**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/01496/2013

**THE IMMIGRATION ACTS**

| **Heard at : Field House** | **Determination Promulgated** |
|---|---|
| **On : 5 March 2014** | **On : 12 March 2014** |

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**YOGARAJA PONNIAH**
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms S Iqbal, instructed by Maliks and Khan Solicitors

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Ponniah's appeal against a decision to refuse to revoke a deportation order made against him. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Ponniah as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Sri Lanka, born on 7 July 1973. He arrived in the United Kingdom on 10 October 2000 and applied for asylum. His claim was refused on 17 February 2001. His appeal against that decision was dismissed on 22 April 2013, with adverse credibility findings made against him. His appeal rights were exhausted on 1 July 2003 and he was subsequently listed as an absconder when he failed to report as required.

3. On 11 November 2008 the appellant was arrested by the police on suspicion of committing an offence under the ID Card Act when a forged National Insurance card and a forged passport containing his name and photograph were found during a search of his room. On 26 January 2009 he was convicted at Isleworth Crown Court for possessing improperly obtained identity documents with intent and sentenced to 12 months' imprisonment. On 17 April 2009 he was notified of his liability to automatic deportation. On 8 May 2009 he made further submissions on asylum grounds. On 13 May 2009 his custodial sentence ended and on 3 August 2009 he was granted bail and released from immigration detention.

4. On 16 November 2010 the appellant was made the subject of a signed Deportation Order and a decision was made that section 32(5) of the UK Borders Act 2007 applied. In making that decision the respondent considered his asylum and human rights claims but concluded that he would not be at risk on return to Sri Lanka and that his deportation would not breach his human rights. He appealed that decision and following the dismissal of his appeal on 3 February 2011 and unsuccessful attempts to apply for permission to appeal to the Upper Tribunal he became appeal rights exhausted on 1 June 2011. He sought unsuccessfully to judicially review the refusal of permission to appeal. There then followed several unsuccessful attempts to document and remove him.

**Application to Revoke the Deportation Order**

5. On 29 May 2012 the appellant's solicitors submitted an application to revoke the deportation order. The application was not pursued on asylum grounds but on Article 8 human rights grounds, with submissions being made as to his good conduct since the previous unsuccessful appeal against the decision to deport him. It was submitted that the appellant had only one conviction arising from his conduct in 2008 and since that time there had been no offending. He had undertaken voluntary work at a Hindu temple and attended a Catholic church and had strengthened his ties to the community.

6. On 27 September 2012 an application was made for leave to remain in the United Kingdom on the basis of the appellant's private life ties based upon his length of residence in the country. Further representations were made on 11 June 2013, notifying the respondent of his marriage on 6 June 2013 to a British citizen.

7. On 4 July 2013 a decision was made to refuse to revoke the deportation order. The respondent, in making that decision, gave consideration to the immigration rules with respect to Article 8 of the ECHR. It was not accepted that paragraph 399(a) applied to the appellant since he did not have children. Neither was it accepted that paragraph 339(b)

applied. Whilst it was accepted that he was in a genuine and subsisting relationship with a British citizen, the respondent noted that he had not been living in the United Kingdom with valid leave for 15 years and considered that there were no insurmountable obstacles to his family life continuing in Sri Lanka. It was not accepted that paragraph 399A applied as it was considered that he had retained ties to Sri Lanka. The respondent did not accept that there were exceptional circumstances such that the appellant's right to family and/or private life outweighed the public interest in his deportation. It was accordingly concluded that his deportation would not breach Article 8.

**Appeal before the First-tier Tribunal**

8. The appellant's appeal against that decision was heard in the First-tier Tribunal on 10 January 2014, before a panel consisting of First-tier Tribunal Judge Suchak and Mr G F Sandall. The Tribunal heard from the appellant and his wife, noting the appellant's evidence that he had no contact with his family in Sri Lanka since 2008 and his wife's evidence that she was born in Sri Lanka but had lived in the United Kingdom for 14 years since 2000 and was established in this country. She was in full-time employment and owned a property here and had no relatives in Sri Lanka. Two further witnesses gave evidence before the Tribunal. The Tribunal accepted the evidence of the appellant and wife and concluded that their relationship was genuine and subsisting and that there would be considerable insurmountable obstacles to their family life continuing in Sri Lanka. The appellant's evidence, that he had had no contact with his family in Sri Lanka since 2008, was also accepted. The Tribunal found that, whilst the appellant could not meet the requirements of the immigration rules, his removal would be disproportionate and in breach of Article 8 of the ECHR. The appeal was accordingly allowed on human rights grounds.

9. The respondent sought permission to appeal that decision to the Upper Tribunal on the following grounds: that the Tribunal had misinterpreted the term "insurmountable obstacles"; and that the Tribunal had failed to identify any exceptional circumstances rendering the appellant's deportation unjustifiably harsh. Reliance was placed on the Court of Appeal's judgment in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192.

10. Permission to appeal was granted on 3 February 2014.

**Appeal before the Upper Tribunal**

11. The appeal came before me on 5 March 2014. The appellant and his wife were present at the hearing, but were not required to give oral evidence. I heard submissions on the error of law.

12. Ms Isherwood relied on the cases of Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 and Kabia (MF: para 398 - exceptional circumstances) (Gambia) [2013] UKUT 569 in submitting that the Tribunal had failed to identify any exceptional circumstances such as would make the appellant's deportation

unjustifiably harsh. There was a failure, in considering that there were insurmountable obstacles to family life being enjoyed in Sri Lanka, to take account of the fact that the appellant's wife was aware that he had no status here and that he had been found by a previous Tribunal to be lacking in credibility. No reasons had been given as to why there were insurmountable obstacles. There had been no assessment of the Secretary of State's position in the case of a person who had used false documentation. The rule 24 response, in setting out a chronology of events, failed to acknowledge the appellant's previous history of absconding.

13. Ms Iqbal relied on her rule 24 response and submitted that the grounds of appeal were misconceived and that the grant of permission was based upon a factual error in that it referred to the appellant's wife having resided in the United Kingdom since 2010 rather than 2000. The Tribunal had given full reasons for finding that deportation was disproportionate, taking account of the public interest and assessing, in substance, whether there would be "unjustifiably harsh" consequences. She submitted that the appeal should have been allowed under the rules.

14. I heard submissions from both parties on the re-making of the decision should an error of law be found. It was agreed that there was no further evidence to be produced and that the findings of fact made by the First-tier Tribunal were not challenged. Ms Isherwood submitted that the appellant had shown a complete disregard for the laws of the United Kingdom and had not admitted to his use of false documents until a late stage. His ties to the United Kingdom were all within the Sri Lankan community. His appeal should not be allowed. Ms Iqbal submitted, with regard to the question of absconding, that the appellant had been compliant since 2009 and had complied with all the attempts to document him and yet he had not been removed.

15. I enquired of the parties as to any explanation for the difficulties faced in documenting the appellant for removal but was advised that that had also been raised in the First-tier Tribunal and there was no information available. Ms Isherwood had no instructions on the matter.

**Error of Law**

16. It is the appellant's case that the grounds of appeal amount to no more than a disagreement with the Tribunal's decision and that the Tribunal's findings, whilst not specifically referring to unjustifiably harsh consequences, adequately dealt with the matter in substance. Indeed, it is the case that the Tribunal, at paragraph 6 of its determination, referred to relevant case law and at paragraph 46 to the "exceptional circumstances" requirement arising when the first stage of the rules could not be met.

17. However in my view the Tribunal failed properly to engage with the relevant principles and to identify unjustifiably harsh consequences giving rise to exceptional circumstances such as to meet the requirements of paragraph 398 of the rules. Indeed, if it were the case that the Tribunal had properly identified such exceptional circumstances, it is not clear why the appeal was not allowed under the rules rather than on wider Article 8

grounds. Furthermore, it seems to me that the Tribunal failed to give adequate reasons for finding there to be insurmountable obstacles to family life being enjoyed in Sri Lanka.

18. Turning to the question of "insurmountable obstacles" the relevant findings are to be found at paragraph 49 of the Tribunal's decision and appear to be based simply upon an acceptance of the claims made by the appellant and his wife to that effect. There is some further, albeit limited, analysis in the following two paragraphs, but no clear findings arising out of that. Drawing what is possible from those paragraphs it seems that the Tribunal relied upon an acceptance that the appellant had had no contact with his family since 2008; that his wife had been in the United Kingdom since 2000 and was working full-time and owned property here; that she had no family in Sri Lanka; and that she feared being a lone female if the appellant was detained. That appears to be the sole basis for the Tribunal's conclusions on "insurmountable obstacles". I do not consider that to be an adequate basis for such a conclusion, particularly considering that the latter reason was inconsistent with the findings of previous Tribunals that the appellant had given an incredible account of his experiences in Sri Lanka and that there was no credible basis for believing that he would at any risk of arrest and detention on return.

19. No real consideration appears to have been given by the Tribunal to the fact that the appellant's wife was herself of Sri Lankan origin and had spent most of her life in that country, albeit that she had since taken British nationality. There was no evidence to suggest that she would be at risk in that country herself. The Tribunal, furthermore, appears at paragraph 51 to have decided to attach little or no weight to the fact that the appellant's wife met and married him at a time when he was subject to deportation proceedings. Clearly it was not simply a matter of a precarious immigration status in the appellant's case, as the Tribunal put it, but a matter of impending deportation with the most recent attempt at removal having taken place only a matter of two months before they met and further attempts made shortly after their relationship began and prior to their marriage. Her own evidence in her statement was that she knew of him whilst he was in immigration detention even before they met and she plainly had some knowledge and awareness of his circumstances.

20. Ms Isherwood relied upon paragraph 42 of the Administrative Court's judgement in Nagre in submitting that the Tribunal had erred by failing to make findings on whether the consequences of deportation would be unjustifiably harsh:

> "Nonetheless, I consider that the Strasbourg guidance does indicate that in a precarious family life case, where it is only in "exceptional" or "the most exceptional" circumstances that removal of the non-national family member will constitute a violation of Article 8, the absence of insurmountable obstacles to relocation of other family members to that member's own country of origin to continue their family life there is likely to indicate that the removal will be proportionate for the purposes of Article 8. In order to show that, despite the practical possibility of relocation (i.e. the absence of insurmountable obstacles to it), removal in such a case would nonetheless be disproportionate, one would need to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh."

21. Clearly regard was being made by Sales J to circumstances where the family life was precarious, whilst the Tribunal in the appellant's case made no findings on the strength of the appellant's family life ties other than concluding that his relationship with his wife was genuine and subsisting. No consideration appears to have been given by the Tribunal to the fact that the marriage had been subsisting for a matter of only six months at the time and, as stated above, that it took place at a time when active efforts were being made to deport the appellant. In such circumstances it was all the more necessary for the Tribunal to provide clear reasons as to why it concluded that deportation would be unjustifiably harsh. Yet no findings were made in that regard and certainly not explicitly. The only findings of any substance made in that regard are to be found at paragraphs 50, 51 and 53, but the Tribunal failed to give any adequate reasons for concluding that unjustifiably harsh consequences had thereby been established.

22. At paragraph 51 the Tribunal placed weight on the appellant's conviction being at the lower end of the scale, which it was entitled to do, but also relied on the fact that he had pleaded guilty at the earliest opportunity, whilst the appellant's own evidence in his statement at paragraph 6 was that he did not plead guilty initially. At paragraph 53 the Tribunal took account of the fact that the appellant had not reoffended since 2008 and was unlikely to re-offend. Again it was entitled to do so and to place weight upon that consideration. However, I do not consider that to be anywhere near an adequate basis for concluding that deportation would be unjustifiably harsh and note that the Tribunal did not, in any event, properly address itself to that requirement.

23. In all of the circumstances I find that the Tribunal erred in law by failing to give adequate reasons for concluding that there were insurmountable obstacles to family life being enjoyed in Sri Lanka and by failing to address the issue of "exceptional circumstances" and "unduly harsh consequences" either explicitly or on the basis of any adequately reasoned findings. Accordingly, I consider that the Tribunal's decision cannot stand and must be set aside and re-made.

**Re-making the Decision**

The Tribunal's decision, that paragraphs 399 and 399A do not apply to the appellant, has not been challenged and is clearly correct. The only consideration, therefore, is whether there are, in the appellant's case, exceptional circumstances such that the public interest in deportation will be outweighed by other factors, pursuant to paragraph 398 of the rules.

24. In the head-note to Kabia, the Upper Tribunal held that:

> "The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in MF (Nigeria), exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

25. The relevant issue, therefore, is whether deportation would result in unjustifiably harsh consequences for the appellant and his wife such that deportation would not be

proportionate. For the reasons given above and set out in more detail below, I do not consider that it would.

26. The main factor in the appellant's favour is his marriage to a British citizen who has lived in the United Kingdom for 14 years and who has become established here in terms of employment, property and some family ties (a brother and his wife and children, an uncle and cousins). In terms of the strength of the appellant's family life with his wife it is not disputed that their relationship and marriage is a genuine and subsisting one. However it is not the case that the marriage followed a long-standing and established relationship. According to his wife's evidence the decision to marry was made after the appellant was released from detention in December 2012, following a period of several months when they met on occasions at church and spoke on the telephone. It seems that the relationship only became a significant factor for the appellant some time after his application to revoke the deportation order, with no reference to it even in the further representations of 27 September 2012 (the vague reference to family life appears to have been in relation to the various friends who were supporting his application). The appellant's wife was not aware of his criminal convictions until shortly before the decision to marry and evidently knew little of his history. It is, furthermore, her evidence that she would not follow him to Sri Lanka if he was deported. It is also relevant to note that the couple have now been married for less than one year (and at the time of the respondent's decision only one month).

27. Of particular relevance is the circumstances in which the appellant and his wife met and decided to marry. The appellant's wife's evidence in her statement was that she knew about him and his situation before she met him and was aware that he was in immigration detention centre. It was only shortly after the relationship commenced that further attempts were made to remove him, a previous attempt having failed only two months before they met. Clearly, she embarked on the relationship and entered into the marriage in the full knowledge that active efforts were being made to deport him from the United Kingdom.

28. In such circumstances, whilst the appellant and his wife state that there are insurmountable obstacles to their family life continuing in Sri Lanka, I do not consider that it would be unreasonable or unduly harsh to expect them to pursue their family life in that country. Although the appellant's wife is now a British national with established ties to this country in terms of employment, property and some family, she is also a Sri Lankan national who spent the majority of her life in that country. Whilst she does not have close remaining family ties in Sri Lanka she would be returning with the appellant to a country with which she is familiar and whose language and customs are known to her. There is no evidence to suggest that either would be at any risk in that country. The appellant has never had any leave to remain in the United Kingdom and, whilst he has been here for a substantial number of years, he spent the majority of his life in Sri Lanka and would be able to re-establish himself there. Other than his length of residence in the United Kingdom and his marriage to a British national, there is limited evidence of any significant private life ties to this country.

29. It is submitted on behalf of the appellant that the public interest in his deportation is limited by reason of the passage of time since the deportation order was made and the absence, in the meantime, of any offending or risk of re-offending. However, it is clear that the respondent has, since that time, actively pursued the documentation and removals process, but has been hindered by an absence of adequate information and evidence to enable the Sri Lankan Embassy to document him. Indeed, the chronology set out in the appellant's rule 24 response indicates an inability by the Sri Lankan High Commission to verify his identity and nationality. It is unfortunate that there is a lack of information before me from either party in regard to the difficulties encountered in the documentation process but such indications raise some concerns as to the extent of the appellant's co-operation. Furthermore, whilst the chronology provided by the appellant refers to his good conduct and compliance with conditions imposed upon him, it is relevant that that has occurred during a period when there remained a threat of deportation hanging over him. His earlier history, however, consisted of reliance upon an asylum claim that was found to be a fabrication, followed by a four to five year period of non-compliance and absconding and conviction for the possession of forged documentation.

30. In all of these circumstances I do not consider that the consequences to the appellant, or to his wife, of deportation would be unduly harsh and conclude that the appellant has failed to demonstrate exceptional circumstances outweighing the public interest in his deportation for the purposes of paragraph 398. Having reached such a conclusion, and in accordance with the Court of Appeal's approach to the rules in MF (Nigeria), I find that the decision to maintain the deportation order and to continue to seek the appellant's deportation was a proportionate one and was not in breach of his Article 8 human rights. There being no other relevant considerations or compelling circumstances, I find that the respondent's decision was in accordance with the terms of paragraph 390 of the rules.

**DECISION**

31. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Ponniah's appeal on all grounds.

**Anonymity**

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I see no reason to continue that order and I accordingly lift the order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed
Upper Tribunal Judge Kebede