Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09313/2017
HU/09323/2017
HU/09326/2017
HU/11384/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 June 2018	**On 26 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GAWRI NAYANAKUMARI WAHANTHARAGE
RUVINDU AGRAJITH SAUNYA HANNADIGE
NISHANTHA UDENI SAUNYA HANNADIGE
PAWAN ANURAJA SAUNYA HANNADIGE
(ANONYMITY DIRECTIONS NOT MADE)

Respondents

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondents: Mr C Talacchi of Counsel instructed by Sriharans

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decisions of First-tier Tribunal Judge Bart-Stewart promulgated on 22 November 2017 in the linked appeals of Mrs G N Wahantharage, her husband Mr Nishantha Hannadige and their children Ruvindu Hannadige

(date of birth 7 March 1999) and Pawan Hannadige (date of birth 21 April 1997).

2. Although before me the Secretary of State for the Home Department is the appellant and the Wahantharage/Hannadige family are the respondents, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and the Wahantharage/Hannadige family as the Appellants.

3. The Appellants are nationals of Sri Lanka. The parents' dates of birth are a matter of record on file; I have set out the dates of birth of the 'children' above – they are the children of the family albeit that they are now both adults.

4. The family entered the United Kingdom on 26 September 2007. The First Appellant came to the UK for the purposes of study; her husband and children had leave 'in-line' as her dependants. The children of the family at the time of initial entry were 8 years old and 10 years old. The Appellants were initially granted leave to enter until 31 August 2008; thereafter they obtained a sequence of subsequent grants of leave to remain until June 2016. Joint applications were then made for indefinite leave to remain which were refused on 4 July 2016 because of irregularities in the payment of tax by Mrs Wahantharage. Nonetheless further representations and submissions were made which were treated as a further joint application for leave made on 20 August 2016. By that date the children of the family had been in the United Kingdom for just under 9 years. The elder child was no longer a minor, but the youngest child was still under 18 years of age. The applications were refused for reasons set out in decision letters dated 11 September 2017 – by which time even the youngest child had become 18.

5. It is pertinent to note that the applications were put 'on hold'. The decision letter of 11 September 2017 in respect of Pawan Hannadige, for example, states:

> *"Your application was placed on hold following a pause in Appendix FM decision making which began on 22 February 2017. This applied to applications made or considered under Appendix FM where the application falling for refusal involved a child (in this case your brother). This temporary hold was to enable the Home Office to consider the implications of and to make necessary changes in the Immigration Rules and guidance to reflect the judgment of the Supreme Court in* ***MM (Lebanon) and Others****."*

6. Necessarily because of the delay imposed by the Respondent Ruvindu Hannadige reached and passed his majority whilst the application was pending. Nonetheless the Respondent treated his application as if he were still a minor - as indeed he had been when the application was made - and gave consideration to his circumstances under paragraph 276ADE(1)(iv) accordingly.

7. The Appellants appealed to the IAC.

8. The appeals were allowed for reasons set out in the 'Decision and Reasons' of First-tier Tribunal Judge Bart-Stewart promulgated on 22 November 2017. The essential basis of the favourable outcome is encapsulated in paragraph 28 of the Decision:

> "*I find that the public interest does not require the removal of the [children of the family] and it would not be reasonable to expect them to leave the UK which has been their home for more than half their lives, have established strong private life and where for most of the time they have lived lawfully. It would not be reasonable for the family to be separated and consequently not reasonable or proportionate for the parents to be removed.*"

9. The Secretary of State sought permission to appeal, which was granted on 19 April 2018 by Designated First-tier Tribunal Judge Manuell.

10. There are two aspects to the Respondent's grounds of challenge. It is argued that the Immigration Rules could not be satisfied in respect of any of the Appellants, that the Judge essentially placed determinative weight on the educational progress of the children and their potential to pursue higher education in the UK, and that in so doing he failed adequately to explain why this rendered removal disproportionate. It is also pleaded that the Judge's reference to the public interest not requiring removal of the children of the family and it not being reasonable to expect them to leave the UK suggested a reliance upon section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which should not have been applied because neither were still children under 18 years of age – and in such circumstances where the Immigration Rules were not satisfied the public interest pursuant to section 117B(1) favoured removal.

11. In my judgement, at least in so far as the position of Ruvindu is concerned, the Respondent's challenge is unsustainable. I make the following observations:

(i) In respect of the approach under the Immigration Rules it is to be noted that the Respondent acknowledged that Ruvindu was a minor at the date of application and accordingly evaluated his claim against the criteria of paragraph 276ADE(1)(vi). The Judge recognised that this had been the Respondent's approach: see paragraph 10.

(ii) In the premises, in so far as the Judge was entitled to give consideration to the substance of the decision that was the subject of challenge, in evaluating the appeal on human rights grounds he is not to be criticised for evaluating the circumstances of Ruvindu with reference to the Rule applied by the Respondent decision-maker. As such it was open to the Judge to have regard to the 'reasonableness' test under 276ADE(1)(iv).

(iii) In this context the Judge's essential conclusion was that Ruvindu did satisfy the requirements of the Immigration Rules as they were to be applied to his application – irrespective of the fact that he might have reached his majority by the date of the appeal hearing.

(iv) In so far as the Respondent seeks to suggest it was reasonable to expect Ruvindu to leave the UK, that is in substance a mere disagreement with the finding of the First-tier Tribunal and does not constitute an error of law.

(v) Further, in all such circumstances I do not accept that it is to be implied that the Judge was erroneously having regard to section 117B(6) simply because he concluded that it would not be reasonable to expect Ruvindu (or Pawan) to leave the UK.

(vi) In any event such an expression – 'not reasonable to expect' – is essentially an alternative way of expressing a conclusion on proportionality, and so is not in any way in itself indicative of a misapplication of the law in respect of either Ruvindu or Pawan.

(vii) In any event, in so far as the Respondent by emphasising that by the date of either the Respondent's decision or the date of the appeal hearing Ruvindu could not avail himself of section 117B(6) by reason of having become an adult, the Respondent's submissions run into the difficulty that by the date of decision, and at all times thereafter Ruvindu has been aged between 18 and 25 years and has spent at least half of his life living continuously in the UK - thereby satisfying the substance of paragraph 276ADE(1)(v). The Judge recognised this circumstance at paragraph 26, with the implicit caveat that such a circumstance might technically necessitate a further application to succeed under the Rules. It seems to me that recognition that Ruvindu met the substance of the Rules (and indeed that his older brother would shortly also do so) was a legitimate and relevant consideration to take forward into the overall proportionality evaluation in respect of each of the younger Appellants.

12. In substance the Judge reached a conclusion to the effect that Ruvindu satisfied the requirements of paragraph 276ADE(iv) at the date of application and satisfied the requirements of paragraph 276ADE(v) at the date of the appeal. That was sufficient in the Judge's view to establish that the removal of the youngest child of the family - even if he had by this time reached his majority - would constitute a disproportionate interference with his private life. That conclusion was informed by the bench mark of proportionality expressly set out in the Immigration Rules. It seems to me that that is an uncontroversial outcome. It follows that there is little or nothing offensive in the Judge's consequent conclusions in respect of the remaining members of the family.

13. I also consider in more general terms that it is adequately clear from the Decision that the Judge identified that there were no adverse features of immigration history in respect of any of the Appellants. So far as the irregularity in respect of payment of tax that had defeated the earlier joint applications for indefinite leave was concerned, the Judge gave express consideration to this circumstance at paragraph 24 and noted that there was no evidence *"to suggest that the underpayment was deliberate."*

14. In all of the circumstances of the case I can see no material error of law and I uphold the decision of the First-tier Tribunal.

Notices of Decisions

15. The decisions of the First-tier Tribunal in these linked appeals contained no error of law and stand. The Appellants' appeals each remain allowed.

16. No anonymity directions are sought or made.

Signed: Date: **14 November 2018**

Deputy Upper Tribunal Judge I A Lewis