

Heard at: Field House
On 18th May 2004

SS (ILR - Article 8 - Return) Sri
Lanka [2004] UKIAT 00126

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 18th May 2004
Date Determination notified:
4th June 2004

Before:

The Honourable Mr Justice Ouseley (President)
Mr J Barnes (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation:

For the Appellant: Mr I Burnett, instructed by Waran & Co, Solicitors (N17)
For the Respondent: Mr J McGirr, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Sri Lanka of Tamil ethnicity who arrived illegally in the United Kingdom on 4th October 2001 and subsequently claimed asylum on 8th October 2001. Her screening questionnaire, completed on 10th October 2001, recorded her as being married to Mr Tharmaseelan Sithrangan but said that she did not know his present address; the box concerned with whether the husband was in the United Kingdom and had made an asylum claim was left blank. Somewhat confusingly, under applicant's details the Appellant referred to her marital status as being that of a single woman. Following submission of a self evidence form the Appellant was then interviewed and her application was refused for the reasons set out in a letter dated 27th November 2001. On 5th December 2001, the Secretary of State issued directions for her removal to Sri Lanka as an illegal entrant after refusal of her asylum application. She appealed against the decision on both asylum and human rights grounds, but these did not include any claim to relief under Article 8 of the European Convention nor, apart from the identification of her husband in the

screening form, was there any other reference whatsoever to him in connection with her asylum and human rights application.

2. Her appeal was heard on 30th January 2003 by Mr Jonathan Holmes, an Adjudicator, who dismissed her appeal. The Adjudicator did not believe her account of why she feared persecution or breach of her Article 3 rights in Sri Lanka, but we do not need to refer further to that basis of claim because there is no appeal against the Adjudicator's decision in this respect. The only issue raised before us is whether the Adjudicator erred in law in his approach to the relief sought by her under Article 8 of the European Convention based on the family life which, by the time of the hearing she had established in this country with a Mr Thanabalasingham Sithrangan, whom she claimed to be the person to whom she had referred as her spouse in the screening application under the name of Tharmaseelan Sithrangan.
3. The Adjudicator deals with her evidence as to her marriage at paragraphs 9 to 19 of his determination including the oral evidence of Mr Sithrangan. He noted that, in evidence before him, the Appellant now said that she was in the United Kingdom by late September 2001. She claimed that she had been married on 18th January 1998 and produced what she described as her marriage certificate accompanied by a translation from Tamil certified as being made by a retired Court interpreter in Sri Lanka on 11th April 1999. This recorded her husband's name as "Thanapalsingam Sithrangan". She said in evidence that it was an arranged marriage and that she had never met her husband prior to it. Her husband said they had met one week prior to the marriage. When he left Sri Lanka on 28th April 1999 he did not take her with him and his only contact with her had been one letter sent to her in Sri Lanka because, he said, there was nothing for him to say to her although he was frequently in contact with his own parents. The Appellant said that the letter provided her with a telephone number as a contact in the United Kingdom who was a female Tamil who had provided her with accommodation when she arrived. She had contacted her from Sri Lanka prior to leaving but had not been able to make any contact with her husband because he had moved away from that address. In his evidence he said he had only one friend in the United Kingdom whom he identified as a single man. He said he did not know who met the Appellant at the airport and denied having any friends other than this man. The Adjudicator noted that on the original marriage certificate produced to him the date of the marriage appeared to have been overwritten.
4. He deals with his factual findings in relation to the claimed marriage and the relationship established with the witness in the United Kingdom at paragraphs 46 to 53 of the determination. He accepted that the Appellant and her witness were the parents of the child born on 17th November 2002 here, that they lived as tenants or lodgers with another family of Sinhalese and had established a family unit in the United Kingdom with a stable and loving relationship existing between them. He rejected, however, the Appellant's claim to have been married in Sri Lanka on 18th January 1998 adding "*I accept that it is likely that they now consider themselves to be married, but whether, and if so when and in what circumstances, their relationship was formalised in the United Kingdom I obviously do not know*".

5. His reasons for rejecting the claimed marriage in Sri Lanka were based on the clear difference in the evidence which they had given before him as to when they first met and how they came to meet each other again in the United Kingdom some two months after the Appellant's arrival; the lack of contact following his departure; and the lack of any reference at all to her husband in the account given by the Appellant. He dealt with the weight to be placed on the marriage certificate produced at paragraph 51 as follows:

“Although the Appellant has placed before me a document that she says is her Sri Lankan marriage certificate I can place no weight upon the content or existence of that document at all. As set out above, not only does it have alterations to its face, but it has not been fully completed. It was agreed by both parties that I should follow the Tanveer Ahmed approach when considering the weight to be given to this document. Given the damage to the Appellant's credibility as to my findings of fact on the core of her asylum claim, together with my concern that over this aspect of her evidence, together with my concern as to the context of the document itself, it would not be safe for me to put any weight upon the existence of this document”.

6. Whilst, therefore, the Adjudicator accepted that a relationship had been formed in the United Kingdom there does not appear to us to be any error of law on his part in his approach to the evidence as to the marriage having taken place earlier in Sri Lanka.
7. When leave to appeal was granted it was noted by the Vice President that the Adjudicator appeared to have arrived at no formal finding as to whether he accepted that the parties were married as they claimed, and he added “*no doubt that is a matter which is susceptible of proof and it might be advisable to do so*”. No new evidence in relation to the marriage has been provided to us with the exception of some photographs which it is said relate to the marriage ceremony but we have heard no oral evidence and Mr Burnett rested upon the submissions which he made to us. He submitted that the Adjudicator had erred in regarding the marriage certificate as being incomplete because it appeared that the passage to which he was referring in this respect was a part of the form of certificate which needed completion only where the marriage was solemnised by a Minister as opposed to a Registrar. But that does not, in our view, deal with the fact that it is clear that there has been some alteration to the date on the original certificate. Nor does it take into account the suspicious factors arising from the differences in the evidence of the Appellant and Mr Sithrangan, in respect of which the Adjudicator had noted that when he gave evidence the Appellant was trying to prompt him as to the answers he should give in relation to the identity of the claimed mutual friend in the United Kingdom. There is in our judgment no arguable basis upon which we could or should interfere with the factual findings made by the Adjudicator in this respect which are clearly reasoned on the basis of the totality of the evidence before him.
8. The Adjudicator then went on to consider the Article 8 claim on the basis of his acceptance that there was now a family life enjoyed in the United Kingdom. He wrongly thought that it was not appropriate to take into account matters which post dated the decision of the Secretary of State, but it was agreed before us that this error in failing to apply the law as clarified by the starred Tribunal decision of SK [2002] UKIAT 05613 has made no practical difference to the outcome of the hearing before him. The

Adjudicator correctly considered the issue of proportionality by reference to the ratio of the decision in Mahmood [2001] Imm AR 229 and, making the assumption that Mr Sithrangan was unable to travel to Sri Lanka by virtue of his acknowledged status as a refugee, followed by grant of indefinite leave to remain in the United Kingdom from 7 January 2002, he nevertheless concluded that the Appellant and the baby could return to Sri Lanka to make an application for leave to enter under the Immigration Rules from abroad. He deals with this at paragraph 56 of his determination where he says this:

“A waiver of the requirement to obtain entry clearance in Sri Lanka in favour of the Appellant when she has no other legitimate claim to enter would require exceptional circumstances to justify the disruption and undermining of a firm immigration control system. It would also be unfair to those who follow the rules, and who patiently wait their turn for their application to be processed. Ms Bayley [who appeared for the Appellant below] advanced no exceptional circumstance. ... In my judgment therefore I have been given no reason as to why the Appellant would be unable to apply from Sri Lanka for entry clearance, and no reason why in the fullness of time such application would not be granted. I cannot see any exceptional features of the position of the Appellant ...”

9. Mr Burnett did not seek to argue before us that the Adjudicator had erred in law in his approach to proportionality if his findings in relation to the marriage were sustainable.
10. He did seek to uphold the approach of the Adjudicator to the effect of the grant of refugee status to Mr Sithrangan as raising an insurmountable obstacle to his return to Sri Lanka, submitting that the burden of proof that this was not the case would rest upon the Secretary of State. We do not agree and we consider that the Adjudicator was wrong in his assumption of the existence of an inability for Mr Sithrangan to return to Sri Lanka simply by reason of his having been recognised as a refugee. That means no more than that the Secretary of State cannot give directions for his removal whilst his indefinite leave to remain exists but it does not mean that there is, in the sense in which it is explored in Mahmood, an insurmountable obstacle to his return. The fact of former recognition of refugee status does not of itself show that there is a continuing insurmountable obstacle to returning to the country of origin. Such cases will depend upon a consideration of the specific facts upon which the claim had been recognised. It is not necessary for the Refugee Convention cessation provisions to be applied to someone with refugee status and ILR in order for the potential for his return to the country of origin, so as to remain with his family, to be contemplated in an Article 8 case. There is no automatic insurmountable hurdle in the mere fact of the past grant of ILR. Of course, that person is not expected to prove his asylum claim again and there would need to be a proper basis for contemplating that circumstances had changed significantly since the grant of ILR. If they have, and it is contended that a person still faces an insurmountable obstacle to return with his family, evidence will be needed as to why.
11. In Sri Lanka there has been a substantial change in the situation following the cease-fire in February 2002 shortly after the grant of indefinite leave to remain. There was no evidence either before the Adjudicator or before us to show that there existed any current insurmountable obstacles to Mr Sithrangan returning to Sri Lanka with the Appellant and their child. For

this reason alone, there is no evidential basis for saying that the removal decision made by the Secretary of State is unlawful, or was so at the date of the hearing before the Adjudicator, in the sense that no Secretary of State could reasonably have regarded removal as proportionate to the state interest in enforcing effective immigration control.

12. In any event, however, there was no error of law on the part of the Adjudicator in the way in which he approached the proportionality of removal on the basis of the ability of the Appellant to make an out of country application under the Immigration Rules.
13. Had the Adjudicator's findings in relation to the claimed marriage of the Appellant been unsustainable, however, there would have been force in Mr Burnett's submission that the Secretary of State's family reunion policy would have rendered removal disproportionate. Since, however, we are satisfied that the Adjudicator's findings in this respect are sustainable, the Appellant cannot succeed before us on this basis.
14. It follows that there has been no error on the part of the Adjudicator in his dismissal of the Article 8 claim and for the reasons which we have set out above, and in respect of which we differ slightly from the Adjudicator in our reasoning, this appeal is dismissed.
15. This decision is reported for what we say about the significance of refugee status as an insurmountable obstacle to return in an Article 8 case.

MR JUSTICE OUSELEY
PRESIDENT