



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

Appeal Number: IA/46843/2013  
IA/52631/2013

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 2<sup>nd</sup> February 2015**

**Determination Promulgated  
On 10<sup>th</sup> March 2015**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**KORONCHIGE MUDITHA DE SILVA  
DENETH SURANGA MALLAWA**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant:

Dr Mynott, instructed by Jackson and Canter

For the Respondent:

Mr McVeety on 28<sup>th</sup> October 2014 and Mr Diwyncz on 2<sup>nd</sup> February 2014, Senior Home Office Presenting Officers

**DETERMINATION AND REASONS**

1. Following a hearing on 28<sup>th</sup> October 2014 I found an error of law in the First-tier Tribunal decision dismissing the appellants' appeal against a decision refusing them leave to remain and against a decision to remove them pursuant to s47 Immigration Asylum and Nationality Act 2006, in the following terms:

- i. Mrs De Silva sought indefinite leave to remain as a Tier 1 (General) Migrant. Mr Mallawa, her husband is her dependant as are her two children born 2005 and 2007. Her application was refused by the respondent (and her dependants refused in line) under paragraph 245CD (c) and (d) and a decision to remove her and her dependants was made in accordance with s47 Immigration Asylum and Nationality Act 2007. She was served with a s120 Nationality Immigration and Asylum Act 2002 notice. The reasons for the decision were:
  1. She had not been continuously lawfully resident in the UK for a period of five years, her residence being broken by a period of five months when she was unlawfully in the UK.
  2. She had not presented evidence that her accountant who provided details of her earnings was a member of the requisite specified bodies; that she did not qualify for any points on the basis of her age; she failed to score the minimum 75 points required.
  3. She had not made an application for leave to remain on the basis of her family and/or private life and thus no consideration was given by the respondent to Appendix FM or paragraph 276ADE
  4. The respondent considered s55 UK Borders Citizenship and Immigration Act 2009 and concluded that the children could reasonably be expected to return to Sri Lanka with her.
  5. The SSHD considered whether there were any circumstances such as to allow her to remain exceptionally outside the Rules and concluded that considering her circumstances as a whole there were no factors sufficiently compelling or compassionate to warrant granting any period of leave outside the Rules.
- ii. The appellant appealed on the grounds that she had established a private and family life in the UK; her and her dependants removal would be unlawful as it was incompatible with her rights under the ECHR; she had no ties with Sri Lanka and discretion as to the qualifying period for settlement should have been exercised differently. She did not challenge the decision under the Rules other than by reference to an incorrect use of discretion.
- iii. The First-tier Tribunal judge found, as was conceded by the appellant's representative, that the appellant's accountant had not provided evidence with the application that he was a member of an approved body. As a PBS application the judge found that the appellant did not meet the requirements of the Rules at the date of application and thus she could not meet them now, even with the submission of evidence to that effect for the appeal. The judge also went on to consider the removal decision on the basis that he was not entitled to take account of post decision evidence. He addressed the length of time the appellant had been in the UK both lawfully and unlawfully, her private life, and s55 and concluded there were not arguably good grounds for granting leave outside the Rules.
- iv. Permission to appeal was sought and granted on the grounds that it was arguable:
  1. That the calculation of the period of residence in the UK by the judge was incorrect and she had been lawfully present in the UK for a period of five years when taking account of various periods of overstay are permitted.
  2. That the judge erred in holding that the appeal against the decision to remove could only be determined by reference to the decision to refuse leave to remain and thus post decision evidence could not be considered.

3. That the judge erred in his consideration of paragraph 276ADE by taking account of a break in the eldest child's residence in the UK which had not been taken by the respondent.
  4. Had failed to give proper consideration to s55 issues.
  5. Erred in his consideration of Article 8;
- v. In so far as the challenge to the decision to refuse to grant indefinite leave in accordance with the Immigration Rules as a Tier 1 (Migrant), that submission is plainly wrong. The applicant failed to submit the required evidence of the membership of her accountant with the approved membership body. Dr Mynott conceded that the appellant could not succeed under this ground.
- vi. In so far as the s47 removal decision was concerned Dr Mynott submitted that the fact that the appellant had now submitted evidence of the compliance by her accountant with the relevant regulatory body was a matter that could be taken into account. He further submitted that the calculation of the period of lawful residence in the UK was incorrect and this factored into the assessment of the appeal against the removal decision.
- vii. With regards to the length of residence the following matters were agreed between Dr Mynott and Mr McVeety:
1. The appellant arrived in the UK and was granted leave to remain as a Tier 1(General) Migrant until 13<sup>th</sup> November 2009.
  2. Her first application for further leave to remain was made on 5<sup>th</sup> November 2009.
  3. That application was refused on 5<sup>th</sup> December 2009 with a right of appeal, which she did not exercise.
  4. She had s3C Immigration Act 1971 leave until she became appeal rights exhausted on 19<sup>th</sup> December 2009
  5. She submitted a further application for leave to remain, and paid a further fee, on 29<sup>th</sup> December 2009.
  6. That application was put in to the UKBA during a period that she was an overstayer but within the period of 28 days permitted to be ignored in calculating lawful residence.
  7. That application was refused on 2<sup>nd</sup> February 2010 without a right of appeal.
  8. She put in a further application and paid a further fee on 12<sup>th</sup> March 2010, which was granted on 7<sup>th</sup> April 2010.
  9. Each application was a fresh application, not a continuation of previous applications.
  10. She was an overstayer for a period exceeding 28 days between the rejection of her second application and the submission of her third application.
  11. She could not therefore rely on the discounting of 28 days unlawful stay on the UK when calculating the length of lawful residence.
- viii. Dr Mynott accepted that he could not pursue his submission that the first applicant had been lawfully in the UK for the period between her arrival in the UK in November 2007 and the expiry of her leave in April 2013.
- ix. Dr Mynott continued to rely on his further grounds seeking permission notably that the children met the requirements of the Rules because they had been lawfully resident for a period in excess of 7 years and that in such circumstances the reasonableness of their removal had to be considered. The

First-tier Tribunal had made a finding that the children had not been lawfully resident for 7 years.

- x. The children had initially been resident in the UK as dependants of their father who had leave to remain as a Tier 4 student. The family had returned to Sri Lanka and then been granted entry clearance as dependants of the first appellant namely as Tier 1 (General) Migrant dependants. Dr Mynott referred me to his skeleton argument produced for the First-tier Tribunal, which set out that the children had been lawfully resident. He said that there had been no challenge to that assertion in his skeleton by the presenting officer and the First-tier Tribunal judge had not raised any objection to that assertion. Mr McVeety did not dispute this submission.
- xi. In [24] of the determination the judge states
  1. “.....The older child was born in 2005, in the UK, but spent a period in Sri Lanka in 2007 between his father’s student visa ending and his mother returning with her HSMP visa. I am not told how long the family was away from the UK but it must have been a short period. The younger child was born in Liverpool on 11/10/2007 and he and his mother returned to the UK on 19/11/2007. I have not been told what date they went back to Sri Lanka and neither representative addressed me on this point. There must however have been a break in the period and so neither child meets the continuous residence requirement.”
- xii. The difficulty with this conclusion by the judge is that had he raised it with Dr Mynott and/or the presenting officer the submission would have been made that in calculating continuous lawful residence, periods of absence can be ignored if a person left within a period of existing leave and returned within a period of existing leave. This includes where an existing leave is extended following an application for a variation in that leave (IT (Long residence – “continuous residence” – interpretation) British Overseas Citizen [2008] UKAIT 00038).
- xiii. Mr McVeety acknowledged that the First-tier Tribunal judge appeared to have based his conclusion on matters that were not put to the parties and of which no notice had been given and that it was thus possible that the consequent decision to dismiss the appeals was tainted.
- xiv. One issue is that the respondent when taking her decision did not take a decision on any human rights application because one had not been made. Although the respondent made reference to s55 there was no apparent engagement in the decision with the factual matrix of this family and in any event it seems unclear why the respondent considered s55 yet failed to consider whether those considerations were relevant to any proportionality decision on the s47 removal decision.
- xv. Dr Mynott submitted that in any event the respondent’s consideration of s55, and that of the First-tier Tribunal judge, was inadequate because she and he had failed to engage with the specific factual matrix. Furthermore any findings on s55 could and should have been considered as part of the appeal against removal on human rights grounds.
- xvi. It is plain that the appellants appealed on human rights grounds against the decision to remove them in accordance with s47. The First-tier Tribunal judge has not properly considered such an appeal. He reached a finding on the

continuity of residence by the children without having put relevant matters upon which he based that decision to the parties. The finding as to the lawfulness of the children stay in the UK taints the whole of the findings on the proportionality of the decision to remove this family from the UK.

xvii. I set aside the decision to be remade.

Conclusions:

The First-tier Tribunal erred in law in its decision on the appeal against the decision to remove the appellants. I set aside that decision to be remade.

The First-tier Tribunal did not err in its decision to dismiss the appeal against the refusal to grant indefinite leave to remain as a Tier 1 (migrant) and dependants in accordance with paragraph 245CD (c) and (d) of the Immigration Rules. That decision stands.

Consequential Directions

1. I made the following directions on 28<sup>th</sup> October 2014:
2. This matter will be listed for 2 hours for further hearing on the First Available Date after 8<sup>th</sup> December 2014 for submissions only unless either party notifies the Tribunal 7 days prior to the hearing date that oral evidence is required, with reasons.
3. The SSHD to disclose all documents relevant to applications for entry clearance and applications for leave to remain pertinent to the children by 10<sup>th</sup> November.
4. Leave to the appellants to make further submissions to the respondent on the basis of those documents, if so advised, by 24<sup>th</sup> November 2014; such submissions to be served on the presenting officer as well as the UKBA.

**Resumed hearing on 2<sup>nd</sup> February 2015.**

2. Mr Diwyncz did not contest that the children of this family had accrued 7 years continuous lawful residence in the UK. He conceded that the two appellants have a genuine and subsisting relationship. He did not challenge the assertion by Dr Mynott that the family met all of the “criteria” in s117B(1) to (5) Nationality Immigration and Asylum Act 2002. In so far as s117B(6) was concerned he submitted that it was in the best interests of children to be with their parents and it was reasonable for children to follow their parents to their country of origin. He said that he was “struggling to advance any argument that it is reasonable for the children to leave the UK”.
3. Dr Mynott drew attention to the fact that the eldest child, who was born in the UK and had never left the UK, would be 10 years old in March 2015 and thus eligible for registration as a British Citizen. He submitted that the starting point was the very significant period of time spent in the UK by the children. The private life of the children is well established. To go to Sri Lanka would involve considerable and significant disruption to their education; they would be attending school in a language they did not know where English was taught as a subject and was not the medium of instruction; the children are mono-lingual (English). The family are economically self-sufficient and the business employs 12 people. There is an absence of a poor immigration history and their time in

the UK has not been precarious. Dr Mynott submitted that the appeal should be allowed under paragraph 276ADE in addition to being allowed on Article 8 grounds. He submitted that the Secretary of State had manifestly failed to show, in the factual circumstances of this family, any justification for removal.

## **Conclusion**

4. The appellants do not meet the criteria in paragraph 276ADE. They have not resided in the UK for the requisite period of time. The children are not appellants before me and they do not have an appeal to be determined. It is not possible to allow an appeal where one does not exist.
5. There was no challenge to the factual matrix as set out above. It is plain that the circumstances of the children are such that it would not be reasonable for them to leave the UK – their lives in terms of schooling and socially are in the UK. They know of no other life than living in the UK. The difficulties they would face adjusting to life in Sri Lanka on a permanent basis would result in significant difficulties for them. Although it may be that the parents would do all they could to reduce those difficulties, it remains a fact that it would create very significant and serious difficulties for them most particularly with regard to their future education. The parents have established a flourishing business and meet the “criteria” in s117B of the 2002 Act.
6. Applying the 2002 Act it is not in the public interest for these appellants and their children to leave the UK.
7. I allow the appeals on Article 8 grounds.

## Conclusions:

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeals by allowing them on Article 8 grounds.

## Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005; one was not requested and I see no reason to make one.

Date 9<sup>th</sup> March 2015

Upper Tribunal Judge Coker