



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/49595/2013
IA/49602/2013
IA/49604/2013
IA/49616/2013

THE IMMIGRATION ACTS

Heard at Taylor House
On 11 September 2014

Determination Promulgated
On 22 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MR DIMINGU BADATHURUGE MANESH NISHANTHA DE SILVA (FIRST
APPELLANT)
MRS DASNI THARSHULYA PATHEGAMA KURUPPU DE SILVA (SECOND
APPELLANT)
MASTER DIMINGU BADATHURUGE MANUL DINUSHANA DE SILVA (THIRD
APPELLANT)
MISS THANURI CHATHURYA DE SILVA (FOURTH APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms A Sahra, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellants are all citizens of Sri Lanka. Mr De Silva's date of birth is 28 June 1968 and his wife Mrs De Silva's date of birth is 9 August 1967. Their children are the two younger appellants. Their son Manul's date of birth is 14 September 1997 and their

daughter Thanuri's date of birth is 21 January 2002. They made applications for leave to remain on 17 October 2013. Their applications were refused by the Secretary of State in decisions of 7 November 2013 under the Immigration Rules. Exceptional circumstances were also considered by the Secretary of State in relation to the parents and the decision maker found that there were none in this case.

2. The appellant Mr De Silva came to the UK in 2005 in order to study. His wife and their two children joined him here in 2006. They have been granted extensions of leave. They have all remained in the UK since then legally (Mr De Silva continuing to study). Both children are now attending secondary school.
3. The appellants made an application to appeal against the decision of the Secretary of State on 7 November 2013 and their appeal was dismissed by Judge of the First-tier Tribunal Lobo in a decision that was promulgated on 11 July 2014 following a hearing. Permission to appeal was granted to the appellant in a decision by First-tier Tribunal Judge R A Cox dated 31 July 2014.

The Decision of the First-tier Tribunal

4. The Judge made the following findings:
 - (1) The third and fourth appellants have lived in the United Kingdom for nearly eight years.
 - (2) The third and fourth appellants have done exceptionally well in the United Kingdom as evidenced by the glowing reports of their academic and sporting success and their social involvement.
 - (3) The first and second appellants made a second decision not to speak to their children in Sinhalese. It is claimed that the third and fourth appellants do not speak Sinhalese but the first appellant's sister Mrs Jayasuriya does not speak English and she frequently looks after the children and speaks to them in Sinhalese which they understand.
 - (4) There is no evidence that the return of the third and fourth appellants to Sri Lanka would be detrimental to their general welfare including their education. Families and children frequently move from country to country, and whilst there may be difficulties it cannot be assumed that these are insurmountable nor can it be assumed that the effect is always negative.
 - (5) The family presents as intelligent, well-educated, ambitious and hardworking. They have demonstrated a resilience in moving from Sri Lanka to the United Kingdom. There is no evidence that a move as a family to Sri Lanka would be a negative move which would adversely affect the third and fourth appellants.

- (6) The third and fourth appellants have failed to establish to the necessary standard of proof that it would not be reasonable to expect them to leave the United Kingdom and therefore they cannot succeed under paragraph 276ADE(iv).
 - (7) The appellants have not established to the necessary standard of proof that there are arguably good grounds for granting them leave to remain outside the Immigration Rules.
 - (8) The fact that the third and fourth appellants may have lived in the United Kingdom during a formative period of their lives is an advantage which they can take back with them to Sri Lanka. I do not accept that they do not understand Sinhalese and although it may take some time for them to become fluent speakers of Sinhalese I do not accept that these appellants, from this family, will have any insurmountable difficulty. Even if there is an interference with their private life that interference is completely proportionate when balanced against the interests of the community as a whole in a firm and open immigration policy.
 - (9) With regard to Section 55 of the Borders, Citizenship and Immigration Act 2009 there is nothing which allows me to conclude that the Secretary of State has not discharged her duty.
5. The Judge recorded at paragraph 20 that the appellants relied on a bundle comprising 142 pages and he also acknowledged further evidence as provided by Mr Palmer at the hearing including a photograph of Manul receiving a cricket award and a letter from the Slough Athletic Association dated 25 June 2014 concerning the selection of the youngest child to represent at under 13 level in the Berkshire Schools Athletic Championships.

The Evidence before the First-Tier Tribunal

6. The evidence of Mr De Silva and his wife was that they always speak English to their children and neither can read or write in Sinhala. Both his children do well at school and his son won a place at Upton Court Grammar School. He is involved in many extracurricular activities. His wife's mother is in Sri Lanka; however, there are no other relatives there. His only sibling lives in the UK and they have a very close relationship with her. They do not own property in Sri Lanka. Their children would not be able to go into mainstream education in Sri Lanka should they be forced to return because they do not have language skills and are entrenched into the United Kingdom system. There is no possibility of Mr De Silva and his wife being able to send their children to the English Language International School in Colombo and it is very unlikely that they would be able to get reasonably remunerated employment so that we could afford to privately educate them.

7. There was a witness statement from each of the children. Manul's evidence was that he worked very hard for his GCSEs and that he is planning to study maths, physics, chemistry and psychology at A-level. He has lived in the UK for more than half his life and he has made numerous friends here. He has integrated well into the community in the UK. Thanuri's evidence is that she has lived nearly two thirds of her life in the UK and could not bear the thought of leaving all the amazing friends that she has made here. She is unfamiliar with Sri Lankan culture and unable to read, write or speak Sinhalese. She has spent the greater part of her life here.
8. In support of the application there was a letter from Upton Court Grammar School of 5 June 2014 relating to Manul confirming that he has made an excellent contribution to the school community throughout the five years of his studies there. He has fully immersed himself in the ethos of the school and his most notable contribution has been in extracurricular school sport. There is a certificate presented to Manul of 5 September 2008 for working cooperatively and a certificate awarded to him in year six. There are many certificates relating to both children and their successful studies in the UK.

The Grounds Seeking Leave to Appeal and Oral Submissions

9. The thrust of the grounds clarified by Ms Sahra is that the Judge did not consider material evidence in relation to the children, he did not make a finding in relation to their best interests and he misdirected himself. The Judge did not give sufficient weight to the length of time that the children have lived in the UK and he did not take into account their evidence. No weight was given to jurisprudence relating to the best interests of the children specifically **EM and Others (returnees) Zimbabwe CG [2011] UKUT 98 (IAC)**, **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC)**, **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**. The children are appellants in this case and the Judge should have applied paragraph 276ADE and allowed their appeal on the basis of their private life within the rules.
10. Mr Tarlow relied on the response under Rule 24 of the 2008 Procedure Rules namely that the Judge directed himself appropriately and he correctly referred to current case law under the Immigration Rules at paragraphs 8 and 9 of the determination and relevant case law relating to Article 8 at paragraph 12. The findings of the Judge at paragraphs 25 and 26 were open to him on the evidence. Mr Tarlow submitted that it is clear that the Judge had the best interests of the children in mind. He applied the right test but he used the wrong words. Both parties agreed that in the event that the decision would need to be remade this could be done without a hearing.

The Law

11. Paragraph 276ADE provided as follows:

“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:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (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; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- (vi) is aged 18 or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.”

12. In relation to the best interests of the child in the case of **Azimi-Moayed** the Upper Tribunal 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."

13. The same case also looked at the position of children in onward appeals and noted that:

- "(2) Duties to have regard as a primary consideration to the best interests of a child are so well established that a judge should take the point for him or herself as an obvious point to be considered, where the issue arises on the evidence, irrespective of whether the appellants or the advocates have done so.
- (3) Although in some cases this may require a judge to explore whether the duty requires further information to be obtained or inquiry to be made, the judge primarily acts on the evidence in the case. Where that evidence gives no hint of a suggestion that the welfare of the child is threatened by the immigration decision in question, or that the child's best interests are undermined thereby, there is no basis for any further judicial exploration or reasoned decision on the matter.
- (4) Even if a decision of the First-tier Tribunal involves the making of an error on a point of law, in deciding whether to grant permission to appeal to the Upper Tribunal, it is relevant whether there are any reasonable prospects of that Tribunal exercising its powers to re-make the decision in a different way. The Upper Tribunal is unlikely to do so if the error was marginal and would not have made a difference to the outcome."

14. In **Zoumbas v SSHD [2013] UKSC 74** at paragraph 10 there is set out the legal principles in considering the best interests of a child which are deemed to be an integral part of the proportionality assessment. Paragraph 10 reads as follows:

"In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely *ZH (Tanzania)* (above), *H v Lord Advocate* 2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

- (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
- (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
- (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
- (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
- (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
- (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
- (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

15. In **E-A (Article 8 - best interest of child) Nigeria [2011] UKUT 315 (IAC)** it was held that the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contraindication. However absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case. The authority goes on to suggest that during a child's very early years he or she will be primarily focussed on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have a greater impact on his or her wellbeing. This authority also goes on to suggest that those who have their families with them during a period of study in the United Kingdom must do so in the light of the expectation of return. The Supreme Court in **ZH (Tanzania) [2011] UKSC 4** was not ruling that the ability of a young child to steadily adapt to life in a new country was an irrelevant factor, rather that the

adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

16. In the case of **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874** paragraphs 58 and 60 which as follows:

“58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has a right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?”

59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.”

17. In that case it was argued by the appellants that the best interests of their children would be to remain in the UK with their parents and continue their education here. The court went on to find in relation to how a Tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England and at paragraph 33 the Tribunal stated as follows:-

“33. ... Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the child are to be

determined by reference to the child alone without reference to the immigration history or status of either parent.”

18. The court went on to state the following at paragraph 35:-

“35. 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 or their rights (if they have any) as British citizens.”

Error of Law

19. The Judge materially erred because he did not make a finding as to the children’s best interests in accordance with the will of parliament and established jurisprudence. His finding that removal would not be detrimental to the children’s general welfare or that they would not be adversely affected is a different test. In addition the Judge did not consider the children’s appeals under paragraph 276ADE of the respondents’ own immigration rules (private life within the rules) and did not consider reasonableness in this context. I set aside the decision of the Judge. It was agreed by the parties that I could go on to remake the decision without a further hearing (in accordance with the directions of the Tribunal). There was no challenge to the primary findings of fact and the evidence set out by the Judge.

Conclusion

20. Whilst it is the case that the children are not British citizens and their parents have no right to remain here, there are significant factors in this case which lead me to conclude that, after applying relevant jurisprudence on the issue, it would be in their best interests to remain here in the UK. They have been here for eight years and they have spent a lengthy period of residence here (since the age of four). They have social and educational ties here. Their parents have been here legally. The eldest child has embarked on an A- level course and the youngest child has just started secondary school. The children’s best interests are a primary and not paramount consideration.

21. The decision maker should have considered the children’s applications under paragraph 267ADE (iv). I have considered reasonableness in the context of the fact that their parents have no legal right to be here and that they are being educated at the expense of the state, but I find that it would not be reasonable to expect them to leave the UK at this stage of their education and in the light of the time they have been here and their respective ages.

22. It follows that their parent's appeals should be allowed outside the rules. There are good grounds for granting leave outside the rules. It would not be reasonable (or in their best interests) to expect the children to return to Sri Lanka and this amounts exceptional and compelling circumstances. The fact is that a removal decision would result in the children having to leave the UK despite the fact they meet the requirements of the respondent's own immigration rules. The first three questions of the guidance in **Razgar, R (on the Application of) v SSHD [2004] UKHL 27** are answered in the affirmative. The decision is necessary for the economic well-being of the country through the maintenance of immigration control. The children are being educated here at significant expense to the state (albeit that they meet the requirements of the rules), and their parents are unable to satisfy the requirements of the rules. I must consider article 8 through the prism of paragraph 117B of the Nationality, Immigration and Asylum Act 2002 and accordingly I acknowledge that the maintenance of immigration control is in the public interest. The family has formed a private life whilst they have been here legally. There is no suggestion that they cannot speak English or that they are not financially independent. I have considered whether the best interests of the children are outweighed by the public interest, but do not consider that they are.
23. I allow the appeals of the adult appellant's under Article 8 and the appeals of the children under the Immigration Rules.

Signed Joanna McWilliam

Date 20 September 2014

Deputy Upper
Tribunal Judge McWilliam