Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03502/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 12th September 2017 **On 12th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS MADUSHI WEERARATNE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Raza of Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 25th of August 1990. She appeals against a decision of Judge of the First-tier Tribunal Hawden-Beal sitting at Birmingham on 23rd November 2016 which dismissed the Appellant's appeal against a decision of the Respondent dated 25th of January 2016. That decision was to refuse to grant the Appellant further leave to remain on the basis of her private life under the Immigration Rules and Article 8 of the Human Rights Convention.

2. The Appellant entered the United Kingdom with entry clearance as a visitor from 18th of February 2002 to 18th of August 2002. She was given further entry clearance as a visitor from 18th of March 2003 to 18th of September 2003 and thereafter she and her mother overstayed. The Appellant applied for leave to remain outside the

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Immigration Rules on 10th of September 2010 which was refused on 23rd of October 2010. A further application on 2nd of April 2013 was rejected on 29th of April 2013. An application on 20th of June 2013 was refused by the Respondent on 12th of August 2013. On 30th of January 2014 she was served with notice of removal from the United Kingdom. On 21st of February 2014 she applied for leave to remain which was refused on 27th of February 2014. An appeal against this decision was unsuccessful in front of Judge of the First-tier Tribunal Aujla. I refer to that decision in more detail below. On 14th of August 2015 the Appellant applied for leave to remain in the United Kingdom on the grounds of her private life indicating she did not wish to return to Sri Lanka. It was refusal of that application on 25th of January 2016 which has given rise to the present proceedings.

The Explanation for Refusal

3. The Respondent was not satisfied that the Appellant met the requirements for leave to remain on the basis of her private life pursuant to paragraph 276 ADE (1) (v) of the Immigration Rules. The Appellant was said to be not under the age of 25 years. This appears to have been a mistake, the requirements of the paragraph have to be met at the date of application. The application was dated 14th of August 2015 11 days short of the Appellant's 25th birthday. Having said that, the refusal letter then went on in the next paragraph to accept that the Appellant was aged between 18 and 25. The Respondent did not accept that the Appellant had spent at least half of her life living continuously in the United Kingdom at the date of application. The Appellant had lived in Sri Lanka for 12 years 7 months and 6 days which was longer than the amount of time she had lived in United Kingdom at the date of application.

4. The Respondent did not accept that the Appellant could meet the requirements of the following sub-paragraph (vi) because the Respondent did not find there were very significant obstacles to the Appellant's reintegration back into Sri Lanka. It was not accepted the Appellant had no ties to Sri Lanka. During the time spent in Sri Lanka the Respondent considered that the Appellant would have been exposed to and have a level under of understanding of the cultural norms of that country. Whilst the Respondent accepted that the Appellant might have some initial difficulty upon return to Sri Lanka there was no reason to believe she would not be up to establish contact with her family and resume family life with them in Sri Lanka. She was a healthy female aged 25 and while the material quality of her life in Sri Lanka might not be at the same level as it was in United Kingdom this did not give rise to any right to remain here. The Respondent did not consider there were any exceptional circumstances to justify a grant outside the rules.

The Appellant's Case

5. The Appellant argued that the Respondent should have included her first entry into the United Kingdom in 2002 as relevant to the consideration of the time that she had spent in United Kingdom. She had not lived in Sri Lanka since she was 12 years old. There was no factual basis for the assumption that she could reintegrate into Sri Lanka. Given that she had spent half of her life in the United Kingdom her personal

circumstances were sufficiently compelling for her application to be considered outside the Rules. The Appellant told the Judge that a job offer from a company called Digital Vision was still open to her. She no longer lived with her mother but with a friend because she wanted to be independent and anyway her mother could no longer support her. As at the date of hearing at first instance the Appellant's mother who is also still in United Kingdom was awaiting a decision on her claim. Her father's family did not want to know the Appellant because she and her father had never really got on and she had had no contact with him since he was deported back to Sri Lanka. Her father had remarried once he had returned to Sri Lanka. Her maternal grandparents were dead but her paternal grandparents were still in Sri Lanka but she had not spoken to them for 10 years.

The Decision at First Instance

6. At paragraph 18 the Judge noted the differences between the application which was before her and the application which had been before Judge Aujla. These were: the passage of time; the Appellant had completed her education (she had obtained a first-class degree from Middlesex University) and was living with friends; she had an offer of a job and this was her solo application not one made with other members of her family. The appeal was based on the Appellant's private life, the Judge finding that Article 8 family life was not engaged. The Appellant had established a private life in this country and her removal would interfere with that private life the issue (outside the Rules) was the proportionality of that decision.

7. At paragraph 22 the Judge went into some detail as to the calculation of precisely how much time the Appellant had spent in this country. The Appellant had spent over 12 ½ years in Sri Lanka before March 2003 when she came to the United Kingdom and had not spent at least half of her life here when she made the application. The subsection was no longer available to the Appellant because she was now aged 26.

8. The 2nd issue the Judge had to decide was whether there were very significant obstacles to the Appellant's integration back into Sri Lankan society. Judge Aujla had noted that there was no maternal family in Sri Lanka but there was still paternal family there albeit there was no contact with them. The Appellant spoke Sinhalese and understood the language and circulated within the Sri Lankan community in this country maintaining social and cultural connections with her background as a Sri Lankan national. The Appellant attended religious functions. The passage of time, approximately 13 months, since Judge Aujla's dismissal of the Appellant's appeal did not alter Judge Hawden-Beal's conclusions. The Appellant still had family in Sri Lanka even though she had said she had no contact with her father since he left the United Kingdom in 2010. This time she would be returned to Sri Lanka without her mother and brother, as this was her solo appeal. There was no evidence of very significant obstacles to the Appellant integrating back into Sri Lankan society. The Appellant could not meet the rules.

9. On the issue of proportionality outside the rules, the Judge noted the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002. The Appellant had been educated here and would have had access to NHS treatment at some stage and therefore there had been a cost to the public purse. None of the family had leave to remain in this country after September 2003 and were over stayers. That the Appellant had been financially supported by her mother did not confer upon the Appellant a positive right to remain. Pursuant to subsection (5) of section 117B, little weight could be placed upon a private life established when a person's immigration status was precarious. The Appellant's status had always been precarious because it had been dependent upon the grant of further leave to remain. The Judge placed little weight upon it. The Appellant was a fit and healthy young lady who would be up to make use of the educational qualifications obtained in United Kingdom to re-establish a life in Sri Lanka. The interference caused by removal was proportionate and the appeal was dismissed.

The Onward Appeal

10. The Appellant appealed against this decision arguing that the Appellant's representative (different Counsel to the one who appeared before me) had not made a concession at the hearing that the Appellant could not meet the requirements of the rules. The Judge's reasoning was flawed when she had said that the Appellant could not meet the Rules because the Appellant's application was made on the wrong form. The Judge was wrong to dismiss the Appellant's case that she had spent over half of her life in United Kingdom at the date of hearing. There was little or no public interest in seeking the Appellant's removal. The proportionality exercise had been infected by the failure to separate the Appellant's current circumstances with those in her previous appeal (before Judge Aujla) when she was younger and a dependent of her mother. The Appellant's education had been achieved in her more important formative years and she would be returning to a country she had last lived in as a 12-year-old minor. She had excelled in her studies obtaining a first-class degree.

11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal O'Garro on 18th of May 2017. In refusing permission to appeal she wrote that the Judge had thoroughly analysed the Appellant's Article 8 rights both under the Immigration Rules and under the Human Rights Convention taking into account all relevant factors. The grounds disclosed no arguable error of law.

12. The Appellant renewed her application to the Upper Tribunal reiterating the point that at the date of hearing the Appellant had spent more than half of her life in the United Kingdom. The Judge's approach had been unfair/unreasonable. There had been a failure to take into account the length of the time the Appellant had spent in United Kingdom and the strong roots she had put down in this country.

13. The renewed application for permission to appeal came on the papers before Deputy Upper Tribunal Judge Holmes on 4th of July 2017. In granting permission to appeal he wrote that it was arguable that the Judge had considered the Appellant's ability to meet the Immigration Rules at the date of decision and not at the date of the hearing

before her. I pause to note here that Judge Holmes did not indicate why that was an arguable error of law in the light of the clear wording of the paragraph.

14. Judge Holmes added that Judge Hawden-Beal had arguably misdirected herself that there existed no material change circumstances since the assessment of proportionality in the previous appeal before Judge Aujla. By the date of the hearing the Appellant had lived more than half of her life in United Kingdom albeit unlawfully for the majority of that time. She first entered the United Kingdom at the age of 11th of February 2002 which the Judge appeared to have overlooked arguably taking her first entry as March 2003. Judge Holmes did not make it clear why that was an arguable error of law given that the wording of the paragraph requires the applicant to have lived continuously in United Kingdom for the relevant period. Since the Appellant evidently return to Sri Lanka at the end of her previous visit that continuous period would have been broken at that time.

15. Although the Appellant was 26 at the date of hearing Judge Holmes said she had arguably met the requirements of the subparagraph before she turned 25. It was her circumstances viewed as a whole that should have been the central focus. Although this was a private life appeal the section did not require the Tribunal to give no weight to the private life that she had established. The Judge appeared to have accepted that the Appellant would be returning to a country where she had no family support and which she had left as a young child. The Judge had failed to evaluate adequately the difficulties that the Appellant would face in so doing.

16. The Respondent replied to the grant of permission saying that the grounds were no more than an attempt to reargue the case put before the Judge at the First-tier. Weight was a matter for the Judge except where prescribed by statute. The Judge properly assessed the evidence and properly applied the law.

<u>The Hearing Before Me</u>

17. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the determination such that it felt to be set aside and the matter reheard. If there was not, then the decision at first instance would stand. For the Appellant reliance was placed on the decision of Judge Holmes in granting permission. The previous decision of Judge Aujla in 2014 had formed the starting point for the Judge in this case. There had been no real engagement with the change of circumstances since the appeal before Judge Aujla. Judge Hawden-Beal had simply adopted the previous Judge's findings. There had been no proper assessment of the impact on the Appellant upon return of being a single woman. The Judge said the Appellant had family ties but had not looked at what connections the Appellant had. The Appellant said she had no paternal family members she had no contact with the father or his family. To say she had family members was not enough. When she entered the United Kingdom as a child the Appellant's status could not be said to be precarious. The Judge had failed to engage with the Appellant's private life claim of 12 years and 6 months more than half of her life spent in this country.

18. In reply for the Respondent it was argued that the Judge had looked at the issue of very significant obstacles. She had taken Judge Aujla's decision as a starting point but indicated the differences between then and now. This was an independent single woman who would be returning to her country of origin. There was no evidence of very significant obstacles the only evidence was in the Appellant's witness statement in which she had said that she had no family in Sri Lanka and no life there to go back to. She had no house or any business interests. She did not know the culture or the way of life there. Although she spoke the language it was not her first language. She had no friends in Sri Lanka to help her survive and she would struggle to live there. That was the sum of what the Appellant had submitted. Without further evidence of significant obstacles, it could not be said that the Judge was wrong in her approach.

19. The Article 8 assessment carried out by the Judge was sufficient. The Judge acknowledged the Appellant was fit and healthy and could use her educational qualifications. If the Judge was wrong under the Immigration Rules, then it would follow that the assessment outside the rules was also flawed but if it was accepted that the Judge had made sufficient findings under the Rules the remainder of her determination could not be wrong. Finally, in conclusion counsel reiterated that the Judge had failed to make any findings of fact. She appeared to have accepted that the Appellant had no relationship with the paternal family. There had been no evaluation of the Appellant's private life or friends or colleagues or her educational qualifications. There was no mention of the extent of her integration.

Findings

20. The first issue the Judge had to decide was whether the Appellant could meet the Immigration Rules. In order to come within the Rules the Appellant's position had to be assessed at the date of application. The position at the date of decision or the date of hearing was irrelevant. The wording of the Rules was quite clear. As at the date of application the Appellant could not show that she had lived more than half of her life in this country. The previous visit to the United Kingdom as a visitor could not count for the reasons which I have given above. The Appellant had to show that the time she had spent in this country had been spent continuously not partly in this country and partly in Sri Lanka. I accept that if the word continuously had not been used in the paragraph the interpretation of Judge Holmes in granting permission to appeal would be correct but that is not the case.

21. The Appellant's continuous period of residence in this country was from March 2003 until 14th of August 2015 a period of approximately 12 years and 5 months. At the date of application, the Appellant was 11 days short of her 25th birthday and thus she narrowly missed satisfying the requirement of the Rule. There is no such thing as a near miss, one either meet the Rules or one does not. In this case the Appellant did not meet the Rules.

22. The alternative basis to succeed under the Immigration Rules was that there would be very significant obstacles to the Appellant's integration into Sri Lanka. This was very much a matter of fact for the Judge to decide. The Judge took as her starting

point the decision of Judge Aujla but accepted that time had moved on and there had been consequential changes. The argument in this case essentially disagrees with the Judge's evaluation of those changes. The Appellant has done very well in her education and she has exercised a degree of independence living away from her mother. The Appellant's complaint is that if she goes back to Sri Lanka she will know no one there, will not have a job and will have no support network.

23. There was no country background material or other evidence before the Judge to indicate what the Appellant's position as a single woman returning to Sri Lanka would be. The Appellant is of Sinhalese ethnicity and speaks that language as she herself accepts. The Appellant has a marked reluctance to return to Sri Lanka as she makes clear in her statement whose relevant passage I have quoted above. The Judge was of the view that the difficulties to which the Appellant pointed did not represent very significant obstacles. The Appellant was vague in her evidence as to why she had no contact with her father or grandparents, the Judge's conclusion was that the Appellant had family in Sri Lanka. I interpret paragraph 25 of the determination as indicating that the Judge did not consider that the Appellant's claim that her relationship with her father and his family had broken down to be a very significant obstacle. That was a matter for the Judge taking a holistic assessment of all of the evidence.

24. Although Judge Holmes indicated that the Judge had arguably erred in not assessing what those difficulties were the Judge had precious little evidence before her of what those difficulties might be. The Appellant is a 26-year-old fit and healthy young woman, highly intelligent, she speaks the language and has not in fact lost the cultural ties to Sri Lanka that she claims to have lost, see paragraph 23 of the determination. It was a matter for the Judge to decide whether in the light of that evidence the Appellant would indeed face very significant obstacles. Her decision that the Appellant would not face such obstacles was one open to the Judge on that evidence. The Judge gave sound reasons for her decision and I reject the argument that the Judge was wrong to conclude that the Appellant could not have succeeded under the Immigration Rules.

25. That being the case matters moved on to consider whether the Appellant could succeed outside the rules. The Appellant's status as a child could not necessarily be held against her as being precarious since she would not have been in control of her own actions. Having said that for the seven years prior to the appeal the Appellant had been an adult and had had no leave to be in this country. The Appellant's private life that she had built up during that period such as her academic qualifications had thus been established at a time when the Appellant's status undoubtedly was precarious if not unlawful. There was no error of law for the Judge to say in her determination when carrying at the proportionality exercise that the interference with the Appellant's private life was proportionate to the legitimate aim pursued since little weight could attach to the Appellant's private life of the last seven years. The Appellant had had access to educational facilities at a time when she had no entitlement to them and it appears that she had had some form of medical treatment

although that was not specified in the determination and not raised as an argument before me.

26. To succeed outside the rules the Appellant had to show something compelling. The Judge did not find that to be the case and that ultimately was a matter for her to decide upon. The onward appeal in this case is no more than an attempt to rehearse arguments rejected by the Judge at first instance for cogent reasons. The discretion afforded to the Tribunal under the jurisprudence of Article 8 may lead, as the Higher Courts have themselves acknowledged, to differing decisions by two Judges on essentially the same facts without either Judge being wrong in law. That I find to be the case here. The issue is not whether another Judge might have decided the Appellant's case differently but whether this Judge in deciding the case made a material error of law on the way. I find that is not the case here. I do not find that there was any material error of law in the Judge's determination and I dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 22nd of September 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 22nd of September 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge