IAC-FH-AR-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01668/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 11th January 2016	**On 26th January 2016**

Before

Upper Tribunal Judge Chalkley

Between

SOTHILINGAM YOGESWARAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr William M Rees of Counsel instructed by Raj Law Solicitors
For the Respondent: Mr Tom Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka, born on 7th June, 1982.

Immigration History

2. The appellant claims to have arrived in the United Kingdom on 22nd July, 1999. On 30th July, 1999 he claimed asylum. His asylum claim was refused on 27th February, 2001 because, on 4th December, 2000 he was

asked to complete and return within fourteen days a Statement of Evidence Form in support of his application. He failed to do so.

3. The appellant was served with form IS151A on 12th February, 2001 and advised of his liability to detention and removal. He lodged an appeal against that decision on 26th February, 2001. On 12th May, 2001 the appellant was granted temporary release and since January 2003 he was recorded as an absconder.

4. On 12th December, 2003 the UK Borders Agency wrote to the appellant informing him that they were withdrawing their asylum refusal decision on 2nd February, 2001 since it was clear that he had returned his Statement of Evidence Form in time. However, on 18th May, 2004 his asylum application was subsequently refused. The appellant's subsequent appeal was dismissed and on 2nd December, 2004 he exhausted his appeal rights.

5. On 5th May, 2005 the appellant was apprehended by the police and placed on reporting restrictions. He failed to report on 20th May, 2005 but on 31st October, 2006 he was sentenced to a 28-day custodial sentence for having breached his bail conditions. On 31st October, 2006 the applicant was transferred into immigration detention.

6. Subsequently, on 23rd November, 2006 the appellant made application for judicial review as he had been recommended for deportation. On 20th December, 2006 this application was refused and on 21st March, 2007 the appellant was removed from the United Kingdom.

7. On 16th July, 2007 the appellant submitted an entry clearance application as the spouse of someone present and settled in the United Kingdom. This was refused on 6th August, 2007 and on 28th August he lodged an appeal. On 20th August the following year, 2008, the appellant's appeal was allowed and on 12th November, 2008 he arrived in the United Kingdom as the spouse of a person present and settled in the United Kingdom with a visa valid from 21st October, 2008 until 21st January 2011.

8. The appellant's first child was born on 15th October, 2009.

9. On 6th January, 2011, the appellant submitted an application for indefinite leave to remain in the United Kingdom as a spouse of a person present and settled in the UK. The appellant's application was granted and he was granted indefinite leave to remain in the UK on 20th April, 2011.

10. On 2nd October, 2012 at Isleworth Crown Court the appellant was convicted of two counts of attempted theft from the person of another and was sentenced to twelve months' imprisonment. He appealed neither the conviction nor the sentence. On 28th February, 2012 the appellant second child was born in the United Kingdom. The appellant was advised of his liability to deportation on 27th December, 2012.

11. The appellant appealed and his appeal was heard by First-tier Tribunal Judge E B Grant sitting at Hatton Cross.

12. First-tier Tribunal Judge Grant dismissed the appellant's deportation appeal and dismissed his Article 8 appeal.

13. Permission to appeal to the Upper Tribunal was granted on the basis that having made no findings as to whether or not the separation of the appellant from his children would be unduly harsh on either child, the judge may have erred in law. The judge noted that the appellant would be deported to Sri Lanka but made a finding that there were no insurmountable obstacles to the life with the appellant's wife continuing outside the United Kingdom in India. The judge made no findings as to the ability of the appellant's wife to visit the appellant in India or whether it would be open to the appellant to relocate to India. It was also suggested that the judge appeared not to have fully engaged with the expert opinion in the psychologist's report.

The Hearing

14. Mr Rees criticised the determination suggesting that it was not sustainable. The judge simply failed to make a finding whether it would be unduly harsh on the appellant's children for the appellant to be removed. She failed to apply the test in paragraph 399A(1)(b) and consider whether it will be unduly harsh for either of the appellant's children to live in the country to which the appellant was deported and whether it would be unduly harsh for the children or either of them to remain in the United Kingdom without their father who was to be deported.

15. Such finding, it was suggested, was integral to any overall assessment of proportionality in respect of Article 8 under or outside the Immigration Rules. The approach taken by the judge was flawed. The judge also erred in her assessment of paragraph 399(b). The judge made a finding that there were no insurmountable obstacles to the family life between the appellant and his wife continuing outside the United Kingdom through meetings in India but made no finding as to whether or not there were insurmountable obstacles to family life continuing between the appellant and his wife in Sri Lanka (the country to which he was to be deported). Lastly the judge failed to make any findings as to whether or not the appellant's wife has sufficient assets to be able to sustain the extensive visits envisaged for the minimum of ten years that the appellant would not be able to re-enter the United Kingdom whilst the deportation order is in force. The judge has not identified any evidence suggesting that it was open to the appellant to relocate to India in order to enjoy a degree of family life with his wife. He is not an Indian citizen. Lastly the judge only refers to the risk of offending made in the psychologist's report but does not otherwise engage with the expert opinion given in the report.

16. I heard lengthy submissions from Mr Wilding who urged me to uphold the determination. He drew my attention to paragraph 22 of the determination where First-tier Tribunal Judge Grant noted that it would not be reasonable for the appellant's wife to accompany him to Sri Lanka and that his removal from the United Kingdom would separate him from his

children. However, she went on to note that the serious nature of the index offence, followed by the appellant's subsequent even more serious offending during which he was not an observer but a key organiser of a sophisticated crime involving a Lebanese loop, that any interference resulting from his separation from his wife and children would be proportionate and in pursuit of a legitimate aim as a prevention of disorder and crime. She points out that in reaching this decision she has borne in mind the psychological report of Michelle O'Sullivan and the OASys Report. The judge finds, therefore, that the public interest outweighs the question of family life. While she does not expressly consider the unduly harsh test, it is clear that she considered the relevant question and found that the public interest outweighed the Article 8 rights. He suggested that it would be an option for the appellant to visit India to see his wife should he wish to do so. He invited me to uphold the determination.

17. In closing, Mr Rees again referred me to the report of 31st August, 2004 and criticised First-tier Tribunal Judge Grant for not having addressed it at all. It should have been properly evaluated and the judge should have demonstrated that she had carefully considered it. The report goes into considerable detail concerning the appellant's history and his problems of gambling. The Lebanese loop offence occurred, suggested Mr Rees, simply because of the appellant's gambling habits. There was no evidence that the judge had properly considered the report when considering the question of proportionality. He invited me to find that the determination was flawed and set it aside.

18. I reserved my determination.

19. Dealing first with the psychological report, the first page of the report says that the subject matter is "Immigration Tribunal – risk of re-offending". Paragraph 2.1 of the report says: -

> "I have been instructed to undertake a psychological assessment of Mr Sothilingam upon the instructions of Raj Law Solicitors. This assessment was requested to consider the risk of re-offending and the possible role of Mr Sothilingam's gambling as a factor in his re-offending."

20. It is true that the author sets out the methods of assessment and the appellant's background. She also refers to the interview and explains how she reaches her conclusion that the appellant currently represents a medium risk of re-offending. The purpose of the report was to aid the judge by providing an assessment of the risk of the appellant's re-offending. What the judge actually said at paragraph 22 after having referred to the report is this: -

> "… since his offending appears to have been driven by gambling addiction which he did not address after being released from prison after the index offence sentence concluded, despite already having two children and a wife who depended on him, I am not satisfied that the appellant's claims that he will engage in rehabilitation and seek help for his addiction or that he will be successfully rehabilitated. I appreciate that he has done an addiction

> course whilst in prison, but nonetheless his OASys Report and his psychologist's report put him at a medium risk of offending. I accept the expert assessment and find that he does present a medium risk of re-offending and that his removal is in the public interest. The protection of the public of the United Kingdom carries greater weight than the appellant's right to a family life with his wife and children and they to a family life with him in the United Kingdom. I find that the appellant's right to family life and his family's right to family life with him do not outweigh the public interest in seeing him deported. I find his deportation would not breach Article 8 of the ECHR."

21. It is clear to me that there was nothing further the judge needed to quote from the psychological report. She had clearly read it. It was only directed to two matters, the risk the appellant presented of reoffending and his gambling addiction. I find that there is simply no merit in the last challenge to this determination. First-tier Tribunal Judge Grant very clearly has properly considered and engaged with the expert report.

22. As will have been observed from the quotation above First-tier Tribunal Judge Grant has concluded that notwithstanding the fact that the appellant's right to family life with his wife and children will be ended his deportation would be proportionate. It is clear from what the judge says at paragraph 22 that the judge is fully aware that the appellant's removal will separate him from his children but nonetheless any such resulting separation is proportionate. She went on to note in paragraph 24 that the appellant's wife does not wish to return to Sri Lanka having been granted refugee status in 2001 but stated in paragraph 25 that the appellant's parents now live in India where the appellant went to stay with his wife's grandparents when he was removed in 2006 and that he was permitted by the Sri Lankan authorities to travel to India. She points out that the parties could, if they wished meet in India.

23. As Lord Justice Sedley said in *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 at paragraph 27:

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does."

24. The third challenge raised by the appellant is in respect of alternative findings. The judge accepted that family life was going to end but suggested that if the parties wished to attempt to continue some form of family life then they could do so by regular visits to India.

25. I do not believe there to be any merit in the second ground for the reasons I have already given.

26. So far as the first challenge is concerned it is clear from paragraphs 18 to 22 that the judge did consider paragraph 399(A) and the fact that the appellant's conduct led to his separation from both children. The youngest was so young when he was first imprisoned and subsequently imprisoned following his re-offending that the judge thought it unlikely that she would

have any recollection of life with her father in the family home. The appellant's son who was only 3 years of age when the appellant was sentenced may have some recollection of his father having lived in the same home but to all intents and purposes both children have been cared for by their mother. She noted that both children had been taken to visit their father throughout his prison sentence and that the respondent accepted that the appellant does enjoy a genuine and subsisting relationship with each child however, it is clear from paragraph 22 that the judge concluded that the public interest ultimately outweighed the appellant's right to a family life. What the judge did, although not expressly considering the unduly harsh test, was to consider the relevant question in the assessment of public interest as opposed to the appellant's family life and found that the public interest outweighed his family life. That was a finding open to the judge to make. It is not perverse in the public law sense. It may not have been the decision which I would have reached but that is not the test. I am satisfied that the determination does not disclose any error of law on the part of the Immigration Judge and I uphold the decision.

Notice of Decision

The appellant's appeal against deportation is dismissed.

The appellant's Article 8 appeal is dismissed.

No anonymity direction is made.

Upper Tribunal Judge Chalkley

TO THE RESPONDENT
FEE AWARD

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

Upper Tribunal Judge Chalkley