



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/25873/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 June 2017  
Prepared 26 June 2017

Decision & Reasons Promulgated  
On 23 October 2017

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Claimant

**and**

**MR JANAKA JITHA FERNANDO MUTHUTHANTRIGE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Presenting Officer

For the Respondent: Mr A Burrett, counsel instructed by Lawland Solicitors

**DECISION AND REASONS**

1. The Appellant is hereafter referred to as “the Secretary of State” and the Respondent is referred to as “the Claimant”.
2. The Claimant, a national of Sri Lanka, date of birth 4 July 1966, appealed against the Secretary of State’s decision, dated 2 July 2015, to refuse an application for leave to

remain under the Immigration Rules, particularly Appendix FM and paragraph 276ADE, but also with reference to Article 8 ECHR. His appeal came before First-tier Tribunal Judge Malone (the Judge) whose decision [D], on 11 August 2016, dismissed the appeal under the Immigration Rules, but allowed it on Article 8 ECHR grounds.

3. On 30 March 2017 I decided that the Original Tribunal had made an error of law and that the decision would have to be remade in the Upper Tribunal. It is clear, as I directed, that the issues to be addressed were whether Article 8 ECHR was engaged, and if so, whether the Secretary of State's decision was disproportionate or compliant with Article 8 ECHR.
4. I gave a direction for the service of any further evidence to be provided seven working days before the resumed hearing.
5. The Claimant did produce a bundle of additional documents, being a supplementary statement by the Claimant, a statement by the Claimant's partner, correspondence from the Claimant's partner's children and other family members, a medical letter relating to the Claimant's partner's health, family photographs and information relating to one of the Claimant's partner's daughter, together with recent evidence to prove address and effectively cohabitation.
6. Mr Tufan emphasised at the outset that the Secretary of State held to the view that there were no exceptional or compelling circumstances that warranted the consideration of Article 8 outside of the Rules.
7. Mr Burrett submitted that there were such circumstances which went to show that the Secretary of State's decision was disproportionate.
8. The background to the relationship between the Claimant and his partner, both of whom remain married to others at the present time, was fully set out in the original Claimant's bundle that was before the Judge, together with the supporting documentation, evidence of their cohabitation and their then current arrangements. The Judge in considering this matter accepted that the Claimant's partner had been

the subject of abuse and domestic violence, which had been witnessed by their children, and that she, that is the partner, had been in an unhappy relationship which had been brought to an end by the process of legal separation in the British courts.

9. The Judge found all those witnesses who gave evidence honest and reliable and accepted their oral and written evidence. Those matters are summarised succinctly [D15 to 35]. Whilst it was accepted that the Claimant could not meet the family life requirements set out in Appendix FM, or the private life requirements set out in paragraph 276ADE, the Judge accepted that it was for the Claimant to show compelling circumstances justifying the consideration outside of the Rules.
10. The Judge then set [D 37] and following considerations which he found as a fact bore on the issues, and, in particular, confirmed that the Claimant enjoyed a family life with his partner and their then adult children. The adult children of the Claimant's partner are all undertaking further education at university and, with the exception of the second child who had a period in college accommodation, which has come to an end, reside at home. They are undoubtedly dependants of the Claimant's partner and they are certainly dependent to a degree for their emotional support and guidance upon the Claimant. The Judge had no doubt that the Claimant's partner had been abused and bullied and emotionally blackmailed by the father of her children, and that he had left her with debt and caused problems with her physical health through the pressures he had put upon her. The children had grown up witnessing their mother's abuse, and they did so, as the Judge found, when they were at vulnerable ages. The Judge realised that the Claimant had brought some sense of stability and security and wellbeing to the family and had played a major role in taking them away from the darkest areas where the Claimant's partner's husband had taken them. It is also clear that the children wrote in support of the Claimant and gave evidence which the Judge accepted, and found of significant value and contribution, in his assessment of those exceptional circumstances.
11. Whilst the Judge erred in failing to properly address the public interest, the fact is that the considerations of the public interest are important, not least in view of the

Claimant's poor immigration history and his personal circumstances. I take into account that the Judge made a favourable assessment of the Claimant's character and contribution whilst recognising that the Claimant was an overstayer and had worked in the United Kingdom.

12. It is clear that the Judge understood, although it was not perhaps as fully expressed as it could have been, the extent to which the family members truly related to him and saw the value he gave to settling the relationship with their mother, his partner, and the stressful times that they had all been through. The Claimant's daughter, Lakna, who is at Hertfordshire University studying Economics, her daughter Nisdi, who is studying Automotive Design at Brunel, and her son, Santush, who is studying Business and Management at Hertfordshire University all speak well of the Claimant and the contribution he makes. Photographs similarly produced evidently show affection, both by the Claimant's partner and the children.
13. The Claimant's partner's daughter Nisdi gave evidence and was not challenged as to the substance of the issues which she addressed in her letter dated 19 June 2017. Similarly, there was no challenge by Mr Tufan to the contents of the 20 June letter from Lakna or the 29 June letter from Santush. Similarly, there was no challenge to the Claimant's partner's cousin's statement, nor to the Claimant's father's statement, nor to the Claimant's partner's brother statement.
14. The overall position was that on the findings of fact which stood, which were not actually challenged by the Secretary of State, I find the circumstances are not addressed within the Rules and they are sufficiently exceptional to be taken into account in an assessment of Article 8 ECHR. I therefore find on the balance of the information relating to the Claimant, his partner and the family of which he is part, that the Claimant has discharged the burden of proof, of showing that Article 8 ECHR was engaged in that Article 8 family/private life rights were engaged, and that the effect of interference was and is significant. I find that the Secretary of State's decision is lawful. There is a clear the public interest in maintaining immigration control and the public interest in dealing with persons who breach UK

immigration law. The question is whether the public interest is outweighed by the particular circumstances of the Claimant's case.

15. In considering this matter I have applied Sections 117A and Section 117B of the NIAA 2002 (as amended) and taken into account the fact that the Claimant can work, could obtain employment and wishes to do so. I also take into account that his English language skills can be improved and such progress as he has made has been in the right direction. I further find that the position is there is no evident reason why the Claimant should be a burden upon the taxpayer. He is fit, well, able to work and in the circumstances wishes to continue to make a contribution to the upbringing of three, albeit adults, young persons who have yet to make their own way in life; being independent.
16. In these circumstances I have particularly noted the submissions of Mr Tufan concerning the generality of the law, as expressed in relation to the position of return to Sri Lanka by the Claimant for the purposes of making an out of country application, and the length of time in which such applications are processed. Of course the outcome is unresolved as to what that might be, but the Home Office figures for the number of days in which 93% of applications are decided is 60 days, and 100% of applications are decided in 90 days.
17. I take into account the position of whether or not it is reasonable to expect the Claimant to go back to Sri Lanka. In considering that matter I have also taken into account the decision of the Supreme Court in Agyarko [2017] UKSC 11 and the view expressed therein about both the precariousness of life in the UK and the extent to which there needs to be an assessment of the precariousness of the circumstances in which a person has known themselves to be. I do so, but it does not seem to me that the overall body of the evidence goes to show that a person should, in each and every case, be expected to return to their home country and make an out of country application: For it to be so would be disproportionate and at odds with case law on the point.

18. I do not speculate on whether the Claimant could meet the requirements of the Immigration Rules, although Mr Burrett submitted that they self-evidently would, but rather, he argued, that it is simply disproportionate to expect that course to be followed. I agree with Mr Burrett that requiring the Claimant to do so would be disruptive, costly, create unnecessary uncertainty and upset to no meaningful purpose other than an unreasoning application of the Rules.
19. In the circumstances it seemed to me that the precariousness of which the Claimant has been under relates both to private and family life issues, but that the sum of the favourable points that can be properly made in relation to the best interests of British nationals, be they under 18 or recently so over, means that they should not suffer the unsettling consequences, for which there is no need or purpose, by the interruption in their care and way of life, in the Claimant having to remove to Sri Lanka.
20. I conclude that the public interest should be given substantial weight but is outweighed in the proportionality assessment by the circumstances of the adult children of his partner, the role he plays in their lives and the interests of his partner. It must be material that the partner and the children are all British nationals who have largely grown up in the United Kingdom and certainly made their adult lives here and no interest in removing from the UK. I find the Secretary of State's decision is disproportionate.
21. I have formed no view as to whether or not there really are threats to the Claimant from his partner's ex-husband in the sense of the burden and standard of proof in civil cases, but it seems to me that the Claimant's partner's ex-husband has been accepted as a man of violence, of intemperate behaviour, and he has articulated threats of his intentions to do the Claimant harm which, apparently have been made both to the Claimant's children but also persons who he knows in the United Kingdom.

22. In these circumstances, whilst I make no final conclusion on the matter, it seems to me that it is a relevant consideration to which some weight could be given as to difficulties that the Claimant might face on a return to Sri Lanka.

**NOTICE OF DECISION**

23. The Original Tribunal's decision does not stand. The following decision has been substituted. The appeal of the Claimant has been allowed under Article 8 ECHR.

**ANONYMITY DIRECTION**

No anonymity direction was sought nor is one required.

**TO THE RESPONDENT**

**FEE AWARD**

A fee of £140.00 was paid and there is essentially no material change in the circumstances, rather that the exercise has been undertaken in connection with the reasonableness of the decision. In the circumstances it seems to me that a fee award in that sum is properly to be made.

Signed

Date 10 August 2017

Deputy Upper Tribunal Judge Davey

P.S. I regret the delay in promulgation which was due to the case-file and typing being miss-located.