



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

Appeal Number: HU/24623/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2019**

**Decision & Reasons Promulgated
On 12 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

**MR U E P
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Kumudusana, Solicitor, of Liyon Legal Ltd

For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Sri Lanka, date of birth 27 January 1963, appealed against the Respondent's decision, dated 14 October 2016, to refuse leave to remain. He appealed against that decision, which was rejected by First-tier Tribunal Judge Andonian in a decision promulgated on 12 March 2018. That decision in relation to the Article 8 issues was overturned by Deputy Upper Tribunal Judge Juss in a decision on 9 July 2018. The matter was returned to the First-tier Tribunal on the issue of the

child (DGE) and the best interests of the child, came before First-tier Tribunal Judge A M Black (the Judge), who on 18 October 2018 dismissed the appeal under Article 8 ECHR claim.

2. Permission to appeal was given by Deputy Upper Tribunal Judge Chapman on 22 January 2018 on the basis as follows:

“In the light of the Judge's findings at [33] that the Appellant and his wife have a good immigration history; at [34] that the Appellant met all the requirements of the Immigration Rules apart from the English language test; at [24] that it would be in the best interests of the Appellant's son to remain in the UK and at [38] that it may be some considerable time before entry clearance is granted, it is just arguable that the finding at [40] that the public interest in maintaining effective immigration controls outweighs the degree of interference with the Appellant, his wife and child's protected rights fails to fully take into account the Judge's earlier material findings.”

3. The amended renewed grounds to the Upper Tribunal are fairly reflected in the permission granted by the Judge.
4. Having considered the Judge's decision, the factual matters as set out in the grant of permission appear to me to be sustainable and the Judge carefully addressed the best interests of DGE, born on 29 December 2006, who entered the UK in February 2014 as the dependant of his mother, a lady who is a dual national but who now has British nationality as well as Sri Lankan.
5. The Appellant is a Sri Lankan national and he came here lawfully as a dependant upon his wife, who had entry clearance, as did their child. The Judge noted the personal circumstances of the Appellant's mother, her status in the UK, her work and the fact that DGE was in schooling in the UK and such evidence as there was seemed to show reasonable progress and advancement. There was no report from an independent social worker about the impact upon DGE having to return to schooling in Sri Lanka for such a period of time before entry clearance could be made to the UK but

the Judge set out, with full and adequate reasons, why she considered the best interests of the DGE child lay in remaining within the United Kingdom.

6. The Judge then went on to cite the relevant case law for such considerations as might arise in this matter outside of the Rules, bearing in mind that the fact that the Appellant had not, before or at the time the matter came before the Judge, mastered the English language sufficiently to pass the English Language Test (ELT). The Judge [D34] concluded that the Appellant does not speak English. On what basis that was arrived at I do not know but the grounds of appeal do not essentially dispute that finding but rather argued in submissions made and in the grounds that he sought to take the test but had not had his passport returned by the Respondent in order to do so.
7. The facts of the matter were that the Judge set out in the context of *Agyarko* [2017] UKSC 11 the clear reasoning why she concluded that the Appellant could return to Sri Lanka and make an out of country application to return. On the bare evidence that was given, the impact upon DGE of him doing so was simply a general assertion of harm rather than identifiable material harm to his development or well-being. For that reason the Judge's assessment of the proportionality issue was necessarily fact-specific and set in the context that was before the Judge. The Judge therefore at [D38, D39] concluded for reasons given that it was not unreasonable for the Appellant, his wife and child to be temporarily separated while the Appellant returned to Sri Lanka, learned English and then applied for entry clearance. That separation could be some period of time, certainly months, and the Judge did not speculate, but not least because there was no evidence of the likely impact upon DGE or the Appellant's wife through his absence although no doubt there would be consequential effect on general childcare arrangements. The Judge noted that the family had been separated for four years while the Appellant's wife was working in the UK and the Appellant and DGE had remained in Sri Lanka.

8. In the circumstances, much as Mr Kumudusana might press the case that the Appellant should be given a chance to remain in the UK, get his passport back and be able to take the test at some stage or another I did not find that the present failure of the Appellant to be able to meet the Rules, i.e. pass the ELT demonstrated that there was anything of the unusual circumstances that warrant the consideration of the case outside of the Rules. In any event, the fact was that the Judge did look at it under the Rules and concluded for reasons given that the Respondent's decision was correct and not disproportionate. The interference that followed from return to Sri Lanka did not render the decision unduly harsh in terms of its impact on the Appellant, his wife or DGE.
9. It was not for me to interfere with decisions simply because I might have reached a different one. The fact was I can only do so where there is a material error of law. In this case, I can find no material arguable error of law in the decision. The decision made by the Judge was indeed a matter of discretion and judgment made after appropriate consideration of the facts. It was not said that in effect material issues have not been taken into account but rather a different decision ought to have been reached on the same evidence.

NOTICE OF DECISION

The Original Tribunal's decision stands. The appeal is dismissed.

ANONYMITY

An anonymity order was made and that is continued.

DIRECTION REGARDING ANONYMITY - RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 5 March 2019

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

The appeal has failed and therefore no fee award is appropriate.

Signed

Date 5 March 2019

Deputy Upper Tribunal Judge Davey