



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: AA/03525/2014
AA/03526/2014
AA/03527/2014
AA/03568/2014

THE IMMIGRATION ACTS

**Heard at Columbus House, Decision & Reasons Promulgated
Newport On 2 September 2015 On 18 September 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**M J J
R J
H J J
M J J**

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Davison instructed by Lawland Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the child appellants. This order prohibits the

disclosure directly or indirectly (including by the parties) of the identity of any of the appellants. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

Introduction

2. The appellants are citizens of Sri Lanka who were born respectively on 9 June 1971, 7 December 1977, 21 January 2004 and 15 April 2009. The first and second appellants are married and are the father and mother respectively of the third and fourth appellants who are their son and daughter.
3. The second appellant arrived in the United Kingdom on 10 April 2007 accompanied by the third appellant. She had leave as a student. In November 2007, the first appellant, her husband, arrived in the UK as her dependant. Their leave was subsequently extended until May 2009. Thereafter, the second appellant was granted leave to remain as a Tier 1 (Post-Study Work) Migrant until 31 March 2011 and that leave was later extended to 28 July 2013. The leave of the family (which now included the fourth appellant) was extended in line with that of the second appellant.
4. On 13 May 2013 an application for further leave was made but was subsequently rejected on 22 May 2013 as no fee had been paid. On 20 January 2014, the appellants were issued with form IS.151A as overstayers. In April 2014, the first appellant claimed asylum with the remaining appellants as his dependants. On 9 May 2014, that application was refused and on 13 May 2014 decisions were made to remove the appellants as overstayers by way of directions to Sri Lanka under s.10 of the Immigration and Asylum Act 1999.

The Appeal

5. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 10 July 2014, Judge Troup dismissed the appellants' appeals on asylum, humanitarian protection grounds and under Arts 2 and 3 of the ECHR. He also dismissed their appeals under Article 8 of the ECHR.
6. The appellants appealed to the Upper Tribunal. Permission was granted by the First-tier Tribunal (Judge Vaudin d'Imecourt) on 28 July 2014.
7. The appeal was first listed for hearing on 26 September 2014 before DUTJ Zucker. Before Judge Zucker the appellants accepted the judge's decision to dismiss their appeals on refugee and humanitarian protection grounds and under Articles 2 and 3 of the ECHR. They pursued their appeals only on the basis of Article 8.
8. In his decision promulgated on 10 October 2014, Judge Zucker concluded that the First-tier Tribunal had erred in law in dismissing the appellants'

appeals under Article 8. He set aside Judge Troup's decision on that ground only and adjourned the hearing for a resumed hearing before the Upper Tribunal. Following a number of adjournments, the resumed hearing was listed before me on 2 September 2015.

The Resumed Hearing

9. At the resumed hearing, the appellants were represented by Mr Davison and the respondent by Mr Richards.
10. At the outset, the issues relevant in the appeal were clarified.
11. First, Mr Richards, having been given the opportunity to interrogate the appellant's Home Office files, informed me that the First Appellant had been in contact by telephone with the Home Office on 8 April 2014. As a result of that, an appointment had been made to deal with his "asylum claim" on 15 April 2014. Mr Richards informed me that the records showed that the first appellant's "asylum claim" had been made on that day. In the light of that, Mr Richards indicated that he had no argument to contradict the conclusion that the appellant had made his "asylum claim" on 15 April 2014. In my judgment, that is undoubtedly the date on which the first appellant made his asylum claim rather than the day on which he telephoned in order to fix up an appointment to make, as is required in the usual case by the Secretary of State, an appointment to make an asylum claim in person.
12. Secondly, as a consequence of that, since the third appellant arrived in the UK on 10 April 2007, at the date of the application namely 15 April 2014, he had continuously resided in the UK for at least seven years. The effect of that is that the third appellant may potentially fall within para 276ADE(1)(iv) of the Immigration Rules (HC 395 as amended) and s.117B(6) of the Nationality, Immigration and Asylum Act 2002. In relation to the former, he would be entitled to leave to remain on the basis of his private life providing that it "would not be reasonable to expect [the third appellant] to leave the UK". In respect of the latter, given that both the first and second appellant have a "genuine and subsisting parental relationship" with the third appellant who is a "qualifying child" (within the definition in s.117D(1): "the public interest does not require [the parents] removal where it would not be reasonable to expect the child to leave the United Kingdom."
13. Both Mr Richards and Mr Davison accepted that the single issue I had to decide was whether it would be reasonable to expect the third appellant (aged 11) to leave the UK and return to Sri Lanka. Mr Richards accepted that if that would not be reasonable, then none of the appellants could be removed and their appeals should be allowed. On the other side of the coin, Mr Davison accepted that if it was reasonable for the third appellant to leave the UK and return to Sri Lanka, none of the appellants could succeed under Article 8.

14. As a consequence, the sole issue addressed in the evidence and submissions was whether, in all the circumstances, it was reasonable to expect the third appellant to leave the UK and return to Sri Lanka.

Discussion and Findings

15. On behalf of the appellants, Mr Davison principally relied upon the evidence of the first appellant in his two witness statements dated 27 June 2014 and 1 September 2015 which the first appellant adopted in his oral evidence. In addition, he relied upon two witness statements of the third appellant dated 14 April 2015 and 1 September 2015 which the third appellant adopted in his oral evidence before me.
16. The appellants' international protection claims having been rejected, the focus of the evidence and the representatives' submissions were the impact upon the third appellant of having to leave the UK.
17. The third appellant is 11 years of age. He came to the UK when he was 3 years old. He has, therefore, lived in the UK for over seven years. He is in school. I accept that he has established himself as a student within the British educational system.
18. The third appellant's parents are ethnically Malay. The principal issue explored in the evidence of both the first and third appellants was what language was spoken by the third appellant and, as an aspect of that, what language was spoken by the first and third appellants particularly in the home context. Mr Davison submitted that on the basis of the evidence it was established that the third appellant only spoke English. That would put him at a considerable disadvantage if returned to Sri Lanka as he did not speak one of the main languages, namely Tamil or Sinhalese, which were the languages in the educational system. It has never been suggested that the third appellant could attend a fee paying international school in Sri Lanka where English was spoken. Mr Davison submitted that the Secretary of State's position was in effect that the third appellant should learn a new language in Sri Lanka, returning at the age of 11 and complete his schooling up to the compulsory age of 14 years. Mr Davison submitted that was neither in the third appellant's best interests nor reasonable.
19. Mr Richards submitted that, on the evidence, it was simply not believable that the third appellant did not speak any of the indigenous languages of Sri Lanka given that his parents did not speak in English to each other at home.
20. The evidence of the first appellant given orally at the hearing was that he spoke a number of languages including English, Sinhalese, and Tamil. His evidence was that he and his wife (the second appellant) spoke Malay at home to each other when they did not wish the children to understand. However, they communicated with the children in English. None of the children were able to speak any languages except English. He said that he

and his wife did not communicate in Malay very often, though they did speak every day. He said they did not speak Tamil at home.

21. Mr Richards put to the first appellant that in his screening interview he had said that his main language was Tamil and that he also spoke Sinhalese and English. Mr Richards asked him why he had not mentioned that he spoke Malay. The first appellant said that he had not said that Tamil was his main language. He had said that he communicated in Sinhalese and English and that he was comfortable in Tamil. He had said that he was able to speak in Tamil; he had not mentioned Malay as he was not sure they could provide a Malay interpreter.
22. I interpolate that the Tribunal has been unable to provide a Malay interpreter with a Tamil dialect or accent for these proceedings.
23. In his evidence, the third appellant also told me about the language spoken by his family. He told me that he spoke English and no other languages. He told me that he did speak to family in Sri Lanka on occasions such as birthdays but that he spoke in English. He said that he did not know any words in any other languages. He told me that his mother and father did speak to each other in other languages but he did not know what they were and he had not picked up any of the words. He said they spoke to each other in another language “nearly all the time”.
24. Mr Richards submitted that the first appellant was not telling the truth. He submitted that it was inconceivable that a couple would speak a language virtually all the time in their home that their children did not understand. He submitted that it was simply not believable that the third appellant did not speak one of the languages spoken at home. Mr Richards submitted, in effect, that the first and second appellants spoke in Tamil at home and that the third appellant (like the first appellant) was not telling me the truth that the third appellant could only speak English.
25. I have to say that I do not find the evidence of the first appellant to be as inconsistent as Mr Richards’ submission would suggest. It is quite easy to imagine that a couple who are able to speak a language or languages different from their children would use those languages in order to communicate with each other when they did not wish the children to understand. It is also entirely possible that they would tend to use their “first” language rather than English but, nevertheless, when speaking to the children who are living and being brought up in a community speaking English that they adopt English as the language of communication. Likewise, it is entirely plausible that at his screening interview the first appellant indicated, in effect, that the language he would prefer the interview to be conducted in (his “main language”) was Tamil which, it was quite clear at the hearing, the first appellant was perfectly able to communicate in to the Tribunal interpreter.

26. Significantly, however, Mr Richards' submissions have embedded within them the premise that the third appellant was lying to me as to what languages he spoke. The third appellant is 11 years old. I had the advantage of hearing him give his evidence and he was an impressive witness whom I have no doubt was telling me the truth. I bear in mind the possibility that a child could be coached to lie but I saw no suggestion that the third appellant was doing anything other than seeking to tell me the truth. His answers were clear and given without hesitation. His evidence, which I accept, is that he only speaks English. I find as a fact that the third appellant only speaks English.
27. With that finding in mind, I now turn to consider whether it would be reasonable to expect the third appellant to leave the UK and return to live in Sri Lanka.
28. In reaching a finding on that issue, I take into account as a primary consideration the "best interests" of the third appellant. Mr Davison referred me to the Upper Tribunal's decision in Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC). Mr Davison relied upon the Upper Tribunal's identification of the principle applicable in appeals dealing with children which are summarised in para 1 of the headnote as follows:
- "(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:
- i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
 - ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
 - iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
 - iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
 - v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any

event, protection of the economic well-being of society amply justifies removal in such cases.”

29. In this case, the third appellant came to the United Kingdom aged 3. He is now aged 11 and has spent those formative years in the UK. He is integrated in school and, no doubt, has developed friendships and links within his social community. He only speaks English. The third appellant told me, and I accept this, that he does not remember anything about Sri Lanka. Whilst I accept that it would be in principle in the third appellant’s best interests to live with his parents, that does not, however, answer the question of whether it would be in his best interests to do that in the UK or in Sri Lanka. Mr Davison took me to paras 60-63 of the respondent’s decision of 9 May 2014 dealing with Section 55 of the Borders, Citizenship and Immigration Act 2009 and the children’s “best interests”. It is clear that education is free and compulsory until the age of 14 in Sri Lanka and, no doubt, the third appellant could attend school. However, and it is not challenged by Mr Richards, that education would not be conducted in English. The third appellant would, as a result, be required to learn a new language, perhaps Tamil or Singhalese, whilst at school in order to complete his education. Of course, children can adapt and can learn new languages. But, to borrow Mr Davison’s word in his submissions, that would be a “big ask” for the third appellant who has spent over seven years in the UK using only the English language and has been in full-time education here for the last six years. This is not a case, as in a deportation case, where it is necessary to show that the impact upon the third appellant would be “unduly harsh” of returning to Sri Lanka. What has to be established is that it is not “reasonable” to expect him to return to Sri Lanka.
30. Given the third appellant’s age, the time he has spent in the UK and the fact that he has been embedded in the educational system for the last five years, speaks only English, together with all the circumstances, leads me to conclude that it would be both not in his best interests to return to Sri Lanka. Also that would have a sufficiently serious impact upon him by uprooting him that I conclude that to leave the UK and return to Sri Lanka would not be reasonable.
31. For these reasons, the third appellant has established that he meets the requirements of para 276ADE(1)(iv) and the first and second appellants satisfy the terms of s.117B(6) of the NIA Act 2002. On that basis, Mr Richards accepted that all the appellants’ appeals should succeed under Art 8 of the ECHR.

Decision

32. Consequently, the First-tier Tribunal’s decision to dismiss the appellants’ appeal on asylum, humanitarian protection grounds and under Arts 2 and 3 of the ECHR stands.

33. The First-tier Tribunal's decision to dismiss the appeal under Art 8 has been set aside.
34. I remake the decision under Art 8 allowing each of the appellants' appeals on that basis.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal