Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-004006; IA/07233/2021

UI-2022-004008; IA/07234/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S J P G
R V G
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms J Theilgaard instructed by Richmond Chambers

Heard at Field House on 22 December 2022

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless hereinafter I refer to the parties as they were described before the First-tier Tribunal ("the FtT").

2. The Secretary of State appealed against the decision of FtT Judge Lucas ("the judge") who on 12th July 2022 allowed the appellants' appeal on human rights grounds.

3. The appellants, husband and wife, are nationals of Sri Lanka both born in 1986. They married in 2006 and entered the UK in 2009. They had leave to remain until 2015 whereupon they made various unsuccessful applications for further leave. Their leave including any Section 3C leave ended on 23rd January 2018. Since that time, they have been overstayers.

4. Both appellants have medical issues, both are educated to degree level, and both have family in Sri Lanka. The first appellant has mental health issues, and the second appellant has hyperthyroidism and Graves disease. The appellants gave evidence through a witness statement that they 'doubt' there is adequate medical treatment available in Sri Lanka.

5. The Secretary of State's refusal decision of 24th May 2021 noted that the appellants had made a number of unsuccessful applications to remain until making the present claim in 2020. It was not accepted that here were very significant obstacles to their return to Sri Lanka.

6. In his decision the judge found the appellants had lived most of their adult lives in the United Kingdom and they had close friends here. He stated that there were 'no sustainable public issues in the case' [40], no adverse immigration history [40], no criminal convictions and both of the appellants spoke good English. He observed they had done their best to integrate here and clearly wished to remain. The judge also found at [42] that the health condition of the second appellant to be 'significant' (principally an eye condition), but it was unclear whether or if there were any relevant medical facilities in Sri Lanka but there was 'no evidence of any efforts made by the appellants to research or access this care upon return'. The judge found the second appellant's treatment was intensive and her condition would 'deteriorate fairly rapidly on return' [42]. That was not helped by 'her absence from that country and again by the economy in Sri Lanka which was 'now at best precarious'.

7. The judge also found that the medical condition of the appellant did not cross the very high threshold to breach article 3 but it added to the 'overall mix' in the case in relation to article 8. The judge referred to the 'suicide risk' upon return of the first appellant. This was caused inter alia, by his parents' separation, the worry of his status, and the health of his wife. The judge stated that he placed little weight on the assertions that the appellants did not have family in Sri Lanka [45] although this was mitigated by the fact that the appellants had been away from the country 'for much or most of their adult lives'.

8. At [46]-[47] the judge said this

> *"I view this case holistically. I reach the conclusion that there are a number of exceptional features in this case. I bear in mind that*

> *the couple have effectively settled here and have quite literally made this country their home. They have lived away from Sri Lanka for most of their adult lives and I have no doubt that both have and could make a proper contribution to life here if their status is settled.*
>
> *47. In short, I reach the conclusion that the combination of different factors in this case leads to the conclusion that the refusal decision id disproportionate and that any public interest issues, however legitimate, are mitigated by the private and family life of the Appellants in the UK."*

The judge allowed the appeal on article 8 grounds.

The grounds of appeal

9. The Secretary of State asserted that the judge

(i) made a misdirection in law

(ii) failed to give adequate reasons

(iii) gave weight to immaterial matters

(iv) was irrational in the findings.

10. It was submitted that the judge had not made clear what 'public issues' he was referring to and if they were the public interest considerations these applied in all cases and was in direct contradiction of **Agyarko** [2017] UKSC 11. The appellants could not meet the rules which was a factor that weighed against them. Any private life was limited and the decision was tainted by the initial misdirection at [40] where the judge stated:

> *"I note that there are no sustainable public issues in this case. There is no adverse immigration history, no criminal convictions and both of the Appellants speak good English. It is fair to conclude that they have done their best to integrate here. They clearly wish to remain in the country that they have now made their home."*

11. The judge had established that the article 3 claims fell below the threshold in AM (Zimbabwe) [2020] UKSC 17 given the absence of evidence that the appellants would not be able to obtain treatment or that the appellant would be exposed to serious rapid and irreversible decline in health. In relation to article 8, the judge's conclusion that there would be a rapid decline in the health was unsubstantiated given the absence of evidence to establish there was no appropriate treatment.

12. The judge failed to explain why the time the appellant had been absent from the Sri Lanka would carry any weight. There was no evidence to suggest that since the appellants had lived their formative years in Sri

Lanka with family members, there would be any real issue to their reintegration or that their absence from Sri Lanka would be a weighty factor which would demonstrate any unjustifiably harsh outcome in breach of Article 8.

13. The exceptional features referred to by the judge were the length of residence. The appellants had a mortgage and dogs but there was nothing to demonstrate why they were exceptional or how would they prevent the appellants reintegrating into Sri Lanka. Their private life could only attract limited weight and the judge had failed to explain how such private life factors attracted sufficient weight to dislodge the Secretary of State's right to control those entering and or remaining in the UK or to amount to exceptional circumstances. There is no right to choose a place of residence in article 8 terms which could not be used as a general dispensing tool.

The hearing

14. At the hearing before me Mr Melvin relied on his written grounds of appeal but added that the judge had merely found that the appellants wished to remain in the UK. There was no attempt to show whether medication would be available in Sri Lanka.

15. Ms Theilgaard opposed the Secretary of State's challenge on all grounds. She submitted the judge had considered the appellants' immigration history previously in the decision and had made reference at paragraph 42 to the appellants' ability to speak good English. That showed the judge had contemplated Section 117B. A balancing exercise had been undertaken and cumulatively it was clear that the judge had found factors in the appellants' favour. The judge had actively considered the question of the relevant public interest. The health considerations, although not engaging article 3, were part of the broader assessment and there was no error of law. The challenge was in fact a disagreement with the findings on certain factors and the judge was entitled to take into account the length of time the appellants had been in the UK during their adult lives. **Agyarko** was implicit in the judge's findings.

Analysis

16. I appreciate in accordance with UT (Sri Lanka) [2019] EWCA Civ 1095 that

> *"judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.*"

17. The judge, however, has not directed himself legally in accordance with either statute including Section 117B of the Nationality Immigration and Asylum Act 2002 (the 2002 Act) or various legal authorities including

Agyarko [2017] UKSC 11 and Kamara [2016] EWCA Civ 813. A structured approach might have avoided the lack of legal direction resulting in misdirection.

18. First the judge referred to there being 'no sustainable public issues' and 'no adverse immigration history'. It is not apparent he was referring to public interest considerations set out in Section 117B because the reference to 'no adverse immigration history' was simply incorrect. The appellants have been in the United Kingdom unlawfully since 2018. When considering article 8 the judge was required to consider Section 117B which sets out:

> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to—*
>
> *(a) a private life, or*
>
> *(b) a relationship formed with a qualifying partner,*
>
> *that is established by a person at a time when the person is in the United Kingdom unlawfully.*
>
> *(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."*

19. Apart from the fact that the judge failed to address whether the appellants were financially independent, and although he made a reference to the appellants speaking good English, application of the pertinent provisions was absent. In his *conclusions*, despite a recording earlier in the decision of the circumstances of the appellants, the judge failed to appreciate that their status had always been precarious and latterly the appellants were

here unlawfully. The judge failed to apply Sections 117B(4) or (5). As held in Deelah and others (section 117B - ambit) [2015] UKUT 515 (IAC) (iii)

> *"A private life "established", in the wording and in the context of section 117B(4) and (5) of the 2002 Act, is not to be construed as confined to the initiation, or creation, of the private life in question but extends to its continuation or development".*

20. Agyarko sets out the correct approach to the application of article 8 to the removal of a non-settled migrant. At [47] the Supreme Court held

> *"It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case".*

21. And at [48]

> "*That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. …If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are "exceptional circumstances*".

22. The application of the rules in this case should have entailed a consideration of paragraph 276ADE(1)(vi) and whether there would be very significant obstacles to the appellants' integration into Sri Lanka. That was not undertaken. As the judge allowed the appeal outside the rules it can only be concluded that the judge found the rules not to be fulfilled. Unless the appellants can demonstrate 20 years lawful residence, they must demonstrate that there are very significant obstacles to their integration in Sri Lanka. The judge did not address that consideration.

23. The judge failed to undertake an analysis of very significant obstacles in accordance with Kamara which held at [14]

> "*The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life*."

24. When discussing article 8, the judge failed to apply Agyarko. He found, that the health considerations did not breach article 3, but despite noting

that there was no evidence of any efforts to research or access medical treatment on return nevertheless factored it in as a matter for article 8 purposes, hence the judge's conclusion that there would be a rapid decline in the health was unsubstantiated. GS (India) [2015] EWCA Civ 40 confirms at [86]

> *"If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm."*

And at [87]

> *"the rigour of the D exception for the purpose of Article 3 in such cases as these applies with no less force when the claim is put under Article 8:*

25. The judge had rejected the medical conditions in relation to article 3 for good reason but having found it lacked underpinning apparently resuscitated the issue for the purpose of article 8. This approach was given inadequate reasoning.

26. The judge found the appellants could benefit from the fact that they had been here for 'most of their adult lives' and characterised this as an exceptional factor. He also referred and apparently relied on their family life at [47] without making any previous findings in that respect. The family life that the appellants have is between themselves. There was no indication that the appellants had family life with anyone else living in the United Kingdom. The judge therefore included immaterial and irrelevant factors when assessing the appellants' circumstances.

27. The judge even concluded that should the appellants be allowed to remain they would 'could make a proper contribution to life here if their status was settled'. Not only was that speculative but even those who have already made a contribution need to make a substantial contribution to the community in order that the public interest in their removal be reduced. As held in Thakrar (Cart JR; Art 8: value to community) [2018] UKUT 336 (IAC)

> "*The fact that a person makes a substantial contribution to the United Kingdom economy cannot, without more, constitute a factor that diminishes the importance to be given to immigration controls, when determining the Article 8 position of that person or a member of his or her family"*.

28. Finally, the judge expressed that having viewed '*the case holistically'*, he had identified a 'number of exceptional features' but in reality, failed to identify any 'unjustifiably harsh consequences' on sustainable findings. The judge failed adequately to explain how the absence from Sri Lanka since 2009 and that the economy in Sri Lanka is precarious were 'exceptional features'. The judge simply did not adequately explain what

the combination of different factors were in this case to allow the appeal outside the rules on the basis of 'unjustifiably harsh consequences'.

29. Despite Ms Theilgaard's valiant attempt to persuade me to uphold the decision, I do not accept that a recognition of the principle in Agyarko was even implicit within the conclusions of the decision.

30. The Secretary of State's challenge is made out. The decision contained material errors of law and the decision of the FtT is set aside. In view of the extent of the relevant findings to be made I remit the matter to the First-tier Tribunal.

31. I was asked to make an anonymity direction because they assert that since the last hearing, they have received threats over social media. No evidence of the contents of those threats in the form of disclosure of the messages were produced by the appellants. The appellants apparently did not wish to produce them. There was a letter from the police recording the reporting of an offence. Only because it is submitted that the matter is subject to investigation by the police do I direct an anonymity direction.

"Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant/respondent is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant/respondent, likely to lead members of the public to identify the appellant/respondent. Failure to comply with this order could amount to a contempt of court."

Notice of decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Helen Rimington Date 13th January 2023

Upper Tribunal Judge Rimington