Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: HU/13218/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC
On 2 February 2021

Decision & Reasons Promulgated
On 15 February 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAJANA THAVABALAKRISHNAN

(ANONYMITY ORDER NOT MADE)

Respondent

DECISION AND REASONS

For the appellant: Ms E Rutherford of counsel, instructed by Oaks Solicitors

For the Respondent: Mr C Bates, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. To avoid confusion, I have referred below the parties as they were at the First-tier Tribunal appeal hearing.
2. The appellant is a national of Sri Lanka with date of birth given as 24.2.94.

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3. The relevant background is that the appellant arrived in the UK on 29.4.15. An application for asylum was withdrawn. The appellant was advised that as she had claimed asylum in Switzerland under Third Country arrangements she was not entitled to do so in the UK. Her LTR application was made on the basis of her relationship with her partner, whom she met in the UK and with whom she entered into a religious form of marriage not legally recognised as valid in the UK in December 2015. Her partner also comes from Sri Lanka. His asylum claim was rejected but he was subsequently granted LTR in the UK.

4. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 24.12.19 (Judge Clarke), allowing on human rights grounds the appellant's appeal against the decision of the Secretary of State, dated 16.7.19, to refuse her application made on 8.9.18 for Leave to Remain (LTR) on family life grounds under Appendix FM of the Immigration Rules and alternatively outside the Rules pursuant to article 8 ECHR.

5. The application was refused because, whilst it was accepted the couple had a genuine and subsisting relationship, the respondent considered that there were no insurmountable obstacles to family life continuing in Sri Lanka; her private life was established at a time when her immigration status was precarious; suitable medical treatment for the appellant's diagnosed conditions of PTSD and depression was available in Sri Lanka and she did not meet the article 3 threshold; and that there were no exception circumstances which would render the refusal decision unjustifiably harsh.

6. Judge Clarke entirely accepted the appellant's factual account that she was a LTTE member who had been persecuted, tortured, and subjected to sexual abuse. At [28] of the decision the judge found that the appellant would face very significant difficulties in continuing family life outside the UK and in particular that these difficulties would entail serious hardship for the appellant. In the premises, the judge accepted that the appellant met the requirements of Appendix FM and that as she had established private and family life in the UK, the respondent's decision was not proportionate. Hence the appeal was allowed on human rights grounds.

7. The respondent's grounds of application for permission to appeal to the Upper Tribunal assert that the First-tier Tribunal failed to provide adequate reasons on a material matter, and made a material misdirection in law.

8. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 1.4.20, on the basis that it is arguable that the judge may have too readily accepted: (i) the appellant's "asylum-like" case; (ii) the assertions as to her fragile mental health; and (iii) the claim that she and her partner could not live together in Sri Lanka. "*It may have been appropriate for the judge to give consideration to other*

aspects of this matter – including the questions of public interest set out in Part 5A of the Nationality, Immigration and Asylum Act 2002."

9. Pursuant to directions, the Tribunal has received the respondent's submissions, dated 11.6.20, and the appellant's further written submissions, dated 18.6.20.

10. I have carefully considered the decision of the First-tier Tribunal in the light of the oral and written submissions, and the grounds of application for permission to appeal to the Upper Tribunal. In doing so, I also bear in mind the Court of Appeal's direction that an appellant Tribunal should not impose its own assessment of the facts over that of the fact-finding Tribunal; see Cadonius De-Havalan Lowe v SSHD [2021] EWCA Civ 62.

11. At the outset of the hearing before me, it was agreed that ground 2 stood or fell with ground 1. If the finding of very significant difficulties in continuing family life outside the UK stands, then consideration of s117B of the 2002 Act falls away.

12. Relying on her written submissions, Ms Rutherford made a robust defence of the decision. It was argued that, although the findings are admittedly brief, the judge's finding at [14] of the decision, accepting the credibility of the appellant and her partner on the basis of being open and honest, amounted to adequate reasoning. Ms Rutherford asserted that the Home Office Presenting Officer did not challenge the conclusions of the expert's report (Dr Dhumad) that the appellant has PTSD, is suffering from a depressive episode, is a suicide risk, and that even the threat of her return to Sri Lanka would likely lead to a deterioration in her mental health. However, as Mr Bates pointed out, the appellant was not in receipt of treatment or medication, and, more significantly, no specific concession was made. It was not incumbent on the Presenting Officer to advance every challenge to the appellant's case. I accept that ultimately the judge may have been entitled to accept the conclusions of the expert report, but I am not satisfied that the judge was entitled to do so without adequate reasoning sustaining that conclusion.

13. This was a human rights appeal in which it was made clear that neither asylum nor articles 2 or 3 ECHR were pursued. At [8] of the impugned decision, the judge correctly set out the standard of proof as the balance of probabilities. However, I am concerned that the judge appears to have simply accepted without question the appellant's factual claim of persecution, without reasoning, and in particular without considering of the risk categories set out in the Country Guidance of GJ [2013]. For example, at [24] of the decision the judge states that "*there is no issue that the appellant has been a victim of torture and sexual abuse*." It is not clear whether the judge has applied the balance of probabilities or the lower standard of proof of a reasonable likelihood. I am not satisfied that merely stating that the appellant was found to be open and honest and therefore credible can be properly described as adequate reasoning for the several findings made

thereafter. Further, from the way in which the decision is drafted, the reader might (mistakenly) assume that the primary facts and findings were entirely uncontested, which is not the case. Merely because the Presenting Officer did not specifically challenge every aspect of the expert report cannot be converted into deemed concession; the appellant still bore the burden of proof, on the balance of probabilities. In summary, the medical evidence was accepted without question, the judge extrapolating from those findings that the appellant's mental state was so fragile that there would be very significant difficulties in continuing family life with her partner in Sri Lanka. However, the decision cries out for an explanation as to why her partner could not join her and, if so, why his and her widder family support, including her parents, would not be adequate. There is no suggestion that appropriate treatment would not be available for the appellant in Sri Lanka and it is not claimed that the circumstances cross the high threshold for article 3 ECHR. The decision is devoid of adequate explanation as to why continuing family life in Sri Lanka would entail such difficulties so as to amount to insurmountable obstacles within the Rules, or render the respondent's decision so unjustifiably harsh that it is disproportionate pursuant to article 8 ECHR outside the Rules.

14. If the appellant could not succeed under the Rules, it is clear that outside the Rules the judge went on to make an entirely unreasoned article 8 ECHR assessment, failing to address the mandatory statutory public interest considerations under s117B of the 2002 Act. It follows that the proportionality assessment outside the Rules was entirely unbalanced and, in consequence, unsustainable.

15. Whilst in due course the judge may have been entitled to come to the same conclusions, the decision must at the very least provide adequate reasons open on the evidence to justify reaching those conclusions. I find that such reasoning markedly absent from the decision. Virtually each finding is presented as its own self-sustaining fact.

16. In the circumstances and for the reasons set out above, I find such error of law in the decision of the First-tier Tribunal, that it must be set aside and remade afresh with no findings preserved.

17. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiate all findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do

so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The Secretary of State's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The making of the decision in the appeal is remitted to the First-tier Tribunal, where an interpreter in Tamil will be required.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 2 February 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*"

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 2 February 2021