



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

Appeal Number: HU/14119/2015  
HU/14120/2015  
HU/14121/2015  
HU/14122/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 1 February 2018**

**Decision & Reasons Promulgated  
On 13 February 2018**

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**KS  
VM  
PK  
AK**

**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the appellants: Mr R Wilcox, Counsel, instructed by Nag Law Solicitors  
For the respondent: Ms A Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. These are appeals against the decision of Judge of the First-tier Tribunal Kinnell (the judge), promulgated on 4 April 2017, in which he

dismissed the appellants' appeals against the respondent's decision dated 11 December 2015 refusing their human rights claims.

## **Factual Background**

2. The appellants are nationals of Sri Lanka. The 1<sup>st</sup> and 2<sup>nd</sup> appellants are husband and wife and were born in June 1972 and August 1978. They are the parents of the 3<sup>rd</sup> and 4<sup>th</sup> appellants. The 3<sup>rd</sup> appellant, a boy, was born in the UK on 22 May 2008, and the 4<sup>th</sup> appellant, a girl, was also born in the UK on 6 September 2012. At the date of the First-tier Tribunal's decision the 3<sup>rd</sup> appellant was 8 years old, although he was due to turn 9 the following month.
3. The 1<sup>st</sup> appellant entered the UK illegally on 8 December 2001 and made an asylum claim. This was refused on 23 November 2003 and his appeal against the refusal was dismissed on 23 February 2004. An application for an EEA residence card was refused on 30 April 2007. The 2<sup>nd</sup> appellant entered the UK illegally on 14 July 2007 and claimed asylum. Her asylum claim was refused on 26 September 2007 and an appeal dismissed on 19 March 2008. Following earlier unsuccessful applications, the appellants made human rights claims on 7 September 2015 seeking a grant of leave to remain under the 10-year route to settlement under Appendix-FM.
4. In refusing the human rights claims the respondent maintained, in particular, that it was reasonable to expect the 3<sup>rd</sup> appellant to go to Sri Lanka given his age and the fact that he would be returned as part of his family unit. The respondent additionally considered that there were no exceptional circumstances outside the immigration rules sufficient to warrant a grant of leave to remain under article 8. The respondent noted that Sri Lanka had a functioning educational system, and there was no evidence that the welfare and safety of the children would be put in jeopardy.

## **The decision of the First-tier Tribunal**

5. The appellants provided a large bundle of documents that included witness statements. The judge was also provided with the authority of *MA (Pakistan)* [2016] EWCA Civ 705. The judge heard oral evidence from the 1<sup>st</sup> and 2<sup>nd</sup> appellants. The judge additionally heard oral evidence from VM and RM, the 2<sup>nd</sup> appellant's two brothers living in the UK, as well as SBP, a family friend with whom the appellants were living, and KS, another family friend.
6. In the section headed "Decision and Reasons" the judge first considered the best interests of the 3<sup>rd</sup> and 4<sup>th</sup> appellants. He noted that the 3<sup>rd</sup> appellant in particular was in education and that the whole family were supported in the United Kingdom. The judge referred to the 3<sup>rd</sup> and 4<sup>th</sup> appellant's extended family members in the UK, and the submission that the children may be affected by a deterioration in the 1<sup>st</sup> appellant's mental condition if returned to Sri Lanka (there was a psychological report diagnosing the 1<sup>st</sup> appellant with a mild depressive disorder attributed to his immigration issues and some general anxiety-related symptoms). The judge did not accept that there would be no family support if the appellants were removed to Sri Lanka and found that the reasons given by extended family and friends in the UK for discontinuing financial support if the appellants were returned to Sri Lanka were very weak. The judge specifically noted that the 3<sup>rd</sup> appellant was in year 4 at school but did not accept that the children could not speak or understand Tamil as it was the language spoken by their parents and both parents needed an interpreter at the hearing. The judge noted that education was available in Sri Lanka and that, whilst it would be advantageous for the 3<sup>rd</sup> appellant to continue her education in the UK, he could nevertheless access schooling in Sri Lanka. At [46] the judge noted that there was very little evidence that the 3<sup>rd</sup> appellant had established social ties and friendships outside his nuclear family, but

accepted that he saw “quite a bit” of his cousins. Having noted that the most important aspect of the children’s best interests was that they continue to reside with their parents, the judge concluded, at [48], that,

“It may be marginally in the best interests of the two children, particularly the third appellant, to be allowed to remain in the UK though that is not the determinative issue.”

7. Having identified the best interests of the children, the judge proceeded to consider whether it would be reasonable to expect the children to leave the UK. In so doing he made specific reference to the reasonableness test as considered in *MA (Pakistan)*. The judge engaged in a balancing exercise to determine whether the need for immigration control outweighed the best interests of the children [51]. The judge noted the strong weight that must be given to the need to maintain immigration controls and the fact that the applicants had no entitlement to remain, and reminded himself that the children should not be held responsible for the conduct of their parents. The judge noted that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> appellant had lawful leave to remain, and neither was capable of finding gainful employment, indicating that the family would always be a drain on others. The judge noted that the 1<sup>st</sup> appellant had received NHS treatment although that money was being repaid. The judge referred to the psychological report confirming that the 1<sup>st</sup> appellant was suffering from mild depression which was likely to deteriorate if he was removed. The judge noted however that the 1<sup>st</sup> appellant’s mental state related to concerns in respect of immigration issues. The judge referred to an overdose taken by the 1<sup>st</sup> appellant in 2004 but noted that he was at low risk of suicide, that his asylum claim had been dismissed and that any subjective fear held by the 1<sup>st</sup> appellant was not objectively well-founded. The judge was not therefore satisfied

that there was any significant risk of further deterioration in his mental health if he were returned to Sri Lanka.

8. Having found that the appellants would continue to receive financial support if removed to Sri Lanka the judge concluded that the lack of immediate accommodation in that country was a neutral factor. The judge additionally noted that the 2<sup>nd</sup> appellant's parents lived in Sri Lanka. Whilst again noting that the children should not be blamed for their parent's conduct, the judge considered that there was a strong public interest in removing the 1<sup>st</sup> and 2<sup>nd</sup> appellants given, *inter alia*, their lack of status in the UK and their inability to speak English and inability to support themselves, and the cost to the NHS of treating the 1<sup>st</sup> appellant. The judge considered that the 3<sup>rd</sup> appellant would be able to speak the language in Sri Lanka, that education was available, that he would remain with his parents and would have the chance to meet his grandparents. The judge concluded that, in these circumstances, it was not unreasonable to require the children to leave the UK with their parents. The judge concluded that there were no insurmountable obstacles to reintegration in Sri Lanka in light of his factual findings, and that a proportionality assessment following the *Razgar* [2004] UKHL 27 principles would not yield a different conclusion.

### **The grounds of appeal and the error of law hearing**

9. The grounds contend that the judge failed to take account of relevant evidence when concluding that it was only 'marginally' in the 3<sup>rd</sup> appellant's best interests to remain in the UK. The judge failed to properly consider the evidence that the extended family members had lived with each other at various stages, that they all lived close by and saw each other daily/weekly. The failure to analyse the relationships between the appellants and their extended family members rendered the decision unsafe. There was said to be a

fundamental misdirection in that the judge appeared to believe that one of the 2<sup>nd</sup> appellant's brothers lived in Sri Lanka, and the judge failed to appreciate that the 3<sup>rd</sup> and 4<sup>th</sup> appellants had never seen their grandparents, who were not in good health. The judge failed to consider the 1<sup>st</sup> and 2<sup>nd</sup> appellants' evidence relating to their children's proficiency in Tamil. As a consequence, the judge's assessment of the children's best interests was flawed and he failed to follow the guidance issued in *MA (Pakistan)* that there would be a very strong expectation that the best interests were to remain in the UK. This meant that the overall proportionality assessment was flawed, more so because the judge failed to consider the reasons why the 1<sup>st</sup> had to receive NHS treatment (arising from an assault while trying to report a crime). Issue was taken with the judge's conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were unable to find gainful employment given that he worked as a lorry driver in Sri Lanka and neither was permitted to work in the UK. A second ground contended that the judge failed to apply the policy guidance considered in *MA (Pakistan)* and that he should have allowed the appeal given that the Presenting Officer was unable to assist in identifying the "strong reasons" for refusing leave once a child attained 7 years continuous lawful residence, despite the Presenting Officer being given an opportunity to seek instructions on this point.

10. The lengthy grant of permission commented that the judge may have set out an insufficient analysis of the extent of the 3<sup>rd</sup> appellant's integration, that he failed to adequately consider the relevance of the benchmark period of 7 years, as contemplated in *MA (Pakistan)*, and that his assessment as to whether it was reasonable to require the children to leave the UK was affected.
11. In his oral submissions Mr Wilcox submitted that the judge failed to assess the evidence relating to the children's integration, and that in concluding that it was only 'marginally' in the 3<sup>rd</sup> appellant's best

interests to remain in the UK, the judge downplayed the significance of the child's integration and the significance of the breakup of the unusually close family members. It was submitted that the judge was not entitled to conclude that neither parent was incapable of finding gainful employment as they could look for work if leave was granted. I was referred to a letter from the 3<sup>rd</sup> appellant's headteacher. Mr Wilcox repeated the grounds of appeal relating to the judge's assessment of the children's proficiency in Tamil and the reasons why the 1<sup>st</sup> appellant sought NHS treatment. Having heard submissions from Ms Fijiwala I reserved my decision.

## **Discussion**

12. I find, for the following reasons, that the decision does not contain any material legal error.
13. The grounds of appeal, as expanded by Mr Wilcox, argue that the judge's assessment of the best interests of the children was flawed because he failed to appreciate or consider the strength of the appellants' relationships with their extended family members. Had the judge fully considered the evidence of the relationships between the appellants and their extended family members, he would not have been entitled to conclude that the 3<sup>rd</sup> appellant's best interests were only 'marginally' to remain in the UK. This finding infected the judge's subsequent analysis of the proportionality of removing the children.
14. The judge however considered written and oral evidence from RM and VM, the 2<sup>nd</sup> appellant's two brothers ([21] to [28]). The judge was clearly aware from this evidence that the 3<sup>rd</sup> and 4<sup>th</sup> appellants had close relationships with their extended family members in the UK (see also [42]), that they saw quite a bit of their cousins [46], and that they would see far less of their family members in the UK if they returned to Sri Lanka [47]. There is nothing in the judge's assessment

to suggest that he did not take full and proper account of the nature of the extended family relationships. In any event, other than by way of financial support the written and oral evidence from the 2<sup>nd</sup> appellant's brothers did not disclose anything more than the normal love and affection between adult siblings (or indeed between the 3<sup>rd</sup> and 4<sup>th</sup> appellants on the one hand and their aunts, uncles and cousins on the other) (*Singh* [2015] EWCA iv 630; *Kugathas* [2003] EWCA Civ 31), and there was little independent evidence to suggest that the 3<sup>rd</sup> and 4<sup>th</sup> appellants were dependent on their extended family members or that the impact of being separated from their extended family members would have any significant adverse effect on their welfare or emotional well-being. In reaching this conclusion the judge was clearly aware that the 2<sup>nd</sup> appellant's two brothers resided in the UK and not in Sri Lanka. It is not apparent from [12] that the judge believed the 2<sup>nd</sup> appellant had a brother in Sri Lanka, and there is nothing in the rest of the decision to suggest that the judge acted under any misapprehension as to the identity of the relatives who remain living in Sri Lanka (e.g. at [47] the judge only refers to the 2<sup>nd</sup> appellant's parents residing in that country).

15. The judge was, moreover, entitled to his conclusion at [46] that there was very little evidence of the 3<sup>rd</sup> appellant's social ties and friendships established outside the nuclear family. The various school reports established that both children were doing well school but there was little evidence describing the nature and extent of the friendships they had established. This is not at all surprising given that the 3<sup>rd</sup> appellant was only 8 years old. While I accept that the judge did not make specific reference to the letter from the headteacher of Kenmore Park Junior School, there is no requirement for a judge to specifically deal with each and every item of evidence. The head teacher's letter, dated 2 February 2017, confirmed that the 3<sup>rd</sup> appellant had been attending the school since 3 September 2015,



was a valued member of the community, had settled into school life and was progressing well in his studies. The school believed any change in the 3<sup>rd</sup> appellant's status would have a negative impact on his academic and emotional development and that his educational needs were best served at the school. The letter does not significantly enhance the 3<sup>rd</sup> appellant's claim. There is no explanation as to how the 3<sup>rd</sup> appellant's emotional development would be affected or why his educational needs are best served at that particular school. It is readily apparent that any child would be adversely affected if they had to leave a school they had attended for one and a half years. The head teachers letter does not identify any particular vulnerability on the part of the 3<sup>rd</sup> appellant. The judge makes the point, at [45], that school friendships are transient and likely to change on any change of school. I am not persuaded that the failure by the judge to make specific reference to the head teacher's letter indicates that it wasn't taken into account, or that it could, in any event, make any material difference to the judge's ultimate findings.

16. Nor am I satisfied that there was any arguable legal error in the judge's conclusion that the 3<sup>rd</sup> and 4<sup>th</sup> appellants were sufficiently proficient in Tamil. The judge indicated in his decision that he took into account the statements from the 1<sup>st</sup> and 2<sup>nd</sup> appellant and recorded their evidence that the children did not answer their parents in Tamil but in English and only understood a little Tamil. At [44] the judge observed that both parents needed an interpreter at the hearing. In these circumstances the judge was rationally entitled to conclude that the children did indeed speak and understand Tamil as it was the language spoken by their parents and that they were bilingual.
17. The judge was demonstrably aware of the principles enunciated in *MA (Pakistan)* and the respondent's policy guidance ([37], [49]). The judge specifically indicated that he accorded significant weight to the

fact that the 3<sup>rd</sup> appellant had resided in the UK for more than 7 years and to the policy guidance relating to “strong reasons” [49]. The judge was mindful that, during a lengthy period of residence, a child will have put down roots and developed some social, cultural and educational links to the UK such that their removal might be highly disruptive, but noted that this may be less so where the children are very young because the focus of their lives will be on their families [49]. The 3<sup>rd</sup> and 4<sup>th</sup> appellants were still very young at the date of the First-tier Tribunal’s decision and the focus of their lives were unarguably on their immediate family. This is entirely consistent with the decision in *Azimi-Moayed and others (decisions affecting children; onward appeals)* [2013] UKUT 00197 where the Upper Tribunal observed that 7 years residence from the age four is likely to be more significant to a child than the first seven years of life.

18. It is apparent from a holistic assessment of the determination that the judge considered and applied the respondent’s guidance relating to “strong reasons”. At [51] the judge indicated that strong weight must be given to the need to maintain immigration controls and to the fact that the appellants had no entitlement to remain in the UK. In so doing the judge specifically noted that the children must not be blamed for matters in respect of which they are not responsible such as the conduct of their parents (see also [55]). The judge, at [52] was rationally entitled to take into account, when determining the reasonableness of requiring the children to leave the UK, the fact that both parents entered the UK illegally and remained without leave. Although it is not clear why the judge believed neither parent was capable of finding gainful employment if given permission to work, this, at best, is only a neutral factor (*Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803). The judge was also entitled to take into account the fact that the 1<sup>st</sup> appellant was receiving NHS treatment and he specifically acknowledged that the

money was being repaid. The reasons that caused the 1<sup>st</sup> appellant to seek NHS treatment do not detract from the fact that treatment was sought. The judge's conclusion, at [55], that there was a strong public interest in removing the 1<sup>st</sup> and 2<sup>nd</sup> appellants was one open to him all the evidence and for the reasons given. In concluding that it was not unreasonable to require the children to leave the UK the judge was entitled to consider his finding that it was only marginally in the 3<sup>rd</sup> appellant's best interests to remain in the UK, that the 3<sup>rd</sup> appellant would be able to speak the language if returned to Sri Lanka, that education was available to him, that there would be some third-party support, and that he would remain part of the immediate family unit.

19. The fact that the Presenting Officer was unable to provide further assistance in respect of the respondent's IDI guidance on the need for "strong reasons" for refusing leave to a child who has achieved 7 years residence, despite being given an opportunity to take instructions, did not compel judge to accept that there are no "strong reasons". It is for the judge to determine whether it is reasonable for children who have attained at least 7 years continuous residence in the UK to be removed, and in so doing the judge will have regard to all relevant circumstances, including the guidance issued by the respondent. But the fact that a Presenting Officer did not articulate "strong reasons" in oral submissions does not mean that "strong reasons" did not exist, still less, that the respondent was conceding that there were no "strong reasons". Nor was the judge privy to any discussion that may have occurred between the Presenting Officer and the person from whom she may or may not have sought instructions.
20. For the reasons given above I am not persuaded that the determination contains any material legal error.

### **Notice of Decision**

**The First-tier Tribunal's decision did not contain a material error of law. The appeals are dismissed.**

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants in this appeal are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.



9 February 2018

Signed  
Upper Tribunal Judge Blum

Date