



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

Appeal Number: HU/04677/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 April 2017**

**Decision & Reasons  
Promulgated  
On 5 May 2017**

**Before**

**DUPTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MRS THAVAYOGANAYAKI KURUMOORTHY  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation**

For the Appellant: No appearance

For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge SJ Clarke sitting at Taylor House on 24 August 2016) dismissing her appeal on the papers against the decision of the Secretary of State to refuse to grant her leave to remain on human rights grounds on account of her suffering from dementia and being dependent upon her nephew and niece in the United Kingdom, who are British citizens. The

First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

### **Relevant Background Facts**

2. The appellant is a national of Sri Lanka, whose date of birth is 18 December 1939. She came to the United Kingdom as a visitor on 12 October 2014. The day before the expiry of her visit visa, her solicitors applied on 9 April 2015 on her behalf for leave to remain on the ground that there had been a serious change in her health condition since she had been in the UK, with the consequence that she was unable to return to Sri Lanka.
3. In their covering letter, they said that the appellant had a good immigration record. She had been to the United Kingdom for three previous visits, and had always returned back to Sri Lanka. Although she became a widow in August 2013, she was an independent lady with sufficient funds and accommodation in Sri Lanka provided by her UK sponsors, and she had had no medical concerns before coming to the UK.
4. A few months after her arrival, her family noticed that she had developed confusion and memory loss, with loss of balance when walking. She had resorted to using a wheelchair as she was unable to walk. She had been unable to do anything herself, and had become dependent upon her family. A private GP and a consultant had examined her a few times, and she had undergone a brain scan. In a letter dated 8 December 2014 a Consultant Neurologist had diagnosed her as suffering from incurable dementia.
5. She had developed a private and family life in the UK with her nephew and other family members here. She had no children of her own. Her only family was in the UK. Her removal from the UK would adversely impact on her health in a manner that would significantly affect her moral and physical integrity, and it would be a violation of her rights under Article 8.
6. On 13 August 2015 the Secretary of State gave her reasons for refusing the appellant's application. She did not qualify for leave to remain on family or private life grounds under the Rules. Consideration had been given as to whether there were exceptional circumstances in her case. Her condition was not life-threatening. According to the Country Information of Sri Lanka, treatment for her condition was available there. Although it was accepted that the healthcare systems in the United Kingdom and Sri Lanka were unlikely to be equivalent, this does not mean that her case is exceptional, and so she was not entitled to remain here. Suitable medical treatment was available for her in her country of origin.

## **The Decision of the First-tier Tribunal**

7. The appellant asked for her appeal to be dealt with on the papers. The appellant's solicitors compiled a bundle of documents for the hearing. This contained a witness statement from the appellant's nephew and sponsor; a letter from Dr Arulnanthy; a letter from Bart's NHS Trust dated 7 March 2016; a hospital Emergency Department discharge summary dated 23 January 2016; and a further hospital Emergency Department discharge summary dated 11 July 2016.
8. In his subsequent decision, the Judge noted the contents of the nephew's witness statement which set out the difficulties which faced the appellant. She was immobile, required 24-hour care, could not carry out any basic functions for herself, suffered dementia, and did not recognise familiar faces. He stated that she had no close or distant relatives in Sri Lanka, being now a childless widow. The Judge commented: "*However, the nephew did not provide any supporting evidence of this.*"
9. At paragraphs [9] and [10], the Judge referred to the letter dated 18 August 2016 from the private GP, Dr Arulnanthy, and the medical evidence emanating from the hospital. The Judge observed in paragraph [10] that she had been discharged from hospital on two occasions, and there was no record of any follow-up following her discharge from hospital in July 2016. He continued:
  - [12] The GP writes that the appellant is not fit to fly, but there is no basis for why he reaches this assessment and what diagnostic tools are used to conclude that she could not fly. There is no mention from a consultant as to her not being able to fly, or being fit to fly. Accordingly, in the absence of any properly reasoned conclusion by the GP, or any supporting conclusion by the Hospital Consultant, I do not find that the appellant is not fit to fly.
  - [13] I ask myself whether there are any exceptional compelling circumstances in this case. However, the appellant presents as an elderly woman who has medical needs, but it is not shown that she would not be able to access medical treatment in Sri Lanka. She suffers dementia, and her nephew writes that she had difficulty recognising faces. There is nothing exceptional in her state, she has no imminent death. Accordingly, I do not go on and consider Article 8 outside the Rules.
  - [14] Section 117B must be considered by me. The appellant appears not to speak English, and has had reason to access the NHS services ... The appellant submitted an in-time application for leave to enter. The appellant only had precarious leave in the UK, and the public interest lies in her removal.

## **The Application for Permission to Appeal**

10. The application for permission to appeal to the Upper Tribunal was settled by the appellant's solicitors. It is only necessary to refer to Ground 4, as

this is the only ground upon which the appellant was granted permission. Ground 4 was that the Judge applied the wrong test in paragraph [13] of his decision, namely that the appellant was not facing imminent death. This was not the correct proportionality test. The appellant would face a degrading treatment, due to her medical condition, on return to Sri Lanka. The appellant qualified under the Immigration Rules on dependency grounds.

### **The Reasons for the Grant of Permission to Appeal**

11. On 18 January 2016 First-tier Tribunal Judge Kelly granted permission to appeal as it was arguable that the Tribunal materially erred in law by - (i) failing to have regard to the medical reports of Dr Arulnanthy (dated 18 August 2016) and Dr Shantikumar (dated 11 October 2016); (ii) failing to consider whether it is proportionate (and thus in breach of Article 8 of the Human Rights Convention) to require the appellant to regularise her immigration status as an adult dependant relative under Appendix FM of the Immigration Rules in the light of - a) the evidence referred to in (i) (above) concerning her current state of health and consequent inability to perform everyday tasks without personal care, and b) the fact that leave to remain on this basis can only be granted if the initial application is made from "*outside the United Kingdom*" (a combined effect of ECDR.1.1 and E-ILRDR.1.2); (iii) applying an inappropriate test of imminent death to the question of whether the potential operation of Article 8 (as opposed to Article 3) of the Human Rights Convention is engaged.

### **The Hearing in the Upper Tribunal**

12. In advance of the hearing before me to determine whether an error of law was made out, the appellant's solicitors wrote to the Tribunal on 11 April 2017 to say that their client was not in a position to attend Court due to her deteriorating medical condition. They were enclosing their letter to the HOPO with the latest medical report. They had instructions for the hearing to proceed on the papers only, and they relied on the grounds upon which permission was granted.
13. The report annexed to their letter was a report from Dr Shantikumar dated 28 March 2017. He said that his patient was suffering from severe dementia which had continued to deteriorate since he had written his last report in October 2016.
14. Mr Melvin, for the Secretary of State, submitted that the Judge had given adequate reasons for dismissing the appellant's appeal on the evidence that was before him.

### **Discussion**

15. The first arguable error identified by Judge Kelly is the First-tier Tribunal Judge failing to have regard to two medical reports. The medical report of Dr Shantikumar dated 11 October 2016 is not before me, and it was also

not before the First-tier Tribunal Judge. This is because Dr Shantikumar's report was not generated until a month after the Judge's decision was promulgated. As the report was not relied on by way of appeal to the First-tier Tribunal, it was not an error on the part of the First-tier Tribunal Judge not to take it into account.

16. The report of Dr Arulnanthy dated 18 August 2016 was before the First-tier Tribunal Judge, but the point taken in the permission application is a curious one. It is argued that the Judge ignored this report, and instead only gave weight to an earlier medical report of March 2016. The Judge clearly did not ignore Dr Arulnanthy's report of 18 August 2016, as he specifically comments on the report in paragraphs [9] and [12], noting that it is the most recent medical report.
17. The real issue is whether it was open to the Judge not to accept the assessment by the GP that the appellant was not fit to fly. I consider that it was open to the Judge to make this finding for the reasons which he gave. This is underlined by the fact that efforts have since been made to provide more cogent medical evidence for the proposition that the appellant is unfit to fly. In his latest report, Dr Shantikumar says as follows: *"She is not fit to sit, stand, transfer or walk, even with assistance. This would deem her unfit for a journey of any duration, and any form of transport that requires her to sit up. Her inability to communicate would further complicate the issue. Due to her generalised frailty, she would be at very high risk, if required to take a flight."*
18. Dr Shantikumar indicates that his earlier report of October 2016 was to the same effect, except that the appellant's condition has deteriorated even further since October 2016. Of particular significance is that Dr Shantikumar says that the appellant has completely lost any residual sitting balance. In contrast, Dr Arulnanthy did not say this in his report. So it was reasonable for the First-tier Tribunal Judge to infer that the appellant would be able to sit on a seat in the aircraft, and that she could be moved in and out of the aircraft on a wheelchair.
19. The eligibility requirements for entry clearance as an adult dependant relative set out in Section E-ECDR of Appendix FM include the following:
  - 2.4 The applicant ... must as a result of age, illness or disability require long term personal care to perform everyday tasks.
  - 2.5 The applicant ... must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because - a) it is not available and there is no person in that country who can reasonably provide it; or b) it is not affordable.
20. It was not part of the appellant's evidence that the requirements of E-ECDR.2.5 were met. If they had been met, it is likely that the appellant's solicitors would have applied for leave to remain under Appendix FM, while at the same time inviting the Home Office to waive the requirement of the

appellant returning to Sri Lanka to seek entry clearance in this capacity - on the ground that her health had significantly deteriorated since her arrival in the UK.

21. Since it was not, and is not, the appellant's case that she meets the criteria for a grant of entry clearance as an adult dependant relative, the Judge did not err in law in not asking himself whether it would be disproportionate to require the appellant to return to Sri Lanka in order to apply for entry clearance in this capacity.
22. It is a relevant consideration that the appellant was not facing imminent death, following **N -v- UK**. Nonetheless, in suggesting that this resolved the question of whether Article 8 was engaged, the Judge was clearly in error. However, I do not consider this error was material, as the Judge went on to address proportionality. Moreover, in the light of his sustainable findings of fact on the limited medical evidence that was before him, no viable case on health grounds was disclosed under Article 8 ECHR any more than it was disclosed under Article 3 ECHR. Not only was there no evidence to show that the sponsor could not pay for the appellant to have round-the-clock care in Sri Lanka, but the Judge also commented on the absence of supporting evidence for the claim that the appellant had no family in Sri Lanka.
23. For the above reasons, I find that no error of law is made out. This is probably academic, as I do not consider that there is a realistic prospect of the Home Office seeking to remove the appellant.

### **Notice of Decision**

The decision of the First-tier Tribunal does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date 4 May 2017

Judge Monson

Deputy Upper Tribunal Judge

