 14 May 2018 decision, on 7 March 2019. Her entitlement to free treatment on the NHS continued to that point.

63. I was initially concerned that the respondent had not refused the case on the Suitability ground at S-LTR 4.5[1]. It occurred to me that I should perhaps disregard the cost to the NHS in the absence of a suggestion that this ground of refusal applied. But that would be to overlook the chronology in this case, given that the most significant costs to the NHS accrued after the refusal dated 25 October 2019. Neither advocate submitted that I should disregard the costs to the NHS from my proportionality assessment in the absence of such a ground of refusal.

64. All of the NHS treatment I have summarised at [30] above was received at a time when the appellant was unlawfully present in the UK. Ms Revill accepted that the appellant was not entitled to that treatment free of charge. The appellant stated that the sponsor had been asked about the cost of her treatment. The sponsor stated that he had not been asked about this by the NHS. Ultimately, I do not think that it matters whether the

[1] S-LTR.4.5. One or more relevant NHS bodies has notified the Secretary of State that the applicant has failed to pay charges in accordance with the relevant NHS regulations on charges to overseas visitors and the outstanding charges have a total value of at least £500.

sponsor has been asked or not; Ms Revill accepts that there must be a significant sum[2] which is payable to the NHS as a result of the liver transplant, the inpatient treatment thereafter, and the ongoing care which the appellant is presently receiving from the NHS. Despite the food, clothing and accommodation which is provided to her by her son and husband, there can be no doubt that she has been a significant burden on the taxpayer and that she cannot properly be said to be financially independent for the purposes of s117B(3).

65. Ms Revill submitted before the FtT that the appellant must be taken to speak English because she was granted entry clearance as a spouse in 2014. Appendix FM was certainly in force at that date and the appellant would have been required to show that she met the English Language requirement of having passed an English language test of at least level A1 on the CEFR. Had that submission stood alone, I would have had some difficulty accepting it in the absence of any evidence. There is no evidence of the certificate which was shown to the Entry Clearance Officer. The appellant gave evidence through an interpreter before me. I do not understand why I am asked to make assumptions in this respect when the evidence could easily have been produced.

66. That submission does not stand alone. Ms Revill also relied upon the fact that the appellant is over 65 and would be exempt from the English Language requirement in the Immigration Rules at the date of the hearing. Mr Whitwell had no answer to that submission, which seems to me to be sound. If as a matter of policy the respondent has decided that those who are over 65 need not establish their proficiency in the English language, it cannot be right to add the appellant's apparent inability to speak the language to the list of points which militate in favour of immigration control. I treat that as a neutral matter, in accordance with *Rhuppiah v SSHD*.

67. Nor do I consider s117B(4) or (5) to militate against the appellant to any significant extent. As to sub-section (4), the appellant's relationship with her husband was not formed at a time when she was in the United Kingdom unlawfully. Their relationship was not, in fact, formed in this country at all, but in Sri Lanka in the 1970s. In any event, the appellant entered the United Kingdom lawfully, as a spouse, in 2014 and her presence in the UK must be taken, for the reasons above, to have been lawful up to March 2019. There has certainly been a period of unlawful residence for the subsequent two and half years or so but that does not appear to be the mischief to which s117B(4) is directed; it makes specific

[2] I canvassed with the advocates the possibility of obtaining confirmation from the NHS of the precise sum but they were content to proceed on the basis that the appellant had received 'significant' treatment to which she was not entitled.

reference to the formation of a relationship at a time when the individual is in the UK unlawfully.

68. As for s117B(5), it is firmly established that it strikes only at the weight to be attached to a *private life* during periods of precarious stay in the UK: *Lal v SSHD* [2019] EWCA Civ 1925; [2020] 1 WLR 858, at [58]. Whilst that provision renders it appropriate to attach little weight to the appellant's private life, including her relationships with people outside Mohanathas' house, it has no effect on the weight I should attach to the relationships at the centre of Ms Revill's argument.

69. I now draw the threads together and balance the matters militating for and against the appellant in the scales of proportionality. On the one hand is the very real human cost of the appellant's removal. She will lose regular face to face contact with her children and her grandchildren, to whom she has become very close since entering the UK lawfully seven years ago. Those relationships will have deepened further still whilst the appellant was significantly unwell in 2020. There will, as I have set out above, be some impact on the best interests of the children (particularly the older children) as a result of her removal. The appellant's removal will also present her husband with an invidious choice, of staying in the country to which he has become accustomed since 1994 or returning to Sri Lanka to be with his wife. For the reasons I have given above, I think it more likely than not that he will leave his children and grandchildren in the UK and return with his wife of 44 years to Sri Lanka. Aside from the loss of contact with his children and grandchildren, he will no longer have ready access to the NHS and he will have to return to the UK every two years in the event that he does not wish his ILR to lapse. I do not underestimate any of these consequences, and they are offset to only a limited extent by the presence of siblings in Sri Lanka, the support they would receive from the UK, and the likely visits from Mohanathas and other family members.

70. On the other hand, I have found there to be powerful public interest considerations which favour the appellant's removal. She is unable to meet the Immigration Rules, which are statements of policy to which I am required to attach weight. I have rejected Ms Revill's submission that the appellant is able to meet the substance of the Minimum Income Requirement by reference to her son's income. The weight to be attached to the maintenance of an effective immigration control, and specifically the public interest in the consistent application of the Minimum Income Requirement, militate against the appellant. Of much greater significance, however, is the point which Mr Whitwell quite properly put at the forefront of his oral submissions: the accrued and ongoing cost to the NHS of the appellant's presence in the UK. She has received a liver transplant and lengthy inpatient treatment to which she was not entitled. She continues to receive follow-up care and medication to which she is not entitled. She and the sponsor seem to have proceeded on the basis that she

could receive treatment if she had a pending application or appeal. That is evidently not the case and it is rightly accepted by Ms Revill that there is a significant sum owing to the NHS for the appellant's treatment.

71. I have found above that the burden on the NHS falls within the scope of s117B(3) of the 2002 Act. Whether or not that is correct, it is quite clear that such matters fall within the scope of Article 8(2) as they bear directly on the economic wellbeing of the country. As the Upper Tribunal held in *Akhalu* [2013] UKUT 400 (IAC), the existence of such an impermissible burden on the limited resources of the UK's health services speak cogently in favour of removal. I consider that those observations apply with some force in the present appeal and that there is a cogent public interest in the appellant's removal as a result.

72. Taking all relevant matters above into account, I come to the clear conclusion that the consequences to the appellant and her family, whilst serious, are not unjustifiably harsh. She can and will live with her husband in Sri Lanka and the upset and hardship which that will certainly cause are justified by the public interest in maintaining an effective immigration control and protecting the economic wellbeing of the country.

Notice of Decision

The decision of the FtT has been set aside in part. I remake the decision on the appeal by dismissing it on human rights grounds.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
29 July 2021