Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03703/2014
IA/03704/2014
IA/03705/2014
IA/03706/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th October 2014	**On 11th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SARATH AMARASINGHE ARACHIGE
MRS YAMUNA NIMALI AMARASINGHE
MASTER ISHANKA DILSHAN AMARASINGHE
MISS KAVEESHA DEVMINI AMARASINGHE

(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms P Yong, Counsel instructed by Polpitiya & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First Tier Tribunal that is Mr and Mrs Amarasinghe and children as the appellants and the Secretary of State as the respondent.

2. The appellants are nationals of Sri Lanka and their applications dated 14th November 2013 under Appendix FM were refused on 27th December 2013 by the respondent under R-LTRP.1.1 and under paragraph 276ADE. A decision was also made to remove them.

3. In a decision dated 29th August 2014 Judge of the First Tier Tribunal Samimi allowed the appellant's appeal on human rights grounds.

4. She recorded that the first appellant arrived in the UK in October 2005 and his wife and children now aged 15 years and 11 years followed in 2008. The first appellant worked as a manager in Macdonalds Restaurant and the children were settled and doing well at school. An independent social worker gave evidence that the children would experience emotional harm should they be removed to Sri Lanka. She also found that the appellants were not an economic burden on the UK.

Application for Permission to Appeal

5. The application for permission made stated that any Article 8 assessment should only be made after a consideration of the rules and the assessment should be carried out only when there were compelling circumstances. **Gulshan** [2013] UKUT 00640 (IAC) made clear that an Article 8 assessment should only be carried out when there were compelling circumstances and **Nagre** [2013] EWHC 720 confirmed that the meaning of exceptional circumstances as leading to an unjustifiably harsh outcome.

6. The judge had failed to provide adequate reasoning to show why this would lead to an unjustifiably harsh outcome. The family knew on entry that their life here was temporary. The family still have ties in Sri Lanka and were able to speak the language. The family had knowledge of the language and customs there and could fully re-adapt. As Sri Lankan nationals it would be in the children's best interests to return. Paragraph 60 of **EV (Philippines) & Others v SSHD** [2014] EWCA Civ 874 stated

   'That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world'.

7. The judge had erred in failing to consider the burden on the public purse and resources. The social worker report was not an objective report and the expert was not a country expert on Sri Lanka nor a qualified psychologist and therefore not qualified to make assessment on the psychological impact on the appellants if removed. In essence this was an ordinary family.

The Hearing

8. At the hearing Mr Melvin submitted that the schooling costs of the third and fourth appellants were a burden to the public purse and this had not been taken into account and outweighed any the assertion of relaxation of immigration control. The judge had misdirected herself by not following the **MF (Nigeria)** [2013] EWCA Civ 1192. The judge was not aware of **Patel and ors v SSHD** [2013] UKSC 72 which reminded the courts that Article 8 was not a general dispensing power. At the date of the application the children had only been in the UK for 7 years and could not come within the Immigration Rules. The focus in the determination was purely on the education of the children. If the judge had considered the correct caselaw she could not have come to this decision. There was nothing unjustifiably harsh in expecting the family to leave.

9. Ms Yong submitted that the judge had looked at the compelling circumstances outside the immigration rules at [10] of the decision. She referred to [128] of MM. This case was clearly distinguishable from **Patel** which referred to adult students. These were two young children who had spent their formative years in the UK. She accepted that the expert was neither an educational psychologist nor a psychiatrist but the judge took into account the best interests of the children. The social ties of the children to the UK had been taken into account. The first appellant earned an income of £21,000. His wife was not working. The P60 submitted by the first appellant showed he earned £24,000 in 2012 to 2013 not £21,000. The family did not claim any benefits.

Conclusions

10. The judge took into account the principles evinced in **Razgar** [2004] UKHL 27 and repeated throughout the decision that the appellants were not an economic burden on the country [17], [23]. That said the judge also concentrated on the education that the children were receiving and how well they were doing academically. She accepted that the appellants had integrated well into the community [23] and took into account the best interests of the children following **Zoumbas v SSHD** [2013] UKSC 74. She identified **Azimi-Moayed and others (decision affecting children; onwards appeals)** [2013] UKUT 197 IAC which identified that with regards children seven years from the age of four is likely to be more significant to a child that the first seven years of life.

11. The fact is however that only the first appellant is working and paying tax. He paid the sum of £2,702 in the tax year 2012-2013. Although there were repeated findings that the family were not an economic burden on the country there was no evidence

before the judge of the cost to the taxpayer of the children's education. The judge cited **EV (Philippines) v SSHD** [2014] EWCA Civ 874 but did not appear to identify the reasoning that the public expense of education should be taken into account and this was an error. **EV** stated

'In fact the immigration judge weighed the best interests of the children as a primary consideration, and set against it the economic well-being of the country. As Maurice Kay LJ pointed out in AE (Algeria) v Secretary of State for the Home Department [2014] EWCA Civ 653 at [9] in conducting that exercise it would have been appropriate to consider the cost to the public purse in providing education to these children. In fact that was not something that the immigration judge explicitly considered. If anything, therefore, the immigration judge adopted an approach too favourable to the appellant'.

12. Further the judge identified that a child remaining in the UK for seven years was a relevant period in assessing proportionality but found that the children had only been in the country for 6 years and 9 months. The judge found at [16] that

*'the children would clearly be removed with their parents and there would be no prospect of the family unit being disrupted. The first and second appellants have no right to remain in their own right. They are not British Citizens and they have no legitimate expectation of remaining in the United Kingdom beyond the period of their leave. The first appellant has said that the family do have a home in Sri Lanka and given that the first appellant ahs studied and worked in the United Kingdom it is highly likely that he would be in a good position to seek employment in Sri Lanka. However in considering the interest of the children I attach particular weigh to the fact that they have been living in the United Kingdom for six years and nine months now. In this regard this case is distinguishable from **EV** where the children had only resided in the United Kingdom for three years'.*

13. I find that the judge erred when approaching the matter on the basis that the appellants are not an economic burden on the UK and I set aside the decision. There are two children in full time education and the papers before the First Tier Tribunal Judge showed the tax paid by the father, the first appellant which was £2,702 in the tax year 2012 to 2013 on a yearly salary of £21,440.

14. It was accepted by Counsel for the appellant that the appellants could not succeed under the Immigration Rules and I find that to be the case. The determination of Judge Samimi is also preserved in respect of the findings regarding the Immigration Rules.

15. I am not persuaded there is anything which is not encompassed by the Immigration Rules such that the matter needs to be considered further save that the children have been in the UK for a lengthy time. I proceed to remake the decision following the **Razgar** principles.

'*In a case where removal is resisted in reliance on Article 8, these questions are likely to be:*

b. Will the proposed removal be an interference by a public authority with the exercise

of the applicant's right to respect for his private or (as the case may be) family life?

c. *If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*

d. *If so, is such interference in accordance with the law?*

e. *If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*

f. *If so, is such interference proportionate to the legitimate public ends sought to be achieved?'*

16. I accept that the family have developed a private life in the United Kingdom. Their family life however is amongst themselves. As the judge stated at [16] of her determination, and which paragraph I preserve, the family will be removed together. The threshold to show that their removal from the United Kingdom would have "consequences of such gravity' as to engage Article 8 is low. I find that his removal is in accordance with the law and indeed it was accepted by counsel that the family could not succeed under the Immigration Rules. I conclude that the decision has a legitimate aim and is necessary for the protection of the rights and freedoms of others and the economic wellbeing of the country through the maintenance of immigration control. I give weight to the position of the Secretary of State further to **Shahzad (Art 8: legitimate aim)** [2014] UKUT 00085 (IAC).

17. I turn to proportionality. I consider the children's interests as a primary consideration and further to Section 55 of the Borders Citizenship and Immigration Act 2009. I have read the independent social worker's report. The children have now been in the United Kingdom for 6 years and 11 months. It is clear that this is a considerable time and a time which is during the formative years of the children's development, **Azimi-Moayed**. Nonetheless the older child spent the first eight years of his life in Sri Lanka prior to coming to the UK in 2008. However, the daughter came to the UK at the age of four and has now spent a key period of her life developing in the UK. I factor this into the balancing exercise. The older child a son is about to take his GCSE examinations in 2015 and his predicted grades are 10 A*s. The younger child a daughter is due to take her 11 plus examination in September 2014. Both have friends at school and in the community.

18. I also note the report from Diane Jackson the independent social worker dated 30th July 2014. She referred to the negative impact of the children's education and the sense of bereavement should the children be removed to Sri Lanka because they were completely acclimatised to life in the UK and had strong ties. She opined that the removal would set the children back several years and would cause them emotional harm but this is speculation and although a social worker Ms Jackson does not

profess to be a psychiatrist or a psychologist. The children would be parted from friends but would remain with the emotional support of their parents who assisted them in the transition and relocation from Sri Lanka some years ago. There was no indication that the removal, particularly when the parents have always known that their stay in the United Kingdom was temporary, could not be effected constructively. There was no indication of significant special educational needs or health problems.

19. The best interests of the children further to **ZH (Tanzania) v SSHD [2011] UKSC 4** is that they remain with their parents. There is no question other than the children would remove with their parents to Sri Lanka. The children speak basic Sinhalese and have a home in Sri Lanka to which they can return. I take into account that their education would be disrupted but there was no evidence before me that there was no education system in Sri Lanka. Indeed the first appellant came to the United Kingdom in 2007 having had an education in Sri Lanka to continue his studies. The children's education may be of a lower standard in Sri Lanka and that is a factor that I take into account but it is not the case that the children would be without parents, a home or an education or health care on removal to Sri Lanka.

20. The children also have extended family in Sri Lanka and are Sri Lankan nationals. To continue their lives in the United Kingdom will deprive them of further knowledge of their own customs and traditions there. The best interests of the children are to be with their parents. That their education will be disrupted is unfortunate and not in their interests but I am enjoined to consider other factors. Indeed **Zoumbas** confirms that the best interests of the children can be outweighed by other factors.

21. I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. All of the family have only been here on temporary leave.

22. I must also have regard factors with regard to Section 117B of the Nationality Immigration and Asylum Act 2002 that

(3)
'It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a)are not a burden on taxpayers',

…and..

(5)

'Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious'.

23. The maintenance of immigration control is thus in the public interest and those who seek to remain in the United Kingdom should not a burden on taxpayers. That cannot be said of this family. I do not accept that the cost of educating the children is outweighed by the tax paid by the father as outlined above. His salary is now at £24,000 but this would not generate significantly more tax. Both children are educated at state expense and only the father is working and paying tax.

24. Despite the fact that **EV Philippines** related to children who had been in the UK for a lesser period nonetheless the general principle enunciated was as follows at paragraph 59

'In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?'

25. I must consider the position of the parents. Neither have a right to remain. Both came to the United Kingdom on temporary leave and with no expectation of being able to remain here. I must have regard to the fact that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. Since arrival and prior to the refusal in December 2013 the appellants have known that their status was at best temporary and since December 2013 have known their status has been precarious.

26. I also take into account **Patel and Oths v SSHD** [2013] UKSC 72 and although that judgment referred to adult education the principle was nonetheless underlined that Article 8 does not encompass a right to an education. I can accept that the father has work in the UK but he visited the UK initially on visit visas until he was granted a student visa in 2007. The father has had the benefit of further education and working experience in the UK which he can put to use on return to Sri Lanka where the family already have a home. The parents have lived most of their lives in Sri Lanka and they will be returning to a culture and language with which they are familiar.

27. **Huang v SSHD [2007] UKHL 11**

'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'.

28. In the light of my findings above I am not persuaded that family life cannot be reasonably be relocated in Sri Lanka or that the family and private life of any of the members of the family would be prejudiced in a manner sufficiently serious to amount to a breach of their protected rights.

29. The Judge erred materially for the reasons identified above and I set aside that decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) save that I preserved the findings at [5] and [16] and I remake the decision under section 12(2) (b) (ii) of the TCE 2007 and dismiss the appellants' appeals.

DECISION

The Appeals are dismissed under the Immigration Rules and on Human Rights grounds.

Signed Date 6th December 2014

Deputy Upper Tribunal Judge Rimington

To the Respondent

FEE ORDER

I make no fee award as the appellants have been unsuccessful in their appeals.

Signed Date 6th December 2014

Deputy Upper Tribunal Judge Rimington