



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
AA/01325/2014

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons**

**On 12<sup>th</sup> December 2014**

**Promulgated**

**On 12<sup>th</sup> January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**MRS SHIYANI DARIFO  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms V Laughton, Counsel, instructed by Tamil Welfare Association (Romford Road)

For the Respondent: Mr S Walker, Home Office Presenting Officer

**DETERMINATION AND REASONS**

*Introduction*

1. There are in fact two appeals in this case: one by each party, but I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Sri Lanka born on 28<sup>th</sup> November 1990. She arrived in the UK on 30<sup>th</sup> August 2007 as an unaccompanied minor. She applied for asylum on 17<sup>th</sup> January 2008. On 31<sup>st</sup> August 2011 she married a British citizen. On 17<sup>th</sup> December 2012 she applied to remain in the UK on the basis of her marriage. Her asylum application and marriage/ Article 8 ECHR applications were refused on 27<sup>th</sup> June 2013, but were not served on the appellant with removal directions until 11<sup>th</sup> February 2014. She appealed on 28<sup>th</sup> February 2014. Her appeal against the decision was allowed by Designated Judge of the First-tier Tribunal Manuell on Article 8 ECHR grounds but dismissed on asylum grounds in a determination promulgated on the 28<sup>th</sup> August 2014.
3. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Garratt on 15<sup>th</sup> September 2014 on the basis it was arguable that the First-tier Tribunal had erred in law. On 12<sup>th</sup> November 2014 I found that Judge Manuell had materially erred in law when deciding the appeal under Article 8 ECHR and the Refugee Convention/ Article 3 ECHR. The reasons for this decision are set out at Annex A of this determination.
4. The matter came back before me to re-make the appeal. The appellant has served a bundle of additional evidence which included an additional witness statement from the appellant, a letter from the International Centre for Prevention and Prosecution of Genocide and an expert report of Dr Suthaharan Nadarajah.

### *Submissions*

5. At the start of the hearing Mr Walker informed me that the respondent had decided to grant the appellant refugee status and therefore the refusal decision of the 27<sup>th</sup> June 2013 was withdrawn. Action to issue refugee status papers would be commenced next week.
6. Mr Walker and Ms Loughton confirmed that they therefore asked for permission to withdraw their respective appeals, and it was agreed that it would be appropriate for me to do a very simple determination in which the matter was re-made allowing the appeal on asylum grounds on the basis of the respondent's concession that the appellant qualified for this status.

### Decision

7. The decision of the First-tier Tribunal involved the making of an error on a point of law.
8. The decision of the First-tier Tribunal was set aside.
9. The decision is re-made allowing the appeal on asylum grounds, and also on the same facts on human rights grounds.

Deputy Upper Tribunal Judge Lindsley

13<sup>th</sup> December 2014

Fee Award

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I make no fee award as no fee was paid.

Deputy Upper Tribunal Judge Lindsley  
13<sup>th</sup> December 2014

**Annex A****DECISION AND DIRECTIONS***Introduction*

1. The appellant is a citizen of Sri Lanka born on 28<sup>th</sup> November 1990. She arrived in the UK on 30<sup>th</sup> August 2007 as an unaccompanied minor. She applied for asylum on 17<sup>th</sup> January 2008. On 31<sup>st</sup> August 2011 she married a British citizen. On 17<sup>th</sup> December 2012 she applied to remain in the UK on the basis of her marriage. Her asylum application and marriage/ Article 8 ECHR applications were refused on 27<sup>th</sup> June 2013 and served on the appellant with removal directions on 11<sup>th</sup> February 2014. She appealed on 28<sup>th</sup> February 2014. Her appeal against the decision was allowed by Designated Judge of the First-tier Tribunal Manuell on Article 8 ECHR grounds but dismissed on asylum grounds in a determination promulgated on the 28<sup>th</sup> August 2014.
2. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Garratt on 15<sup>th</sup> September 2014 on the basis it was arguable that the First-tier Tribunal had erred in law in dismissing the asylum claim as it was arguable that Judge Manuell had not followed guidance in GJ and Others (Post-civil war; returnees) Sri Lanka CG [2013] UKUT 00319 and thus properly assessed risk in this case in failing to consider expert evidence in that case from Callum McRae and the fact that she would be returned in circumstances where it was accepted her brother had had been shot by the Sri Lankan authorities as a LTTE suspect. Permission was also granted to the Secretary of State who cross appealed on the basis that Judge Manuell had also arguably erred in law in allowing the appeal on Article 8 ECHR grounds because he failed to consider the insurmountable obstacles test at paragraph EX 1 of Appendix FM and did not specify the factors at s.117B of the Nationality, Immigration and Asylum Act 2002 which were for and against the appellant in consideration of the proportionality of her removal in the context of her family life in the UK.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

*Submissions - Error of law Asylum*

4. Ms Loughton relied upon the grounds of appeal and her skeleton argument. In summary these contend as follows.
5. The appellant was found to be a credible witness. It was accepted that her brother Rothanth Lohiththasan had been shot on 2<sup>nd</sup> January 2006 (when he was aged just 15 years) by the Sri Lankan army with other unarmed youths on a beach at Trincomalee on suspicion that they were involved with the LTTE. This was agreed to be a high-profile killing. The appellant did not witness this shooting herself. The families of the boys had filed a court case against the army. They had then all received

threatening letters and telephone calls and were told they must not give evidence, and should leave Sri Lanka or be killed. The appellant and her family all left Sri Lanka. She became separated from her mother in Egypt. The rest of her family travelled to Switzerland and were granted refugee status in 2008. The court case regarding her brother is still on-going in Sri Lanka.

6. Judge Manuell appears to accept that the appellant had a valid claim for asylum when it was made, and up until the end of the civil war in May 2009 (paragraph 18). But finds she is not at risk because she did not witness the shooting of her brother; she had not herself pursued pro-separatist activities or campaigned about the death of her brother; and because it would be counter-productive for the Sri Lankan government's image for them to harm the appellant (paragraph 19).
7. Judge Manuell made errors in the consideration of risk in the appellant's case in the following ways.
8. It was contrary to GJ to find that the Sri Lankan government would not ill-treat individuals so as to preserve their international image as it was clearly held that there was a real risk of torture for those detained by the security services.
9. Further in GJ the evidence of Callum McRae was accepted as being balanced and such that weight should be given to it (see paragraph 260 of the determination). This evidence states (at Appendix H to GJ) that it was very dangerous to be a critic of the Sri Lanka government. Consideration should have been given to the risk the appellant faced as a potential witness in the case against the government involving her brother given this evidence; the category of persons at risk identified in GJ (witness in relation to war crimes) and also given what was said in MP (Sri Lanka) v SSHD [2014] EWCA Civ 829. At paragraphs 36 to 38 the Court of Appeal identified that there was a potential further category of persons at risk (those who may wish to give evidence about war crimes) in addition to those identified in GJ. This was something that might well happen as the appellant would be the only family member in Sri Lanka to do this and at the very least the Sri Lankan government might therefore perceive that this was the purpose of her return to Sri Lanka after her long absence.
10. The evidence of the appellant in her statement (accepted as credible by Judge Manuell) was that she had taken part in anti-government demonstrations organised by the Tamil Youth Organisation in London. In accordance with GJ at paragraph 352 these are likely to be known about by the Sri Lankan authorities. It was also notable that the appellant would be returned from London a known Tamil diaspora hotspot, and the fact of her long residence here would add to her being seen as an LTTE member or supporter given her Tamil ethnicity (see evidence at paragraphs 324, 338 and 427 of GJ). The additional matters were also

not put in the balance in consideration of risk based on the category identified above.

11. It was also argued that Judge Manuell had fallen into error by taking irrelevant and inaccurate factors into account when considering the appellant's asylum claim. He had held that the appellant was a married woman settled in the UK who had left Sri Lanka behind at paragraph 19. The appellant is not legally "settled" in the UK; the respondent clearly does not accept she is entitled to remain in the UK on the basis of her marriage to a British citizen as she is pursuing a cross appeal on this basis and has set removal directions for the appellant's return to Sri Lanka; and an asylum claim must always be determined on the basis of the hypothetical return of the appellant in any case.
12. Mr Toufan relied upon the Rule 24 notice. This states that the appellant was not a witness to her brother's shooting and not a party to the complaint against the Sri Lankan government and had lived in the UK since 2007. It was therefore open to Judge Manuell to find that she did not have a profile which would lead her to be at risk of harm from the Sri Lankan authorities. Mr Toufan pointed out that Judge Manuell had found that it was the appellant's family who was pursuing an on-going court case against the Sri Lankan government and not just the appellant. Judge Manuell had considered GJ at paragraph 21 of his determination and come to the conclusion that she was not at a real risk of harm. The appellant's case simply was not on the same facts as the possible extra risk category set out in MP.
13. I told the parties at the conclusion of the hearing I found an error of law in the consideration of the asylum appeal by Judge Manuell.

#### *Conclusion – Error of Law Asylum*

14. On the face of the determination it appears that the finding by the First-tier Tribunal that the appellant was entitled to remain in the UK on the basis of her family life with her husband had caused the First-tier Tribunal see risks on return as lesser in the sense that they were viewed as "academic" (see paragraph 17 of the determination). Whilst the First-tier Tribunal acknowledges that it is bound to determine the protection claim, as the appellant has chosen to pursue it, Judge Manuell returns to the fact that the appellant is "settled in the United Kingdom", "married" and has "left Sri Lanka behind" when considering risk factors at paragraph 19. I find that immaterial factors have been brought into play in the consideration of the asylum claim.
15. I also find that it could not be said that the Sri Lankan government would not subject the appellant to serious harm to preserve their good image internationally as is said at paragraph 21 of the determination. Clearly GJ does find that in a number of circumstances the Sri Lanka government is quite willing to commit such acts against those who they

regard as dangerous opponents without apparent regard to the bad reputation that this creates.

16. I also find that the First-tier Tribunal did not properly consider whether the appellant was at risk on return to Sri Lanka on the basis of her potential to give evidence in the case or to advance the case brought by her family against the Sri Lankan government due to the extrajudicial execution of her brother as a suspected LTTE member or supporter. The fact that she did not actually witness this event clearly would not prevent her doing either of these things. She is now an adult who could instruct a lawyer to pursue the case and who has relevant knowledge about her brother's activities in life if not the circumstances of his death.
17. Such a risk factor would be in line with the thinking that such a category might exist, as set out in MP by the Court of Appeal at paragraphs 36 to 38, and the evidence of Mr Callum McRae in GJ. It was not sufficient to dismiss this potential source of risk by saying that it would be contrary to the good image of the Sri Lankan government (for the reasons I set out at paragraph 14 above) or simply because it was not a factor identified in GJ, particularly as some indication that it might have potential as a risk factor was noted by the Court of Appeal in MP.
18. I make clear however that at this stage I do not find that this is a risk factor or that there is sufficient evidence in the Callum McRae material to find the appellant at risk on this basis: I simply find that this ought to have been explicitly explored; and the fact that as it was not could have materially affected the outcome of the appeal.

#### *Submissions – Error of Law Article 8 ECHR*

19. Mr Toufan relied upon the grounds of appeal. These argue that Judge Manuell failed to consider whether the appellant could meet the requirements of the Immigration Rules in relation to Article 8 ECHR as the first step in considering the appeal on this basis. Furthermore he fails to consider the issue raised in paragraph EX1 (b) and EX2 of “insurmountable obstacles”. In accordance with Gulshan (article 8 – new Rules –correct approach) [2013] UKUT 00640 IAC the Immigration Rules must be considered first before Article 8 ECHR is considered at large.
20. It is also argued for the Secretary of State that Judge Manuell erred in not identifying that not all the factors under s.117B of the Nationality, Immigration and Asylum Act 2002 are supportive at paragraph 25 of his determination. The appellant's family life was developed whilst she was in the UK unlawfully so little weight should be attached to it. The appellant's asylum claim was dismissed and whilst she had a valid reason to be in the UK in 2007 it was speculative that she would have succeeded in her asylum claim until 2009 and in any case her residence was not lawful.

21. Further there was no concession by the presenting officer that the appellant should succeed under Article 8 ECHR and so the proportionality assessment was inadequately argued, and any delays in the consideration of the appellant's case were not material as she had contributed herself to some of them as initially she had said she was happy to join her family in Switzerland and then changed her mind - see paragraphs 12 to 15 of the reasons for refusal letter.
22. Ms Loughton said that she relied upon her Rule 24 notice; the statement of Ms Gemma Loughran, who had been counsel at the hearing before the First-tier Tribunal; and her skeleton argument. In Ms Loughran's statement she says that she recorded the Home Office Presenting Officer Mr Choudary as saying that "Article 8 is difficult to get round" and made no submissions beyond relying upon the refusal letter. In these circumstances the Secretary of State should not be allowed to pursue an appeal on the basis that the reasoning of Judge Manuell was not sufficient as it had been strongly indicated to him that everyone accepted that Article 8 prevented the removal of the appellant.
23. Ms Loughton argued that the appellant was not unlawfully present so there was no error in the assessment that all factors under s.117B of the 2002 Act went in the appellant's favour. It was clear that Judge Manuell had found the appellant a genuine asylum seeker at paragraph 18 of the determination. She had been on temporary admission at all times.
24. Ms Loughton also submitted that delay was clearly material to consideration of the Article 8 ECHR claim. The Secretary of State had delayed for six years before making a decision. If a prompt decision had been made within six months the appellant would have been granted refugee status or at least discretionary leave as an unaccompanied minor asylum seeker. Delay was clearly material to Article 8 ECHR in accordance with EB Kosovo v SSHD [2008] UKHL 41. This added to the legality of the appellant's stay in the UK and also to the finding her removal would be disproportionate to her family life.
25. At the end of submissions on Article 8 ECHR I indicated that I found Judge Manuell had erred in law in consideration of this issue too.

#### *Conclusions -Error of Law Article 8 ECHR*

26. Judge Manuell ought to have first assessed the appellant's Article 8 ECHR claim against the requirements of the Immigration Rules in accordance with Gulshan as the application on family life grounds was made after commencement of the new Article 8 Immigration Rules in Appendix FM. He did not do this in his determination. This failure was material as an evaluation of the obstacles, and how "insurmountable" they may be, to family life continuing in Sri Lanka is in any case a material factor in the consideration of the proportionality of removal of the appellant and is not set out at any point in the determination.



27. The Secretary of State did not concede the appeal under Article 8 ECHR. In these circumstances it was necessary for the First-tier Tribunal to give a reasoned decision on the issue even if no submissions beyond reliance on the reasons for refusal letter were made. I do not find the reasoning on this issue adequate in the determination. There was no consideration of the issue of whether family life could reasonably take place in Sri Lanka as indicated above; or the weight to be given to delay by the Secretary of State; and the basis on which the appellant was said to be lawful present (as Judge Manuell finds by implication at paragraph 25 of his determination when he says all factors at s.117B of the Nationality, Immigration and Asylum Act 2002 are in her favour) was not explained.

### Decision

28. The decision of the First-tier Tribunal involved the making of an error on a point of law in the determination of the asylum and article 8 ECHR appeals.
29. The decision of the First-tier Tribunal is set aside, with only the findings that the appellant is to be seen as a credible witness in relation to all matters and that all personal documentation presented by her is also found to be credible preserved.

### Directions

1. The appeal will be remade de novo before me on Friday 12<sup>th</sup> December 2014.
2. The estimated length of hearing is 2 hours.
3. Any fresh evidence that the parties wish to adduce should be served in accordance with paragraph 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the Tribunal and the other party at least seven days prior to the hearing.

Deputy Upper Tribunal Judge Lindsley  
12<sup>th</sup> November 2014