IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001335

First-tier Tribunal No:
HU/52800/2022
IA/04436/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 December 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

AGMA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Sellwood, of Counsel, instructed by David Benson Solicitors Ltd
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Interpretation: Ms P Pathmanathan in the Tamil language

Heard at Field House on 21 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any family member. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Sri Lanka born in June 1965. He arrived in the UK in May 2000 and made an asylum claim which was refused. His appeal was dismissed by Judge of the First-tier Tribunal Coleman in April 2001. He was not removed from the UK and continued to remain illegally. On 21st March 2011 the appellant was sentenced to twelve months imprisonment for assisting unlawful immigration by providing illegal immigrants with jobs, accommodation and food. A deportation order was signed against him on 7th September 2011, and a human rights appeal challenging that order was dismissed in January 2012 by a panel of Judge of the First-tier Tribunal Frankish and Mrs Bray JP. The appellant was deported from the UK on 4th May 2012.

2. The appellant returned to the UK on 15th April 2015 and claimed asylum. A number of decisions were made by the respondent, but on 19th April 2022 his claim was accepted as a fresh protection and human rights claim but refused, and the appellant appealed against this decision. On 8th February 2023 Judge of the First-tier Tribunal CR Cole heard the appeal and dismissed it on all grounds.

3. Permission to appeal was granted and a Panel of the Upper Tribunal found that the First-tier Tribunal had erred in law in the determination of the human rights appeal for the reasons set out in the decision appended as Annex A to this decision. The decision and findings dismissing the protection appeal were preserved.

4. The matter comes before me now to remake the human rights appeal. It was accepted by both parties that there were two issues to be determined in the appeal: firstly whether the appellant's appeal could succeed with reference to Exception 2 under s.117C(5) of the Nationality, Immigration and Asylum Act 2002, namely whether the deportation of the appellant would be unduly harsh to his son and partner; and secondly whether there are any very compelling circumstances over and above the exceptions to deportation under s.117C(6) of the Nationality, Immigration and Asylum Act 2002 which would make the appellant's deportation a disproportionate interference with his, and his family's, Article 8 ECHR rights.

5. In respect of the first issue it was accepted by the respondent that it would be unduly harsh to the appellant's son and partner for them to be required to return to Sri Lanka with him if he were deported, so it was only necessary to determine whether it would be unduly harsh for the appellant to be deported and his partner and son to remain. In relation to the second basis of appeal it was accepted that the appellant could not meet all of the requirements

of the first, private life, exception to deportation under s.1175(c) Nationality, Immigration and Asylum Act 2002.

Evidence & Submissions – Remaking

6. The evidence of the appellant in his two statements and from his oral evidence is, in summary, as follows. He came to the UK in May 2000 and started to cohabit with his partner, SN, in December 2001. Their son, SA, was born in June 2006, and is a British citizen.

7. In Sri Lanka the appellant had been married to another woman and they had four children together born between 1986 and 1996. The appellant says that he has no contact with any of these children. He also had seven full siblings and one half-sibling from his father in Sri Lanka. Two of the full siblings have died. He says that he only has contact with two of his remaining five full siblings and they would not be in a position to assist him if he were to return to Sri Lanka due to their family commitments.

8. The appellant was detained in January 2010 for facilitating unlawful immigrants, convicted and given a 12 month sentence, of which he served half. He was then deported to Sri Lanka in May 2012. His partner and son visited him in Sri Lanka in March/April 2013 and he married his partner in Sri Lanka in April 2013. He left Sri Lanka in April 2013, and travelled to Malaysia with an agent. He spent 1 year and 11 months in Malaysia until an agent arranged for him to travel to France in April 2015, and the next day, in April 2015 he returned to the UK clandestinely in a lorry. He claimed asylum on 10th August 2015 and has remained in the UK ever since.

9. In the UK he has lived throughout with his wife and child. He has been financially supported by his wife who works full time running a shop with one employee. He has therefore taken care of the home and cared for his son, cooking for him, taking him to school and attending to his needs. His son is, in his words, his life. His son is currently doing a BTEC at college, and is a happy young man, with no health problems who socialises with friends. His son will consider going to university when his BTEC is concluded in 2025. The appellant has also done some charity work with the Tamil Welfare Organisation and managing a Tamil football club.

10. The appellant suffers from diabetes, depression and anxiety. He has discussed this with his GP and had some therapy sessions in the past, but the psychologist concluded that his immigration problems/threat of deportation was the cause of this and it was decided he did not need further treatment. The appellant explained that his wife suffers from fits. She had a frequent problem with fits when she was younger but this then stopped, but came back when he was deported from the UK. She has had fits on two or three occasions since he was sent to Sri Lanka. They tried

to attend two hospital appointments with a neurologist to understand the nature of this problem, however on the first occasion they were late and missed the appointment due to a parking problem and on the second occasion they could not find the place. They are now waiting for a third appointment. The couple have no relatives in the UK to turn to for help.

11. The evidence of SN the appellant's wife is, from her statements and oral evidence, in summary as follows. She says that she met the appellant in 2000 as they worked in the same place, the Labour Department in Trincomalee in Sri Lanka. They met again in the UK and entered into a relationship, and had a son, SA together in June 2006. The appellant was deported to Sri Lanka in May 2012 due to his criminal conviction. She and their son visited him in Sri Lanka in March/April 2013; and the appellant returned to the UK to claim asylum in April 2015. Whilst he was absent from the UK she suffered mentally, being very stressed, and financially as she was alone without family support in the UK, and this in turn this impacted on their son and his studies. Ever re-entered the UK the appellant has been an amazing father to their son doing everything for him, and the cooking and chores at home, whilst she works running her own business, a shop with one employee. Their son has taken his GCSEs and is now doing a BTEC at college. He will finish his course in 2025 and then has the idea to go to university after this. Their son only speaks English and could not reasonable live elsewhere as he is totally integrated into British society. He is a happy boy when they are all together, and goes out with friends and has no health problems.

12. SN has had a few of episodes of fits in the UK when she has been worried about the future. When she had them when the appellant was not in the UK she did not seek medical help as she was scared they would keep her in hospital and there would be no one to look after her son. She has recently had a couple of appointments with a neurologist about her condition but on both occasions she did not actually see a doctor as she was late for the appointments. She is waiting for a third appointment. After an episode of fits she feels very low in energy and feeble. There have been two episodes since the appellant returned to the UK in 2015.

13. The evidence of SA the appellant's son, from his statements and oral evidence is, in summary, as follows. He was born in the UK in June 2006 and is a British citizen. He is very close to the appellant and the appellant has always encouraged his studies and extracurricular activities such as swimming and karate. The appellant cares for him, makes his food and supports him psychologically. Whilst the appellant was absent, between 2011 and 2015, he felt sad, but when the appellant returned to his life he felt fulfilled again. The appellant is his biggest support and his role model in life. He has visited Sri Lanka but he could not have

the same relationship with the appellant on brief visits in the holidays. SA has no health problems and is generally happy. He could not live in Sri Lanka as he does not speak Sri Lankan languages fluently and all his friends and education are in the UK. He is currently studying for a BTEC in Esports which he will finish in June/July 2025 at college in Crewe. Once he is finish he will either take a job or go to university in Stoke. He plans to stay living with his parents if he goes to university.

14. Mr Tufan submitted for the respondent that he relied upon the reasons for refusal letter. He argued in oral submissions that it would not be unduly harsh for the appellant to be deported to Sri Lanka whilst his partner and son remained in the UK. He argued that the appellant's partner is a successful businesswoman who is the breadwinner for the family. Whilst she has had a couple of episodes of fits since 2015 her medical condition was not such that it would be unduly harsh for her to remain without the appellant. Mr Tufan argued that the appellant's son is now 17 years old and is therefore on route to adulthood. He is a happy and healthy adolescent, studying and intending to go to university. Whilst of course the appellant's son would be affected by the appellant's deportation it would not reach the required degree of harshness to be unduly harsh. The test was an elevated one, and the harshness would be lessened by the fact the appellant could see his father on visits and have contact via modern means of communication. Their relationship would therefore be able to continue.

15. Mr Tufan argued that the appeal also could not succeed on the basis of very compelling and compassionate circumstances over and above the exceptions to deportation. He accepted that he appellant was in the medium level offending bracket (12 months to four years), and his sentence was at the bottom end, and also that it could properly be said that he was rehabilitated as he had not reoffended. However this made little difference to the weight to be given to the public interest. Mr Tufan argued that the public interest outweighed the factors in favour of the appellant. For the reasons given above his relationship with his son did not weigh heavily in the balance. The appellant's anxiety, depression and moderate risk of suicide were not sufficient to amount to an Article 3 ECHR risk on return to Sri Lanka, and thus the medical issues were not sufficient on its own for the appeal to succeed on Article 8 ECHR grounds. The appellant had a number of adult relatives in Sri Lanka and had lived there most of his life, and was not receiving any mental health treatment and could access healthcare in Sri Lanka. The appellant's wife's ill-health was likewise not severe enough to weigh heavily in the balance.

16. Mr Sellwood relied upon his skeleton argument and on oral submissions. It was submitted that the witness evidence, psychiatric reports and social work expert evidence showed that it

would be unduly harsh to the appellant's son for the appellant to be deported. He drew attention to the fact that these documents showed that there is a very strong family life bond between the appellant, his partner and son, and that the appellant's son has a stronger relationship with the appellant than with his mother due to the nurturing role he has played in his life as the homemaker. When the appellant was away from them due to his arrest and imprisonment and deportation the appellant's partner felt anxious, depressed and lonely, and felt much better when the appellant returned. The appellant's son would be extremely distressed if the appellant was taken away from him, and this would in all probability have a seriously detrimental impact on him, with likely devastating long term affects on his mental health. Conducting the relationship by visits and modern communications would not substitute for the relationship which exists between appellant and son.

17. It was argued for the appellant that when considering the appeal under Article 8 ECHR beyond the exceptions to deportation, and therefore looking for very compelling circumstances over and above the exceptions to deportation, relevant factors including the relatively short custodial sentence the appellant received for the offence of providing employment to illegal persons; the fact that the appellant entered a guilty plea at an early stage; the appellant's lack of offending and rehabilitation since this offence, the offending behaviour having taken place up until January 2010; the twenty one year relationship the appellant has had with his partner and the strength of his family life ties with his partner and son; the appellant's private life ties with the UK, his having lived in the UK for a total of over twenty years (although these can only be given little weight); the appellant's partner's depression and ill health; the appellant's accepted diagnosis of PTSD, moderate depression and suicide risk and his diabetes; the country of origin evidence of problems with mental health care in Sri Lanka and stigmatisation of those with mental health problems; the discrimination of those of Muslim origin in Sri Lanka and difficulties he would have seeking work; and the best interests of the appellant's child and the harshness of his deportation to his son and partner. It is argued that the appellant is financially independent as he is supported financially by his wife and that he speaks English as he communicates with his son, who does not properly speak Sri Lankan languages, and that these last two factor are therefore neutral matters. It is argued that when all this is placed in the balance the appellant is entitled to succeed in his appeal as there are very compelling compassionate circumstances over and above the exceptions to deportation.

Conclusions – Remaking

18. The appellant is a foreign criminal having been convicted of an offence with the imposition of a custodial sentence of one year. He was convicted of assisting unlawful immigration by providing illegal immigrants with jobs, accommodation and food. He was sentenced to twelve months in custody because he was here unlawfully at the time and he was facilitating others who were remaining unlawfully. As set out above the first question is whether the family life exception to deportation, Exception 2, as set out at s.117C(4) of the Nationality, Immigration and Asylum Act 2002 applies. If it applies the appellant is entitled to succeed in his appeal.

19. The family life exception applies if the appellant has a genuine and subsisting parental relationship with a qualifying child and the effect of the appellant's deportation would be unduly harsh on that child; or if the appellant has a genuine and subsisting relationship with a partner and likewise the impact of his deportation would be unduly harsh on his partner. It is accepted by the respondent that the appellant has both a qualifying partner and qualifying child. It is disputed that the impact on his partner and child would be unduly harsh. The test of undue harshness was considered by the Supreme Court in HA (Iraq) & Ors v SSHD [2022] UKSC 22. Harshness is an elevated test, requiring something severe or bleak rather than things being uncomfortable, inconvenient, undesirable or merely difficult for the qualifying partner or child. The question is whether that harshness outweighs the public interest in deportation but there is no requirement of exceptionality; and impairment to mental health, social, educational or behavioural development is as significant as to physical health. What is required is an evaluation of all the evidence before the Upper Tribunal in relation to this particular partner and child. The seriousness of the offence is not a consideration in this process.

20. I find that the witness evidence of the appellant, SN and SA is all evidence on which reliance can be placed. Mr Tufan did not make a submission that it was not credible and could not be given weight in relation to the family life relationship between the appellant, SN and SA. Whilst the evidence of family in Sri Lanka might have come out slowly, and indicated, I find, a reluctance on the appellant's part to focus on his past life in Sri Lanka, I find that this does not affect the reliability of the evidence with respect to his relationships and time in the UK. There was consistency in this evidence between witnesses and with their written and oral evidence. The questions were answered directly, and I find there was no attempt to embellish the evidence – an example being that all three witnesses gave evidence that SA is a healthy and currently generally happy 17 year old with friends who is studying for a BTEC at college whilst living with and having close relationships with both parents, particularly the appellant.

21. I focus primarily on the impact of deportation on SA, the appellant's son, when evaluating whether it would be unduly harsh. I find that Ms Smart, the independent social worker, is a suitably qualified expert who undertook a lengthy interview with the family and reached conclusions with reference to relevant source materials in a report dated 21st October 2022 which complies with the relevant practice direction. She has also provided a supplementary interview with the family in November 2023 to update her report. Ms Smart's opinion in her original report is that if: "the structure, stability, and consistency the appellant's child, SA, currently enjoys is "disrupted abruptly", then it is more likely than not to "create confusion, anxiety and emotional instability, which would have a detrimental effect on his educational, social, emotional and behavioural development". Further within the report there are other negative consequences which are found "will" happen or "are more than likely than not" to happen: for instance the confusion, anxiety, and emotional instability detrimentally affecting the appellant's son's education, social, emotional and behavioural development; and irreparable damage to the close bond and meaningful relationship between the appellant and his son. Any current separation brought about by deportation would take place in the context of the appellant being his son's primary carer and after a period of eight years in which their relationship has deepened, and in the context of SA being at a challenging developmental stage of life where he needs support and guidance. The opinion of Ms Smart is that contact other than in the form it currently takes would not be meaningful to the appellant's son and would be experienced as a form of punishment and would be traumatic, and would not serve SA's best interests. Whilst Ms Smart does mention the possibility of interventions such as therapy and safeguarding services these would clearly to be to try to address the trauma and emotional distress, and would not prevent it taking place. From the updating report it is clear that SA is currently worried, sad and anxious about the possibility of the appellant's deportation, and is worried that: "everything that he has loved is ripped away from him". Ms Smart cites expert evidence about the loss of a parent during the teenage years being associated with emotional instability, impulsivity and depression and finds the appellant's deportation will be highly likely to be emotionally difficult for SA, which may then impact on his development, and she remains concerned in addition about the deportation disrupting SA's educational progress.

22. I note in the context of these issues for the appellant that his mother, SN, is someone who has been found by the consultant psychiatrist, Dr Dhumad, following three interviews (2019, 2022 and 2023) to suffer from recurrent depressive disorder, with anxiety and poor sleep, and to have experienced a recurrence of her childhood epilepsy which is currently being investigated

through the NHS. I find that Dr Dhumad is a qualified expert who has written reports on which reliance can be placed. In his latest report the opinion of Dr Dhumad is that there is a low risk of suicide if she remains with her son SA as he is a protective factor, although a recurrence of epilepsy might make this risk higher. I find that SN is generally a competent and resilient woman running her own business but that the removal of the appellant would in all probability make her feel low and stressed, as it did when the appellant was previously not with the family, due to his imprisonment and previous deportation, and that she would have the added anxiety that this might also trigger epileptic fits as it has done on two occasions since the appellant returned. The stress and sadness of his mother would in turn make SA's experience of the appellant's deportation more emotionally distressing and disruptive to his home life, which in turn would make it more likely that he would struggle educationally.

23. On consideration of all of the evidence regarding I find that the deportation of the appellant would be unduly harsh to SA. I find that this is the case because removal of the appellant from his life would be to remove his day to day lynch pin who supports him practically by keeping house and cooking for him, and emotionally, supporting him through life's difficulties allowing him to be happy and educationally successful. The appellant, SA and SN are a close family unit, who rely heavily on each other and do not like to reach out for help with psychological issues beyond their family unit, as shown by the reluctance of SN and the appellant to seek professional help for their psychological conditions due, as Dr Dhumad has stated, the stigma of having mental health problems within their community. They have friends but no relatives in the UK to turn to, and I find in this context that SA could not reach out to anyone but his mother SN for the intimate type of support the appellant is providing. SN would not, I find, be in a position to step in and effectively replace the support the appellant gives SA because she is already working full time running a business to provide financially for the family, and also because the impact of the appellant's deportation would be make her stressed and low in mood, and anxious about becoming debilitated by her epilepsy worsening due to the stress and sadness of her situation. I put weight on the opinion of the independent social worker, Ms Smart, that the consequences of the deportation of the appellant for SA, given the closeness of their bond and integration of their day to day lives, would be experienced as a punishment which would probably be traumatic and emotionally and developmentally damaging, and which in turn would be likely to affect his educational prospects. I reach these conclusions even though I accept the probability that SN and SA could have visits to the appellant in Sri Lanka from time to time in school holidays and contact via phone and social media, as, I find, this degree of

contact would not be sufficient to less the traumatic impact of removal of the appellant from their day to day family lives. I find, on consideration of all of the evidence, that the impact of the deportation of the appellant is not therefore merely difficult, undesirable and inconvenient but is properly found to be bleak and severe for SA.

24. In case I am wrong in this conclusion I also consider whether, in the alternative, the appellant may succeed in his human rights appeal because he can show very compelling circumstances over and above the exceptions to deportation in accordance with s.117C(6) of the Nationality, Immigration and Asylum Act 2002. This is a balancing exercise in which all evidence for and against must be placed in the balance.

25. The starting point is that there is a strong public interest in the deportation of the appellant as a foreign criminal. The appellant's criminality is however at the lower end of the scale, not relating to drugs or violence and having received a twelve month prison sentence after an early guilty plea. The public interest element relating to deterrents to other foreign nationals and reflecting public concern about offending by foreign nationals must be given full weight, but the element of that public interest which relates to potential recidivism need not being given weight as it is accepted by the respondent that the appellant is rehabilitated, and has not been convicted for any further offences in the 12 years since the index offence.

26. I find that it is probable that the appellant can speak day to day English given his very close relationship with his son for whom I accept this is his main language, and that he is financially supported by his wife so is financially independent, and these matters are therefore to be treated as neutral factors in the balancing exercise.

27. Weighing against this public interest in deportation are the following matters. Firstly, the best interests of the appellant's son, SA, a British citizen, which the evidence of the independent social worker clearly supports permitting the appellant to remain due to his pivotal emotional relationship with SA and key position as homemaker in the family. Further the probable impact on his emotional health, education and development as outlined above in the conclusions on the second exception to deportation set out above and the accepted fact that it would be unduly harsh for SA and SN to live with the appellant in Sri Lanka. Secondly, the impact on the appellant's qualifying partner, who has vulnerable mental and neurological health, again outlined above, and who has been in a committed relationship with him for over twenty years. Thirdly, the vulnerable mental health of the appellant himself which includes diagnoses of PTSD, recurrent depression and

moderate suicide risk, although I find that there would be some treatment available in Sri Lanka for these conditions and the appellant could reach out for support to Sri Lankan family, even if he has not been in touch or they are not able to provide financial support to him, and could obtain some support via modern methods of communication from his wife and son in the UK. Fourthly, only little weight can be given to the appellant's private life ties with the UK built over twenty years of residence, due to his having been present unlawfully. Fifthly, the difficulties the appellant would face on return to Sri Lanka on return to a country he has not been resident in for the past eight year, however whilst acknowledging his age, mental health issues, lack of recent work experience, minority Muslim faith and diabetes, I do not find that he would be unable to find any work or accommodation in his country of origin and find he would be able to achieve a basic level of integration on return particularly as it was not submitted that it would be impossible for his wife to send some financial support for him there at least until he were able to establish himself.

28. Bringing the strands together I find that that in light of all of the evidence that given the factors I have identified which do somewhat lessen the public interest in deportation in the appellant's case and the compelling and compassionate family life factors discussed in relation to the issue of whether the appellant's deportation would be unduly harsh combined with the little weight that can be given to his long residence private life ties with the UK and the difficulties he would face reintegrating in Sri Lanka, even though they would not be prohibitive of him achieving a basic private life in that country, mean that it can properly be found that there are very compelling circumstances over and above the exceptions to deportation and that thus the appeal succeeds on this basis too.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of a material error on a point of law in the determination of the human rights appeal.
2. The Upper Tribunal Panel set aside the decision dismissing the appeal on human rights grounds but preserve the decision dismissing the protection appeal.
3. I re-make the human rights appeal by allowing it on Article 8 ECHR grounds.

Fiona Lindsley

Judge of the Upper Tribunal

Immigration and Asylum Chamber

22nd November 2023

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Sri Lanka born in June 1965. He arrived in the UK in May 2000 and made an asylum claim which was refused. His appeal was dismissed by Judge of the First-tier Tribunal Coleman in April 2001. He was not removed from the UK and continued to remain illegally. On 21st March 2011 the appellant was sentenced to twelve months imprisonment for assisting unlawful immigration by providing illegal immigrants with jobs, accommodation and food. A deportation order was signed against him on 7th September 2011, and a human rights appeal challenging that order was dismissed in January 2012 by a panel of Judge of the First-tier Tribunal Frankish and Mrs Bray JP. The appellant was deported from the UK on 4th May 2012.

2. The appellant returned to the UK on 15th April 2015 and claimed asylum. A number of decisions were made by the respondent, but on 19th April 2022 his claim was accepted as a fresh protection and human rights claim but refused, and the appellant appealed against this decision. On 8th February 2023 Judge of the First-tier Tribunal CR Cole heard the appeal and dismissed it on all grounds.

3. Permission to appeal was granted on 15th May 2023 by Upper Tribunal Judge Kamara on the basis that it was arguable that the First-tier judge had erred in law in failing to follow country guidance; and because it was arguably not properly found that the appellant had not shown it would be unduly harsh for him to be deported whilst his son remaining in the UK in light of the evidence before the First-tier Tribunal.

4. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision should be set aside and remade.

Submissions – Error of Law

5. In the grounds of appeal and in oral submissions from Ms Mellon it is contended, in short summary, as follows.

6. Firstly, it is argued, that the First-tier Tribunal erred with respect to the protection appeal by failing to follow the country guidance in GJ at paragraph 356(4) with respect to the real risk of ill-treatment when the appellant was detained. It was found that the appellant had been detained at paragraph 40A of the decision and so it follows that he should have been found to have fallen into a risk of

persecution category if returned to Sri Lanka, and so should have been found to have succeeded in his protection appeal. It is further noted that in accordance with Chiver it was not necessary for the appellant to succeed for his entire history to have been believed, simply the central plank had to be credible. Further, it is argued, the First-tier Tribunal erred by requiring that there be corroboration as per ST (corroboration – Kasolo) Ethiopia [2004] UKAIT 00119.

7. Ms Mellon argued that the decision was flawed as the First-tier Tribunal, whilst accepting the detention in 1998 and that the appellant was briefly detained on arrival in Sri Lanka in May 2012, did not accept that he was detained in December 2012 and 2013. During the 2013 detention the appellant contended he was ill-treated. It is argued, that no proper reasons are given for rejecting the later 2012 and 2013 detentions, instead the First-tier Tribunal Judge simply lists reasons why the appellant and his wife were not credible witnesses due to inconsistencies in their evidence which related to their marriage, place of residence, religion of the appellant's wife and how the appellant travelled to the UK which, it is argued, are not pertinent to determining the credibility of the detentions and ill-treatment. It is argued that the descriptions of the detentions in the appellant's witness statement are detailed, and supported by evidence of trauma resulting from detention and ill-treatment from Dr Dhumad.

8. It was also argued that there was no mention of the appellant's diaspora activities but Ms Mellon accepted that there was no reference to the appellant engaging in political activities in the UK in the documentation, and that there was no statement from counsel who attended the hearing setting out any oral evidence on this issue either. In these circumstances we indicated we could not agree with this submission.

9. Secondly, it is argued, the First-tier Tribunal erred in law in determining the human rights appeal by taking an irrational approach to the unduly harsh test. All that was needed to determine the appeal was to consider the stay scenario with respect to the appellant's wife and child born in June 2006 (so now 17 years old) as the respondent did not argue that they could leave with the appellant.

10. It is argued that the medical and social work expert evidence showed that it would be unduly harsh to the appellant's child for the appellant to be deported. The independent social worker report of Ms Nadine Smart was properly accepted as expert evidence to which weight could be given by the First-tier Tribunal. It was written in moderate professional language, but clearly stated that the appellant's son would be traumatised if the appellant were deported from the UK. It was found by the social

worker that it was not in the son's best interests for the appellant to be deported and that it would negatively impact on his educational, social emotional and behavioural development. The appellant was found by the social worker to be his son's primary carer since 2015 as he was unable to work and his partner works full time, and it was found that the appellant and his son had a much closer relationship than when the appellant was in prison/detention and during the period he was deported to Sri Lanka. The social worker records that there is no family for the appellant's son to turn to in the UK beyond his mother; that although at the time of the report he was 16 years old he still needed the appellant's parenting; and that visits and telephone contact with the appellant in Sri Lanka would not be a substitute for the relationship the appellant and his son have between them. The independent social work report was also supported by the statement of the appellant's son and was consistent with the finding of Dr Dhumad that the appellant's son suffers from high levels of stress and worry. It is argued that the representation of the report by the First-tier Tribunal in the decision was partial and inaccurate emphasising the use of words such as "may" and "could" in a way which does not properly summarise the findings of that report. The First-tier Tribunal therefore erred in law in failing to properly consider material evidence when determining if it would be unduly harsh to the appellant's son for him to be deported to Sri Lanka.

11. Thirdly, it is argued, the First-tier Tribunal erred in law in determining the human rights appeal with respect to the consideration of the appeal under Article 8 ECHR looking for very compelling circumstances over and above the exceptions to deportation because there was a failure to look at and balance relevant factors including the relatively short custodial sentence the appellant received; the fact that the appellant entered a guilty plea at an early stage; the appellant's rehabilitation; the ten year relationship the appellant has had with his partner and the strength of his family life ties with his partner and son; the appellant's partner's depression; the appellant's accepted diagnosis of PTSD, moderate depression and suicide risk; the country of origin evidence of problems with mental health care in Sri Lanka and stigmatisation of those with mental health problems; the discrimination of those of Muslim origin in Sri Lanka and the best interests of the appellant's child. There was also a mischaracterisation of the offence of the appellant as people smuggling rather than providing employment to illegal persons.

12. There was no Rule 24 notice provided by the respondent. It was argued in short summary by Mr Tufan as follows.

13. With respect to the first ground Mr Tufan argued that there were plenty of detailed negative credibility findings made by the First-

tier Tribunal which justified the conclusion that the appellant had not made out his protection claim to the required standard of proof. There were many inconsistencies including about the appellant having been previously married and having four adult children in Sri Lanka.

14. With respect to the second ground Mr Tufan argued that the First-tier Tribunal had set out the correct test for unduly harsh and therefore direct itself correctly. He argued that it was a high test to show that the treatment of the independent social worker report was irrational. We did interject to point out that whilst this was one contention by the appellant another was that material evidence had been ignored by a mischaracterisation of the report. Mr Tufan argued however that the evidence simply did not meet the threshold for being unduly harsh, namely being bleak or severe. He argued that the First-tier Tribunal had properly considered all of the evidence in the round, including that of Dr Dhumad, and had rationally concluded the test of unduly harsh was not met in the case of this 16 year old boy.

15. With respect to the third ground Mr Tufan argued that the appellant had himself accepted he could access medical treatment in Sri Lanka and had never argued he was at risk as a Muslim, and that the very high test of very compelling circumstances over and above the exceptions clearly was not met on the facts of the case.

16. At the end of the hearing the Panel informed the parties that we found that the First-tier Tribunal had erred in law in the determination of the human rights appeal with reference to the unduly harsh exception to deportation but did not find that the First-tier Tribunal had erred in law when determining the protection appeal. We did not give an oral judgment but set out our reasons in writing below. We indicated however that all the findings in relation to the asylum appeal are preserved and all of the findings in relation to the Article 8 ECHR appeal were set aside. It was agreed that the remaking hearing would take place in the Upper Tribunal, but would be adjourned as the appellant wished to obtain further psychiatric evidence and put in updating witness statements, and in any case a Tamil interpreter was required and the appellant’s wife and son, whom he wishes to call as witnesses, were not present in the Upper Tribunal.

Conclusions – Error of Law

17. We find that there is no material error of law in the determination of the protection appeal. This is because we find that there are good reasons given in the decision of the First-tier Tribunal why the appellant is not a credible witness, and we find the key detentions in December 2012 and 2013 which are not accepted as having been evidenced to the lower civil standard of proof rely

primarily on the evidence of the appellant. The First-tier Tribunal Judge Coleman, who heard the appellant's first asylum appeal in 2001, found the appellant not be credible. The current First-tier Tribunal found that the appellant's evidence was not credible when considered in the round at paragraph 44 of the decision. It is clear that the appellant's mental health was factored into this assessment at paragraph 43 of the decision. Detailed examples of inconsistencies in evidence or a failure to provide a complete account are given in the decision of the First-tier Tribunal in relation to addresses; the religion of the appellant's wife; the date on the marriage certificate; the route by which the appellant came to the UK; the application for an Irish visa in 2013; and the appellant's first wife. The only other evidence supporting the appellant having been detained and ill-treated in 2013 is the medical report of Dr Dhumad which attributes the appellant's mental health problems to this detention and ill-treatment. However, we find that the First-tier Tribunal has properly found that this is not supporting evidence to which weight can be given in relation to the attribution of the appellant's mental health problems because, as set out at paragraphs 64 to 67 of the decision, the Dr Dhumad report records the appellant as having no psychological or mental health problems prior to the alleged torture and detention in 2013 but a Rule 35 report from October 2011 records the appellant has having been "emotionally and mentally affected from the two periods of captivity".

18. It was found, at paragraphs 39 to 40 of the decision of the First-tier Tribunal, that the appellant was very briefly detained and interrogated on arrival in Sri Lanka in May 2012, but was not tortured or ill-treated – indeed he did not claim that any ill-treatment took place at this stage. The country guidance in GJ is about prospective events and the appellant is not entitled to succeed in his appeal simply because this aspect of his claim was found to be credible. Good reasons are given why it is not believed that the appellant will be detained in the future as the rest of his history about what happened on his return to Sri Lanka in2012 is not believed, and so the findings amount to an acceptance that he was interrogated by the Sri Lankan authorities, found to be of no interest and released back into the community with no further interest shown in him.

19. With respect to the second ground however we find that the First-tier Tribunal has erred in law. This is because we find that the appellant correctly contends that the evidence of Ms Smart, the independent social worker, has been mischaracterised in the decision to the extent that the First-tier Tribunal has failed to consider material evidence that it considered overall to be worthy of weight.

20. We find that there is a correct legal direction on the definition of unduly harsh given by the First-tier Tribunal at paragraph 123 of the decision.

21. At paragraphs 95 and 96 of the decision it is noted that Ms Smart, the independent social worker, is a suitably qualified expert who undertook a lengthy interview with the family and reached conclusions with reference to relevant source materials. It is accepted that her evidence is that it is in the best interests of the appellant's son that he not be deported to Sri Lanka at paragraph 97, and at paragraph 98 of the decision it is noted that he is a British citizen.

22. Whilst it is accepted that Ms Smart's view is that the deportation of the appellant would be traumatic for his son at paragraph 100 of the decision, and at paragraph 101 that Ms Smart's opinion is that: "the structure, stability, and consistency the Appellant's child currently enjoys is "disrupted abruptly", then it is more likely than not to "create confusion, anxiety and emotional instability, which would have a detrimental effect on his educational, social, emotional and behavioural development". The force of these conclusions is then found to be reduced by the use of "may" and "could" in relation to a number of outcomes within the report. It would appear that the First-tier Tribunal was ultimately not prepared to give weight to the summarised conclusions because, for instance at paragraph 103 it was not certain that the appellant would suffer mental health problems as a result of his trauma. We find that this is the wrong standard of proof. The appellant had to show, as is in fact set out at paragraph 126 of the decision, that on the balance of probabilities that it would be unduly harsh for his son to remain in the UK without him, not that it was certain it would be so. Further within the report there are plenty of negative consequences which are found "will" happen or "are more than likely than not" to happen: for instance the confusion, anxiety, and emotional instability detrimentally affecting the appellant's son's education, social, emotional and behavioural development; and irreparable damage to the close bond and meaningful relationship between the appellant and his son. It would appear that weight has not been given to these outcomes that are shown on the balance of probabilities.

23. The First-tier Tribunal finds at paragraph 113 that the fact that the appellant's son was not significantly impacted by the previous separation from the appellant and that this means that the appellant's deportation would likewise not be unduly harsh, but ignores the reasoning within the independent social work report that a current separation brought about by deportation would be different and more damaging as it would be permanent, would take place in the context of the appellant being his son's primary carer and after a period of 7 years in which their relationship has

deepened, and that the appellant's son is at a challenging developmental stage of life where he needs support and guidance. We find that there is also an error of law in failing to consider this material evidence.

24. The First-tier Tribunal finds that the impact of the appellant's deportation on his son could be mitigated by visits and modern methods of communication at paragraph 115 of the decision, but this ignores material evidence in the opinion of Ms Smart that contact other than in the form it currently takes would not be meaningful to the appellant's son and would be experienced as a form of punishment and would be traumatic. Whilst Ms Smart does mention the possibility of interventions such as therapy and safeguarding services these would clearly to be to try to address the trauma and emotional distress, and would not prevent it taking place. We find that there is insufficient reasoning addressing this matter in the conclusion on this issue at paragraph 128 of the decision.

25. We find therefore that the conclusion that the deportation of the appellant would not be unduly harsh to the appellant's son to be undermined by errors of law in failing to give full consideration to all of the material evidence in the report of Ms Smart.

26. With respect to the third ground we find that some relevant factors have been omitted from the consideration of the Article 8 ECHR proportionality balancing exercise looking to see if there are very compelling circumstances over and above the exceptions to deportation. We are concerned that the criminal offending had been factually mischaracterised in the decision at various points, the appellant was not convicted of trafficking people to the UK but of providing work to illegal people in the UK; that his strong family life bond with his partner and child was not placed in the balance, and that the best interest of the appellant's child in the appellant remaining in the UK were not explicitly noted at this point. We are satisfied however that the First-tier Tribunal factored in the appellant's mental health, his own evidence that he could access a doctor in Sri Lanka, the fact of the appellant having other family living in Sri Lanka, the fact that his offending took place many years ago and the custodial sentence was only 12 months. We would not however have found a material error on this ground were it not for the error found above with respect to the unduly harsh exception which necessarily impacts on this assessment, and which makes it necessary to set aside this part of the decision so that the Article 8 ECHR appeal can be remade in its entirety.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of a material error on a point of law in the determination of the human rights appeal.
2. We set aside the decision dismissing the appeal on human rights grounds but preserve the decision dismissing the protection appeal.
3. We adjourn the re-making of the human rights appeal.

Directions:

1. The remaking appeal will be relisted at the first available date with a 4 hour listing.
2. A Tamil interpreter will be booked for the hearing.
3. Any party wishing to adduce further evidence relevant to the Article 8 ECHR appeal must file with the Upper Tribunal and serve on the other party that evidence ten days prior to the date it is listed to be heard.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we 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. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16th August 2023