



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/01320/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 2 December 2021**

**Decision & Reasons
Promulgated
On 15 December 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**PS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, Counsel, instructed by S Satha and Co

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. I allowed the appeal in the light of the concession made by Mr Tufan on behalf of the SSHD. I communicated my decision at the hearing.
2. The Appellant is a citizen of Sri Lanka. His date of birth is 21 December 1981. The Appellant's appeal against the decision of the Secretary of State on 24 January 2020 to refuse his claim on protection grounds was dismissed by First-tier Tribunal Judge Pears in a decision dated 18 March 2020 following a hearing on 12 March. I found that the First-tier Tribunal

materially erred in respect of its findings under Article 8 ECHR. However, the Appellant was not granted permission to appeal on protection grounds.

3. At the hearing before Judge Pears the Appellant, his wife and their daughter gave evidence. The Appellant came to the UK in 2010. While the Appellant was the UK in 2010 his wife's asylum appeal was allowed. Judge Pears stated that the Appellant played no part in the appeal.
4. Before Judge Pears the Appellant's evidence was that he had re-established contact with his wife as a result of his sister and his wife's chance encounter in India in July 2019 and that he had been living with his wife since August 2019. The judge did not accept this evidence, however, she did accept that they had been living together since November 2019. The judge rejected the Appellant's evidence that he had total responsibility for the couple's children because of his wife's mental health problems. The judge heard evidence from the Appellant's wife and their 13 year old daughter.
5. I found that the First-tier Tribunal made an error of law for the following reasons:-

"31. The judge's assessment of the evidence is that the Appellant was not credible. He did not accept that there had been a chance encounter, he did not accept the claimed level of his wife's dependency on him, he did not accept that the Appellant had been living with the family since 2019 and he rejected the evidence that the Appellant has total parental responsibility.

32. The judge accepted that he had been living with the family since November 2019. He did not make a clear finding regarding the Appellant's wife's evidence. He found that R's evidence was simply given to please her mother. It may be inferred that he thought they are innocent victims duped by the Appellant into believing that he intends to re-establish himself as a husband and father. If this is what was intended by the judge, she should have explained this.

33. It may be that the judge found that they were complicit in not telling the truth, but the Appellant's wife was motivated by hope and R just wanted to please her mother. However, this is not sufficiently clear. Though not raised in the grounds, it is of concern that the judge attached weight to the demeanour of a witness particularly a 13 year old child. It is of some concern to me that she was required to give evidence at all.

34. Another problem is that the judge having accepted that the Appellant had been living with the family since 2019, considered immaterial matters when assessing whether the relationships are genuine; namely whether he has 'total parental responsibility'. While I accept that this was the Appellant's evidence and the

judge was entitled to reject it, the Appellant can have a genuine and subsisting parental responsibility without total responsibility. While the judge was entitled to reject the Appellant's evidence about the time that he lived with the family, having found that he had lived with them since November, albeit only three months, the decision is inadequately reasoned. There needed to be a closer analysis of the relationships before reaching a conclusion.

35. For the above reasons, I set aside the decision of the judge to dismiss the appeal under Article 8.
36. My initial view is that the findings of the judge about the chance encounter and the credibility of the Appellant in respect of how the relationship was established are sustainable. In addition, the finding that the Appellant lived with his family since November is not challenged. Similarly, there is no challenge to the lack of dependency and that the Appellant has not been entirely credible about this aspect of his claim. However, there needs to be an assessment of family life to establish proportionality as informed by the Rules and outside the Rules.
37. The matter should be listed for a face to face hearing to re-make the appeal under Article 8.

Directions

I make the following directions.

- (i) Should the Appellant wish to rely on further evidence which was not before the First-tier Tribunal an application should be made in accordance with Rule 15(2) of the 2008 Procedure Rules.
 - (ii) If an interpreter is required to attend the hearing (in anticipation that it is intended that oral evidence shall be given by the Appellant and his wife), the Appellant's solicitors should notify the Tribunal not later than seven days before the substantive hearing".
6. The matter was listed before me on 23 March 2021 for a resumed hearing. At that hearing the Secretary of State relied on further evidence concerning the Appellant's arrest in November 2020. The document stated "warning signal; violent punched wife". In my view it was in the interests of justice to require the Secretary of State to provide further evidence relating to this incident. Mr Tufan was unable to explain what, if any, action had been taken by the police. Further information would be capable of being material to a proportionality assessment. I adjourned the hearing and made directions.

The Law

7. The following provisions of the Nationality, Immigration and Asylum Act (NIAA) 2002 apply.

Section 117A

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
 - (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

Section 117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) 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 able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (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.
- (4) Little weight should be given to—

- (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.]

117D Interpretation of this Part

- (1) In this Part—

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who—

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who—

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

The Immigration Rules (IR)

8. The following IR are relevant to this appeal:-

EX.1. This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

- (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave, or humanitarian protection, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

Conclusions

9. At the start of the hearing before me Mr Tufan indicated that having considered the witness statements, served on him that morning, he conceded on behalf of the SSHD that the Appellant has a genuine and subsisting relationship with his wife and children. It was also accepted that in the light of his wife being a refugee, there are insurmountable obstacles to family life in Sri Lanka. It was accepted that she and their children are qualifying and that it would not be reasonable to expect them to leave the United Kingdom. Mr Tufan served a PNC print out concerning the Appellant. He stated that he accepted the Appellant’s version of events concerning his arrest. The Appellant and his wife’s witness statements explained an incident that gave rise to the document that was served at the hearing in March 2021 and which had caused me concern. Mr Tufan confirmed that there was no action taken against the Appellant and the SSHD was not relying on the incident.

10. In the light of Mr Tufan's concession, the appeal has to be allowed on Article 8 grounds (s.117 C (6) of the 2002 Act and Appendix FM (EX.1) of the Rules).

11. The appeal is allowed on Article 8 grounds.

Notice of Decision

The appeal is allowed.

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

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

Signed Joanna McWilliam

Date 7 December 2021

Upper Tribunal Judge McWilliam