IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002668

First-tier Tribunal Nos: HU/53980/2023
LH/01472/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2 January 2025

Before

UPPER TRIBUNAL JUDGE KEITH

Between

ROHINIDEVI RAJESWARAN
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr G Symes, Counsel, instructed by S Satha & Co Solicitors
For the Respondent: Ms S Nwachuku, Senior Home Office Presenting Officer

Heard at Field House on 26th November 2024

DECISION AND REASONS

Background

1. This is the re-making decision in the appellant's appeal, against the respondent's decision to refuse her application for entry clearance as an adult dependent relative to join her UK family members. I had previously found that a Judge of the First-tier Tribunal, First-tier Tribunal Judge Nixon, had erred in law in her decision dated 16th April 2024, but I preserved some findings of that decision insofar as they related to the facts as the date of the decision of 15th April 2024. I set out these preserved findings later in these reasons.

The Hearing

2. I also retained re-making in the Upper Tribunal for reasons set out in the error of law decision, which is annexed to these reasons. Following my directions, the appellant adduced additional evidence, and I heard witness evidence from the one of the appellant's daughters, Priyatharshani Indran, which I refer to as Mrs Indran, and her daughter, (also the appellant's granddaughter), Marumeta Indran (hereinafter referred to as Ms Indran). Mrs Indran gave evidence via a Tamil interpreter whilst Ms Indran gave evidence in English. I checked Mrs Indran's understanding of the interpreter and at no stage was any difficulty identified in the interpretation.

3. I also refer to and have considered in full an appellant's bundle and page references are referred to for the remainder of these reasons in the format X/AB. For the avoidance of doubt whilst I do not recite each piece of evidence, I have considered them. In these reasons I will do no more than summarise the gist of the respective arguments and a summary of the evidence, only to explain why I have reached my decision.

The Issues

4. The appellant helpfully set out in a skeleton argument prepared on her behalf the following issues:

   (1) Does the appellant meet the requirements of paragraph E-ECDR.2.5. of Appendix FM of the Immigration Rules? These relate to the requirements of an adult dependent relative. If the appellant does meet those requirements, then that would be an answer to the appellant's appeal on human rights grounds because she meets the Rules.

   (2) To the extent that the appellant does not meet the requirements of the Immigration Rules, is refusal of entry clearance nevertheless a breach of her right to respect for her family life and that of her family's life contrary to Article 8 ECHR? Breaking down that question into the sub-issues the questions are as follows:

      (a) Does family life for Article 8 purposes exist?

      (b) Does the decision interfere with the appellant's family life, so as to engage Article 8?

      (c) If so, is that interference in accordance with the law and for a legitimate aim?

      (d) Is that interference proportionate to the legitimate aim?

The appellant's case

5. In very simple terms, the appellant says that she meets the requirements of the Immigration Rules. She is a 70-year-old woman who lives in Sri Lanka, having lived there all her life. She raised her children a single mother, having been estranged from her husband. Those children are all adults and have emigrated to different countries, leaving her alone. The sponsoring daughter in the UK is the youngest of two daughters. The sponsor has a brother who also resides in the UK, with indefinite leave to remain. The sponsor is a British citizen. Up until the latter part of 2021, the appellant lived with her eldest daughter in Sri Lanka but

in September 2021, the appellant's grandson in Canada sponsored his mother, the eldest daughter, to join him there. He was unable to sponsor the appellant as well. Since that time, the appellant has remained alone in Sri Lanka and whilst arrangements were made for a carer, there had been multiple different carers which had not proven to have provided adequate or sustained care. She also has support from her neighbours. She had a heart attack on 19th November 2022 and relies upon updated medical evidence as to her previous medical interventions, namely heart surgery and advice from doctors that she would experience a significant improvement if she were with her children. The doctors had advised that the appellant's health had been deteriorating since the departure of the elder daughter. Various care homes have indicated that they would be unable to accommodate the appellant due to her medical needs and the absence of a guardian in Sri Lanka, and although she had been receiving psychological treatment and medication for depression, which had been ineffective. The consequence of her mental ill-health was to affect her ability to care for herself including showering, eating and complying with her medication regime. In summary, the care she received does not meet her needs as considered by the Court of Appeal in Britcits v SSHD [2017] EWCA Civ 368. In particular, the focus should be on the care required and whether it can be reasonably provided to the required level in Sri Lanka. The appellant says that there is no person in Sri Lanka who could reasonably provide her with the care she requires, and that includes consideration of whether the carer should be a member of her family. Whilst there may be care homes and medical treatment available in Sri Lanka, the reality is that the only people who could reasonably provide the care required to meet the appellant's needs is the appellant's daughter, who is willing to be able to do that in the UK.

6. In the alternative and outside the Rules, the nature and quality of the relationships and clear dependency are such that family life exists. The denial of entry clearance interfered with that right and even if in accordance with the law in pursuit of legitimate aims, it was disproportionate. She would be of no burden to UK taxpayers as she would be cared for by her daughter and family in the UK, whose business is said to be thriving. She would have the love and care of her grandchildren, and the separation of the family was having a negative impact upon the appellant, and if there was to be any possibility of improvement it would be with, and cared for by, her daughter and family in the UK. The ultimate question is whether family life could reasonably be enjoyed elsewhere and that had to be considered in the context of all of the circumstances. Preservation of the status quo meant that the appellant's physical and mental health would continue to deteriorate and there were clear exceptional circumstances making the refusal of settlement in the UK unjustifiably harsh.

The respondent's case

7. The respondent disputed that the appellant meets the Immigration Rules. The respondent pointed to the choice of the eldest daughter to emigrate to Canada and the absence of evidence as to why the appellant could not emigrate to Canada with her. The respondent also disputed that the appellant would be unable to obtain the required level of care in Sri Lanka. Having heard the evidence of the sponsoring daughter and stepdaughter, in reality, the only issue of needs related to emotional needs with it being accepted that the appellant's physical medical conditions could be met in Sri Lanka. The witness evidence before me was that the appellant had disengaged with the care offered, because she was emotionally dependent on her UK daughter. She had chosen not to

engage with arrangements which would otherwise mean that her caring arrangements would be satisfactory. The evidence heard was that the appellant did not trust those caring for her but that was not unique to many caring situations. The correspondence from two care homes suggesting that they would be unwilling to care for the appellant should have little weight attached to them where they appeared to be in identical terms but misdated. The provenance of them was unclear. A psychiatric report also had deficiencies because it did not discuss the fact that the appellant now had a carer and could assist with many tasks and was not in the format of an expert medical report. The medical evidence had previously stated that she was not receiving treatment for her mental ill-health, whereas now it was accepted that she had received psychiatric treatment and pharmaceutical interventions. The evidence was clear that psychiatric treatment was available, but the sponsor had said that the appellant was stubborn, would not take medication, and needed her family. There was no medical evidence that if she were reunited with her UK family, she would continue to have any medical conditions. There was no evidence that different medication had been tried and if that might be a solution. There had been a carer in place now for four months and it appeared that the appellant's needs were being met.

Findings

8. I start with the preserved findings of Judge Nixon, made on 15th April 2024. I make clear where I depart from those findings considering the further evidence after 15th April. He found as follows:

> "(1) I find that the appellant cannot meet the criteria of Appendix FM. There is no dispute that she suffers from multiple health conditions as reflected in the medical evidence and that she requires care. There is no dispute that the cost of any care can be afforded by the sponsor. The real issue is whether the 'required level of care….is not available and there is no person who can reasonably provide it'.
>
> (2) I agree with the submissions made by Miss Bibi, that no evidence has been provided of the sort of care that is needed and so it is unclear whether, as a result of her conditions, she needs 24 hour care, daily assistance with day to day activities or qualified medical care. I would have expected this to have been set out in the various medical letters but they are silent about this. Accordingly I have seen no evidence to show that she needs personal care of such a level that she needs it to perform everyday tasks as required by the Rules.
>
> (3) I am told that she has had carers attend to her since her daughter left for Canada and I am not told that the care they have provided, albeit not what the sponsor would like, has fallen below what the appellant requires. Furthermore, whilst there is no continuity in staff (as is often the case with carers) and the appellant does not trust them (which once again is often the case), I am not told that this level of care would cease. I have not been provided with any evidence from her doctors to suggest that this level of care is no longer enough. I have seen a letter from Dr Jatheesan stating that she is not currently treated for depression but I have not been told why she cannot obtain that treatment from the doctors and then the carers ensure she takes her medication.

(4) I have seen one letter from one care home saying they would not accept her but nothing further. The sponsor stated she had spoken to a couple of others but she had nothing from them to confirm that the appellant would not be accepted. She did not say that she had spoken to any of the care homes mentioned by the respondent. She did however make it clear, perhaps unsurprisingly, that she did not want her mother to go into a care home. However, applying the law as I must, I find that she has not shown that there is no suitable care available.

(5) I have been helpfully referred to the case of Britcits v SSHD [2017] EWCA Civ but I find that in this case there is no evidence that the level of care presently provided is insufficient or that a more concentrated level of care provided in a care home is not available to her. Whilst both the appellant and her family members would prefer for her to be with her family members, I find that the care available in Sri Lanka is sufficient to meet her needs in the absence of medical evidence to the contrary".

9. Since those findings on 15th April, there has been the following additional medical evidence and evidence from care home providers. A letter from the Max Care Medical Centre in Colombo dated 3rd May 2024 at 5/AB says that the appellant was examined on 22nd April 2024. I presume that the letter is from her treating doctor and the doctor notes her expressions of frustration and sadness which had significantly affected her appetite and overall physical condition, with a description of a weakened appearance and fatigue. The doctor stated:

> "While her vital signs appear stable considering her age and medical history, I am deeply concerned about the potential ramifications of her deteriorating mental health which may exacerbate her physical symptoms if left unaddressed. As a medical professional, I emphasise the intricate correlation between mental and physical wellbeing, and it is evident that Mrs Rajeswaran's emotional distress is affecting her overall health. Mrs Rajeswaran's adamant belief that she can no longer reside with her children, cites fear and worry as predominant factors contributing to her current state. Considering this, I urge you to consider options that would facilitate her living arrangements, specifically her desire to be with her children in the UK with her loved ones."

10. The other additional evidence is dated 18th September 2024, at 3/AB from a consultant psychiatrist, Dr Sivathas. I should add in this context that the appellant's daughter, Ms Indran has already given evidence that the appellant has in fact been living with a carer since July 2024 in her family home, having only briefed lived in a care home for around 10 days, as the e care home was unable to support her needs. Dr Sivathas continued:

> "Ms Rajeswaran, a 69-year-old female, presented to the clinic with a depressive episode associated with unresolved grief. Her husband left her many years ago, and her children migrated abroad, leaving her alone. She has been undergoing both psychological and pharmacological treatment for more than a year. Although she has been on antidepressant medications for several months, she has not recovered from the depressive episode. Currently, she is experiencing residual symptoms of depression, which have markedly impacted on her day-to-day activities. She struggles with basic

self-care, often forgetting or lacking the willingness to shower, eat, take medications, or generally look after herself. These symptoms are concerning, as they suggest a deeper deterioration in her mental health, which may worsen without appropriate intervention. Ms Rajeswaran has repeatedly expressed feelings of loneliness due to her separation from her children, which appears to play a major role in the recurrence of her depressive symptoms. I strongly believe that Ms Rajeswaran would greatly benefit from the presence and support of her children. Reuniting her with her children could provide a supportive environment to improve her depressive symptoms and facilitate her recovery. I am hopeful that, with her children's involvement, she will begin to regain the confidence to care for herself and engage actively in her treatment".

11. There was dispute as to further evidence, specifically two letters from the 'Shantha Seva Elders Home'. One version of it was dated 12th March 2023, 6/AB whereas a subsequent letter apparently from the same provider in the same terms was dated 17th July 2024 (8/AB). It was suggested that they were not reliable documents as the appellant had not attended the care home until July 2024, but I am prepared to accept the evidence of Mrs Indran that the earlier version of the letter was misdated and that it was in fact in July 2024. In simple terms, the letter explains that the care home was unable to continue to care for the appellant who faced challenges with food intake and sleep and was resistant to the care that they were able to provide and therefore they were serving notice as otherwise there was concern that her health may deteriorate further. It was in that context that the appellant returned to the family home after 10 days. It is the same family home where she had lived previously.

12. Finally, there was correspondence dated 27th May 2024 from a local Baptist Church, which, it is said, owns care homes, in which the Church said that the appellant's needs exceeded their current staffing capabilities, due to her underlying heart conditions and the lack of availability of a guardian in medical emergencies (7/AB).

Mrs and Ms Indran's witness evidence

13. I should say at the outset that, despite the challenge to the correspondence from Shantha Seva Elders Home, I found Mrs Indran and Ms Indran to be careful and honest witnesses, who were prepared to concede points that were not in the appellant's favour. Ms Indran confirmed that she was unaware of the exact nature of the psychiatric treatment that her grandmother had undertaken and she candidly admitted that her parents had shielded her from the details of her grandmother's illness because they did not wish to overburden her as she had started her own studies in medicine at university. She emphasised her love for her grandmother, the closeness of the family relationship, and particularly the fears of the UK family after the appellant had a heart attack in November 2022.

14. Mrs Indran also revealed, and not readily apparent from the witness statement, that when her elder sister emigrated to Canada, having previously looked after the appellant's mother in many respects, the elder sister assumed that the UK sponsoring sister would be able to bring the appellant to the UK. It was after the elder sister left Sri Lanka, that the appellant had hade a heart attack and became depressed, and there had been a succession of carers who kept changing and to whom the appellant would not listen and she declined to accept their encouragement to take her heart medication.

15. Mrs Indran also candidly accepted that her mother's physical conditions did not prevent her from living in Sri Lanka, and that the real issue was because she was mentally ill. In her words, the appellant was not sick, but continued to worry, did not take her medication, and argued with professional carers whom she did not trust. The sponsor said that the appellant was struggling and feeling very sad, whereas if she lived with the sponsor in the UK, she would live for a long time and would not need medication. Mrs Indran said that her mother had struggled to bring up her children and now that the UK relatives were doing well, they wished to look after her. The week of the hearing had been the appellant's 70th birthday and she had no one to celebrate her birthday with her. Mrs Indran reiterated that the issue was not physical illness and when asked whether medication for mental ill-health would not help at all, she said that the appellant would only be happy with the UK family and that was her illness, as she had never been alone before. Mrs Indran was aware that the appellant had attended a psychiatrist but did not know the precise details of that. She had however visited in 2024, to ensure that a carer was in place to attempt to ensure adequate arrangements for her mother, after the appellant left the care home following the brief 10-day stay in July 2024.

Findings on the appellant's medical conditions

16. I turn first to the medical evidence. I should say from the outset that whilst the skeleton argument has dealt with a number of physical conditions including a reference to the appellant's previous heart condition, Mrs Indran has candidly accepted and I find her evidence as reliable, that none of the appellant's physical conditions other than her mental health condition would necessitate her needing care in the UK, nor do they play any material weight in the proportionality analysis. Considering the letters from Dr Jatheesan and Dr Sivathas, their credentials have not been questioned. However, when Mr Symes suggested that I was bound to accept their contents by reference to the well-known authority of TUI UK Ltd v Griffiths [2023] UKSC 48 and HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC), I queried with him whether they could truly be treated as complying with guidelines on expert evidence, particularly as they did not contain statements of truth and did not, for example, confirm any duty to this Tribunal to give independent expert evidence. Rather they were, I find, honest views expressed by doctors who were treating the appellant but nevertheless ones that are quite obviously partial. They have clear views that their patient is expressing and indeed ruminating on her desired outcome, namely to join her family in the UK and they think that would benefit her. I do not doubt their assessment, in this context, the appellant's health has suffered to a serious extent, because of her lack of self-care including taking medication and eating.

17. However, there is also an important gap in the evidence. I accept Ms Nwachuku's challenge that the letter from Dr Sivathas comments on the appellant's symptoms and struggling with various aspects of looking after herself but makes no comment on the ability of her carer with whom she has lived since July 2024, to mitigate the risks. That is an important gap in the analysis of any care setting and must undermine Dr Sivathas' analysis of the stability of the current arrangements, where it is far from clear that the doctor is in fact aware of the care arrangements, even though his letter was written in September 2024. The same criticism cannot be fairly made of Dr Jatheesan's letter of 3rd May 2024 as this predated the appellant having her current live-in carer but it also does not comment on any previous care arrangements and how they may mitigate against the appellant's absence of self-care. Crucially in this case is the question of whether, with an appropriately managed carer relationship with whom the

appellant gains trust, she would be willing to accept help in self-care and in her medication regime. The fact that she had not done so by 3rd May 2024 is an important factor, but the new arrangements are not commented upon in Dr Sivathas' report and there are no details provided as to the counselling that the appellant has undertaken, or the nature of medication regime for her depression. Whilst both doctors suggest that the best outcome would be that she lives with her UK family, this is in turn is because of the appellant's adamant belief that this should happen, and that this is the only satisfactory option.

18. There is the additional inference, from Mrs Indran's evidence, that if the appellant were to come to the UK, it is questionable whether she would require any medical care for depression at all. In that scenario, it is not that she needs care and treatment which can only be provided by UK relatives. Her loneliness, and consequential depression and distrust of professional carers, is the medical issue, and if this can be resolved, the situation will stabilise. The two scenarios which have been posed by the appellant's family are that first, the appellant is permitted to come to the UK, and as Mrs Indran envisages, the appellant's mental health issues will resolve. Her physical health issues are not central to this appeal. Second, the appellant remains in Sri Lanka, distrustful of carers, and her mental health continues to deteriorate, as it has done in the past, with residential care homes unable to cope with her and a succession of domestic carers who do not provide adequate care. However, there is a third scenario. Mrs Indran indicated that following the appellant's brief stay in the residential care home in July 2024, from which she was discharged home after around 10 day, Mrs Indran has intervened to ensure that one domestic carer has been in place since around July 2024, and she confirmed that the same carer remains in place. Mrs Indran's intervention was also to ensure that the carer adequately looks after her mother. While Mrs Indran fears that the current carer may leave employment at some stage, there is no evidence of any breakdown in the current care arrangements, or that that the carer is not able to ensure that the appellant accepts the care provided and take her medication. This has required Mrs Indran's intervention, no doubt at significant inconvenience given her distance from her mother, but the care is not such that no person in Sri Lanka can reasonably provide it, in the sense that the appellant's psychological needs are not met by a paid carer, as envisaged in Britcits. The key is the trust that the appellant can develop with her domestic carer, as managed by Mrs Indran's interventions and, where necessary, visits from the UK.

Whether the appellant meets section E-ECDR.2.5 (now ADR5.2)

19. I conclude that the appellant does not meet section E-ECDR.2.5, on the basis that the level of required care that is reasonable is available in Sri Lanka. The issue is not one of resource but of a relationship in which the appellant has sufficient confidence to be willing to take her medication and to be willing to accept help in eating and self-care. The burden of proof is on the appellant. Since Mrs Indran stepped in and intervened after the appellant returned home in July 2024, the appellant's situation has remained stable, based on the limited evidence available. I bear in mind Dr Sivathas's letter of September 2024, but it is not in the format of an expert report and makes no reference to the current caring arrangements. There is also no detail about the psychiatric treatment beyond a brief reference to medication and counselling. There is no discussion, for example as one might see in GP records or a detailed report, about different medication regimes, or alternative forms of counselling and therapy, should the existing arrangements become unstable. In summary, the appellant's

circumstances are not at the stage where the current arrangements are likely to be so unstable such that no person in Sri Lanka can reasonably provide it.

Article 8 – whether refusal would result in unduly harsh consequences and also outside the Rules.

20. I accept that there is family life in an Article 8 sense, between the appellant, her UK children, and no doubt, her Canadian relatives (the appellant had lived until recently with the older daughter who is now in Canada, and so is also likely to be emotionally dependent on her). Based on Mrs Indran's evidence, the appellant is someone who has always lived for her family, bringing them up and caring for them. They have all emigrated and she is left without them. She is lonely and ruminates on her absence from them. This is at the root of her depression. There is on the evidence before me to be a strong emotional dependency. Mrs Indran confirms the regularity of their communications via telephone and via social media, which I accept cannot be a substitute for physical presence. The respondent's refusal to allow the appellant to settle in the UK has had a significant impact, to engage Article 8 ECHR. The remaining questions are whether the refusal would result in unduly harsh consequences, to not be in accordance with the law and whether the decision is proportionate outside the Rules. I have approached both questions based on a balance sheet analysis, focussing on the impact of the family unit as a whole, as per: Al Hassan & Ors. (Article 8; entry clearance; KF (Syria)) [2024] UKUT 00234 (IAC)

21. In the balance in the appellant's favour, the UK family are well-resourced. They will be able to care for the appellant, with whom they have a committed and loving relationship, in the UK. Refusal affects not only the appellant, but the wider family with whom she can deepen relationships, such as Ms Indran, in a way that she otherwise could not, because of time pressures. Mrs Indran is busy running a successful business, which restricts her ability to travel to Sri Lanka. Ms Indran is busy with her studies at university. They will be able to speak and communicate via social media and messaging, but that is no substitute for living with a family member, as the appellant had done previously. The family will continue to worry about the appellant and Mrs Indran may well need to continue to make trips to Sri Lanka to allay those fears and to ensure that the care arrangements are maintained.

22. There also remains the risk that the current care arrangements break down, in the sense that the current carer leaves, so that Mrs Indran also needs to intervene and manage a new carer, and consider alternative medical interventions if the appellant's health begins to deteriorate, such as different medication regimes or different kinds of counselling.

23. In the balance in support of the respondent's position, the medical issues are simpler than had appeared. The medical issue is the appellant's loneliness, depression, and lack of self-care. The appellant's family can afford professional domiciliary care, and carers have been found in the past, although found wanting. While the appellant's health has deteriorated in the past, the current arrangements appear to be stable (having endured since July). While previous carers were not adequate and when the appellant's health deteriorated significantly such she had had to go to a care home, that care home served notice because of her dysregulated behaviour, it is testimony to Mrs Indran and the UK family that they were able to manage the situation swiftly and the risk to the appellant was mitigated. I do not suggest that the appellant's mental ill

health is contrived, but its effects have been mitigated through Mrs Indran's management of the carer arrangements. I have no doubt that Mrs Indran would swiftly intervene in the future to ensure that the care is adequate, because of Mrs Indran's obvious wish to support the appellant.

24. In conclusion, while there may be sympathy for anyone who is left lonely and seriously depressed by the emigration of their family members, that does not begin to outweigh the public interest in the maintenance of Immigration Rules, to render the consequences unjustifiably harsh. The medical evidence, such as it is before me, is limited and obviously not independent expert evidence. There is insufficient evidence that with current carer arrangements, or as adjusted in the future, the medical risks to the appellant cannot be adequately mitigated. As to the wider non-medical aspects, the family undoubtedly miss the appellant, and worry about her, but their contact with her will continue via modern communication means and the option remains for family members to visit her in Sri Lanka, as they have done in the past. She has a deep emotional dependency on them, even with a committed professional carer whom she trusts. However, with management of the appellant's depression, that emotional dependency does not make refusal of settlement in the UK disproportionate. The appellant can be reasonably expected to enjoy family life with her relatives in the UK and Canada from Sri Lanka, with the current arrangements in place, in answer to the question posed at para [20] of Huang & Ors v SSHD [2007] UKHL 11.

25. The respondent's refusal of leave for the appellant to enter and settle in the UK is not in breach of the appellant's right to respect for her private or family life. The appellant's appeal is accordingly dismissed.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20th December 2024

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002668

First-tier Tribunal No: HU/53980/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE KEITH

Between

Rohinidevi Rajeswaran
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr N Paramjorthy (Counsel) instructed by S Satha and Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 21st August 2024

1. These written reasons reflect the full oral decision which I gave to the parties at the end of the hearing.

Background

2. The appellant appeals against the decision of a Judge of the First-tier Tribunal, Judge Nixon, who, in a decision dated 16th April 2024, dismissed her appeal on human rights grounds.

3. The appellant is a 69-year-old Sri Lankan national who lives alone in Sri Lanka, albeit with a succession of carers and neighbours who are said to look out for her welfare. Until 2021, her eldest daughter lived with her. That daughter then emigrated to live with her own son in Canada. It is said that the son could not sponsor both mother and grandmother.

4. The appellant then sought entry clearance to settle in the UK with her other daughter. She relied on paragraph E-ECDR.2.5, namely that even with the practical help and support of her UK sponsor, she was unable to obtain the required level of care in Sri Lanka because it was not available and there was no one in Sri Lanka who could reasonably provide it.

5. Alternatively, the appellant claimed that refusal of leave to enter to settle was in breach of her right to respect of her family life, under Article 8 ECHR. The gist of the appellant's medical conditions are said to be heart disease, which had been successfully managed, but she suffered chest pains after her daughter emigrated to Canada and is said to suffer from depression, anxiety, high blood pressure and high cholesterol.

The Judge's decision

6. The Judge rejected the appellant's appeal on the basis that she did not accept that the required level of care in Sri Lanka was not available and that there was no one in Sri Lanka who could reasonably provide it. First, it was not clear to her what the required level of care was, even though the appellant had some conditions which required care. It was unclear whether the appellant required 24-hour care, daily assistance with day-to-day activities or qualified medical care (§15(1)) of the judgment). The Judge concluded that this was evidence which could have been adduced and had not. There was no evidence that the level of care currently provided was insufficient. There was no explanation for why the appellant could not get treatment for depression in Sri Lanka.

7. At §15(3) of her reasons, the Judge indicated that professional carers had been able to attend to the appellant, and whilst there was no continuity in staff, as is often the case with carers, the Judge had not been told that the care would cease. The Judge said that she had not been provided with any evidence from doctors to suggest that the level of care was no longer enough. Although there was a letter from a Dr Jatheesan stating that the appellant was not currently being properly treated for depression, the Judge was unclear why there could be no such treatment. At §15(4), the Judge noted that she had seen one letter from one care home saying that they would not accept her, but nothing further. The sponsor had given evidence she had spoken to a couple of other care homes, but the Judge had seen nothing from them to confirm that the appellant would not be accepted. The sponsor did not say that she had spoken to any of the care homes mentioned by the respondent. The sponsor, did, however, make it clear, (perhaps unsurprisingly), that she did not want her mother to go into a care home.

8. The Judge referred to the well-known authority of Britcits v SSHD [2017] EWCA Civ 368, but found that in this case there was no evidence that the level of care presently provided in Sri Lanka was insufficient, or that a more concentrated level of care provided in a care home was not available. While the appellant would be happier with her children around her, there was no reason that they could not visit, perhaps more frequently than they did so at present, as funds were not preventing this.

9. Importantly, the Judge then went on to consider the issue of exceptionality outside the Rules and whether there were such exceptions. In considering the well-known authorities of Kugathas v SSHD [2003] EWCA 31 and Rai v SSHD [2017] EWCA Civ 320, the question was whether there was sufficient emotional dependence on the sponsoring daughter to justify the conclusion of the existence

of family life and that refusal in turn would also be disproportionate. In a critical paragraph challenged by the appellant (§15(7)) the Judge concluded:

> **"**I have been told that the sponsor visited her once in 2023 and I have not been told why there have not been more frequent visits bearing in mind their concerns about her physical and mental health. I have been provided with no evidence of communication, regular or otherwise between the appellant and her daughter. I have seen no evidence of any financial support. I find therefore that the appellant has failed to show that there is sufficient emotional dependence on her daughter over and above the usual emotional ties to justify the conclusion that they enjoy family life. I find therefore that Article 8 is not engaged. In any event, even if I am wrong on this and there is family life, I find that there is no reason why the family life cannot continue in the way it has done for some years. The sponsor has lived in the UK for over 20 years and has not lived with the appellant for a long time. I am told of visits to Sri Lanka but not frequent trips. It appears that they have kept in touch over modern means of communication and this can continue. Accordingly I find the status quo remains that any family life would not be interfered with by the decision. This appeal fails accordingly."

The Grounds and the Grant of Permission

10. The grounds in respect of which there was only a partial grant first challenged the Judge's reasons at §§15(1) to 15(5) both on whether the appellant required long term care to perform her everyday activities, and also the finding that the level of care did not currently meet her needs. That reasoning was at §15(3) to 15(5). Those were matters on which Mr Paramjorthy touched in his submissions to me including referencing two particular letters at pages [56] to [63] of the combined bundle where it refers to the desire or the advice of the doctors suggesting that the appellant's previous medical condition had deteriorated since her daughter's departure.

11. Next, the grounds refer to a misdirection of fact in relation to visits by the family. In particular, the sponsor had set out in her statement the visits that she and her husband had made to Sri Lanka since the other daughter left in late 2021. The sponsor had provided her and her husband's passports showing entry and exit stamps, which showed visits in December 2021, August 2022, November 2022, May 2023, and August 2023. The witness evidence also outlined that they had two minor children and one adult child who had started university, and they were limited both by this and their business as to what the business could bear in terms of visits. Mr Paramjorthy reiterated that that evidence was tested and was crucial to the proportionality assessment. That in turn was a material misdirection as it impacted both on exceptionality and also a proportionality assessment under Article 8.

The limited grant of permission

12. In a limited grant of permission dated 5th June 2024, Judge McMahon rejected the challenges to the conclusions in relation to the level of care provided concluded that the Judge had fairly summarised that evidence at §15(2) to (5). There has been no challenge that the Judge could not limit the grant in that way, other than the fact that I have been referred to the two letters from doctors, relevant to the proportionality assessment. However, the Judge did grant permission on the basis of what he described as a second ground, that there had been an arguable error because the Judge appeared to have made findings at

§15(7) about the frequency of visits which appeared to be in error based on the uncontroversial evidence and that also appeared to be at odds with the uncontentious change in the appellant's circumstances, namely the emigration of the eldest daughter to Canada. Judge McMahon therefore granted permission on these grounds.

Discussion and Conclusions

13. Without reciting all of the submissions before me and having considered the Rule 24 response, I am satisfied that the error was material but in an otherwise clear and well-structured decision, I am also clear as to the limited nature of that error. As indicated, the grant of permission was limited in its scope. There is no ground before me as to the Judge's conclusions and adequacy of reasons in relation to the level of care required in Sri Lanka and its availability. As a consequence, the Judge's findings in §§15(1) to 15(4) and the first two sentences of §15(5) on the level of care are undisturbed, and in terms of any re-making they are expressly preserved. This does not, of course, prevent the appellant from seeking to adduce further evidence, as I must bear in mind the updated position in a human rights appeal, but the starting point is those of the findings made by Judge Nixon on the evidence.

14. Nevertheless, I am satisfied that in terms of exceptionality and the Article 8 ECHR proportionality assessment, the Judge did err. On the one hand I note Ms Cunha's submission that there was reasoning in the alternative, namely that even if the Judge had been wrong in concluding that Article 8 was not engaged, there was no reason why family life could not continue in the way it had done. The difficulty with that alternative reasoning, as Judge McMahon had earlier identified in the grant of permission, is the obvious change over the last 20 years, namely the recent departure from Sri Lanka of the oldest daughter to Canada. The factual errors, in the context of the change in circumstances, are therefore material. The Judge's findings in the final two sentences of §15(5) in relation to family visits, and at §15(7) on the engagement of Article 8 and the proportionality of refusal, are set aside.

Re-making

15. I have heard submissions from the representatives on whether I should retain re-making in this Tribunal or to remit the matter to the First-tier Tribunal. I bear in mind and refer myself to paragraph 7.2(a) and (b) of the Senior President's Practice Statements, and the well-known Court of Appeal authority of AEB v SSHD [2022] EWCA Civ 1512. I have considered whether on the one hand the material error means that the appellant has been deprived of a fair hearing, and on the other whether the nature or extent of necessary fact-finding means it is appropriate that as an exception I should not remit matters to the First-tier Tribunal. I regard it as appropriate to retain re-making in the Upper Tribunal. I do so for the following reasons.

16. The error is not such so as to deprive the appellant of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal. The error related to evidence on the quality of the appellant's family life and the impact of refusal and whether it engaged Article 8, which was presented

to the Judge, but was erroneously understood and evaluated. The factual error was an important, but narrow one. This informs the second consideration which is the nature and the extent of any fact-finding. I have indicated that I have preserved Judge Nixon's findings at §§15(1) to (5) on the availability of the reasonable level of care in Sri Lanka. It does not prevent the appellant seeking, if she so wishes, to adduce updated evidence on that point insofar as it has changed but obviously not simply to adduce evidence that could and should have been adduced at the time. As a consequence, the issue is relatively narrow, namely the nature of the relationship between the appellant and the sponsor. The nature and extent of necessary fact finding is currently very narrow.

Notice of decision

17. **The Judge erred on a narrow ground, namely her assessment of family contact, whether Article 8 was engaged, and the proportionality of the respondent's decision. The Judge's findings and conclusions in the last two sentences of §15(5) and at §15(7) are unsafe and I set them aside.**

18. **The Judge did not err in her conclusions on the care needed and available to the appellant in Sri Lanka. The Judge's findings at §§15(1) to 15(4) and the first two sentences of §15(5) are preserved.**

19. **I retain remaking in the Upper Tribunal.**

Directions on remaking

The following directions shall apply to the future conduct of this appeal:

20. The Resumed Hearing will be relisted at Field House on the first available date, time estimate of two hours, with a Sri Lankan Tamil interpreter, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

21. The appellant shall no later than 4 pm, 14 days before the Resumed Hearing, file with the Upper Tribunal and serve upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which she intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

22. The respondent shall have leave, if so advised, to file any further documentation on which she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4 pm, 7 days before the Resumed Hearing.

23. The parties are reminded that they must comply with the Practice Direction for the Immigration and Asylum Chamber of the Upper Tribunal: Electronic filing of documents online – CE-File – Courts and Tribunals Judiciary. They must lodge any application or documents by the CE-File E-filing service. Documents uploaded to CE-File must have a file name which reflects their contents and any application (whether for urgent consideration, relief from sanctions or otherwise) must be clearly identified as such. The bundle must comply with the President's Guidance on the Format of Electronic Bundles in the Upper Tribunal (IAC), including: being limited in file size, with proper pagination, indexing, hyperlinking, bookmarking and in a format which is text searchable. Failure to comply with these directions may result in the Upper Tribunal making an order for costs pursuant to its power

under rule 10(3), or by imposing any other appropriate sanction. It may also result in the matter being listed before a Duty Judge, where the defaulting party will be required to attend and provide an explanation.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5th September 2024