Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13627/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre **Decision & Reasons Promulgated**
Heard on: 5th January 2021 (remote hearing) **on: 7th May 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Miss Dehemi Divyanjali Siriwardena
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Stedman, Counsel instructed by Michael Rose Baylis Ltd**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka born on the 28th May 2000. She has lived in the United Kingdom since she arrived here with her mother on the 24th October 2010, and now she would like to stay here. She submits that it would be a disproportionate interference with her private life, as protected by Article 8 of the European Convention, to expect her to leave now.

2. The Appellant's human rights claim was rejected, along with those made by her parents, on the 22nd July 2019. The family pursued linked appeals, all of which

were dismissed by First-tier Tribunal Judge Alis on the 1st October 2019. All three sought permission to appeal, but only the Appellant was successful, being granted permission by Upper Tribunal Judge Coker on the 26th February 2020.

3. The written grounds of appeal are that in dismissing the Appellant's human rights appeal Judge Alis erred in:

   a) Failing to give appropriate weight in the balancing exercise to an earlier injustice visited upon the Appellant ('the historic injustice' point)

   b) Failing to give reasons for the conclusion that the Appellant cannot today meet the requirements of paragraph 276ADE(1)(vi) ('the very significant obstacles' point)

   c) Failing to give appropriate weight to the fact that the Appellant had founded her private life in the United Kingdom as a child, and had spent ten years' here ('the private life point').

4. Before me Mr Stedman declined to pursue ground (b). He further acknowledged that ground (a) may well be subsumed by ground (c). Mr McVeety for the Home Office opposed the appeal on all grounds.

Ground (a): 'Historic Injustice'

5. When the Appellant and her parents arrived in the United Kingdom they were all Tier 4 Migrants. Her father was a student, she and her mother his dependents. At some point his leave was curtailed, because he had lost his place at university. The family then made various unsuccessful attempts to regularise their status. One of these attempts was made on the 10th October 2017 when they made joint asylum and human rights applications. These claims were rejected by the Secretary of State on the 13th April 2018, and the consequent appeals dismissed by the First-tier Tribunal (Judge Evans) on the 22nd November 2018. The grounds submit that these three events, and the dates upon which they occurred, are of paramount importance in the Appellant's present appeal. That is because on the date that the Respondent considered the Appellant's human rights claim – the 13th April 2018 – she was a minor who had lived in this country for a continuous period of seven years and therefore qualified for consideration under paragraph 276ADE(1)(iv). Mr Stedman submits that the Respondent failed to give the Appellant the benefit of that qualification, as did the First-tier Tribunal and indeed the Upper Tribunal which subsequently refused permission to appeal. Although detailed and very specific complaint is made about various matters including the behaviour of previous representatives and the failure of the Home Office to process a fee, in fact this point boils down to this submission: the Appellant should have been granted leave to remain in 2018 and that had she done so she would today be on a path to settlement. This was a weighty factor in the balancing exercise which Judge Alis refused to engage with.

6. There are two obvious difficulties with this ground.

7. The first is that the injustice – whether 'historic' or not, a matter I return to below – is not made out. Paragraph 276ADE(1)(vi) of the Immigration Rules provides:

> (1) 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 …
>
> (iv) is under the age of 18 years and has lived continuous**ly in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK".**

8. Assuming that the Appellant's dependency upon her mother's asylum and human rights claim can be characterised as an 'application' for the purposes of 276ADE(1)(vi), it can be seen that she had not, at the point that it was made, spent seven continuous years in the United Kingdom. The application was made on the 10th October 2017, when she still had two weeks to go til she reached the seven year mark (she arrived in the United Kingdom on the 24th October 2017). She was not therefore a 'qualifying' child upon the date of application. Nor could the Appellant establish that she *prima facie* met the requirement of the provision at the date of the appeal before the First-tier Tribunal. The appeal was heard on the 22nd November 2018, when the Appellant had already turned 18. It could not therefore be said that at that date the refusal to grant leave was obviously disproportionate on the grounds that the Appellant then qualified for leave under the Rules. The best that the Appellant could do is to point out that for a period of some months, between the 24th October 2017 (when she reached the 7 year mark) and the 28th May 2018 (when she reached majority) she met *one* of the requirements contained in 276ADE(1)(iv): being a child who had lived here for seven years.

9. The written Grounds of Appeal are conspicuously silent about the remaining limb of the rule: the Appellant also had to establish that it would "not be reasonable to expect her to leave" the United Kingdom. On that matter the First-tier Tribunal had in 2018 concluded, in an undisturbed decision, that it was not disproportionate to expect this child to leave the United Kingdom with her parents, neither of whom had had any extant leave to remain for some time. It is therefore simply inaccurate to assert, as Mr Stedman does, that the Appellant *prima facie* qualified for leave to remain during that period, or that her previous representatives were somehow at fault for "failing to press this case".

10. I would add that recent Tribunal authority makes it clear that arguments of this sort do not gain weight simply by attaching the adjective 'historic' to an allegation of injustice: Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC). In that decision a Presidential panel draws a distinction between cases where some wrong has occurred in the past – historic*al* injustice – and cases where there is now a recognition by the state of a particular class of persons having been treated unfairly:

> *For the future, the expression "historic injustice", as used in the immigration context, should be reserved for cases such as those concerning certain British Overseas citizens or families of Gurkha ex-servicemen, which involve a belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with applications made now (eg Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17; AP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 89).
>
> *The fact that the injustice exists will be uncontroversial. It will be generally recognised. It will apply to a particular class of persons. Unlike cases of what might be described as "historical injustice", the operation of historic injustice will not depend on the particular interaction between the individual member of the class and the Secretary of State. The effects of historic injustice on the immigration position of the individual are likely to be profound, even determinative of success, provided that there is nothing materially adverse in their immigration history.*

11. This case is, quite evidently, not of that type.

12. I now turn to Judge Alis' approach. At paragraph 6 of his decision he summarises the 2018 findings of First-tier Tribunal Judge Evans. These included, at (h), the Tribunal's conclusions on the arguments advanced in respect of 276ADE(1)(vi). Judge Evans had regard to the Appellant's educational achievements, her good level of integration in the United Kingdom and the fact that she had spent her formative teens here; against those matters were weighed the fact that she could speak Sinhalese, with some ability in reading and writing, and the fact that in the 'real world' she would be accompanied and supported by her parents. Applying the guidance in KO (Nigeria) [2018] UKSC 53 Judge Evans found it reasonable to expect her to return to Sri Lanka with her parents in those circumstances. At his paragraph 7 Judge Alis notes that the Appellant was unsuccessful in her attempts to appeal against the decision of Judge Evans. At paragraph 15 Judge Alis records that Mr Stedman had filed a skeleton argument which advanced the proposition that the Appellant had been treated unfairly by Judge Evans:

> "I indicated to him that I was not dealing with those previous decisions…the appeal in these cases arose out of the 29 May 2019 application and subsequent decision and when the second-named appellant was over the age of 18 years of age. She was no longer covered by either paragraph 276ADE(1)(iv) HC 395 or section 117B(6) of the 2002 Act.
>
> Even if Judge Evans had erred then that was something that had to be taken up in that appeal ...".

13. Having so directed himself in his subsequent proportionality balancing exercise Judge Alis attaches no significant weight to the fact that at some point in the past the Appellant met one limb of paragraph 276ADE(1)(iv). Mr Stedman contends that this was an error. For the reasons set out above am satisfied that no material error arises in the context of an assertion that this amounted to a failure to recognise historical injustice: whether there was some other error in approach to the Appellant's long residence I deal with below at ground (c).

Ground (b): Very Significant Obstacles

14. By the date of the appeal before Judge Alis the Appellant was an adult woman of nineteen years. His starting point, upon consideration of her private life claim, was therefore paragraph 276ADE(1)(vi) of the Rules, which provides that leave may be granted where the applicant can show that they have:

> "lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom".

15. In answering this question Judge Alis had a clearly delineated starting point: the findings of two panels of the First-tier Tribunal that had gone before him. In 2016 First-tier Tribunal Judge Bell had found that the Appellant and her parents have social and cultural ties to Sri Lanka, relatives who were willing to support them and English language education for the Appellant. To the extent that the Appellant might have lost some of her Sinhalese in the time that she has spent here she is a bright student who would quickly regain proficiency in that language. Those findings were confirmed by the decision of First-tier Tribunal Judge Evans in 2018. Judge Alis found no material change in circumstances, save that one close relative had now left Sri Lanka for America.

16. The ground – not pursued orally by Mr Stedman – is that these were insufficient reasons. They plainly were not. The test at 276ADE(1)(vi) is a narrow one and it does not purport to be a 'complete code' for the assessment of Article 8 private life, excluding as it does any consideration of the individual's already established private life in the United Kingdom. This is a matter I return to below. But in the context of the rule, Judge Alis was wholly entitled to conclude that the high threshold of "very significant obstacles" was not met.

Ground (c): Private Life

17. Without wishing to diminish Mr Stedman's submissions, both written and oral, the real complaint here is about the fact that the Appellant has lived in this country for a full decade of her young life, and that this matter has been given insufficient weight.

18. It is of course trite that weight is a matter for the judge: I can only interfere with the decision below on this matter if it is shown to be perverse.

19. I start with what *was* taken into account. The First-tier Tribunal started, as I note above, with directing itself to facts already found by previous tribunals. This necessarily involved a review of the findings in respect of the Appellant: references are made to her education and language abilities in both 2016 and 2018 judgments. Moving on to the evidence as it stood before him, Judge Alis noted that the Appellant had completed both primary and secondary education in the United Kingdom and that she had been offered a place to read

Psychology at Keele University; she arrived in this country aged 10, has spent her formative years here and is well integrated. She has volunteered for various organisations and has achieved excellent GCSE and A level results. She regards the United Kingdom as her home, over Sri Lanka. Against these matters the Judge balanced the following factors: that there were no real obstacles to the family reintegrating in Sri Lanka, the Appellant could, as found in 2016, quickly brush up on her Sinhalese, she could pursue her tertiary education in Sri Lanka and there was no basis for finding that the decision to refuse leave would result in unjustifiably harsh consequences for her.

20. It is perhaps self-evident that all of that was relevant. Mr Stedman submitted however that absent from that consideration was any real analysis of his submissions about how the family had been failed by representatives in the past, and how greater weight should have been given to the 'compliance window' in respect of 276ADE(1)(iv): see my [§8] above. For the reasons I have set out above that argument is entirely misconceived. It may be that another Tribunal would, between October 2017 and May 2018, have concluded that it would not be reasonable to expect the Appellant to leave the United Kingdom so that she qualified under the rule. But that was not the finding of Judge Evans and that decision remained undisturbed: Judge Alis was therefore *Devaseelan* bound to accept that its findings were a final determination of matters as they stood at that date. I should add that I wholly reject Mr Stedman's criticism of Counsel who appeared before Judge Evans on the Appellant's behalf: his allegation that she somehow failed to "press the case" under 276ADE(1)(iv) is obviously ill-founded given that the Appellant was, by the hearing in November 2018, an adult.

Decision and Directions

21. The decision of the First-tier Tribunal is upheld. The appeal is dismissed.

22. There is no order for anonymity.

Upper Tribunal Judge Bruce
26th January 2021