

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/07466/2015**

**THE IMMIGRATION ACTS**

|  |  |
| --- | --- |
| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 5 February 2018** | **On 12 June 2018** |
|  |  |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**susiladevi kanapathy**

(ANONYMITY DIRECTION not made)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Martin, instructed by Nag Law Solicitors

For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, Susiladevi Kanapathy, was born on 12 May 1977 and is a female citizen of Sri Lanka. By a decision of the Secretary of State which was dated 17 September 2015, she was refused leave to remain in the United Kingdom on the basis of her family life (she is married to a British citizen). She appealed to the First-tier Tribunal (Judge Buckwell) which, in a decision promulgated on 11 May 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
2. The appellant and her husband have a child (T) the appellant had entered the United Kingdom as a fiancée in 2013 and had been refused further leave to remain in October 2013 and her subsequent appeal had been dismissed in February 2015. Thereafter, the appellant remained in the United Kingdom without leave.
3. At the outset of the Upper Tribunal hearing, a preliminary point was raised. Mr Tufan, who appeared for the Secretary of State, sought to rely on Section 85 of the Nationality, Immigration and Asylum Act 2002 (as amended):

85 Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1) 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

(5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10—

(a) subsection (4) shall not apply, and

(b) the Tribunal may consider only the circumstances appertaining at the time of the decision to refuse.

1. Mr Tufan submitted that the birth of T was a new matter of which the Secretary of State had not been given proper notice which the First-tier Tribunal should not have considered without the Secretary of State having consented to it doing so. I do not find Mr Tufan’s submission persuasive. Section 85 had not been raised before the First-tier Tribunal and the Presenting Officer there (Mr G Jones) plainly proceeded to represent the Secretary of State on the basis that the existence of T would be considered in the appeal.
2. Thereafter, I was significantly assisted by Mr Tufan who told me that, in the light of the birth of T, a British citizen, and given also the decision of the Upper Tribunal in *SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120(IAC)* and, indeed, the respondent’s own policy, he made no submissions supporting Judge Buckwell’s decision.
3. Judge Buckwell has considered at considerably length the previous appeal proceedings in the light of *Devaseelan* [2002] UKIAT 702 at [48]. At [53] Judge Buckwell considered that the birth of T was the only circumstance which differed from those before the previous Tribunal which had dismissed the appellant’s appeal. The judge refers at [51] to Section 117 of the 2002 Act (as amended) but, significantly, makes no mention of Section 117B(6):

(6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom

Although the judge found that there were no insurmountable obstacles to the family returning home to Sri Lanka, he has ignored the fact that statute provides that it is not in the public interest for the family to be separated subject to Section 117B(6), a point re-endorsed by the Secretary of State’s own policy (Immigration Directorate Instruction Family Migration: Family Life (as a partner or parent): August 2015).

1. In the circumstances, in particular in the light of Mr Tufan’s helpful submission, I set aside Judge Buckwell’s decision. I have remade the decision. The appellant’s appeal is allowed on Article 8 ECHR grounds.

**Notice of Decision**

1. The decision of the First-tier Tribunal which was promulgated on 11 May 2017 is set aside. I remake the decision. The appellant’s appeal against the decision of the respondent dated 17 September 2015 is allowed on human rights grounds (Article 8 ECHR).
2. No anonymity direction is made.

Signed Date 4 MAY 2018

Upper Tribunal Judge Lane