



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

Appeal Numbers: HU/00465/2016  
HU/00474/2016  
HU/00482/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 July 2019**

**Decision & Reasons Promulgated  
On 09 August 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

**KM (FIRST APPELLANT)  
AN (SECOND APPELLANT)  
BN (THIRD APPELLANT)  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr D. Bazini (Counsel)

For the Respondent: Mr T. Lindsay (Home Office presenting officer)

**DECISION AND REASONS**

1. This is an appeal against a decision of the First-tier Tribunal (Judge Devittie) ("FtT") promulgated on 16 November 2018 in which the appeals were dismissed on human rights grounds.

**Background**

2. The appellants are citizens of Sri Lanka and are mother and twin daughters now aged 12. The brief facts were as follows. The three appellants are living with the 1<sup>st</sup> appellant's mother, a British Citizen, who was employed full time as a nurse until more recently she has semi-retired and reduced her hours. She provides emotional and financial support for the family. The third appellant has Down's syndrome with global development delay and a bilateral squint. The evidence dated 2012 showed that she had severe delay in manipulative, visual, hearing and speech & language skills and some delay in locomotor, interactive and self-care skills. She is established in mainstream school and making good progress. Her sister recently moved into secondary school and has settled well. The children's father lives in Sri Lanka. He abandoned and rejected the family. There was evidence that educational facilities in Sri Lanka were available for disabled children. The background evidence stated that there was stigmatisation and mocking behaviour towards disabled people in Sri Lanka. The third appellant had attended for a short period at the Chitra school in Sri Lanka where she had made no progress and her behaviour regressed as she would copy the behaviour of others. The appellants relied on an independent social worker's report.

### **FtT decision**

3. The FtT refused an application for an adjournment made on the grounds that the grandmother was unable to attend for the hearing as she was looking after one of the children who was sick. The FtT refused the application having taken the view that the evidence of the grandmother was not disputed and her witness statement could be taken as her evidence.
4. The FtT found that the appellants could return to Sri Lanka and would have financial support available in order to provide for the needs of the third appellant and to make up for any shortcomings in the care available in Sri Lanka.

### **Grounds of appeal**

5. The grounds of appeal were in essence that the FtT failed to refer to the adjournment application, was unfair in refusing the same and inadequately dealt with the evidence in assessing the best interests of the two children, family life and Article 8, and further failed to have any regard to the expert evidence of the social worker.

### **Permission**

6. Permission to appeal was granted by Upper Tribunal Judge Taylor on all grounds.

### **Discussion and decision**

7. I heard submissions from both representatives, the details of which are set out in the record of proceedings. I am satisfied that there were errors of law disclosed in the decision and reasons. All grounds are made out.
8. In terms of the adjournment application, I am satisfied that the FtT failed to fully consider the issue of fairness. The FtT made no reference to the reasons for the adjournment decision and it is unclear how the FtT reached its decision. The appellant's mother's evidence was clearly material to the issue of family life. It was argued, that the relationship she had with her daughter and the twins was over and above the normal family life (**Kugathas**). Further, although her evidence was accepted by the FtT, it was not in fact fully taken into account by the FtT in reaching findings of fact. She had stated in her letter that the third appellant had regressed in terms of her behaviour after having attended the Chitra school in Sri Lanka. This was a matter that the FtT had not taken into account.
9. Secondly, in terms of the approach taken to the Immigration Rules and Article 8 I find material errors of law. The FtT failed to consider the interests of the second appellant at all and/or the fact that she had lived in the UK for nearly seven years and had just started secondary school. The FtT failed to expressly make any finding as to the existence of family life between the grandmother and the appellants, but found that there was a strong bond and emotional and financial support. The FtT failed to reach any findings as to the evidence in the expert report and/or to express any view as to whether or not weight was placed on that report. The FtT appeared to find that there were significant obstacles but then concluded that there was evidence of finance available for the first appellant that would mitigate such obstacles. I am satisfied that there was no direct evidence as to what finances would be available to the first appellant or as to her capacity to provide such finance. The FtT's finding that such finance could come from the appellant's mother or the former husband was based on speculation.
10. Overall I take the view that the FtT, whilst considering the relevant issues, failed to take into account the material evidence and failed to factor in that evidence in reaching a conclusion on the family life of the appellants and in terms of where the best interests lay, particularly for the third appellant. Whilst the FtT concluded that educational facilities were available in Sri Lanka for the third appellant, there was a significant failure by the FtT to take into account the individual characteristics of the third appellant and the negative impact on her of a return to Sri Lanka as concluded by the expert. The expert evidence ought to have been considered by the FtT and/or some indication given as to whether it was rejected and if so for what reasons. I conclude that the Article 8 assessment was materially flawed such as to amount to an error of law.

### **Decision**

11. The decision revealed errors in law and is set aside.

## **Remaking**

12. I have decided to allow the appeal on human rights grounds. I heard submissions from both representatives and also taken into account the skeleton argument produced for the First-tier Tribunal hearing.
13. The findings of fact made by the First-tier Tribunal were essentially unchallenged. The error of law hearing was argued on the grounds that the FtT failed to take into account material evidence in reaching its decision. The FtT had largely considered all the relevant issues but reached a decision that was not supported by the evidence before him, in particular the expert evidence from the independent social worker, Mr John Abdullah-Zadeh. The FtT's decision was premised on the existence of finance available to the appellant where there was in fact no evidence to support that finding.
14. The FtT found that the best interests of the third appellant lay in her remaining in the UK with her sister, mother and grandmother. There was also evidence before the FtT that the second appellant, who was aged 12 years, had started secondary school and lived for a significant period of time in the UK to remain with her grandmother and mother. It is clear that her interests too lay in remaining in the UK with her mother and grandmother.
15. There was no evidence of any meaningful relationship between the children and their father. Indeed, in an undated letter the children's father states "*I have no intention of continuing the married life with her and would like to terminate this. I myself don't want to become a mental patient because of these events. I am looking forward to sending divorce papers*". Clearly he indicated that he wishes to have no further contact with the family. There was no evidence to show that finance would be forthcoming from the father either currently or in the future.
16. The FtT found that the first appellant could seek financial support from her mother. However the grandmother did not give evidence at the hearing and her witness statement confirmed that whilst she currently provided financial support for her daughter and a home for the family, there was no consideration of future financial support. I am satisfied that the FtT's finding as to the availability of finance on return to Sri Lanka was entirely speculative. The FtT concluded that the financial support would go towards mitigating significant obstacles to the appellants' return to Sri Lanka. Specifically, that the third appellant would be able to attend a school (the Chitra School) and any shortcomings in her care could be paid for from the finance available. Again, this finding and conclusion is based entirely on speculation and is not sustainable.
17. I now consider the evidence material to the decision that was before the FtT. The report by Mr Abdullah-Zadeh is an expert report and carries weight in my view. There was no challenge to the content or the

expertise. Mr Abdullah-Zadeh is an independent social worker and his conclusions are set out in the report as follows:-

*"I have concluded that both children concerned are vulnerable in different ways and to varying degrees. They would be even more vulnerable and certainly at risk of avoidable harm if forced to live in Sri Lanka. There are no educational resources that are geared for children with these kinds of problems facing the disabled child. The child would in my view have a very poor quality of life that could even result in lower life expectancy. If the mother were to pass away, it would be almost impossible for this child to survive there.*

*Sri Lanka has not recovered from years of civil war, corrupt and poor governance, population and poverty issues (especially child poverty). There is an absence of child welfare and child protection infrastructures and laws. This culture of corrupt and disinterested judiciary and the concerning record of child abuse has been noted and recorded by UNICEF for decades. ... Some well-known and well-advertised special needs schools too were found to exercise physical punishment supposedly to encourage learning. There is a culture of parents with similar children overwhelmed with the task, forced to disown and abandon their difficult-to-manage children because of lack of any support infrastructure.*

*I am therefore of the firm opinion that the disabled child concerned here would be at huge risk, should she be forced to live in Sri Lanka permanently. Over the past years both children, albeit in different ways, have become accustomed to good care here. Repatriation to Sri Lanka would not just be an upheaval but a traumatic experience that is very likely to significantly compromise their physical and mental wellbeing. Therefore I would strongly recommend that these children should be allowed to remain and continue their current lifestyles they are accustomed to and settled in."*

18. I place weight on the expert report in terms of where the best interests and needs of the second and third appellants lie and the impact on them of any return to Sri Lanka.
19. In addition the oral evidence from the first appellant was found to be reliable and again overwhelmingly in support of the best interests of the third appellant remaining in the UK. The significant features of that evidence was that the third appellant was in mainstream school where she had been accepted, was able to socialise with her peers and she was provided with additional care and support. She has made significant progress and has been used to one-to-one support. The FtT [11] found that it would be difficult for the third appellant to attend mainstream school in Sri Lanka and that she had no ability to speak Sinhalese and had language difficulties.

20. The medical evidence from the GP supported the third appellant's need for stability and to remain at mainstream school in the UK, and the need for family support.
21. As to the circumstances in Sri Lanka the FtT found that the third appellant would be able to return to the Chitra school where she had previously attended for a short time only. There was some reference to background evidence that the schooling in Sri Lanka was free and was able to accommodate children of all disabilities. I do not doubt the accuracy of that evidence and it was not specifically challenged, but it must be considered having regard to the third appellant's circumstances and needs. From that perspective it is abundantly clear on the evidence that the third appellant would have very significant obstacles to integrating in Sri Lanka. She is only able to speak English and would therefore not be able to communicate in Sinhalese with anyone, let alone at the school. The evidence did not show that the school would provide or maintain the specific needs of the third appellant as they cater for generic disabilities. There was evidence from the expert, the grandmother and the first appellant, that if she were to attend the Chitra school it would be detrimental to her both socially, educationally and emotionally. Having got established in mainstream school and making progress as evidenced in the EHC plan (supplementary bundle), I am satisfied that a move to the Chitra School or any other establishment for children with general disabilities would be contrary to her interests and be detrimental to her and that would be the only option open to her in Sri Lanka. The EHC annual review dated May 2017 identified that change was highly detrimental to the third appellant who needed continued support in the form of 1:1 assistance in order to identify her surroundings. There was no evidence of any financial support available to the appellants so as to mitigate the difficulties so as not to be "very significant."
22. In addition there was background evidence to show that there was significant stigma against children with disabilities in Sri Lanka and the expert cited independent evidence of that. This is consistent with the evidence from the grandmother and the first appellant as to the ridicule, mockery and derogatory comments that the third appellant was subject to while in Sri Lanka.
23. In the event of a return to Sri Lanka the first appellant would have no family support. If she were to obtain employment she would not be available to care for the second and third appellants outside of school hours. It was clearly in the best interests for the second and third appellants to have support from their grandmother; practical, emotional and financial, and there was no dispute as to the strong bond between the family members which arguably reached the criteria of family life under **Kugathas**, although no specific finding was made by the FtT.
24. I conclude therefore there are very significant obstacles to integration in Sri Lanka. The appeal is allowed under the Immigration Rules with reference to paragraph 276ADE(1)(vi). In the alternative I allow it under

Article 8 outside of the Rules as the third appellant's circumstances amount to compelling circumstances that justify consideration outside of the Rules. The appellants have established family life in the UK and the second and third appellants have established private lives in the UK. The evidence also shows that the grandmother has strong and close relations with each of the appellants and that she has a significant role in the day to day lives of the appellants. She herself cannot return to Sri Lanka for medical reasons. There would be an interference in terms of disruption of relationships between the parties and a significant disruption to the private life of the third appellant who would not thrive and any progress made would cease and she would deteriorate educationally, socially and emotionally. The decision would not be in accordance with the law as paragraph 276ADE is met. In terms of proportionality I consider Section 117B Nationality, Immigration & Asylum Act 2002 (as amended). The first appellant speaks English. They are supported without recourse to public funds, although I accept that there is access to state education. Their immigration status is unlawful as they are over stayers and their private lives were established when their circumstances were precarious. However, in this case there are no other compelling factors aside from immigration control that weigh against the appellants. This is a case where the evidence overwhelmingly establishes that the interests of the appellants, in particular the third appellant, outweigh the public interest in immigration control. Accordingly I conclude that it would not be proportionate to return the appellants to Sri Lanka. I have also taken into account that the children are two months off from reaching the seven year residence requirement such that they would meet the criteria to be qualifying children.

### **Decision**

25. The appeals are allowed on human rights grounds.

Signed

Date 01.08.2019

GA Black

Deputy Upper Tribunal Judge G A Black

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 01.08.2019

GA Black  
Deputy Upper Tribunal Judge G A Black