IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/05526/2020 (V)
HU/05528/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th August 2021 via Teams	**On 13th October 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS WARNAKULASURIYA I NADEESHANI PIERIS
MR WARNAKULASURIYA S D CHINTHANA FERNANDO
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Stedman of Counsel, VMD Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are wife and husband and both nationals of Sri Lanka born on 8th August 1989 and 1st May 1984, and they appeal against the decision of First-tier Tribunal Judge Hussain dated 9th April 2021, which dismissed their appeal against the decision of the Home Office of 18th March 2020 refusing their human rights claim. The appellants had conceded that they could not meet the eligibility requirements of Appendix FM of the

Immigration Rules and relied on paragraph 276ADE(1)(vi) and their broader Article 8 rights.

2. The appellants argued there would be very significant obstacles to their reintegration to Sri Lanka having in mind the broad evaluative approach to be taken.

Grounds of Appeal

3. It was advanced that the judge's reasoning was based on a mistake of fact. At paragraph 15 the judge stated the lead appellant and her husband had remained in the UK illegally since 2013. That was incorrect and had informed his subsequent reasoning and was material to the negative outcome. In fact the lead appellant entered the UK in 2010 and it was accepted at the time of her last application the appellant had remained in the UK lawfully including by virtue of Section 3C leave for a period of seven years and seven months. That period of residence was now more than ten years.

4. Thus, the Article 8 assessment was conducted on an erroneous basis that the appellant only acquired three years of lawful residence as opposed to nearly eight years at the time.

5. That assessment had an unfair impact on the judge's assessment looking at the position of today's date. Had the judge undertaken a proper evaluation it would have been on the basis of more than ten years' continuous residence in the United Kingdom and the failure to work on the correct facts amounted to a material error of law.

6. The judge stated that the second appellant, Mr Fernando, suffered with depression owing to events which occurred in Sri Lanka. That reasoning informed the judge's conclusion but the focus in these appeals could not simply rely on history but should assess the situation at the date of the hearing. The application giving rise to this appeal was made in August 2017 and the psychiatric evidence before the judge was dated from August 2017, December 2019 and February 2020 and covered the period between the application and the decision and should have been considered relevant.

7. The reasons given by the judge for failing to pay due and satisfactory regard to the medical evidence were insufficient. The recent decision was inadequately reasoned and this amounted to an error of law.

8. The medical evidence before the judge was compelling and it was incumbent on the judge to provide clear reasons why he did not accept it.

9. Specifically, the psychiatric evidence from a consultant psychiatrist opined that the appellant was at risk of self-harm if returned to Sri Lanka. The expert was proven to be accurate given the appellant was admitted to Accident and Emergency following an episode of self-harm later that year.

10. The judge also had a letter from Dr WHJR Jeyatillake dated 7th September 2018 describing the husband as suffering with severe depression and a letter from Dr Sudath Talpahewa his General Practitioner ("GP"). The letters from Dr Talpahewa dated 10th September 2018 and 1st November 2019 confirmed that Mr Fernando was not fit to travel. There was little or no treatment of this evidence within the judge's reasoning.

11. It is not the main issue whether the appellant is able to obtain medication but whether he was able to leave the country in the first place given his mental state and then whether he was able to access adequate medical input once there.

12. In this case the question of whether the second appellant has lived in Sri Lanka for a greater part of his life and speaks the language was secondary to the more pressing issue of whether he would be able to cope and there was inadequate reasoning on these main issues.

13. In terms of Article 8 proportionality the judge failed to undertake a fair assessment of proportionality in this case and there was inadequate consideration of the impact of removal on the second appellant's mental health. The available medication in Sri Lanka was a narrow issue, the issues were far broader.

14. Nowhere did the judge explain how the Section 117B (little weight) provisions were applicable in his case or how he had undertaken a balancing exercise.

The hearing

15. At the hearing before me Mr Stedman submitted that there was nothing to expand on the grounds, but he highlighted two basic failures in the decision. The judge should have afforded a higher status to the appellants as their existence in the UK was precarious and they were able to make applications. Nonetheless he accepted that this was academic because the difference between Sections 117B(4) (unlawful status) and 117B(5) (precarious status) was not material as both Sections applied. Nonetheless there was a tainted approach to Article 8 when one read paragraphs 15 and 23. Their status was precarious and not illegal. In relation to mental health, the judge failed to consider this. The appellant's inability and fitness to fly and his approach to the treatment available in Sri Lanka was not adequate. The treatment of the medical evidence, bearing in mind the appellant had severe depression, was insufficient.

16. Mr Lindsay resisted the appeal and relied on the respondent's Rule 24 response. It was conceded by the appellants' representative that the appellants did not meet the eligibility requirements as they had no leave and their immigration history was not challenged. The appellants had no leave after November 2013. It was difficult to see how unlawfulness or precarity made any difference and indeed Mr Stedman had conceded that.

17. In respect of the medical evidence the standard remained that in **J** and the judge had considered all of the evidence and simply the criteria could not

be met. There was insufficient evidence of real risk and a breach of Article 3. Even if **Paposhvili** was extended to suicide the appellant could not reach the threshold in **AM (Zimbabwe) [2020] UKSC 17)**. As indicated in the Rule 24 response, the judge had considered the evidence at paragraphs 10, 15, 26 and 27 and had given adequate reasons. The fitness to fly issue did not relate to Article 8. The appellant would be assessed as to his fitness to fly and this did not relate to his ability to return to Sri Lanka.

Analysis

18. As pointed out by Mr Lindsay, at paragraph 14 of the First-tier Tribunal decision the appellants' representative at the First-tier Tribunal had conceded that the appellants could not meet the eligibility requirements of Appendix FM because the requirements were not met in terms of their status. The appellants' visas had expired in November 2013 and Mr Stedman before me confirmed that there had been no grant in any form either under the EEA Regulations or in terms of Section 3C leave since November 2013. The chronology in the decision letter states that:

> *"On 5th March 2013 you applied for further leave to remain in the UK as a Tier 4 Student, however, this application was refused on 16th April 2014 with no right of appeal awarded.*
>
> *On 10th June 2015 your application of 5th March 2013 was reconsidered and refused, with an in country right of appeal awarded. You chose not to exercise your right of appeal."*

19. There was no indication that the Secretary of State has done anything other than reconsider the application of 5th March 2013 and there was no indication that the earlier decision of 16th April 2014 had been quashed. In line with the Court of Appeal authority of **Akinola & Anor ,R (On the Application Of) v Upper Tribunal [2021] EWCA Civ 1308** specifically paragraph 69, where decisions are reconsidered and there is no indication that the original decision has been withdrawn, which would normally require a positive step, that is distinct from the making of a new decision. As the Court of Appeal stated

> *"If there is no withdrawal of the original decision, I am satisfied that the making of a new decision or reconsideration does not change the status of the original decision or its effect on Section 3C leave".*

The judge was therefore correct that the appellant's visa leave had expired in November 2013, and albeit that Section 3C leave must have extended it to 16th April 2014, when the first refusal was made and not withdrawn, this reference to 2013 would have had no material effect. The appellants' status was precarious to 2014 and without legal basis thereafter.

20. I do not accept that the appellants' status in the UK was mischaracterised by the judge as being overstayers and that this description tainted the assessment thereafter. Indeed they were overstayers. In **Rhuppiah v the**

Secretary of State for the Home Department [2018] UKSC 58 at paragraph 39, the Supreme Court held that the word "precarious" has been applied by the European Court of Human Rights and by the UK courts to a variety of situations including where people are unlawfully present as well as someone who is lawfully present for a limited period. In the context of Section 117B, however, the word "precarious" has been given a bright-line interpretation which excludes anyone present in the UK unlawfully and includes everyone who, not being a UK citizen, is lawfully present but does not have indefinite leave to remain.

21. As conceded by Mr Stedman there was little material difference between paragraphs 117B(4) and 117B(5).

22. It is true to state that the appellants did not establish their private life in the UK when they were here unlawfully as per Section 117B(4), but they certainly established their private life whilst in the UK on a precarious basis. The judge stated at paragraph 23 that the appellants had remained in the UK illegally since 2013 but, save for the extension of their Section 3C leave for one year from their application in 2013, that is correct. The judge noted at paragraph 3 that the lead appellant entered in 2010 and the second appellant entered in 2009, both came as students. The judge correctly directed himself at paragraph 23(d) stating that little weight is to be given to a private life that is established by a person at a time when they are in the UK unlawfully or at a time when that person's immigration is precarious and the judge states "Those are clearly relevant factors here because the Appellant[s] entered as students with limited leave which expired in 2013. Therefore, their immigration status has been precarious throughout". That is a correct analysis and one that the judge was obliged to consider under Section 117B of the Nationality, Immigration and Asylum Act, which he did. By 2014 both appellants only had either 4 years (wife) or 5 years (husband) lawful leave.

23. It is clear that the appellants did not have even close to ten years' continuous lawful residence in the UK or that their status was mischaracterised. I am not persuaded that the judge proceeded on a mistaken fact amounting to a material error of law. As a logical consequence there would be no negative impact on the article 8 assessment.

24. In relation to the second challenge the weight to be given to medical evidence is a matter for the judge. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, **Herrera v SSHD** [2018] EWCA Civ 412. That said the judge adequately addressed that medical evidence, weaving it into the decision at paragraphs 10, 15, 26 and 27. It was open to the judge to find that there was no basis on which the medical evidence brought the appellant's husband close to demonstrating that the test either in **AM (Zimbabwe) [2020] UKSC 17** or **J v SSHD [2005] EWCA Civ 629** (even if extended in line with AM (Zimbabwe)) was fulfilled. The judge specifically stated that the second appellant suffered from

depression said to be due to bullying whilst growing up in Sri Lanka and a bereavement following his uncle's death and he took into account the evidence on mental health. The judge accepted that the appellant was currently in receipt of medication and noted in his findings at paragraph 15 that "the appellant submitted medical evidence from his psychiatrist dated 3rd August 2017 and his GP at page 117 of the appellants' bundle, which is dated 2nd December 2019."

25. The judge also referenced and factored into his assessment that the appellant had submitted a more recent letter from his GP dated 9th February 2020. It was open to the judge to conclude that because the more recent letter from his GP was written in identical terms that it did not necessarily reflect the up-to-date position in relation to the appellant's condition. The judge accepted that the appellant suffered from depression but also identified that it had pre-existed his arrival in the UK (when he came as a student) and concluded that there was no reason why his current treatment could not continue in Sri Lanka. Nothing in the evidence or as found by the judge suggested there was a real risk of a significant, meaning substantial, reduction in the appellant's life expectancy arising from a completed act of suicide and/or (ii) a serious, rapid and irreversible decline in his state of mental health resulting in intense suffering falling short of suicide. Not least the appellant would be returning with his wife.

26. I was taken to the medical evidence in the bundle, which was said to be compelling evidence but, as indeed the judge indicated, the Consultant Psychiatrist report from Dr S Eagger was dated and from 3rd August 2017. The psychiatrist report detailed that he had family in Sri Lanka, had thoughts of self-harm and had overdosed with ten tablets in 2016, which he did not tell anyone about. The psychiatrist stated

> *"I am concerned that if he goes back to Sri Lanka he will have no-one there who can look after him. His wife is a currently his full-time carer".*

27. In fact, the psychiatrist had already recorded that his wife was also Sri Lankan and not working because a decision on her visa was pending (in fact it had already been refused and their further application dated from 27th August 2017 which post-dated this report). In effect the wife would be removed with him. Dr Sarah Eagger opined the second appellant "would benefit from psychological therapy" and a change of medication. Her diagnosis was of "depression and anxiety" and post-dated and contrasted with the letter of Dr Jeyatillake MD DFFP ARZT (Hamburg) (for whom there was no further indication of his speciality or status) of 9th July 2017 which identified that the appellant had "very severe depression". In those circumstances the report of the Consultant Psychiatrist would evidently prevail.

28. Although the letters from the GP, a Dr S Talpahewa in September 2018 stated he was waiting for further input from psychiatrists, there was no further medical report from a psychiatrist.

29. The letters of 9th July 2017 and 23rd July 2017 written by Dr Jeyatillake were prior to the report of Dr Eagger and albeit the letter of 4th March 2019 referred to Dr Jeyatillake's belief that the husband appellant had overdosed on prescribed antidepressant medication and that he should be taken to hospital, there is no evidence within the papers that attendance at the hospital had occurred. The last letter from Dr Jayatillake was dated 29th October 2019 and there was no indication that the appellant had been examined in person. The judge did refer to the up-to-date medical evidence at paragraph 15 noting that his psychiatrist report was dated in 2017, some four years ago and his GP letter was dated 2nd December 2019, nearly two years ago. The judge clearly stated "he has since submitted a more recent letter from his GP which is dated 9th February 2002[1]. However, both appear to be written in identical terms."

30. From their contents, the judge was correct to state that the GP letters between 2nd December 2019 and 9th February 2021 indeed were written in similar terms; indeed they indicated that the doctor had not reviewed the appellant referring to the same incident in the second paragraph of his letter ("banging his head on the wall"). The doctor also referred to the fact that the appellant had been on antidepressant medication since 2010 and is currently on the same level of medication without being specific save that it was "double antidepressant medication". The medical letters referred to the appellant's anxiety of being removed and his immigration status. There was no indication that the doctor had recently reviewed the second appellant, merely that he had written a further letter.

31. In these circumstances it was entirely open to the judge to conclude at paragraph 15, that "whilst I accept the appellant suffers from depression this was a condition that pre-existed prior to his arrival in the UK", that there was no reason why his current medication could not continue in Sri Lanka where the appellant had studied and he and his wife had spent "the majority of their lives in Sri Lanka" and thus "the appellants are familiar with the language and its culture, both also had family available to support them in Sri Lanka". The judge concluded that there were no obstacles in relation to the appellants' integration back into Sri Lanka. He noted that both appellants were foreign nationals with no settled status in the UK and that their application to remaining in the UK was based on their private lives. The judge noted that they had entered as students, but their leave expired in 2013 (albeit they had Section 3C leave thereafter until the refusal of their applications. I shall not rehearse the points made above on the immigration history.

32. The judge thus overall made a broad evaluative assessment overall of the appellants' ability to integrate in Sri Lanka, in accordance with **SSHD v Kamara** [2016] EWCA 813 finding no very significant obstacle to their return. The evidence presented of very significant obstacles to return was limited and a bare assertion of being unable to return is insufficient, Secretary of State v R (Kaur) [2018] EWCA Civ 1423, paragraph [57].

33. The judge also considered very compelling circumstances and made a balanced assessment on proportionality having noted that the appellant could not succeed under the immigration rules, and finding at paragraph 23(d) that the appellants' private life was subject to the consideration that their immigration status had been precarious throughout their residency in the UK. He was entitled to make that conclusion.

34. The judge accepted that the appellants' removal would interfere with their private life and considered the risk of self-harm should the second appellant be removed but it was open to the judge, at paragraph 26, to conclude that the assessment of the circumstances is a matter of legal appraisal and not for the medical expert. The judge gave sound and adequate reasoning for finding that the appellants could return. At paragraph 27 he referred to the medical evidence and found that there was no evidence that treatment would not be available in Sri Lanka. This was also in the context that the judge was aware the appellant would be returning with his wife. The judge made an adequate assessment and gave adequate reasoning for his findings on the medical evidence; clearly the evidence did not support a finding that the requisite threshold was reached under AM (Zimbabwe) [2020] UKSC 17. The medical evidence on mental health largely related to the appellant's anxiety on his immigration status.

35. The question of whether the appellant is fit to fly and/or travel would be subject to review by the Secretary of State prior to removal and even then I note that Dr S Talpahewa initially stated that the appellant was "unlikely" to be fit to travel by public transport and although the reference to 'unlikely' was deleted in the his second letter and observation on removal was made more strongly, this was without a clear indication on the face of the letter that the appellant had even been reviewed in person. Again, the judge at paragraph 27 stated this:

> *"27. As I noted above the medical evidence confirms his diagnosis of Depression and is currently treated by way of prescription medication. The most recent letter from his GP is a written in identical terms of an earlier letter dated 2.12.2019. No evidence has been submitted to suggest this or any other treatment is not available in Sri Lanka. He appears to benefit from the support of his wife, the first appellant and this could continue as she is also a Sri Lankan national. In addition both have extended families who can provide additional support, if needed."*

36. The judge gave proper regard to the medical evidence on the mental health of the second appellant and adequate reasoning was employed when dismissing the appeal.

37. Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge, Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)**.**

Notice of Decision

On the basis of the grounds as they are drawn and the findings of the judge, I find no material error of law in the decision and the First-tier Tribunal decision will stand.

No anonymity direction is made.

Signed Helen Rimington Date 23rd September 2021

Upper Tribunal Judge Rimington