



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/09658/2017  
HU/09660/2017  
HU/09655/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16<sup>th</sup> August 2018

Decision & Reasons Promulgated  
On 03<sup>rd</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VIMALENDRAN [B]  
BAVANI [B]  
[B B]  
(ANONYMITY ORDER NOT MADE)

Respondents

**Representation:**

For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer  
For the Respondents: Mr J Martin, Counsel instructed by Indra Sebastian Solicitors

**DECISION AND REASONS**

1. For convenience I shall employ the appellations “Appellant” and “Respondent” as at first instance.
2. The first Appellant is a citizen of Sri Lanka and the second Appellant is his wife. The third Appellant is their child whose date of birth is 21<sup>st</sup> June 2009. The Appellants’

appeals were allowed on human rights grounds by First-tier Tribunal Judge Cohen in a decision promulgated on 31<sup>st</sup> January 2018.

3. Grounds of application were lodged. It was said that the judge had erred in finding (paragraphs 17 and 21) that he must consider the human rights and best interests of the Appellants' "British citizen child". There was no British citizen child. He was wrong to consider the younger child as a qualifying child and secondly in coming to an irrational conclusion in respect of the elder child who had been in the UK for only seven years. It cannot be right that a child of such tender years was "ensconced in the UK education system". There was no indication as to why an independent social worker would find that leaving the UK would be traumatic for the child. There was no settled child as found by the judge. It was not open to the judge to find a positive factor in the proportionality assessment that an Appellant could speak English or is financially self-sufficient. Permission was sought to appeal to the Upper Tribunal.
4. Permission was granted by First-tier Tribunal Judge Chohan in a decision dated 24<sup>th</sup> May 2018.
5. Thus, the matter came before me on the above date.
6. For the Home Office Ms Pettersen relied on the grounds. There was no British citizen child and this had infected the whole decision-making process. In all the circumstances I was asked to set the decision aside and remake the appeal by dismissing it.
7. For the Appellants Mr Martin accepted that the judge was wrong to find that there was a British citizen child. He referred to his Rule 24 Notice which indicated that the First-tier Tribunal Judge had not materially erred in law even if he had made mistakes and there was an irrational conclusion in respect of the third Appellant. It was said that Judge Cohen had correctly considered the third Appellant first. He had correctly stated that he was neither a British citizen nor a child settled here. He had identified reasons which led him to conclude that there were insurmountable obstacles to the third Appellant returning to Sri Lanka. This was also an error but this was not material as he had imposed a higher burden than that required under the Rules.
8. Mr Martin said that the judge had been fully entitled to set out the reasons for allowing the appeal in paragraph 18. He noted that the Appellants' child had resided in the UK for more than seven years. He referred to the report from an independent social worker indicating that leave in the UK would be a traumatic experience for the third Appellant. There was a report from a senior lecturer in the University of Jaffna indicating that the third Appellant would struggle to find a similar level of education in Sri Lanka. He was also progressing well in school in the UK and had many friends here. Given those reasons he was entitled to allow the appeal on human rights grounds. Where the judge fell into error (although not a material one) was when he went on to consider the appeal on Article 8 grounds and referred to the best interests of the Appellants' British citizen child – the only proper inference to draw was that this must be the younger child who had not been born at the time of the application.
9. It was accepted that the judge had gone wrong in his further findings but that did not matter and was not material because he had given sound reasons for allowing the

appeal on human rights grounds. As such there was no material error and the decision should stand.

### **Conclusions**

10. It is plain that the judge did fall into error when he referred to the best interests of the Appellants' British citizen child. It has to be said that it is not very clear from the judge's decision as to which child he is referring to because the child is not named and there are two children. It may be that Mr Martin is correct that he was referring to the younger child because the judge finds in paragraph 16 that the third Appellant was not a British citizen or settled here. In any event the judge's findings in respect of the "British citizen child" are at best unhelpful to the decision.
11. Nevertheless, I agree with Mr Martin that sound reasons have been given by the judge (he took into account factors under 117B of the Rules) in paragraph 18. The reports referred to by the judge (particularly the report from the independent social worker) are very much relevant to the issue under Article 8 ECHR. Moreover, it can be said that this is a child who has been in this country for a period in excess of seven years. As such it seems to me that it is relevant to refer to **MA (Pakistan) v SSHD [2016] EWCA Civ 705** where it was said that the fact a child who has been in the United Kingdom for that period of time should be given sufficient weight in the proportionality exercise in terms of Article 8. The starting point is that a child should be granted leave to remain unless there are powerful reasons to the contrary.
12. In my view there are no powerful reasons which go against the proposition that it is reasonable in all the circumstances to allow the appeal of the child under Article 8 ECHR. The judge gave clear reasons in paragraph 18 of the decision even if stating that the child was "ensconced" in the UK education system went too far.
13. It follows that the judge was entitled to find that it would breach the child's rights under Article 8 ECHR and that being so the only path open to the judge was to allow the appeal on behalf of all the Appellants which is what he did.
14. Despite the obvious mistakes in the decision there is thus no material error contained therein and the decision must stand.

### **Notice of Decision**

The making of the decision to the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

No anonymity order is made.

Signed *JG Macdonald*

Date 23<sup>rd</sup> August 2018

Deputy Upper Tribunal Judge J G Macdonald