Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17586/2018

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

KORALE [A]
(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 appeals from the decision of the First-tier Tribunal (Judge Aziz sitting in Birmingham on 4 December 2018) dismissing his appeal against the decision of the Secretary of State for the Home Department ("the Department") made on 1 March 2018 to refuse his application for leave to remain on the basis of family life established in the UK with his wife and two children, who were not persons present and settled in the UK at the date of the decision or at the date of the hearing. 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 November 1981. He is married to [DD], who is also a citizen of Sri Lanka. She has been lawfully residing in the UK in various immigration categories since 7 May 2006. The appellant first arrived in the UK on 24 April 2013 as a dependant of his wife under the points-based system. At the time of entry, his wife was a Tier 1 migrant. She subsequently applied to extend her leave as a Tier 2 migrant until 1 September 2016. Her application was successful, and the appellant was granted leave to remain in line with her as her dependant partner. The couple have had 3 children in the UK: [A] born on 2 March 2014; [S] born on 25 May 2015; and [K] born on 18 October 2018.

3. On 10 June 2016 the appellant's wife applied for indefinite leave to remain on the basis of 10 years' continuous lawful residence. Her application for ILR was refused, but she was granted limited leave to remain for 24 months. At the hearing before Judge Aziz, Counsel for the appellant informed the Tribunal that the reason for the application for ILR being refused was because she had a recent conviction for theft for which she had received a fine. So this disqualified her from being issued ILR at that time.

4. On 1 September 2016 the appellant made his application. He declared that he and his wife had been convicted of shoplifting on 13 June 2016, for which they had received a fine. They had "*extended family/parents"* in Sri Lanka. In answer to the question as to whether there were any obstacles to family life with his wife continuing outside the UK, he said that he did not have a home in Sri Lanka or any employment there. Although they had extended family members in Sri Lanka, it would be very difficult for them to integrate due to their personal circumstances.

5. On 1 March 2018 the Department gave their reasons for refusing the appellant's application. It had been placed on hold following a pause in Appendix FM decision-making. The temporary hold was to enable the Home Office to consider the implications of, and to make necessary changes to, the Immigration Rules and Guidance to reflect, the Judgment of the Supreme Court in **MM (Lebanon) & Others -v- SSHD [2017] UKSC 10**.

6. His application fell for refusal on grounds of suitability under section S-LTR because he had had a previous conviction for theft. Accordingly, S-LTR.1.6 applied. Consideration had been given as to whether there were exceptional circumstances in his case. It was not credible that he and his partner had lost all ties in Sri Lanka. Furthermore, no reasons had been offered as to why they would be unable to apply the skills they had obtained in the UK to thrive in their home country.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. Only the appellant was legally represented before Judge Aziz. There was no Presenting Officer. At the outset of the hearing, Counsel made an application to adjourn. The application was made on two grounds. The first was that the appellant's wife had an outstanding application for ILR with the Home Office. The application had been submitted on 12 October 2018. She said that the appellant's two older children were also included in that application. If the application was successful, then the wife would be granted indefinite leave to remain, and the children would be entitled to register as British citizens. The second reason was that the appellant's wife was not in attendance. While she had submitted a witness statement, due to some oversight she had not been informed by the solicitors that she should attend the hearing to give evidence.

8. The Judge refused the application on both grounds. The fact that the appellant's wife had an outstanding application with the Home Office, and it was not known when the application would be decided, was not in itself a good enough reason for the appeal to be adjourned. Furthermore, he held that the Tribunal should not pre-judge the merits of the application. As to the fact that the appellant's wife had not been able to attend to give *"live evidence"*, he did not consider that the appellant was prejudiced.

9. In his subsequent decision, the Judge explained why he had refused the adjournment application, and why he had gone on to dismiss the appeal on its merits. He noted Counsel's concession that the application could not succeed under the eligibility requirements of Appendix FM, as his wife was not a settled person. He noted that the application was also refused under the suitability requirements, although Counsel stated that the conviction was disputed by the appellant, "*who argues that it was his wife who received the conviction for theft."* He noted that the essence of the appellant's case was that he should be granted limited leave to remain to enable him to remain in the UK with his wife and children, pending the outcome of his wife's application.

10. The Judge set out his findings of fact at paragraphs [26] onwards. He found that at the time of his wife's ILR application made on 10 June 2016, the appellant had existing leave to remain until 1 September 2016. He had hoped that the Department would make a decision on his wife's application prior to the expiry of leave; but when no such decision was made, in order to avoid becoming an overstayer, the appellant had made a further application for leave to remain. Although the wife's application for ILR was refused, she had been granted two years' discretionary leave to remain on 21 September 2016.

11. At paragraph [27], the Judge accepted that the appellant had been lawfully resident in the UK. Counsel asserted that it was her understanding that it was the appellant's wife who had been convicted for theft - not the appellant himself. As the Department had not adduced evidence in support of the assertion that the appellant had a criminal conviction, he found in the appellant's favour that it was only his wife who had been convicted of theft by shoplifting.

12. But despite these findings in the appellant's favour, the Judge was not persuaded as to the appellant's claimed family and personal circumstances in Sri Lanka. He was not persuaded that the appellant and his wife's respective families would be unwilling or unprepared to assist the appellant and his family if they returned to Sri Lanka.

13. The Judge went on to consider the application outside the Rules. He observed that the application was inconsistent with the evidence which had been given, including the assertion in paragraph 14 of the appellant's witness statement that he was a named dependant on his wife's application of 12 October 2018, along with the children: "*It is difficult to see how he can, on the one hand, argue that he wants limited leave outside the Immigration Rules so that he can remain in the country with his family whilst they await the outcome of a recently submitted application for indefinite leave to remain, and, on the other hand, state that he is a dependent family member in that very same application.*"

14. The Judge concluded, at paragraph [40], that the appellant had not brought forward a good reason to consider an application outside the Rules. In case he was wrong about that, in paragraphs [41] to [47], he addressed an Article 8 claim outside the Rules. His conclusion, having applied section 117B of the 2002 Act, was that the appellant's removal from the UK would be proportionate in all the circumstances: "*There is nothing preventing the appellant returning to Sri Lanka whilst his wife awaits the outcome of the immigration application. His children are still very young. They can return to Sri Lanka with him. In the alternative, they can remain here and be looked after by their mother in this country. In the event that their applications are allowed, the appellant can apply for entry clearance to join them. In the event that the application is refused, his wife and children can return to Sri Lanka. Family life will only be disrupted on a temporary basis. Removal is not disproportionate given the basis upon which the appellant seeks to remain here.*"

The Application for Permission to Appeal

15. Counsel, who appeared at the hearing, settled an application for permission to appeal raising four grounds. Ground 1 was that the Judge erred in law in failing to grant an adjournment. Ground 2 was that the Judge had wrongly asserted that only the appellant's wife had section 2C leave at the date of the hearing. Ground 3 was that the Judge had made an unreasonable finding in respect of the appellant's behaviour in the autumn of 2016. Ground 4 was that the Judge had conducted an erroneous assessment of family life considerations and the best interests of the children. Clearly, no regard could be had to the fact that his wife was currently on maternity leave as a Buyer for Poundstretcher. She and the children currently relied upon the appellant to maintain the family financially. Thus, the family would be adversely affected by the appellant's removal from the UK, which would not be in the best interests of the children.

The Reasons for the Grant of Permission to Appeal

16. On 14 March 2019 First-tier Tribunal Judge Fisher granted permission to appeal in respect of Grounds 2-4 for the following reasons:

> "I am satisfied that the Judge was entitled to use an exercise of his discretion to refuse an adjournment. The appellant's wife had an outstanding application with the Home Office, but there was no indication as to when it might be decided. The appellant was certainly not deprived of a fair hearing as the grounds suggest. However, it is argued that the Judge erred in his belief that only the appellant's wife had extant leave. By failing to query why he had made his application if named as a dependant on his wife's application, it is argued that the appellant and his representative were deprived of the opportunity to explain the issue. Whilst the Judge made reference to s.55 in paragraph 29 of his decision, it is argued that he failed to give adequate consideration to the best interests of the children, and it is also arguable that he ought to have made further findings under section 117B(4) in terms of the family life considerations."

The Hearing in the Upper Tribunal

17. At the hearing before me to determine whether an error of law was made out, Mr Harris (who did not appear below) developed the case advanced in the grounds of appeal. She produced a copy of the Home Office Guidance on applications to settle in the UK on the grounds of long residence, which showed that an applicant could not include his family members as dependants in his or her application. For that reason, although the appellant's wife had recently been granted ILR (as evidenced by a letter from the Home Office dated 6 March 2019, which her instructing solicitors had forwarded to the Upper Tribunal on 25 April 2019), neither the appellant nor the children had been granted leave to remain in line with her. As the guidance also indicated, the appellant was now eligible to apply for leave to remain in the UK as a partner of a settled person, and to include their children in his application.

18. It also emerged in the course of the hearing that Counsel had inadvertently misled the First-tier Tribunal Judge in asserting the belief that only the appellant's wife had been convicted of theft by shoplifting. In fact, the appellant had also been convicted of the same offence, as indeed he had admitted in his application form. However, Ms Harris submitted that this did not change the fact that the decision was legally flawed for the reasons given in the grounds of appeal.

19. In reply, Mr Lindsay submitted that the Judge had directed himself appropriately, and that no error of law was made out. The Judge had disbelieved the evidence that the family in Sri Lanka would not support them on return, and it was open to him to find that the maintenance of the refusal decision was proportionate.

Discussion

20. Although Judge Fisher did not consider that Ground 1 was arguable, Ms Harris submitted that it was, and that the Judge's failure to accede to the adjournment request had meant that the hearing was unfair. I consider that the Judge's decision to refuse an adjournment request constituted a reasonable exercise of his discretion, and that it did not engender an unfair hearing. Firstly, the appellant was only entitled to have his human rights claim assessed at the date of the hearing. He was not entitled to have his human rights claim assessed on the basis of a possible future state of affairs. Secondly, the case put forward on the appellant's behalf did not require the attendance of his wife to give oral evidence.

21. It is convenient to deal with Grounds 2 and 3 together, as they both arise from inaccurate information given by the appellant in his witness statement. In his witness statement for the hearing, the appellant said that he had been included in his wife's ILR application of 10 June 2016, as had been the children; and that they had been named as dependants of his wife in her pending application for ILR submitted on 12 October 2018. I infer from Ms Harris' submissions that it is now accepted that this information was incorrect. No dependants were included in the application for ILR in 2016 or in the application for ILR in 2018, as this was not permitted. Insofar as the Judge proceeded on the mistaken premise that what the appellant said on this issue was true, the mistake is the fault of the appellant. Accordingly, the appellant is not entitled to relief on the grounds that the Judge has made a material mistake of fact. In order to be eligible for relief, neither he nor his representatives must be responsible for the error. This requirement is plainly not met.

22. On the case as it was presented to the Judge, it was reasonable for the Judge to take the view that there was little or no objective justification for the appellant's appeal being allowed on the limited basis that he should have further leave pending the outcome of the ILR application, since he was named as a dependant in the wife's application of 12 October 2018. If this was true, the relief was unnecessary, in that even if his present appeal failed, he still had an outstanding application as a dependant which remained to be decided.

23. The Judge did not, in any event, commit himself to a finding that the appellant was correct, either about his inclusion in the ILR application of June 2016 or in his inclusion in the recent ILR application. The Judge's frequent refrain was that if what the appellant was saying was true, certain consequences followed which undermined the merits of the application made on his behalf. In particular, at paragraph [36], the Judge made the following legitimate observation, based on the (false) information given in the appellant's witness statement: "*If the appellant was indeed a dependant on his wife's application of 10 June 2016 and when the Home Office responded to the application by granting the appellant's wife 2 years' limited leave but omitted to even mention the appellant, then the appropriate course of action would have been to challenge the Home Office decision. This appears not to have been done and the appellant has not properly explained why he did not chase the*

Home Office in an application in which he was a main dependant in circumstances where his wife was granted leave and it appears his "dependant application" was not even considered."

24. Ms Harris submits that the Judge's finding that only the appellant's wife had section 3C leave was wrong and productive of unfairness, as it meant that the Judge conducted the proportionality assessment on the premise that the appellant was not lawfully in the UK. However, the Judge accepted at paragraph [33] that the appellant had section 3 leave by virtue of his application submitted on 1 September 2016. The Judge also accepted that the appellant had at all material times been lawfully present in the UK. When the Judge said that only the appellant's wife had section 3C leave, this was in the context of her most recent application for ILR. His finding that the appellant did not have section 3C leave as a result of this application was factually correct.

25. Turning to Ground 4, the necessary starting point is the Judge's sustainable finding that the requirements of EX.1 were not met. There were no insurmountable obstacles to family life being carried on in Sri Lanka. The sole issue was whether it was reasonable and proportionate for the appellant, who did not qualify for leave to remain under the Rules, to return to Sri Lanka pending the outcome of his wife's application for ILR, leading to a temporary interference with family life, whether the outcome was positive or negative. While the Judge did not expressly direct himself to consider the best interests of the children as part of the proportionality assessment, he took their interests into account when assessing proportionality. He observed that the children were still very young, and he found that they could return to Sri Lanka with him, or they could remain here and be looked after by their mother.

26. Given that the youngest child had only been born on 18 October 2018, on analysis the only realistic option was for the youngest child to remain with his mother, and prima facie it was in the best interests of the older children to remain with their mother also for the time being. On the other hand, the Judge did not err in not failing to address the issue of funding while the appellant was abroad. The witness statement evidence did not indicate that the family would face financial hardship as a consequence of this. In addition, if the Judge had not been misled about the appellant's conviction, he would have been bound to take it into account as a matter which fortified the proportionality of a temporary interference with family life, following the **Chikwamba** line of jurisprudence. So I am not persuaded that any deficiencies in the Judge's reasoning on proportionality are material.

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