



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/09863/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 27 November 2018

Decision & Reasons Promulgated  
On 21 December 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

G R  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr N Paramjorthy of Counsel instructed by ABN Solicitors

For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Sri Lanka born on [~] 1969. He appeals the determination of a First-tier Judge following a hearing on 25 June 2018 to dismiss his appeal against a decision of the respondent refusing his application for leave to remain on the basis of Article 8 on 23 August 2017. The appellant arrived in the UK unlawfully on 25 January 2002. He married on 17 November 2011. His wife had been granted asylum on 10 February 2009. The couple have a daughter, R, born on 16 January 2012. The appellant applied for leave to remain on the basis of his marriage on 5 July 2012. Leave was granted until 9 February 2014. On 11 September

2013 the couple had twin daughters born on 5 February 2014. The appellant's leave was extended until 16 January 2017. However, on 6 October 2014 the appellant's leave was curtailed because the respondent alleged that the appellant had fraudulently obtained a TOEIC certificate which had been used in support of his application on 5 July 2012. The appellant's wife has been granted British citizenship.

2. At the hearing before the First-tier Judge Mr Paramjorthy, who also appears before me, told the judge that he intended to adduce no witness evidence and that the appeal would proceed on the basis of submissions and provided the judge with a bundle running to 688 pages – the judge records that the only reference at the hearing to any of the documents was to the respondent's refusal letter.
3. In relation to the allegation that the appellant had fraudulently taken an English language test by proxy Mr Paramjorthy submitted that that the material relied upon by the respondent was insufficient to prove the alleged fraud.
4. The judge, however, having properly addressed himself to the evidence and authorities, considered that the evidence adduced by the respondent was sufficient to shift the evidential burden on to the appellant and the appellant had chosen not to give evidence himself. The judge concluded in paragraph 20 as follows:

“In my judgement, the overwhelmingly probable inference that it is proper for me to draw is that the appellant had and has no answer to the assertion that he cheated the system by causing his TOEIC test to be taken by proxy. I so find”.
5. The judge records that Mr Paramjorthy then submitted that “even if the appellant was found to be a fraudster and cheat” he should nevertheless be permitted to remain in the United Kingdom on Article 8 grounds on the basis that he was married to a British citizen and had three children in the UK. The judge proceeded on the footing that if it was found that the appellant had cheated and abused the system it was highly unlikely that he would meet the suitability requirements of the Rules. The judge notes “it was a matter of concession on the part of Mr Paramjorthy that the appellant does not meet any of the relevant Rules whether in Appendix FM or paragraph 276ADE”.
6. The judge records that when considering Article 8 outside the Rules reliance was placed on his marriage and three children.
7. The judge notes that the appellant's daughter was aged 6½ and the twins were almost 5. None of the children had been in the country for seven years. The judge observed that while the appellant's wife was a British citizen it was not suggested that she did not have dual nationality.
8. The judge did not find anything exceptional or compelling in the case of children who had not resided in the country for seven years. Until the age of 4 or 5 the life of a child “revolves very substantially around its parents and, usually, especially its mother”. There was nothing exceptional or compelling about an appellant who had practised deception. The judge found that the appellant's circumstances were

neither exceptional nor compelling. The judge reminded himself of **SF (Albania) [2017] 120** where the Tribunal had found:

“... save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force the British citizen child to leave the EU, regardless of the age of that child”.

The judge commented that the case before him did involve a parent

“... who has been involved in criminality, albeit not convicted by a criminal court. Criminality will sometimes (and perhaps often) be apparent to the Tribunal, notwithstanding that the criminal conduct has not been met with prosecution and subsequent conviction”.

9. The judge then undertook an Article 8 assessment on the alternative basis that that was necessary. The judge found that the family enjoyed strong family life and that Article 8 was engaged. In considering the issue of proportionality the judge had in mind Section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control was in the public interest and little weight should be given to private life established at a time when a person was in the United Kingdom unlawfully. The family had the choice of remaining together as a family unit by relocating to Sri Lanka. The judge considered that the appellant’s wife’s asylum status had ceased to be relevant given the passage of time. Alternatively, the appellant’s wife and children could remain in the United Kingdom if the appellant was required to depart. The British children would not be forced to depart the United Kingdom – it was a matter of choice. They could choose to relocate to Sri Lanka. The judge had in mind Section 55 of the Borders, Citizenship and Immigration Act 2009 and the principle that the sins of the parents were not to be visited upon the children. Although no reference had been made to any of the documents in the appellant’s bundle the judge did refer to documents concerning the very earliest stages of the children’s engagement with the outside world by way of nursery or infant school. Having referred to **AM (Pakistan) [2017] EWCA Civ 180** the judge adopted a balance sheet approach to the proportionality exercise, concluding his determination as follows:

“42. When I undertake the hypothetical (balance sheet) approach to the proportionality exercise, by weighing the factors for and against a particular conclusion, it seems to me that the following matters are of importance (albeit that I do not set them out in any supposed order of importance):

- (i) The fact that those who flout and/or abuse the immigration laws and system of this country should not be seen to gain advantage therefrom. That, in my judgement, is essential if both the public in this country and would-be migrants from abroad are to have confidence in it being a fair system which does not reward those who choose to abuse or circumvent it. (This is an important factor, seemingly overlooked by those who do not sit regularly in this jurisdiction and so do not appreciate the extent to which abusive

attempts are made to flout and or circumvent our immigration system).

- (ii) Section 117B of the Nationality, Immigration and Asylum Act 2002.
- (iii) The fact that the appellant's children share no part of the blame for the appellant's deception and dishonesty.
- (iv) The fact that this family has the choice to reside together, in Sri Lanka.
- (v) The fact that if the appellant has to depart this country, but his wife and children choose to remain here (as they would be entitled to do), although that will cause a dislocation to the current extent of family life, that is a consequence of the appellant's wrongdoing and places these children in no significantly worse position than children who find that their father has been sentenced to a significant period of imprisonment.
- (vi) The fact that there has been no suggestion, let alone any evidence, to the effect that the appellant and/or his wife would be unable to find suitable employment in Sri Lanka and/or be unable to provide adequate housing, income and/or other necessities for the family if resident in that country. -
- (vii) The fact that statutorily I must give significantly less weight to family life built up in this country during a period when the appellant has been here illegally. However, by analogy with Appendix FM, para EX1, I need also to consider whether it can be said that it would not be reasonable to expect the children, or any of them, to leave the United Kingdom. It is my judgement that it would not be unreasonable, given that the children would remain in the bosom of their family unit if the decision is taken that each member of the family should relocate to Sri Lanka. In my judgement none of the children has yet put down the kind of deep roots envisaged by Lord Justice Elias over a sufficiently lengthy or significant period of time in his/her life as to allow it to be said that it would be unreasonable for that child to live elsewhere, within the bosom of his/her family.

43. When I place those various factors into the balance and, as is necessary in my judgement, give substantial weight to the important factor identified at 42(i) above, it is my judgement that it would not be disproportionate to require the appellant to depart the United Kingdom. I appreciate that this might present the family with a difficult choice to make, but the difficulty of that choice is not, in itself, something which renders it disproportionate to require the appellant to depart".

10. There was an application for permission to appeal. Although there was an application in respect of the finding made by the judge in relation to the procuring of the English language certificate it was determined that that ground had little merit given that the respondent's evidence discharged the evidential burden and the

appellant had chosen not to give oral evidence. The judge had been entitled to reach his findings on the available evidence.

11. It was however considered arguable that the judge had been somewhat dismissive of the higher courts' approach to Article 8 in immigration appeals and whether he had ignored binding authorities with which he disagreed and whether he was approaching the matter in an impartial way. It was arguable that he had proceeded on the basis that the appellant had engaged in criminality in the absence of conviction.
12. At the hearing it was accepted by Counsel that the TOEIC aspect was effectively unchallenged and the case had proceeded on submissions. However, it was submitted that the judge had ignored the decision of **SF (Albania)**. This had to be seen in the light of his criticism of the Upper Tribunal's decisions in paragraph 36 of his decision. The determination contained personal opinions, not judicial ones. The appeal had not been heard justly.
13. Ms Willocks-Briscoe acknowledged that the determination contained some comments which did not add anything. However, if one had regard to the findings made by the judge it was quite clear that he had given consideration to **SF (Albania)**. It was quite correct that the family had a choice to make. The children were not being required to leave. The effect on the children given their ages would not be unduly harsh. The children could remain in the UK with their mother. This was not a case where the primary carer was being removed.
14. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision if it was flawed in law.
15. I have carefully considered the submissions. This was an unusual case in that the allegation of fraud was not answered by the appellant as the judge found the evidential burden had shifted and the appellant chose not to give oral evidence. The challenge to this part of the judge's findings was found to have little merit - correctly in my view - and was not pursued by Mr Paramjorthy.
16. It is correct that there are some passages in the determination which were not necessary and could with advantage have been left out. However, I do not find that the judge misdirected himself in respect of **SF (Albania)** or was dismissive about Tribunal or other authorities because of what he said about, for example, criminality or what he said in paragraph 36 of his decision about unjustified assumptions being detectable in decisions of the higher courts "and perhaps the Upper Tribunal". Objection is taken to the judge's use of the term "third world" but when the remarks are read in context it is quite clear that the judge was criticising the approach that regarded all things in the western world as superior.
17. While the judge's comments could best have been avoided, I am not satisfied that it is remotely arguable that he allowed what was said to influence his findings or his

view of the decisions which he referred to. Since his decision the Supreme Court has given its judgment in **KO [2018] UKSC 53** and there is nothing in the judge's approach that goes contrary to that decision. In fairness to the First-tier Judge's critique of the decisions of the Courts and Tribunal, Lord Carnwath in the Supreme Court did acknowledge in paragraph 57 of the judgment that "... there have been significant differences of approach and conflicting decisions at each level" in the years leading up to the Supreme Court decision. Nevertheless the judge's comments, as Ms Willocks-Briscoe accepted, added nothing and could usefully have been omitted.

18. Having given careful consideration to the points made, I am not satisfied that the judge's conclusions were materially flawed in law. He correctly adopted the balance sheet approach. For the reasons I have given this appeal is dismissed. Because the appeal involves children I make an anonymity direction.

**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.

**TO THE RESPONDENT: FEE AWARD**

The First-tier Judge made no fee award and I make none.

Signed

Date: 13 December 2018

G Warr, Judge of the Upper Tribunal