



**Upper Tribunal  
(Immigration and Asylum Chamber)  
AA/05845/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
and Reasons Promulgated  
On 11 December 2015  
December 2015**

**Decision**

**On 23**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**KH  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Krushner, counsel  
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. This is an appeal against a decision of FTTJ Davidge, promulgated on 3 September 2015.
2. Permission to appeal was granted on 21 September 2015 by FTTJ Shaerf.

### Background

3. The appellant was issued a visit visa for the United Kingdom, valid from 1 November 2004 until 1 May 2005. He arrived in the United Kingdom on 12 November 2004. The appellant applied to remain in the United Kingdom on human rights grounds on 10 August 2010. That application was refused with no right of appeal on 25 August 2010. On 27 July 2012, the appellant was arrested for fraud and served with notice of liability for removal as an overstayer. He applied for asylum on 13 February 2013.
4. The basis of the appellant's asylum claim is that in 1997 he borrowed a million rupees from a wealthy man in order to set up a cashew nut business. The appellant was unable to pay the balance of the loan when it was demanded and the lender demanded the appellant's land in Pillawatta, which was worth considerably more than the loan. The appellant refused to give away his land. As a result the lender came to his house and threatened the appellant, his former wife and his mother. The appellant relocated to Negombo, where his uncle lived and where he remained until 2004, without incident, until he came to the United Kingdom. Around two years ago, the appellant's friend told him that the lender was still looking for him and that he had links to a member of the Sri Lanka National Political Party. The appellant fears that he will be arrested at the airport or that the lender will kill him.
5. The Secretary of State accepted that the appellant had a dispute with the lender, however the police documents relied upon by the appellant showed that the threat was investigated by the Sri Lankan police. Furthermore, the politician the appellant claimed to fear was being investigated for corruption and it was therefore not accepted that he was a person with influence. The respondent considered that Sri Lanka had a functioning police force; the police had afforded the appellant assistance in the past and it was not unreasonable to expect him to relocate as he had between 1997 and 2004 without problems. Regard was also had to the appellant's 9-year delay in seeking asylum. The Secretary of State considered the appellant's application to remain on the basis of Article 8 but he did not meet the suitability requirements owing to his conviction for fraud on 12 October 2012. EX.1 of Appendix FM was also considered, however it was not accepted that the appellant had a genuine and subsisting relationship with the child on the birth certificate submitted. Furthermore, while the appellant had married on 4 May 2014, this was at a time when he was still married to his former wife, according to the divorce certificate and he had submitted no evidence of being in a relationship akin to marriage for a period of 2 years. In terms of private life, it was noted that the appellant had lived less than 20 years in the United Kingdom and had a son and sister in Sri Lanka. There were said to be no exceptional circumstances.
6. During the course of the hearing before the First-tier Tribunal, the appellant and his current partner gave evidence. The appellant did not dispute the respondent's conclusions in the reasons for refusal letter and the FTTJ concluded that there was no current risk to the appellant's safety given that the perpetrator of the threats had been prosecuted and convicted. In relation to Article 8, the FTTJ found that EX.1 did not apply owing to the appellant's criminal record. She considered the child's best interests, including his likely entitlement to British citizenship but concluded that the family as a whole could reasonably relocate to Sri Lanka.

### Error of law

7. Permission to appeal was sought on the basis that the FTTJ misdirected herself in finding that the appellant was disqualified from EX.1 of Appendix FM on the basis

of his conviction; that she erred in not recognising that the appellant's child was British at birth; the FTTJ findings in relation to section 117 had no bearing on a parent-child relationship and that she provided inadequate reasons in relation to her adverse credibility findings.

8. The FTTJ granting permission considered that grounds 1, 3 and 4 showed an arguable error of law. With regards to the second ground, the judge granting permission considered there was no evidence before the FTTJ to show that the child was British, however permission to appeal was not expressly refused.
9. The Secretary of State's response of 13 October 2015 stated that the respondent opposed the application for permission to appeal as it was considered that the FTTJ appropriately directed herself. It was said that the fact that "*following the hearing the child was a British Citizen does not show any error on the part of the Judge.*"

### The hearing

10. Mr Krushner took me to documents in the appellant's bundle, which demonstrated that the child in question was born British, in that his mother had been granted indefinite leave to remain in the United Kingdom prior to his birth. With regard to the FTTJ's findings as to the motivation for the appellant's offending, he argued that these conflicted with the respondent's understanding of the matter, as set out in the Notice of Immigration Decision. Mr Krushner argued that there was no need for the FTTJ to consider the case outside of the Rules, had she considered EX.1 of Appendix FM. He also criticised her assessment of the relevant considerations under section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). He accepted that the FTTJ had considered all the relevant issues but it was not clear why she had reached the decision she had.
11. Mr Walker confirmed the respondent accepted that the false document was used by the appellant for the purpose of opening a bank account and accordingly this was not something the FTTJ could take against the appellant. He argued that sections 117A and B were not as fully addressed as they should have been, however the judge had done enough in coming to her conclusions.
12. In response, Mr Krushner argued that the issue of the reasonableness of the child going to Sri Lanka, in view of the issue of the disputed land, had not been addressed. Furthermore the FTTJ findings were based on a flawed understanding of the offence. In terms of materiality, the test in EX.1 was a slightly lower one than the sufficiently compelling test required for Article 8 outside the Rules.
13. At the end of the error of law hearing, I announced that I was satisfied that the FTTJ had made a material error of law for the following reasons.
14. The Notice of Decision dated 18 August 2014 states as follows; "*We note that you were convicted of using false documents to open a bank account on 12 October 2012 and spent 5 months in prison. You therefore do not meet Suitability S - LTR 1.6 of Appendix FM.*" At [39] of the FTTJ's decision and reasons, she rejects the appellant's evidence that "*he used a false passport to open a bank account.*" The FTTJ considered that the appellant would not have needed a bank account; proceeded to attach no weight to what she considered to be his mitigation and concluded that he was seeking to "*minimise his crime.*"
15. In view of the Secretary of State's acceptance that the appellant used the false document in an attempt to open a bank account, I find that it was not open to the

FTTJ to advance an alternative theory. Furthermore, the FTTJ does not address whether the appellant was rightly disqualified from consideration under EX.1 on suitability grounds.

16. The evidence contained in the appellant's bundle, consisting of the partner's biometric residence permit and the child's birth certificate clearly demonstrated that the child in question was born British. Therefore the FTTJ erred in finding that the child was "not currently British."
17. The two aforementioned errors cumulatively, led the FTTJ to conclude that EX.1 was not engaged and accordingly the reasonableness of the British child's removal from the United Kingdom was not considered.
18. In these circumstances I am satisfied that there are errors of law such that the decision be set aside to be remade. None of the findings of the FTTJ are to stand.
19. Neither representative had any difficulty with my proceeding to remake the decision immediately. The appeal proceeded by way of submissions only.
20. Mr Krushner invited me to allow the appeal under paragraph EX.1(a) of Appendix FM of the Immigration Rules and to find that appellant was able to demonstrate that it was unreasonable to expect his child to accompany his parents to Sri Lanka. He advised me that the asylum matter was relevant only as far as it bears on family life. The only aspect of that claim he relied upon was that the existence of the land dispute was accepted by the Secretary of State. Otherwise, his arguments related solely to Ex.1 of Appendix FM. He did not make any freestanding Article 8 arguments. In relation to the suitability requirements, Mr Krushner argued that the respondent had not explained why it was thought that the appellant's continued presence in the United Kingdom was not conducive to the public good on the basis of a single conviction, which attracted a low sentence.
21. With regard to EX.1, Mr Krushner referred to the land dispute; asserted that the sponsor's parents were elderly and unemployed and that there was no care work in Sri Lanka. He contrasted that to the position for the family in the United Kingdom, where the sponsor, who was long established in the United Kingdom, was employed as a carer. He argued that these factors made it unreasonable to expect the British Citizen child to accompany his parents to Sri Lanka.
22. Mr Walker relied on the Secretary of State's refusal letter. With regard to the appellant's offending, this had been at a time when he was already cohabiting with his partner, however he accepted that there had been no further convictions. He further accepted that the appellant's offending had not been at the higher end of the scale. With regard to the land dispute, it was open to the appellant to live in another part of Sri Lanka.
23. Mr Krushner had nothing further to add.
24. At the end of the hearing I reserved my decision, which I now give with my reasons.
25. I start by considering the respondent's view that the appellant failed to meet the suitability requirements. The relevant paragraph of the Rules states as follows;

*S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within*

paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

26. The Secretary of state has made no link between the offence committed by the appellant and conduciveness. In considering this aspect, I have had regard to the appellant's circumstances as a whole.

27. The offence of using a false document is an isolated offence. After serving his sentence, the appellant has been living in the community since 2013 without further offending. Furthermore, he has complied with immigration conditions. I accept that he attempted to use the document in order to open a bank account. There was no evidence before me to suggest that such an offence was likely to recur. All the more so now that the appellant has married and become a father again. I also note that he received a comparatively low sentence and that there was no indication that the offence was carried out for pecuniary gain. I find that the Secretary of State has failed to demonstrate that the appellant's presence in the United Kingdom is not conducive to the public good. I find that he does not fall foul of the suitability provisions.

28. Paragraph EX.1(a) states as follows;

*EX.1. This paragraph applies if*

*(a)*

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

*when the (aa) is under the age of 18 years, or was under the age of 18 years paragraph applied; applicant was first granted leave on the basis that this (bb) is in the UK;*

*the 7 (cc) is a British Citizen or has lived in the UK continuously for at least years immediately preceding the date of application ; and*

*(ii) it would not be reasonable to expect the child to leave the UK;*

29. The child in question is male and was born in late December 2014. His best interests are a primary consideration in this appeal. At the date of this hearing he was aged 11 months. I accept that the child resides with both his parents. I therefore accept that it is in his best interest to continue to be cared for by both his parents, whether that is in Sri Lanka or the United Kingdom.

30. The appellant's principal ground for arguing that it is not reasonable to expect his child to leave the United Kingdom was that his account of being indebted was not in dispute. Indeed, the reasons for refusal letter, at [24] *"...it is accepted that you have had a dispute with (S) and that he has made threats against you and your family."* However, that was as far as the Secretary of State was prepared to go. It is apparent from [27] of the reasons letter that the respondent was of the view that the appellant had been able to obtain state protection, in that at [27] *"You have submitted police reports to confirm complaints have been made against (S) for his harassment and that these complaints have been followed up. The documents you have submitted are originals and are accompanied by certified translations. I am satisfied that they are genuine documents. You have therefore demonstrated that the authorities of Sri Lanka are able and willing to offer you protection and have done so in the past."*

31. The appellant relied upon a document in which the police provided information to Negombo Magistrates Court magistrates. That evidence showed that S was remanded into custody pending further police investigation regarding the threats to the appellant. Those events occurred in 1997. It is now 2015 and, other than an

unsubstantiated claim that a friend told him people are looking for the appellant, he does not assert that there was any recurrence of the initial threats.

32. The issue of whether the appellant would be at risk elsewhere in Sri Lanka is also addressed in the letter which continues at [34]; *"It is noted that you have previously relocated to Negombo in 1997 where you lived until 2004 when you travelled to the UK. You claim you experienced no problems during that time as nobody knew you were there."* At [35], the respondent concludes; *"it would not be unreasonable to expect you to live in this area (or anywhere else) in Sri Lanka."*
33. The appellant has not challenged any of the respondent's negative conclusions regarding his asylum claim and no longer argues that he has a well-founded fear of persecution. Consequently, I do not accept that he would be at risk of persecution anywhere in Sri Lanka, including in his home area and nor would his wife and child. Given that the appellant's account is that he lived safely in Negombo for 7 years between 1997 and 2004, I find that it is not unreasonable to expect him to relocate there, either temporarily or permanently with or without his family, should he wish to avoid S. The appellant also has the option of selling his land and repaying his debts should he wish to do so. According to the appellant, the land is worth far more than the debt.
34. In assessing the reasonableness of expecting the appellant's child to relocate with the appellant, I have taken into consideration that the child and indeed his mother are British citizens. However the child's citizenship is not a trump card. I have taken into consideration that the sponsor works as a carer in the United Kingdom. It is claimed that there is limited care work available in Sri Lanka, however there is no evidence before me of what work is or is not available. I am told that the sponsor's parents are pensioners and unable to provide long-term financial support. There was no evidence before me as to their ages, financial circumstances and occupations.
35. There was no evidence produced on behalf of the appellant showing that it was necessary for his British Citizen child to leave the United Kingdom in the event that the appellant left or was removed. It is of course open to the appellant's wife to sponsor an application for the appellant to re-enter the United Kingdom as a partner. There was equally no evidence produced showing that the appellant and his wife and child could not settle freely and safely in Sri Lanka.
36. Should the appellant and his wife choose to relocate as a family to Sri Lanka, I find that it is not unreasonable for such a young child to accompany his parents to their country of origin, where they have relatives who can provide short-term support at least until the couple find their feet. As indicated above, the appellant is not without assets of his own. In addition to his parents-in-law, the appellant has a sister, brother-in-law and a son aged 17 and therefore the family would not be isolated or without support.
37. I conclude that paragraph EX.1(a) of Appendix FM is not met and dismiss the appeal.
38. An anonymity direction was made by the FTTJ and I consider it appropriate that this be continued and therefore make the following anonymity direction:

*"Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to,*

*amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. “*

**Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

I remake the decision by dismissing the appeal.

Signed

Date: 13 December 2015

Deputy Upper Tribunal Judge Kamara