IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03975/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 July 2015	**On 14 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

KS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Murphy, Counsel instructed by Waran & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Sri Lanka born on 11 November 1985 and she appealed against the decision of the Secretary of State dated 29 May 2014 to remove her from the UK as an illegal entrant following a refusal to grant her asylum, humanitarian protection and protection under the European Convention.

2. The appellant left Sri Lanka using her own passport on 20 October 2009 and entered the UK as a Tier 4 (Student) Migrant. The appellant's history

was that in May 2007 whilst in Sri Lanka she met and had a relationship with someone by the name of VT working for an NGO and who undertook the transport of weapons for the LTTE. In April 2009 she received a telephone call stating that the body of VT had been found. Subsequently she was visiting the house as her putative mother-in-law and she was arrested and detained by the Sri Lankan authorities. She asserts that she was held in detention for two and a half months and after a month she was the victim of sexual abuse and that she was raped and this was videoed during her detention.

3. She was able to secure her release via a bribe and through the assistance of an agent who also arranged for her to leave the country for the UK. She entered the UK on 20 October 2009 and was accommodated by a friend of her father's. She had a relationship with this person R and subsequently became pregnant. Her child was born on 4 October 2010. R is a Dutch national and has now returned to Holland.

4. Since being in the UK the appellant formed a relationship with KK who is also a refugee from Sri Lanka. It is asserted that she is now pregnant by him and their relationship started at the beginning of 2014.

5. The appellant's case was heard before First-tier Tribunal Judge Cockrill on 5 November 2014 and he dismissed that appeal on 11 November 2014 on all grounds. An application for permission to appeal was made on five grounds. It was asserted that the judge's assessment of the appellant's overall credibility and the accounts she had given of how she had been detained and sexually assaulted in Sri Lanka was accepted. Despite this the judge found that the appellant was at no or insufficient risk on return to Sri Lanka and that the authorities, in particular the CID were no longer interested in her. It was submitted this was speculative and inconsistent with the other evidence accepted by the judge and it was contended that were the appellant of no interest to the authorities she would have been released without the need for payment of a bribe, would simply have been released and the release by way of a bribe would not be recorded as a lawful release. On that basis there must be risk that on return the appellant would be at risk of detention and further persecution.

6. Secondly, the appellant had given evidence her parents were in Trincomalee and that they had told her the CID had been to the house asking them about her whereabouts. The judge stated at [48] "I do not accept that aspect of her case at face value". This is perverse bearing in mind the positive credibility finding made in favour of the appellant as to the other aspect of the evidence. Indeed at [41] the judge had found that he could see why the authorities would wish to detain and question her about the boyfriend's activities.

7. Thirdly, the judge had misunderstood the country guidance of **GJ (Sri Lanka) [2013] UKUT 00319**. The issue is whether on return the appellant is perceived by the authorities of forming part of the Tamil Diaspora. The relevant parts of the appellant's background are that the authorities would have a record of whether she had a relationship with

someone who was transporting weaponry for the LTTE, she was detained and her treatment during detention and the length of her detention, the fact she had paid a bribe were all factors which were relevant in assessing the risk of return.

8. Fourthly, in dealing with the risk factors the judge had taken into account an irrelevant fact when dealing with the assessment of risk finding "it should also be borne in mind that the appellant's family remain living in Sri Lanka, and, so far as I can see matters, the appellant can properly and reasonably go back to them and not be at real risk of persecution for any Convention reason.

9. In ground 5 finally the judge should have considered the proportionality issue outside the Immigration Rules. He was wrong at paragraph 46 to find that the Rules provided a comprehensive code for cases involving consideration of family and private life.

Conclusions

10. Following a finding of an error of law in the decision by Judge Cockrill on the basis I found inadequate reasoning in relation to whether was at risk on return I preserved the findings of Judge Cockrill at paragraphs 39, 40, 41, 42 and 43.

11. These read as follows:

> "39. In short, the appellant's life seems to have been relatively uneventful. She attended school and completed her education reaching 'A' level standard. She then assisted her mother domestically; her father was running his own business. The centrepiece of this appellant's case is her relationship with a man, V. That relationship was not approved of by her family. There is nothing at all lacking in plausibility or credibility about that particular scenario. I accept that the appellant had formed a relationship with this man, V, and in fact she went to live with him and his family. That is documented, to some appreciable degree, by the household register. Some analysis took place of that register and I accept that she was being described really as V's wife in that document. I think that is material which does appropriately confirm the accuracy of the appellant's case. I reject the argument presented by the respondent that is a document that carries little weight. In my judgement it should be given some reasonable amount of weight. What is said to have occurred is that V was killed at a time when he was transporting weaponry. There is no other evidence which would tell me one way or the other whether that is true and whether he was involved in LTTE activity but it does seem to me that some weight should be attached to the death certificate. I accept, looking at the totality of the material presented to me, that V was killed in suspicious circumstances. I accept that he may have had some involvement with the LTTE but that was not known to the appellant before his death.
>
> 40. I accept, specifically, that so far as she was concerned her then boyfriend was working for an NGO and she thought that that is why he was out often in the evenings or away for several days at a time. I repeat the point that there is nothing at all incredible about that

narrative. There is nothing which makes it so lacking in plausibility or credibility that I should respond to it.

41. What occurred subsequently was that the appellant was herself picked up by some men in a van and was held in detention for a little over two months. This is, of course, also central to her case. I can quite accept that if the narrative about her boyfriend is accurate that the authorities in Sri Lanka would want to see whether or not the appellant had any meaningful knowledge about her boyfriend and his LTTE activities. To that end, I can quite see why they would wish to detain her and question her. I repeat the point that that in itself is far from being implausible. The country material on Sri Lanka does show depressingly that those who are held in detention can be subject to sexual abuse and attack and, although the appellant gave only a fairly short and simple reference to being raped and being the victim of sexual abuse, what I conclude, looking again at the case as a whole, is that she was the victim of some sexual abuse whilst she was being detained.

42. I also accept the way in which she described her release, namely as the result of a bribe being paid to the CID, so that she could be released into the care of an agent. Again, this does not seem to me anything which seems at all implausible. It is well known that bribes are paid in Sri Lanka to effect the release of someone held. By that stage, of course, the CID would have established what, if anything, the appellant really knew about this now late boyfriend and, as far as I can see the simple fact is that they would have concluded that she was ignorant of his activities and really was not of any use to them any longer. The appellant was therefore permitted, in effect, to leave after the bribe was paid. She spent some time in Colombo. The respondent has criticised the appellant about her description of her journey. I have tried to see whether or not the appellant was accurate and reliable in her account and, as far as I can tell, the fact that she mentioned only a few checkpoints does not seem to me to undercut the overall credibility of her account as to her experiences n Sri Lanka. What I accept specifically is that she did entrust all practical matters to that agent to gain the student visa and so that the appellant could leave Sri Lanka in safety using her own transport. It seems to me critical to a proper understanding of this case to appreciate that the agent was the person that facilitated that departure.

43. I also accept that the appellant entered into this relationship with a man who was a good deal older than her who provided that money which had been used for the bribe. The appellant, basically, did not want to proceed with that relationship because of the man's age and the appellant gave a perfectly clear and reasonable description of her thinking."

12. At the hearing before me further documentation was submitted which confirmed that on 22 March 2013 the appellant's partner, Mr K K had been granted leave to remain in the United Kingdom as a refugee. He was named on the birth certificate as the father of the child born on 15 May 2015, one A K.

13. Although the passport of the Dutch national said to be the father of the appellant's older child was produced, there was no confirmation as to the

paternity of the older child born to the appellant by way, for example, of DNA analysis, and although I have found that the appellant's credibility was not questioned, I am not persuaded that it has been established that this child is the child of a Dutch national. That said, it is clear that this a close family unit.

14. I bear in mind the preserved findings in relation to the appellant's asylum claim and case law of **MP and NT v Secretary of State for the Home Department [2014] EWCA Civ 829** and **GJ (Sri Lanka) [2013] UKUT 00319**.

15. **GJ and Others (Post civil war returnees)** has established that the focus of the Sri Lankan government's concern has changed since the civil war ended in May 2009 and that the government's present objective is to identify Tamil activists in the diaspora who were working for Tamil separatism and to destabilise the unitary Sri Lankan state. It is clear that this appellant has not been overtly working for Tamil separatism in the United Kingdom.

16. It was also accepted that the risk for those in whom the Sri Lankan authorities were interested in existed not necessarily at the airport but after the arrival in their home area where their arrival would be verified by the CID or police within days. That said, the head note of **GJ** confirms that individuals who are perceived to be a threat to the integrity of Sri Lanka as a single state because they are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora were those who would be at risk. The Sri Lankan authorities' approach is based on the sophisticated intelligence basis to activities within Sri Lanka and in the diaspora and they are aware that many Sri Lankans travel abroad as economic migrants.

17. I have noted above what has been accepted regarding the appellant. She is a Tamil from north Sri Lanka and her previous partner had links to the LTTE. On the strength of that she was detained and assaulted in detention of which there is a possible record. It is clear from paragraph 237 and 290 of **GJ** that the UNHCR guidelines should be taken into account and those with *"more elaborate links to the LTTE"* can vary but may include *"persons with family links or who are dependent on or otherwise closely related to persons with the above profiles."* The *"above profiles"* included former LTTE combatants or cadres. **GJ** confirms that the risk will depend on the specifics of the individual case but nonetheless **GJ** confirmed that the UNHC Guidelines had assisted them in reaching their conclusions.

18. Therefore I accept that the appellant has links which may be classified as 'more elaborate' to the LTTE.

19. The past history of the appellant must be of relevance in assessing the risk on return and it is against this background I consider the circumstances of the appellant. The appellant's claim is found to be credible in that she was placed in detention and assaulted but that she

was able to secure her release via a bribe. She facilitated her exit from Sri Lanka via an agent and thus did not leave the country without assistance. She is a Tamil with connections to someone who worked for an NGO and died under suspicious circumstances and it is the appellant's evidence and has always been the appellant's evidence that the Sri Lankan authorities have visited her home and are looking for her. She stated in oral evidence and also stated in her account during her asylum interview that the authorities had visited her home and beaten up her brother. Bearing in mind the positive credibility findings made in favour of the appellant by the First-tier Tribunal, I see no reason to depart from the appellant's evidence that the authorities have visited her home in Trincomalee. Why the authorities would be interested in her if they did not know about her connection with her previous boyfriend in Sri Lanka is not clear, but it is suggested that this is because of his links to the LTTE and thus she too is associated and of interest.

20. I accept that the appellant was detained by the authorities and thus she was previously perceived to have links with the LTTE whilst she was in Sri Lanka. On this fact together with the acceptance that the authorities have visited her home, I consider that there may be a risk that she will be picked up by the authorities on return and detained for interrogation.

21. The fact that she had secured her previous release via a bribe was also accepted and this would indicate that the authorities had a maintained interest in her. It is possible this continues. **MP and NT** acknowledges that the fact that release is secured with a bribe may indicate that the authorities might still find the person was of interest or concern to them. Indeed she claims that there is a record of her previous interrogation. I also note that should she return there is now the added risk that she is linked with someone who has indeed been granted refugee status in the UK.

22. What was accepted in **GJ** was that if a person is detained by the Sri Lankan security service on return there remains a real risk of ill-treatment or harm requiring international protection and that internal relocation was not an option. I find that the appellant is at risk of detention on return home by the Security Services and risks ill-treatment.

23. Even if her need of international protection is not accepted, I note that the appellant now has formed a relationship and is living with someone KK who has been granted refugee status in the United Kingdom and they now have a child together born on 15th May 2015. These are arguably good grounds for consideration of the appellant's case outside the Immigration Rules.

24. As stated in **MM (Lebanon) [2014] EWCA Civ 985** “if the relevant group of IRs is not such a ‘complete code’ then the proportionality test would be more at large albeit guided by the **Huang** test and UK and Strasbourg case law”.

25. At paragraph 64 of **Singh v SSHD [2015] EWCA Civ 74** the court confirmed,

> "... that there is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

26. I find however that it is not the case that all the relevant factors have been taken into account in this matter.

27. Applying the five stage test set out in **Razgar v SSHD [2004] UKHL 27** the appellant has established family life in the UK with her partner and certainly with her second child. Her partner has been granted refugee status, and her second child is the daughter of someone who has been granted refugee status. The threshold for the engagement of such family life is low and thus engaged. I accept that on the face of it if my findings in respect of the asylum claim are rejected, that her removal as decided by the Secretary of State in its decision of 29th May 2014 was in accordance with the law and necessary for the protection of rights and freedoms of others through the maintenance of immigration control and I attach weight to the Secretary of State's position: **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC).

28. I turn to a consideration of proportionality. **SS Congo v SSHD [2015] EWCA Civ 317** confirms that the starting point in Article 8 cases must be a consideration of the rules. I accept the appellant is the genuine partner of a refugee in the United Kingdom who would encounter insurmountable obstacles to family life with that partner continuing outside the UK precisely because he has been granted refugee status. I note EX.2. confirms that 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.

29. However the Immgration Rules require that the appellant must be the partner for two years prior to the application and the appellant cannot comply with this requirement.

30. It was Mr Murphy's submission that the appellant could enlist the assistance of paragraph 276ADE(vi) as there would be significant obstacles to her returning to Sri Lanka. I would agree that although she has not lived in the United Kingdom for 20 years, on the face of it that her family life is now based in the United Kingdom failing which she would be split from her partner. I accept there is a genuine and subsisting relationship between them as they are living together, he is supporting her and they now have a child. Even if her asylum claim were not to be upheld, it would be the case, that her partner and the father of her child is a refugee from Sri Lanka, and there would be very significant obstacles to the family, as a whole, relocating to Sri Lanka. There was no challenge to the established relationship between the appellant and her partner or that the refugee father was the father of the appellant's child.

31. I must also take into account the best interests of the children as a primary factor, **ZH (Tanzania) v SSHD [2011] UKSC 4**, and the best interests of the second child must be that she lives with her half brother and both parents. It is not in the best interests of the child to be separated from the father who is at present supporting them through his work. As I state, there was no evidence that the first child was in fact a Dutch national, or at least no evidence supplied apart from that oral evidence supplied by the mother and appellant to the effect that he was a Dutch national and as such I find he should be treated in the absence of any further evidence as a Sri Lankan national.

32. I cannot accept that it would be reasonable to expect the children to be separated from their father at their young age. Nor it is reasonable to accept them to separate from their mother.

33. I turn to the application of Section 117B and find that the appellant cannot speak English and although her partner supports her financially for maintenance there was no indication that they reached the subsistence level required by the Immigration Rules or that the family would not be a burden on the state through the use of the NHS and education.

34. Should there be a requirement that the appellant leaves the UK to make an application for entry clearance? I considered whether the temporary separation is proportionate. I note that it is not sufficient to rely solely on the case law concerning **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40**, **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**.

35. I do, however, find that there are insurmountable obstacles to the appellant and her husband who are in a genuine and subsisting relationship with two children pursuing their family life outside the United Kingdom long term. An insistence on the appellant returning even for the short term to Sri Lanka to make such an application would afford significant complications (aside from my findings with regards asylum) in terms of care for the children and indeed although I cannot speculate on the success of such an application, there is no guarantee that any entry clearance application would be successful or the time it would take. This would have the impact of splitting the family which even for a very short period would in turn severely undermine the children's best interests. I also take into account the effect that her removal alone would have on the children and her partner in the United Kingdom further to **Beoku-Betts v SSHD** [2008] UKHL 39.

36. It is clear that the appellant has a genuine and subsisting relationship with a partner who has refugee leave and there are insurmountable obstacles to family life with that partner continuing outside the UK and that is leaving aside the question of the children.

37. I bear in mind the principles enunciated in **Huang v SSHD [2007] UKHL 11**

> "In an Article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

38. I therefore allow the appeal both on asylum grounds and in relation to Article 8 ECHR.

Signed Date

Deputy Upper Tribunal Judge Rimington

Notice of Decision

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 Date

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Rimington