



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06682/2017  
HU/06683/2017  
HU/06686/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21 December 2018

Determination Promulgated  
On 14 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ISURUMUNI LANCHANA TAMARI MENDIS WIJESINGHE  
SAMARASEKARA  
UPUL INDRAJITH JOSEPH  
KK  
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Anzani (for Nag Law Co Solicitors)  
For the Respondent: Mr N Bramble (Senior Presenting Officer)

**DECISION AND REASONS**

1. These are the appeals of Isurumuni Lanchana Tamari Mendis Wijesinghe Samarasekara, Upul Indrajith Joseph, and KK, citizens of Sri Lanka, against the decision of the First-tier Tribunal of 1 June 2018 dismissing their appeals, those appeals themselves brought against the Respondent's refusal of their human rights claims of 24 May 2017.

2. KK was born on 1 January 2004. The family entered the UK on 17 September 2009, with Mrs Samarasekara as the principal (as I read the immigration history, initially as a Tier 4 student, subsequently as a post study worker and then as a Tier 2 sponsored worker) and the others as her Points Based System dependents. They extended their leave variously until 14 December 2015, though further applications were rejected.
3. The First-tier Tribunal accepted the immigration history set out above as established, noting that KK entered the UK aged 5; she was now 14. Mrs Samarasekara had a sister in the UK to whom KK was close, visiting them both during the week and on weekends. KK was set to begin her GCSE courses in September 2018, and did ballet classes outside schools. She had a circle of schoolfriends. The parents could both speak English and Singha; KK could understand some Singha but principally spoke English. The parents had family in Sri Lanka (extended family in the case of Mrs Samarasekara) and relationships with Mr Joseph's father, though were estranged from his brother following a family dispute over an inheritance. Mrs Samarasekara had a degree in chemistry and worked in the care industry, in marketing; Mr Joseph worked as an operations manager, and had qualifications in the hotel and tourism industry.
4. The Tribunal considered that on a return to Sri Lanka KK could be expected to learn Singha given her family spoke the language. Whilst in one sense she was at a crucial stage in her education, the long summer break before starting her GCSEs represented an interregnum; she could enrol in an English-speaking school in Sri Lanka, and any interruption in her studies would not represent unduly harsh consequences or insurmountable obstacles (terms that repeatedly describe the test applied in the decision); nor would the departure from her cousins and friends, given she could stay in close touch with them remotely.
5. The First-tier Tribunal acknowledged that the expert report deserved close attention, but found it wanting. To the Judge's mind, the statement that KK would probably be seriously traumatised and would be unable to comprehend "any sense of justice" if required to depart from the UK given she was "significantly attached to the British way of life" amounted to no more than saying that she enjoyed life in the UK having lived her for some years and did not want to leave the country. The author's conclusion that she would be unable to understand what was happening to her was inconsistent with his recognition of her as an intelligent young woman. The First-tier Tribunal accepted that she might experience some stress and upset following her departure from the UK, but nothing untoward. This was essentially a close family unit which would remain so on a relocation to Sri Lanka. The immigration position of the parents was precarious and there

was no reason they should have anticipated remaining in the UK; they were well-qualified to re-integrate in Sri Lanka.

6. Grounds of appeal argued that the decision of the First-tier Tribunal was unlawful for failing to take account of the statutory guidance on safeguarding and promoting child welfare and for failing to give adequate reasons for rejecting the expert evidence, in the light of the relevant authorities.
7. Although the First-tier Tribunal refused permission to appeal on 28 August 2018, permission to appeal was granted by the Upper Tribunal on 14 November 2018 on the basis that it was unclear, in the light of the authorities, how it was that the First-tier Tribunal considered the departure of the elder child from the UK to be reasonable.
8. Before me Ms Anzani applied to amend the grounds of appeal to take the point (heralded in the written varied grounds supplied before the hearing) that the First-tier Tribunal appeared to have applied the wrong legal test for assessing the proportionality of a minor's removal. Mr Bramble did not object, and given that this was in fact a point which had struck me in my pre-reading as a *Robinson*-obvious error which the Upper Tribunal should raise of its own motion if necessary, I permitted the amendment of the grounds.
9. Mr Bramble accepted that the approach taken to the reasonableness of a seven-year resident child's departure from the UK represented a fundamental error which affected all subsequent consideration of the case, as one could not know to what conclusion the First-tier Tribunal might have come had it correctly directed itself.

### **Findings and reasons**

10. It seems to me that Mr Bramble was right to make the concession that he did. The appropriate test for a seven-year resident child looks to the reasonableness of their relocation abroad; it is in no way a search for the higher thresholds that may be appropriate where no qualifying child is involved. Here there are clear and repeated references to the wrong benchmark.
11. Relatively extensive case law has fallen from the oft-litigated scenario of parents with children. The central provisions in these appeals are those governing the consequences for a family unit of significant residence in the UK by children. The Rules state:

**“Requirements to be met by an applicant for leave to remain on the grounds of private life**

**276ADE (1).** The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant ...

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;”

12. Section 117B NIA 2002 provides:

**“PART 5A**

**Article 8 of the ECHR: public interest considerations ...**

**117B Article 8: public interest considerations applicable in all cases**

...

(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.”

13. The upshot of these provisions is that a child who has been resident in the UK for seven years can only be expected to depart if that would be reasonable in all the circumstances (Rule 276(ADE(vi))); this conclusion will also militate against the departure of any parents caring for them (section 117B(6)). Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 explained that wider public interest considerations had to be taken into account when assessing the reasonableness of a child’s relocation, beyond its best interests. The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise as was shown by the Secretary of State’s published guidance from August 2015 in which it is expressly stated that once the seven years’ residence requirement is satisfied, there need to be “strong reasons” for refusing leave, because after such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. Nevertheless, it may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.

14. *Every Child Matters: Change for Children* (Guidance issued in November 2009 under section 55(3) and 55(5) of the 2009 Act) specifies that safeguarding and promoting the welfare of children requires:-

“protecting children from maltreatment;

preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development'); ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully."

15. A parent's immigration history should not be held against a child. Lord Hope in *ZH (Tanzania)* [2011] UKSC 4 at [44]:

"The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible."

16. There has been a recent re-statement of the law regarding the best interests of the children: *KO (Nigeria)* [2018] UKSC 53 §32.

(a) "in the absence of clear language to the contrary ... the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" §15;

(b) "it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave" §18;

(c) "the issue of "reasonableness" under section 117B(6) is focussed on the position of the child" §32.

17. Seven-year resident children enjoy especially strong protection, then, albeit that their existence within a family unit does not represent a trump card. Relevant factors in assessing best interests include those identified by Jackson LJ in *EV (Philippines)* [2014] EWCA Civ 874 at [35] stated: "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their

connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life ...”

18. The bare fact of seven years’ residence is not in itself sufficient to demonstrate a lack of reasonableness - an evidence-backed case must be put, in order that the evaluative exercise required by the case law of the European Convention on Human Rights is given effect. In *Azimi-Moayed* [2013] UKUT 197 (IAC) the President’s Tribunal set out that:

“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.”

19. Bare assertions that a change of school regime is in itself unreasonable do not suffice. The Tribunal in *AM Malawi* [2015] UKUT 260 (IAC):

“39. ... Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the FtT is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note that the eldest child of this family has been required to move schools, and move from one end of the UK to the other, as a result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill effect from so doing.”

20. The upshot of the review of the authorities above is that where there is an evidence-backed case going to the connections that a qualifying child has with the UK, the Tribunal must engage in detail with their best interests and weigh the reasonableness of relocation with care. Where neither parent has an enduring right to remain in the UK, the qualifying’ child’s best interests aside, then that forms part of the assessment; but that consideration cannot

override strong connections such as those identified in *Azimi-Moayed* and in the statutory guidance *Every Child Matters*.

21. The approach of the First-tier Tribunal was fundamentally flawed. That failing goes to the very basis of its disposition of the appeal, and thus the appeal must be re-heard.

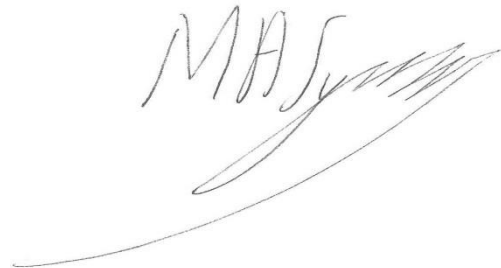
### Decision

The appeals are allowed.

The appeals are remitted to the First-tier Tribunal for hearing afresh.

Signed

Date 2 January 2019

A handwritten signature in black ink, appearing to read 'M.A. Symes', with a long horizontal flourish extending to the left.

Deputy Upper Tribunal Judge Symes