Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07143/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2019	**On 15 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ARUMUGAM SUNDARALINGAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Emma Harris, Counsel instructed by NAG Law Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal from the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State for the Home Department ("the Department") to refuse to grant him leave to remain on the grounds of private life pursuant to Rule 2767ADE(1)(iii). The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Sri Lanka, whose date of birth is 27 May 1949. On 20 July 2017 he applied for leave to remain on family or private life grounds. In a covering letter, his solicitors said that their client had entered the UK in March 1996 and had lived continuously in the UK for the past 20 years. He was also in relationship with a partner who was present and settled in the UK.

3. On 9 March 2018 the Department gave their reasons for refusing the application. The application fell for refusal on grounds of suitability, because he had been convicted at Guildhall Crown Court on 31 March 2000 for indecent assault on a female, an offence committed on 16 December 1997, and he had been sentenced to 18 months' imprisonment. His presence in the UK was thus not conducive to the public good, and paragraph S-LTR.1.4 of Appendix FM of the Rules applied.

4. He also had failed to provide information and documents requested in a letter dated 16 December 2017 and again in a letter dated 31 January 2018. He was also asked to provide evidence of his partner's address, which he had failed to provide. He had provided no reasonable excuse for failing to do so, and so paragraph S-LTR.1.7 of Appendix FM of the Rules also applied.

The Decision of the First-tier Tribunal

5. In a decision promulgated on 16 January 2019, Judge Zahed gave his reasons for dismissing the appellant's appeal following a hearing at which he was represented by Counsel, and at which the Judge received oral evidence from the appellant and from Ms [LP].

6. The Judge found at paragraph [16] that the appellant had sought to bolster his claim by stating that he had a partner, when in fact Ms [P] was not his partner. Accordingly he made an adverse credibility finding against the appellant for advancing this false claim.

7. The Judge then turned to consider the appellant's private life claim. He found that the appellant had been living in the UK continuously for 20 years and 3 months at the date of application. Discounting the 9 months he served in prison, the appellant had been living continuously in the UK for 20 years and 6 months. Thus, he had been living continuously in the UK for at least 20 years. The Judge found that nonetheless the appellant could not succeed under the Rules as his application fell for refusal under S-LTR.1.4.

8. The Judge went on to conduct a proportionality assessment outside the Rules. He concluded that the appellant's circumstances were not such as to be one of those rare cases that Article 8 could be granted outside the Rules, notwithstanding the fact that he had been living in the UK for over

20 years. On that basis, he dismissed the appellant's human rights appeal.

The Application for Permission to Appeal

9. The application for permission to appeal was settled by the appellant's solicitors. They pleaded that the Judge had undertaken no meaningful assessment of the refusal under paragraph S-LTR.1.4. The Judge had failed to consider whether in fact the presence of the appellant in the UK was not conducive to the public good as at the date of the hearing. The Judge's failure to conduct such an assessment was incompatible with the provisions of paragraph S-LTR.3.1. His failure to conduct such an assessment was material to the outcome, as the Judge found at paragraph [27] that the balancing exercise was finely balanced.

The Reasons for Granting Permission to Appeal

10. On 28 February 2019, Judge PJM Hollingworth granted permission to appeal for the following reasons: "*It is arguable that the Judge has set out an insufficient analysis of the factors appertaining to suitability in this context pursuant to the Rules. It is arguable that the factors identified in the permission application at paragraphs 6 and 7 fall to be evaluated. It is arguable that the proportionality assessment has been affected.*"

The Hearing in the Upper Tribunal

11. At the hearing before me to determine whether an error of law was made out, Ms Harris developed the case advanced in the permission application. In reply, Mr Lindsay submitted that the First-tier Tribunal Judge had directed himself appropriately and that no error of law was made out.

Discussion

12. This appeal raises an issue as to the construction of S-LTR.1.4. This provides that the presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they had been sentenced to imprisonment for less than 4 years but at least 12 months.

13. In order to place this paragraph in context, it should be noted that S-LTR.1.2 provides that the applicant will be refused limited leave to remain on grounds of non-suitability if any of the paragraphs S-LTR.1.2 to 1.8 apply.

14. The grounds set out in S-LTR.1.2 to 1.7 are of descending order of gravity. S-LTR.1.2 applies where the applicant is currently the subject of a deportation order. S-LTR.1.7 applies where the applicant has failed without reasonable excuse to comply with the requirement to (a) attend

an interview; (b) provide information; (c) provide physical data; or (d) undergo a medical examination and provide a medical report.

15. S-LTR.2.1 provides that the applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2 to 2.5 apply.

16. The next provision is S-LTR.3.1, which provides that when considering whether the presence of the applicant to the UK is not conducive to the public good, any legal or practical reasons why the applicant cannot presently be removed from the UK must be ignored.

17. It is clear from the Judge's line of reasoning that he considered that the only factual question which arose under S-LTR.1.4 was whether the appellant had been convicted of an offence for which he had been sentenced to imprisonment for less than 4 years but at least 12 months. He did not regard himself as required or empowered to ask whether the presence of the appellant in the UK was no longer conducive to the public good, given the passage of time since the offending had occurred or given other potentially relevant considerations.

18. Ms Harris submits that the Judge erred in law in this regard, as S-LTR.3.1 envisages that the decision-maker will evaluate whether the presence of the applicant in the UK is not conducive to the public good, even if the factual criteria for its invocation are met. However, I do not consider that the construction which Ms Harris seeks to place on this paragraph is correct for a number of reasons.

19. I consider that the paragraph is aimed at directing the decision-maker to ignore any legal or practical reasons as to why an applicant cannot presently be removed from the UK, rather than directing the decision-maker to conduct a wider evaluative exercise. Moreover, the language of S-LTR.1.3 and 1.4 effectively precludes any such wider evaluative exercise being undertaken. In 1.3, it is simply the fact that the applicant has been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years that means that their presence in the UK is not conducive to the public good. Similarly, in 1.4, it is simply the fact that the applicant has been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years or at least 12 months, which means that their presence in the UK is not conducive to the public good.

20. For the above reasons, I do not consider that the Judge erred in law in finding that S-LTR.1.4 applied because the appellant had been convicted of an offence for which he had been sentenced to imprisonment for less than 4 years but at least 12 months. In deciding whether the appellant was disqualified from taking the benefit of the 20-year Rule, the Judge did not have discretion to dis-apply S-LTR.1.4. His ability to exercise discretion arose only in the context of a proportionality assessment outside the Rules.

21. The Judge rightly recognised this. In his proportionality assessment, he said that it was in the appellant's favour that he had been in the UK for nearly 22 years; that he was convicted of sexual assault in March 2000 for an offence committed in December 1997; and that he had he had not offended since; that the offence was thus over 20 years ago; and that the respondent had at no time over that period sought to deport the appellant, notwithstanding that he could have been contacted as he had made further submissions in 2004 which were not rejected until 10 years later in 2014.

22. The Judge continued in paragraph [27] as follows:

> "I find that the balancing exercise is finely balanced but I find, that the fact that the appellant has committed a sexual assault on [a] girl, an offence for which he received 18 months' imprisonment; that the appellant's entire life in the UK has been here as an overstayer; the fact that he has benefited from receiving treatment and medicine from the NHS; the fact that he has worked in the UK when he was not entitled to do so; the fact that he has no partner or children in the UK; the fact that no evidence has been submitted that his life in the UK cannot be replicated in Sri Lanka; the fact that the appellant has not submitted evidence of friends, community groups or any religious affiliation to show that his private life would be severely altered if he were to live in Sri Lanka; that it is a proportionate and legitimate interference with the appellant's right to a private life and in the public interest to remove the appellant from the UK."

23. The Judge added that the appellant could receive treatment for his medical conditions in Sri Lanka, and that he had family in Sri Lanka, including a sister who he had spoken to, and who could support him while he found employment. The fact that he had been in employment in the UK, a country that he had not been to before he came in 1996, pointed to the fact that he would be able to find employment in Sri Lanka - a country where he had lived during his formative years. He also noted that the appellant had previously worked in Kuwait.

24. As I have indicated earlier in this decision, the appellant could not succeed in a private life claim under Rule 276ADE(1)(iii) on account of the operation of Rule 276ADE(1)(i) which provides that the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that, at the date of application, the applicant does not fall for refusal under any of the grounds contained in, *inter alia,* sections S-LTR.1.2 to S-LTR.2.3 of Appendix FM. The appellant could only ever succeed in an Article 8 claim outside the Rules, and the Judge gave adequate reasons for finding that, on balance, the threatened interference was proportionate.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 10 May 2019

Deputy Upper Tribunal Judge Monson