Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08313/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2019	**On 26 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THIRUKUMAR [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr C Youssefian of Counsel instructed by Kothala & Co (Harrow Road)

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Sri Lanka. She came to the UK in September 2007 as a student and received extensions in that capacity until October 2012. In August 2014 she was granted further leave for post-study work. She was then granted leave to remain under Tier 2 until August 2017. On 14 January 2016 her leave was curtailed to expire on 15 October 2016. On 15 October 2016 she applied for

leave to remain on family and private life grounds. This was voided on 5 February 2018. On 22 September 2017 she varied her application to indefinite leave to remain based on long residence. On 21 March 2018 a decision was made to refuse her leave to remain in the UK. The appellant appealed. Her appeal was heard by Judge Iqbal of the First-tier Tribunal. In a decision sent on 14 December 2018 the judge allowed the appeal of the appellant on human rights grounds.

2. The respondent alleged error of law on the part of the judge in four main respects:

   (1) that the judge had wrongly stated in paragraph 36 that the husband and children of the claimant ought to be granted leave in line with the appellant which was said to be clearly outside the judge's remit;

   (2) that the judge failed to apply the guidance given by the Supreme Court in **Agyarko** [2017] UKSC 11 by virtue of which only if there were unjustifiably harsh consequences could a person succeed outside the Rules. In this regard it was considered important that the judge had concluded that the claimant would not face very significant obstacles on return to Sri Lanka;

   (3) that the judge had wrongly stated that the claimant's appeal was one in which there was "historic injustice". It was said that her conclusion that the state of the claimant's mind was the reason as to why she was unable to properly pursue various immigration applications was without any merit and inadequately reasoned;

   (4) finally, it was contended that the judge had failed to properly apply the considerations under Section 117B of the Immigration and Nationality Act 2002 and in particular the judge erred in on the one hand failing to attach little weight to the precarious nature of the claimant's private life, and on the other hand regarding the fact that the claimant speaks English and that she may be financially independent as positive factors rather than as neutral factors.

   I heard pertinent submissions from both representatives.

3. As regards ground 1, I concur with the appellant (hereafter the Secretary of State or SSHD) that the judge erred in stating that the husband and children ought to be granted leave in line with the claimant. The issue of the immigration status of the husband and children was not before the judge as such and it was not for the judge to direct anything regarding their leave. However, I am not persuaded that there was any material implications to this error, and indeed Mr Tufan has not suggested as such. Mr Youssefian properly points to the fact that in any event the judge only stated matters normatively referring to the husband and children as being person who "ought" to be granted "leave in line with the claimant".

4. As regards the second ground, it is correct that the judge did not refer to the Supreme Court guidance in **Agyarko**. At the same time, the approach taken by the judge was clearly consistent with the guidance given in this decision. In particular, the judge properly considered first of all whether or not the claimant could succeed under the Immigration Rules, and then went on in paragraph 28 to consider Article 8

outside of the Rules. It is correct that in paragraph 27 the judge had concluded that there would not be very significant obstacles to the claimant's integration back into life in Sri Lanka. However, that issue arising as it did under para 276ADE was not determinative of the issue of whether or not there were compelling circumstances outside the Rules warranting a grant of leave. This ground could only succeed if it can be shown that the judge's proportionality assessment was vitiated by legal error.

5. Whilst the proportionality assessment made by the judge outside the Rules was a generous one, I agree with Mr Youssefian that it is not one that was outside the range of reasonable responses. First of all, it is clear that the judge took into account a wide range of considerations in assessing whether there were compelling circumstances. At paragraph 33 the judge stated:

> "33. Matters I have considered as part of the balancing act are as follows:
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> - There is in the Appellant's case a potential historic injustice in relation to the rejection of her claim as of June 2009. This is when the Appellant states the Secretary of State claimed they had attempted to take funds from her account, however, claimed that they had not been able to do so given there were insufficient funds in her account. However, as I have already highlighted the I have been provided with bank statements which, show that as at the 21st May 2009, the Appellant had sufficient funds to cover that application and I have seen the account runs up until June consistently with a balance of over £500 in the account.
> - Further, although there was a gap of one year she has had lengthy lawful residence in the United Kingdom. The gap itself was explained by exceptional and compassionate circumstances. I have accepted the circumstances relating to her father's disappearance and the impact they would have had on the Appellant's state of mind. I also note that there has been no real challenge by the Respondent to the evidence of the Appellant and I accept on balance that her state of mind would have been such that she was unable to properly pursue the various immigration applications at that time.
> - There is some evidence that the family in Sri Lanka may have had further difficulties given the Appellant's mother's asylum claim in the United Kingdom, however I have been provided with no further details of this and am only able to accord it with limited weight in the balancing act.
> - I consider the Appellant and her children share a close relationship with her own sister and her children who are British citizens in the United Kingdom.
> - The Appellant's husband is financially stable and owns a convenience store in the United Kingdom.
> - All their family and close friends have relocated abroad from Sri Lanka and they have no real network on which to rely for support in the short term or long term on return after 11 years away from the country.

- Both children were born in the United Kingdom. The eldest child who is 5 has some medical difficulties, however these are not determinative of the Article 8 claim before me. In addition, it is of note that the children have limited or no understanding of the Tamil language. Again this in itself is not a weighty factor, but considered cumulatively with the other factors highlighted this does add weight to the balancing act.
- The Appellant herself is a highly qualified biomedical scientist to the extent that her continuing education will be paid or by her employers".

6. As regards the first bullet point, I agree with Mr Tufan that the judge was incorrect to portray the claimant's case as one of potential historic injustice, that concept being related to cases in which categories of applicants have fallen outside the Rules in ways considered by the Secretary of State to have been wrong for policy reasons. The claimant's case was rather one in which there was a difficulty with the circumstances under which she had become an overstayer. On the evidence before the judge the claimant did have funds in her account at the point in time when the Secretary of State voided her application for insufficient funds. There was evidence produced before the judge to confirm that there were bank statements for sufficient amounts covering this period. As a result, the judge had to consider whether, had it not been for this voiding, the claimant would have had been able to make a legitimate application based on paragraph 276B on the grounds of long residence. It was open to the judge in the context of considering the claimant's circumstances outside the Rules, to take the view that there were exceptional and compassionate circumstances for the claimant arising from her, despite meeting the requirements of the Rules substantively, not having properly pursued the various immigration applications at that time. It was equally open to the judge to consider that this was a very weighty factor when considering the proportionality of the Article 8 assessment. In that context, it was open to the judge to conclude that notwithstanding that there were not significant obstacles in the way of the claimant integrating back into Sri Lankan society and notwithstanding that there were no weighty factors affecting the best interests of the children, the various considerations taken cumulatively were such as to amount to compelling circumstances. It is important in this context to note that the challenge made here by the Secretary of State is a reasons challenge. It will be apparent from the outline I have given that there were more than adequate reasons for the judge's assessment. Certainly, this was not a case in which one could say that it was impossible for anyone reading this decision to understand why and on what basis the judge had assessed the considerations as she did.

7. Turning to the challenge to the judge's treatment of the Section 117B considerations, I first of all set out what the judge stated at paragraphs 34 to 36:

> "34. Furthermore, in considering the Upper Tribunal guidance in *MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC)* it is of note that the best interests consideration must be tackled first by any fact finder as a discrete issue before applying this to any assessment of proportionality. In this respect, I have also considered the independent social worker report

prepared by Stephanie Prempeh dated the 17th May 2017, in which she concludes that the children have not had prolonged exposure to Sri Lanka or its climate and remaining in the UK would ensure significant relationships with family members would remain unaffected and psychological wellbeing was promoted. In addition, that they no longer have any meaningful links with Sri Lanka such as to establish or to ensure a network which could support them during their reintegration back into life in Sri Lanka and the difficulties faced by them and/or assist in ensuring that the children's wellbeing is promoted. Whilst, I take into account the age of the children and find it is in their best interests to remain with both their parents, given their ages, I am also satisfied that it is relevant that they have no experience of Sri Lanka and no network of family or friends that would help them to settle in their environment on return, which could affect their well-being.

35. In relation to Section 117B of the 2014 Act, I take into account that little weight must be given to the Appellant's private life that has been established whilst in the UK with precarious leave. However, it is not in dispute that the Appellant speaks English and that she has never received public funds, having been supported by her own work and husband's business. I note she continues to better herself in respect of academic qualifications which can only assist her in relation to continuing to be economically active.

36. Therefore, when taking into account all the matters I have highlighted above, I find this is a finely balanced case. I find what tips the balance in favour of the Appellant is the immigration history that she has highlighted, together with the fact that she has significant ties in the UK and that the children were born in the United Kingdom and are fully integrated into life in the United Kingdom, with substantive links to return to in Sri Lanka. On the totality of the circumstances presented to me, I find therefore that on balance the removal of the Appellant would be disproportionate interference with Article 8 rights. For the sake of completeness, given the Appellant succeeds in her appeal, I find given the matters I have highlighted above that her husband and children ought to be granted leave in line with hers".

8. From the above it is clear that the judge did properly direct herself as regards the private life of the claimant and the need to ensure little weight was given to such private life. I do not see that in paragraph 35 the judge was stating that the claimant's ability to speak English and her financial situation were positive factors. The judge can properly be taken to have simply ensured that they were not factors to be weighed negatively against this particular claimant. Further, in the light of the Supreme Court guidance in **Rhuppiah** [2018] UKSC 58, I consider the claimant's to be a case in which there was a degree of flexibility open to the judge in respect of the immigration history of the claimant since on the judge's assessment the claimant's immigration status would not have been precarious had the gap not occurred in June 2009 by virtue of her failing to provide evidence of sufficient funds to cover her application (even though such funds existed). For the above reasons I conclude that although generous, this was not a decision vitiated by material legal error.

9. To conclude:

The judge did not materially err in law and accordingly her decision shall stand.

No anonymity direction is made.

Signed Date: 20 March 2019

Dr H H Storey
Judge of the Upper Tribunal