



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

Appeal Numbers: HU/15699/2018
HU/15705/2018
HU/15689/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11th July 2019**

**Decision & Reasons Promulgated
On 06th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

M K S C D

K P A D

K G J M D

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss S Iqbal (Counsel)

For the Respondent: Mr L Tarlow (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants are citizens of Sri Lanka. They are respectively father, mother and daughter. The immigration history of the family is set out in a notice of decision to refuse leave to remain in the UK dated 12th July 2018. What is apparent is that all three Appellants entered the UK as visitors on 3rd May 2003 valid for three months. Since that date the Appellants have been overstayers. At date of entry to the UK the third Appellant was aged

2. Subsequent to overstaying the family made a human rights application on 25th May 2011 i.e. some eight and a half years after they had overstayed. Thereafter further applications were made in 2013 and 2015. The immigration history of the first and second Appellants can at best be described as appalling. The third Appellant clearly relied on steps being taken with regard to her immigration status by her parents.
2. The most recent application for leave to remain based on human rights was made on 26th June 2017 and refused on 12th July 2018. Thereinafter the Appellants appealed and the appeal came before Judge of the First-tier Tribunal Courtney sitting at Hatton Cross on 10th April 2019. In a decision and reasons promulgated on 29th April 2019 the appeal of the first and second Appellants, i.e. the parents, were dismissed. The third Appellant's appeal was allowed to the extent referred to at paragraph 37 of that decision, i.e. that the Appellant in principle qualifies for leave to remain under paragraph 276ADE(1)(v) were she now to make an application. However, absent a fresh application she does not satisfy the requirements because it is assessed as at "the date of application".
3. On 13th May 2019 Grounds of Appeal were lodged to the Upper Tribunal on behalf of the first and second Appellants. On 4th June 2019 Judge of the First-tier Tribunal Andrew granted permission to appeal. Judge Andrew considered that it was arguable that in coming to his decision the judge did not consider whether it was reasonable for a child (as she was at the date of application) who had been in the United Kingdom for a period of over seven years, to leave the United Kingdom and further did not factor into his decision in relation the parties' human rights. It was noted that the First-tier Tribunal Judge had found that the first and second Appellants enjoyed family life with the third Appellant and in such circumstances and given his decision to the third Appellant it was arguable that the judge had erred in his assessment of proportionality.
4. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel Miss Iqbal. The Secretary of State appears by her Home Office Presenting Officer Mr Tarlow. At the time of application the third Appellant was a minor. I made an anonymity direction and this applies to all three Appellants. Such application was not opposed by the Secretary of State.

Preliminary Issue

5. I sought clarification from the parties and gave guidance as to my interpretation of the present position regarding the third Appellant. It was agreed that there was no appeal extant before me relating to the third Appellant, i.e. there has been no cross-appeal lodged by the Secretary of State. At the date of application the third Appellant was a minor. She is now 18 years old. Consequently it would be appropriate for her instructed solicitors and for the third Appellant to note the basis upon which she has been granted leave which is as set out in paragraph 37 of the decision of

Immigration Judge Courtney. Whether it is appropriate for a further application (which presumably would be accepted) to be made under paragraph 276ADE(1)(v) is a matter for the third Appellant and her instructed solicitors.

6. Secondly it was accepted that the first and second Appellants were overstayers and that despite a number of applications being made over the past eight years they had a very poor immigration history. Whilst it is no criticism of the conducting officers on behalf of the Secretary of State it is, bearing in mind the fact that the overstaying must have been known to the Home Office, to be a matter for which they are open to substantial criticism for allowing the situation which comes before the Tribunal today to have happened.

Submissions/Discussion

7. Miss Iqbal submits that the approach of the judge, bearing in mind the finding that the judge makes at paragraph 33 that there is an emotional and financial dependence by the third Appellant on her parents to justify the conclusion that they enjoy a protected family life together for the purpose of Article 8, is subsequently wrong. She submits that when considering the reasonableness of the third Appellant's return the judge fell into material error by not adequately considering and applying *MA (Pakistan) [2016] EWCA Civ 705* and that the judge has given inadequate weight to the significance of the third Appellant's more than seven years' continuous residence in the UK, which she points out to me is in fact sixteen years, notwithstanding what the judge says at paragraph 27 of her decision. Further she submits that the judge has failed to adequately identify powerful reasons why a child who has been in the UK for some sixteen years should be removed and has failed to identify strong countervailing factors and/or compelling reasons to the contrary. She reminds me that there is an absence of the type of behaviour such as criminal behaviour or any outrageousness of the parents' conduct including false claims that would amount to very strong reasons rendering removal of the family proportionate. She submits that the judge erred in finding it not disproportionate and that the error of law is to be found in the way the judge has dealt overall with this appeal.
8. She submits that the judge's conclusion that it would not be unreasonable to expect the child to leave the UK materially impugns her assessment at paragraph 276ADE(1)(iv) in respect of the child and the proportionality in respect of the first and second Appellants.
9. Finally she submits that the overall approach of the judge is contrary to the guidance on qualifying child and the only matter that can be particularly held against the parents is that they are overstayers. She refers me to the decision in *MT and ET (Child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC)* which she submits is authority for concluding that even that is not enough to "trump" the reasonableness position. Further she submits that the judge has applied the wrong

approach to reasonableness when making her assessment at paragraph 25 and 26.

10. In response Mr Tarlow submits that the decision was one that the judge was open to make and that the judge has dealt with the relevant case law at paragraph 34. He reminds me that he agrees that the relevant date is the date of application and that the findings were ones that the judge was entitled to reach and that reasons have been given for this.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

13. I am satisfied that there are material errors of law in the decision of the First-tier Tribunal Judge. The judge did fall into error in concluding it would not be unreasonable to expect the child to leave the UK. Such findings are made at paragraphs 27, 36 and 40 and that materially impugns the assessment of paragraph 276ADE(1)(iv) in respect of the child bearing in mind that the judge has concluded at paragraph 37 that it would be disproportionate to remove her before she is reasonably able to make an application for leave to remain consequently allowing the Appellant's appeal.
14. Further the judge errs in finding that the child is no longer a minor for the purpose of this application so the distinct duty on the Respondent under Section 55 no longer arises. In so finding the judge makes a material

misdirection of law bearing in mind paragraph 276ADE(1)(iv) makes it clear that the age of the child to be considered is at the date of application. Thereafter it is appropriate to consider the reasonableness of the child's return to identify powerful reasons why a child who has been in the UK for some sixteen years should be removed. Subsequently I find that there are material errors of law in the decision of the First-tier Tribunal.

The Remaking of the Decision

15. There is no dispute over the findings of fact in this matter. The facts remain clear. There are findings that the third Appellant has lived in this country for over sixteen years at date of application and to all intents and purposes she has lived all her formative life here being aged 2 at the time that she came to the UK. There is no doubt whatsoever that she has built up her family and private life in the UK and the judge has made a finding that she has emotional ties which would make it inappropriate for her to be separated from her parents. I totally endorse that conclusion. The relevant date is the date of application and it has also to be remembered that the third Appellant is an only child and has always lived with her parents and is financially and emotionally dependent upon them.
16. What is to be held against the first and second Appellants is that they are overstayers. They have overstayed for many years. They can be highly criticised for that. As of course can the Home Office. It is not as if these are people who have hidden beneath the radar. Their position has been well-known to the Secretary of State for years. They are not involved in any criminality or fraud. They are merely overstayers. And whilst this is a matter that the Tribunal needs to take into consideration the position with regard to the third Appellant in this matter makes it clear that it would be inappropriate to remove her from her parents, bearing in mind the emotional and financial support that is required, and that as she has lived her whole life in the UK. I note she has been offered places at university to study psychology, and that her principal language is English, I am satisfied that the best interests of the third Appellant is to remain in the UK with her parents. I put it that way because of course the third Appellant has already won her appeal. It is the appeal by the first and second Appellants that is extant before me today. In all the circumstances I am consequently satisfied for all the reasons given above that the appeals of the first and second Appellants succeed and that it is reasonable and proportionate that family life be maintained and continue in the UK.

Notice of Decision

The appeals of the first and second Appellant are allowed under Article 8. It is recorded that the appeal of the third Appellant was allowed by the First-tier Tribunal Judge. That decision is not the subject of any appeal by the Secretary of State.

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 29 July 2019

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 29 July 2019

Deputy Upper Tribunal Judge D N Harris