Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13732/2019 (V)

THE IMMIGRATION ACTS

Heard at a remote hearing
On the 21 May 2021

Decision & Reasons Promulgated
On 16 June 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

FATIMA AFIZA MOHAMED SUBUHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Ahmed, Counsel on behalf of the appellant.
For the Respondent: Ms Pettersen, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Lodato (hereinafter referred to as the "FtTJ") promulgated on the 5 October 2020, in which the appellant's appeal against the decision to refuse her application for entry clearance on Article grounds was dismissed.

2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. The hearing took place on 21 May 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant's father who was able to see and hear the proceedings. There were no issues regarding sound, and no problematic technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. I am grateful to Mr Ahmed and Ms Pettersen for their oral submissions.

The background:

5. The factual history is not in dispute and is set out in the decision of the FtTJ.

6. I shall summarise the background to this appeal. The appellant is a national of Sri Lanka born in 1997. The appellant's father came to the UK in November 2008 and her mother and younger sibling entered the United Kingdom in March 2009 and made an application for asylum. Their application for asylum was refused however her parents and her younger sibling were granted discretionary leave to remain in the UK.

7. The appellant and the other remaining sibling (born in 2001) remained in Sri Lanka within the care of the elderly grandparents who had been suffering various age-related health conditions.

8. As the appellant's parents and her minor sibling were not recognised as refugees the appellant and her other sibling did not qualify for family reunion. Despite this the appellant and her sibling made application to the respondent to join their parents in the UK. The applications are supported by the parents' local MP in the UK. Each application was refused as the respondent took the view that there was nothing exceptional under article 8 of the ECHR and the appellant's parents did not have settled status to sponsor the appellant and her sibling to join them in the UK.

9. The appellant's father obtained indefinite leave to remain in the UK and following this the appellant and her sibling on 18 April 2019 made an application to join their parents in the UK, relying on Paragraph 297 of the Immigration Rules. The appellant's sibling was under the age of 18 therefore his application was granted as the respondent was satisfied that he met all the requirements of the relevant Rule. The appellant's sibling is now in the UK.

10. The appellant's application was refused in a decision taken on 31 July 2019.

11. The decision letter begins with a consideration of Paragraph 297 of the Immigration Rules. The Entry Clearance Officer (hereinafter referred to as the "ECO") noted that while both the appellant's parents were present and settled

in the United Kingdom, the appellant could not meet paragraph 297 (ii) which states that a person seeking indefinite leave to enter the United Kingdom as the child of a parent is under the age of 18. As the appellant was over the age of 18 at the time of the application, it was refused.

12. The ECO considered the case outside of the rules but concluded that on the information provided he was not satisfied that a refusal would lead to unjustifiably harsh consequences for either the appellant or her family. In doing so, it was stated that the ECO had considered the relevant factors both individually and cumulatively and a key consideration was whether a refusal would be justified by the public interest which included maintaining effective immigration control. The ECO took into account that her parents moved to the UK in 2009 and that the appellant was able to demonstrate she could maintain a relationship with her family members throughout that time. Thus, he concluded as an adult her desire to live in the UK rather than Sri Lanka did not represent a relevant factor. As article 8 does not oblige the UK to permit all other family members to relocate, he was satisfied that the decision was proportionate under article 8 (2) of the ECHR.

The decision of the FtTJ:

13. The appellant appealed that decision, and it came before the FtT on 24 September 2020 before FtTJ Lodato. In a decision promulgated on 5 October 2020 the appellant's appeal was dismissed. At paragraph [2] the FtTJ set out the issues to be determined; it was accepted that the application fell outside of the Immigration Rules and the primary issues to be resolved were whether family life was engaged and if so, whether the interference was disproportionate under article 8 of the ECHR. The FtTJ set out the applicable legal framework at paragraphs [3]-[13].

14. The FtTJ heard oral evidence from the appellant's father and also from her brother which the judge summarised at paragraphs [18]-[19] of his decision. The judge also was provided with written evidence which he summarised at [14] and [17 – 23] which included a statement from the appellant which described the distress she had suffered as a result of the decision (at [17]) and also letters from the younger siblings (at [20]). Further supporting evidence from medical professionals was assessed at [21] – [22] alongside a series of money transfers from 2012 – 2020 and supportive letters from their local MP.

15. Having summarised the arguments advanced by each of the parties, the FtTJ set out his analysis and assessment at [29] – [41].

16. He began his analysis by undertaking an assessment of the best interests of the relevant children affected by the decision and in this context took into account the letters by the children in which they described their sadness at not sharing the family household with their elder sister, the appellant. However, the judge

concluded that "there was very little evidence touching upon their best interests. It is unsurprising that they would like to live in the same home as their older sister. I have seen nothing beyond expressions of sadness that would lead me to conclude that the development, progress or well-being the children would be adversely affected by the respondent's decision." The judge took into account that the appellant had not lived in the same household as her immediate family since 2009 that he found the appellant had not proved on the balance of probabilities that the best interests of children would be adversely impacted by the "continuation of the long-standing situation of her living in Sri Lanka.".

17. The FtTJ then turned to the issue of whether family life was engaged. Having in mind the legal guidance which he had set out earlier in his decision, he observed that it was "too simplistic to find that family life is not engaged simply because the appellant is now an adult." He directed himself that "it is worth bearing in mind that many of the authorities which have emphasise that adult hood is not necessarily a decisive factor, relate to cases where the adult child lived or recently lived, in the family home together with the immediate family. This is not such a case as the appellant has not lived in the same household as her immediate family since 2009, when her parents left Sri Lanka for the UK. "Notwithstanding that feature, the judge was satisfied that the appellant's article 8 rights were engaged and that there had been interference of such gravity as to potentially engage article 8. The judge also noted that the decision had resulted in the further "splintering of the appellant's immediate family in Sri Lanka. Both siblings have described how they relied upon each other to ensure the emotional suffering of being separated from their parents and siblings in 2009." Accordingly, the judge also took into account the further separation between the appellant and her brother as further interference of family life sufficient to engage article 8. Thus, he found that this dimension of the appellant's family life went "well beyond mere ties of love and affection."

18. At [32] the judge addressed an argument advanced on behalf of the appellant that it must be inferred that paragraph 297 would have been satisfied were it not for her age. The FtTJ concluded that the respondent had not directed herself to the wrong provisions nor was paragraph 297 misapplied in the appellant's case. The appellant was over 18 years old at the time the decision was made and therefore could not meet the requirements of the gateway to obtain entry clearance. He rejected the argument advanced on behalf of the appellant that it must be inferred that the rule would have been satisfied if it were not for her age taking into account that "an additional factor that must be considered is whether the appellant lives an independent life." The judge found that it did not necessarily follow that because the appellant's brother was considered to be the sole responsibility of their parents the same conclusion will be reached for the appellant who was an adult sibling who attended university and lived independent of her family during term time. Thus, the judge was satisfied that the decision when applying paragraph 297 was in accordance with the law.

19. At paragraphs [33] – [41], the FtTJ undertook the proportionality balance, identifying the factors in favour of the appellant and those against the appellant thus undertaking the "balance sheet" approach. In doing so, the judge took into account the section 117B public interest considerations (at [34]).

20. The judge took into account in support of the respondent's decision that the appellant's parents made a conscious decision to establish family life in the UK and although an asylum claim was made after the initial arrival, this had failed. He also took into account that the grant of indefinite leave to remain was not based upon international protection and based on the sponsor's evidence that he frequently travelled to Sri Lanka there was no evidence to indicate that the family could not live together with the appellant there. He found that the appellant's parents had made a choice to live in the UK in circumstances when they could have chosen to live in Sri Lanka, and he found that to be a factor "weighing against the appellant in conducting the balancing exercise" (at [35]).

21. At [36] is a further factor weighing against the appellant was that she was to some degree leading an independent life. The judge took into account that she was a student at university a considerable distance from her grandparents' home and that in those circumstances "it would be difficult to conclude that the appellant is wholly dependent or, as the appellant's counsel argued, the sole responsibility of the parents. For much of the year, the appellant would appear to live independently as an adult." The judge did not accept that all key life decisions were taken on her behalf by her parents as this was "difficult to reconcile with her life as a university student living some distance from her grandparents to whom the sponsor entrusted to her care when she was a child." The judge also found that it was "a powerful factor" that the appellant was now an adult and had not lived in the same household as her parents for 11 years.

22. The judge did however take into account that she had not established own family unit and that she was "only just an adult" (at [37]). At [38] the FtTJ took into account in favour of the appellant the nature of her relationship with her brother. He took into account that she adopted something of a "mother figure" to her younger brother after the rest of the family left the UK and that this had had a "profoundly distressing impact" both in the appellant and the younger brother. He also took into account the medical evidence relating to the appellant which had been exacerbated by the departure of her brother. At [39] he undertook an analysis of the evidence relating to the appellant's grandparents which he accepted demonstrated that they become less equipped over time to provide the kind of emotional and practical support that would be given by her family and again that this was a factor in the appellant's favour.

23. At [40] the FtTJ considered the impact of continuing separation upon other members of the family in accordance with the case law taking into account the appellant's father, her brother and mother and also the other minor children.

24. At [41] the FtTJ set out his conclusion. He stated that this was a case where it would be "difficult not to be sympathetic towards the appellant and her immediate family. They all fervently wish to live together in the same household in the same country." However, the judge stated that he must "balance whether the respondent's decision is proportionate in the circumstances. There are aspects of the case weighing for and against the decision, but I am satisfied that the factors weighing for outweigh those against. The appellant is now an adult enjoying some independence as a university student. She has not lived in the same household as her immediate family for many years, and it is clear that a choice was made by her parents to live in the UK in full knowledge that it may mean being separated from her. I find the most powerful factor in the appellant's favourite is the disruption to her relationship with her brother which inevitably morphed into something approaching a parental relationship while they lived together in Sri Lanka. However, on balance I conclude that the factors weighing against the appellant outweigh those in her favour." Accordingly, the judge found that there were no unjustifiably harsh consequences as a result of the decision and the appeal was dismissed.

25. Permission to appeal was issued on the 21 October 2020 and on 24 February 2021, permission to appeal was granted by FtTJ Grant.

The hearing before the Upper Tribunal:

26. In the light of the COVID-19 pandemic the Upper Tribunal issued directions indicating that it was provisionally of the view that the error of law issue could be determined without a face- to- face hearing and directions were given for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

27. Mr Ahmed on behalf of the appellant relied upon the written grounds of appeal.

28. Mr Ahmed submitted that the FtTJ accepted that article 8 was engaged and appeared to accept that the appellant's family life went beyond mere ties of affection. Thus, it was submitted that the appellant satisfied the high threshold set out in the case of *Kugathas*. Having made such a finding, he submitted on behalf of the appellant that the judge failed to properly give sufficient weight to this when carrying out the balancing exercise under article 8 and that this failure amounted to material error.

29. Paragraph 6 of the grounds state that it was reasonable to submit and infer that Rule 297 would have been satisfied were it not for her age. In his oral submissions Mr Ahmed stated that this submission was made because as soon as the appellant's father obtained indefinite leave to remain in the UK the

appellant and her sibling on 18 April 2019 made an application to join their parents in the UK relying on that Immigration Rule. The appellant's sibling was under the age of 18 and thus the application was granted. However, the appellant's application was refused because she was over the age of 18. Based on those facts, it was submitted that this was a significant material factor to take into account when conducting the article 8 proportionality assessment. At [32] the judge did not accept the submission and failed to give any cogent reasons for doing so.

30. The grounds further assert that the judge gave too much weight to the fact that the appellant attended university and lived independently of her family during term. In this context Mr Ahmed submitted that judge failed to take into account the case of *Ghising (family life – adults – Gurkha policy) Nepal* [2012] UKUT 160. He submitted that despite the appellant living away at university it did not mean that less weight should be attached when carrying out the proportionality assessment.

31. It is further submitted that the judge failed to properly consider/apply the proportionality test and it is not clear how much weight (if any) the FtTJ attached to the factors in favour of the appellant.

32. At paragraph 10 of the grounds, it is submitted that the judge attached more weight to the factors against the appellant and therefore erred in the proportionality balancing exercise.

33. The grounds cite the decision in *Sezen v Netherlands* (2006) EHRR 30 where the court stated at [49] "the court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the convention and that split up a family is an interference of a very serious order." No further part of that decision was cited in the oral submissions.

34. It is submitted that the judge failed to properly consider whether it would be proportionate to the appellant to remain in Sri Lanka and be separated from her immediate family when family life was engaged, and it was accepted that the case satisfies the high threshold set out in *Kugathas.* He therefore invited the tribunal to find a material error of law and set aside the decision.

35. Ms Pettersen relied upon the Rule 24 response filed on behalf of the respondent dated 17 May 2021. The respondent opposes the appellant's appeal. In summary, the respondent submitted that the judge of the First-tier Tribunal directed himself appropriately.

36. The respondent further submits that the grounds of appeal are a disagreement about the weight given by the FTT Judge to the factors in carrying out the proportionality balancing exercise. It is asserted that the Judge gave to much weight to the factors that went against the appellant. However, the Judge thoroughly reviewed all the factors, both for and against the appellant in

coming to the conclusion that the decision to refuse entry clearance was proportionate. Ms Pettersen therefore invited the court to uphold the decision.

37. At the conclusion of the hearing, I reserved my decision which I now give.

Discussion:

38. I have given careful consideration to the grounds of challenge in the context of the decision of the FtTJ and the evidence before the tribunal.

39. The grounds seek to challenge the assessment of proportionality carried out by the FtTJ by reference to particular factors relevant to the balancing exercise.

40. Mr Ahmed submitted by reference to paragraphs [24] and [32] of the decision that the judge failed to take into account a significant material factor in the proportionality balance and that had it not been for the appellant's age, paragraph 297 of the Immigration Rules would have been satisfied.

41. Mr Ahmed submitted that as soon as the appellant's father obtained indefinite leave to remain then the appellant and her sibling made an application to join their parents in the UK relying on paragraph 297. As the appellant's sibling was under 18 the application was granted as the respondent was satisfied that he met all the requirements. The appellant's application was refused because she was over 18. He submitted that this was an argument advanced before the judge and that he had failed to give cogent reasons for not taking that into account.

42. Having considered that submission, I am satisfied there is no merit to it. The judge plainly engaged with this submission. At paragraph [24] the FtTJ recorded the submission in full and at [32] addressed the submission by giving cogent and sustainable reasons why such a submission made that "it must be inferred that rule 297 would have been satisfied were it not for her age" did not apply.

43. As the FtTJ correctly identified, the framework for decision-making was provided by the Immigration Rules and as set out, there was no suggestion that the respondent wrongly directed herself to the substance of Paragraph 297. The appellant was over 18 years of age and therefore was an adult at the time the decision was made and therefore could not meet the requirements of the gateway to obtain entry clearance. This argument was akin to a "near miss" argument. As Ms Pettersen submitted the appellant's age was 21 ½ years and thus could not properly be characterised as a "near miss" when looking at her age. As the decision in *Patel* confirms at [56[whilst the "context of the Rules may be relevant to the consideration, proportionality this cannot be equated with a formalised "near miss" or "sliding scale approach".

44. A related point relied upon by Mr Ahmed was that the judge did not address the inconsistency between the decision made in relation to the appellant's brother (who was under 18) and the appellant and that but for her age she would have met the relevant rule. Again, this submission was addressed by the FtTJ at [32] and within the proportionality balance itself, the judge was plainly aware of the circumstances of the applicant and considered it in the context of the family history. The judge was entitled to take into account when addressing the circumstances of the appellant and her brother that on the facts as he found them to be, the appellant's circumstances could be distinguished from those of her younger sibling and that she had been leading an independent life.

45. The judge therefore addressed the point made by Mr Ahmed that the appellant's younger brother satisfied the rule because he was under 18 and because the respondent was satisfied that the parents in the UK had sole responsibility for him, but the judge found that it did not necessarily follow that because the appellant's brother was considered to be the sole responsibility of his parents that the same conclusion could be reached in relation to the appellant. On the factual findings the judge reached the conclusion that the appellant's circumstances differed, not only by reason of her age but also because she was to some degree leading an independent life (at [36]). The judge found that the appellant was at university a considerable geographical distance from her grandparents' home and therefore it was not the case as Mr Ahmed had argued that the appellant was wholly dependent or the sole responsibility of her parents. The judge also rejected the submission that all key decisions were taken on her behalf in the light of the factual circumstances where the appellant was an adult, living a considerable distance away from her grandparents and living as a university student and not having lived with her parents for 11 years.

46. This leads me to the next paragraph of the grounds relied upon set out at paragraph 7 where it is submitted that the judge gave too much weight to the fact that the appellant attended university and was living independently of her family during term time. In this context Mr Ahmed referred to the decision in *Ghising* although the tribunal was not directed to any particular paragraph of that decision. It was submitted that despite living away at university it did not mean that less weight should be attached to this in the proportionality assessment.

47. Again, I am satisfied that there is no merit in the submission. The FtTJ carefully considered the circumstances of the appellant and expressly her age. At [37] he took into account that she had not started or established her own family unit and that at age 21 ½years she was only just an adult but not withstanding that, the judge was entitled to take into account as a factor weighing against the appellant that to some degree, she was leading an independent life for the reasons he set out at [36].

48. The grounds at paragraph (7) and (10) both refer to the judge giving too much weight to the fact that the appellant attended university and was living independently of her family during term time. It is further submitted at paragraph 10 of the judge attached more weight to the factors against the appellant and erred in the balancing exercise. In my judgement these submissions are properly characterised as mere disagreements about the weight to be accorded to the evidence which is a matter for the judge and should not be characterised as an error of law (see decision in *Herrera v SSHD* [2018] EWCA Civ 412 at [18]).

49. Contrary to the grounds (at paragraph 9 and the oral submissions) a careful reading of the decision demonstrates that it is entirely clear how the FtTJ undertook the proportionality balancing exercise. When considering article 8 outside of the rules the judge lawfully applied *R(Agyarko)* [2017] UKSC 17 which demands consideration of whether there are unjustifiably harsh consequences and a proportionality balance between the public and individual's interests.

50. At paragraph [35] the FtTJ expressly directed himself in accordance with the law and that "in deciding whether the respondent's decision was disproportionate I must carefully balance the factors weighing in favour of the decision and those weighing against." The judge addressed as a primary consideration the best interests of the relevant children affected by the decision at paragraph [30] and the finding that the appellant had not proved on the balance of probabilities that the best interests of the relevant children would be adversely impacted by the continuation of her circumstances described as a "long standing situation of a living and Sri Lanka" has not been challenged in the grounds. The judge considered proportionality in accordance with the public interest considerations set out in S117B and was not in error in placing weight on the fact that the appellant could not succeed under the rules in assessing proportionality; the policy of the Secretary of State expressed in the rules is not to be ignored and is to be granted weight in the proportionality balance.

51. The FtTJ in addition took into account on the respondent's side of the balance that the appellant's parents made a conscious decision to establish family life in the UK and that the asylum claim failed after their initial arrival and it was the family's choice to remain and in the light of the knowledge that they would be separated from the appellant who had remained in Sri Lanka. The FtTJ was entitled to place weight on the well-established principle that article 8 does not provide complete freedom for a family to choose the country in which they wish to live.

52. Furthermore, the judge was entitled to place weight upon the factor that there was no evidence that the family could not live together in Sri Lanka (see paragraph [35]). The FtTJ found that the family's grant of leave was not based on any international protection grounds and that the sponsor's evidence was

that he had frequently travelled to Sri Lanka and had done so as recently as August 2019.

53. Whilst reliance is placed on the decision of *Sezen* (as cited earlier), the quotation set out in the grounds is not a complete citation of paragraph 49 which goes on to state "having regard to its finding… That the second appellant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same (as when a 10-year exclusion order remained in force) as long as the first applicant continues to be denied the right to reside in the Netherlands." *Sezen* is cited in the decision of *Beouku- Betts v SSHD* [2008] UKHL 38 as is the decision of *Huang* which refer to the guiding principle as being whether family life can reasonably be expected to be enjoyed elsewhere (Huang at [20]). This was an issue properly addressed by the judge and factored into his assessment as set out at paragraph [35].

54. In addition, the judge identified a number of factors weighing against the appellant and that she was to some degree leading an independent life as a student at a university a considerable distance from the grandparents' home and that for much of the year lived independently as an adult. The judge was also entitled to take into account that "it is also a powerful factor in this case that the appellant is now an adult and has not lived in the same household as her parents for 11 years" (at [36]).

55. At paragraphs [38 – 41] the FtTJ also addressed the factors weighing in favour of the appellant and contrary to the grounds and the grant of permission, properly took into account and placed weight on the nature of the relationship between the appellant and her brother. The judge was acutely aware of the strength of that relationship and the effect of the separation caused by the decision of the respondent including that as reflected upon the appellant's medical health and the loneliness that she described feeling since her brother left. The judge took into account the circumstances of the appellant's grandparents and their advancing years as a factor in favour of the appellant (at paragraph [39]), and properly applied the ratio of *Beouku-Betts* and the impact the decision would have upon the appellant and also the members of her family. At [40] the judge addressed the issue by reference to the appellant's family members including the appellant's father, mother and brother and made reference to the best interest's assessment that he had earlier made at [30].

56. At [41] is the FtTJ returned to the balancing exercise observing that there were aspects of the case weighing for against the decision but that he was satisfied that the factors weighing for the appellant were outweighed by those against and in reaching that decision he plainly accorded significant weight to the disruption of the relationship with her brother which he considered was a "powerful factor". However, on balance he concluded "that the factors weighing against the appellant were outweighed those in her favour."

57. This was a carefully reasoned decision by a judge who was plainly aware of the circumstances of the appellant. As he observed at [41] it was a case where it would be difficult not to be sympathetic towards the appellant and her immediate family. I consider that the decision reached by the FtTJ demonstrates that he undertook a lawful evaluative assessment of proportionality which patently engaged with the material issues raised. The assessment of proportionality has not been shown to be one that was not available to the FtTJ on the evidence and the findings are adequately reasoned and are not shown to be outside the range of reasonable findings open to the judge.

58. I remind myself of the words of Baroness Hale in *AS (Sudan)* at [34] that an "appellate court should not rush to find such misdirection simply because they might reach a different conclusion on the facts or express themselves differently".

59. I am satisfied that the FtTJ addressed all the material factors in the balancing exercise and reached an outcome that was rationally open to him to make. Accordingly, there is no error of law in the decision of the FtTJ.

Notice of Decision.

60. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT shall stand.

Signed *Upper Tribunal Judge Reeds*

Dated 22/5/ 2021.