IAC-TH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/07031/2014
AA/07032/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st January 2015	**On 23rd January 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIYAN NISHAMANI SILVA KIHIMBIYAGE (FIRST APPELLANT)
ISARI TAKSHANA GAJANAYAKA MUDALIGE (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr L Tarlow, Senior Presenting Officer
For the Respondents: Miss E Harris, Counsel instructed on behalf of Nag Law Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Oakley) who, in a determination promulgated on 28th November 2014 allowed the appeals of the Appellants against the decisions made by the Secretary of State on 4th September 2014. Whilst

this is the appeal of the Secretary of State, it will be convenient to refer to the parties as they were before the First-tier Tribunal.

The Background

2. The First Appellant is a national of Sri Lanka as is the Second Appellant, although it is stated that she was born in Italy. The First Appellant married her husband in 1988 and in 1991 they moved to Italy. It was stated that she had been granted indefinite leave to remain in Italy in 2011 on the basis of long residence, and whilst it was stated by her that she believed that the Second Appellant was entitled to apply for naturalisation, given the length of time they had been in Italy, and on the basis that the Second Appellant was born there, there has been no attempt to establish that position. It was claimed by the First Appellant that there were problems arising from her husband's employment as a bodyguard for politicians and that they often travelled to Italy, and as a result of what she knew about their business activities she believed that they had targeted her and harassed and threatened her son and other family members. Notwithstanding the death of one of the men in 2008, the First Appellant's problems continued and she believed that she would be the subject of interest because he had been involved in activities that she had known about. Thus she claimed that she was not safe in Italy nor in Sri Lanka.

3. She had applied for a visit visa to the United Kingdom on 18th January 2013 which had been granted, valid to 23rd July 2013. She arrived in the United Kingdom on 12th February 2013 and claimed asylum on 22nd April 2013. The Second Appellant had also arrived in the United Kingdom and began her GCSE studies in or about April 2013.

4. The Respondent refused the claim for asylum and the decision of the Secretary of State is summarised in the determination of the First-tier Tribunal at [33]-[36].

The appeal before the First-tier Tribunal:

5. The Appellants sought permission to appeal the decision of the Secretary of State on both asylum and human rights grounds and the appeal came before the First-tier Tribunal (Judge Oakley) on 19th November 2014. The judge considered the evidence on both the issues raised on asylum and human rights grounds. At paragraphs [40]-[52] he set out his findings and conclusions on the issue of asylum and reached the conclusion that he did not find the Appellants discharged the burden of proof of having a well-founded fear of persecution for a Convention reason and thus dismissed their claim for asylum, having not accepted the First Appellant's account of the problems that she had alleged had occurred in Italy and in Sri Lanka.

6. Thus he dismissed the appeal under the Refugee Convention and on Article 3 grounds (at [54]). There is no appeal against the decision made as to asylum on behalf of the Appellants.

7. He then went on to consider the claim made under Article 8 of the ECHR at [55]-[65]. At [55] he considered Article 8 under Appendix FM and paragraphs 276ADE-DH of the Immigration Rules. There was no dispute between the parties that the Appellants could not meet the requirements under the Immigration Rules, thus the judge went on to consider Article 8 outside of the Rules and to consider whether it had been demonstrated that the decision to remove them to Sri Lanka would be a disproportionate interference of their Article 8 rights.

8. It is plain from reading the determination that he found that Article 8 was engaged and that there would be an interference and thus the decision rested upon the issue of proportionality. In considering the proportionality balance, the judge took into account Sections 117A-D. He also considered the best interests of the Second Appellant who was a minor. She had been in the United Kingdom from April 2013 she had begun her GCSE studies and was due to take those examinations in or about May 2015. He found that she was in the last six months of her study for those examinations and that her education that had previously been undertaken in Italy was disrupted by her mother who had brought her with her to the United Kingdom. He found that that was not a decision that the Second Appellant had taken herself as a minor, but it had been taken for her by her mother. He found that if she were to be removed to Sri Lanka at this stage in her education it would be disruptive at what was a critical time, and that whilst he found that Sri Lanka had a reasonably operating educational system it would be difficult in the last few months of her study to change to a new education system. He took into account that she had not taken the decision to be in the United Kingdom herself, but that was a decision that had been made for her.

9. As part of the balance, he paid weight and regard to the public interest questions set out in Sections 117A-D and in particular 117B(5) that little weight should be given to a private life established by someone at the time their immigration status was precarious. Taking that into account alongside the matters weighing against the Appellants, he reached the conclusion that the best interests of the Second Appellant would be to remain in the United Kingdom to undertake her studies and as a result of the current state and the critical stage that she was at, that it would be a disproportionate response at this time for the Second Appellant to be removed from the United Kingdom.

10. It is plain from his decision at [64] and [65] that he did not reach the conclusion that both the Second and First Appellants should be granted leave to remain indefinitely or in the long term, but to the contrary, he found that there would be nothing to prevent the Second Appellant's removal following her completion of her GCSEs (and therefore the First Appellant) since she could follow the remainder of her education in Sri Lanka. Thus it was clear from paragraph [65] that the decision he made was that any leave granted should be for a limited period to cover the circumstances that he had found would make return disproportionate at this particular time, it was to be limited to the period when she was taking

her GCSEs in the United Kingdom. Thus he allowed the appeal on that basis.

The appeal before the Upper Tribunal:

11. An application was made by the Secretary of State for permission to appeal that decision and permission was granted by a Judge of the First-tier Tribunal on 12th December 2014.

12. For the Secretary of State, Mr Tarlow relied upon the grounds. He submitted that the judge gave inadequate reasons as to why the Appellants should remain and why that outweighed the Secretary of State's responsibilities in immigration control and in the view of Parliament having passed Sections 117A-D as inserted by the Immigration Act 2014. He reminded the Tribunal that neither Appellant was a British citizen and that the education system in Sri Lanka was identified by the judge as adequate. He submitted the determination disclosed an error of law and that was inadequate attention and reasoning on the judge's part and considering the balance of proportionality and the importance of maintaining immigration control.

13. As the grounds asserted, the judge had failed to properly direct himself in relation to the public interest consideration set out in Section 117B of the 2002 Act and in this regard had attached a significant weight to the private life of the Appellants and erred in law by finding that the minor's private life and ability to finish her education outweighed the public interest.

14. He also relied upon the grounds in which it was said that the judge did not properly take into account the decision of **Zoumbas [2013] UKSC 74** and that the conclusion he reached was contrary to the findings in both **Zoumbas** and the decision of **EV (Philippines) [2014] EWCA Civ 874**.

15. Miss Harris, who appeared on behalf of the Appellants, had served by fax on the afternoon of the hearing a Rule 24 response. It was not served in accordance with the directions and no explanation was given for the delay (see paragraph 2 of the response). Nonetheless she relied upon that response and supplemented it by her oral submissions. She began her submissions by outlining to the court that the written grounds advanced by the Secretary of State were not a "reasons challenge" as the case was now being advanced. In any event, she submitted that the reasons given by the judge were wholly adequate and open to him on the evidence that was before him.

16. As to the legal framework, she submitted that the judge did have regard to the considerations set out in Section 117B, but that the Section itself did not state how the proportionality exercise should be conducted or that it required a judge in every case to agree with and follow every

consideration within 117B. She submitted that the weighing of factors remained a matter for the judge based on the circumstances of each individual case and that having regard to factors is not the same as a mandatory requirement to follow them. Thus she submitted that the grounds of the Secretary of State were incorrect in that regard and that so long as the judge had regard for the considerations listed, he was free to discount them if the specific circumstances of the case so required. In this context she submitted the judge considered Sections 117A-D at paragraphs [63]-[64] and there had been no error of law in the proportionality exercise conducted and that the conclusion reached was open to the judge. In any event she submitted the considerations in 117B(2) and (3) had no materiality as the Second Appellant was studying in English and the First Appellant claimed English as one of the languages that she was able to speak. As regards financial independence, the First Appellant had stated in her interview that she did not want financial support. Thus those were not matters that were relevant to the balance and the relevant matter at 117B(5) was considered by the judge when carrying out the proportionality balance.

17. She submitted that there was no misdirection in the case of **Zoumbas** for the reasons given at paragraph [22] to [27] of the Rule 24 response that she had drafted. As to the ground in which it was asserted that the finding that the Second Appellant should be allowed to complete her GCSEs ran contrary to the findings in **Zoumbas** and the case of **EV (Philippines)** she submitted that that was a finding made on the specific facts of the case. The judge was not stating that the United Kingdom should "educate the world" but had reached the conclusion that with such a short period left to go until her GCSEs it was not proportionate at this juncture to remove her at the critical time of her education. Such a finding was open to the judge to make.

18. I reserved my determination.

Discussion:

19. The Secretary of State does not argue that the judge erred in law in his decision by considering Article 8 outside of the Rules. The thrust of the grounds refer to the proportionality balance conducted by the judge and whether or not he properly applied or misapplied, the public interest considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014).

20. It is necessary to set out those new Sections 117A-D. They provide as follows:-

> "**117A** *Application of this Part*
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B *Article 8: public interest considerations applicable in all cases*

(1) The maintenance of effective immigration controls is in the public interest.

(2) 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 able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(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

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom lawfully.

(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.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C *Article 8 additional considerations in cases involving foreign criminals.*

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal (‘C’) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

> 'Article 8' means Article 8 of the European Convention on Human Rights;
>
> 'qualifying child' means a person who is under the age of 18 and who—
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more;
>
> 'qualifying partner' means a partner who—
>
> (a) is a British citizen, or
>
> (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act)."

21. Section 19 of the 2014 Act introduced into the Nationality, Immigration and Asylum Act 2002 a new Part 5A containing new Sections 117A-D. This new part is headed "Article 8 of the ECHR: public interest consideration". The new Sections 117A-D set out statutory guidelines that must be applied when a court or Tribunal has to decide whether an immigration decision to remove someone from the UK would be in breach of his or her Article 8 rights. The new Section 117A is headed "Application of this Part"; and new Section 117B is headed "Article 8 public interest considerations in all cases". 117C refers to additional considerations in cases involving foreign criminals which is not relevant to this particular appeal.

22. The judge made a self-direction at paragraph [59] of the determination in which he plainly had regard to the public interest considerations and properly identified that those were matters that formed part of the decision in the proportionality balance. In this regard he began the proportionality assessment by considering the best interests of the Second Appellant who was a minor; an approach which could not properly be criticised by the Secretary of State and cited the Supreme Court decision of **Zoumbas v SSHD [2013] UKSC 74**. Lord Hodge, giving the judgment of the court at paragraph [10] set out the principles applicable to the removal of children from the United Kingdom with (or without) their parents.

23. Whilst the grounds submit that the judge in citing the decision of **Zoumbas** and failed to take into account the entirety of the judgment and in particular [24], and that in doing so he misapplied that decision, I do not find that such an argument is made out. It is plain from reading the determination that the judge cited what was the Supreme Court summary of the law as to the best interests of the child and what this encompassed (at [61]) citing paragraph [10] of the judgment and nothing more. In considering the issue as a primary consideration, he began his assessment of the best interests of the Second Appellant on the basis that they would be met by her remaining with her mother, the First Appellant, and that if

she were removed this would be the outcome and that they would be removed together. The judge plainly had in mind that they were not British citizens as in the decision of **Zoumbas** and that as a result they did not have the rights that would flow from such citizenship such as the right to future education or health. However, the case advanced on behalf of the Appellants was not that the Second Appellant or the First Appellant were seeking to remain in the UK to continue her education throughout her minority, but for a short finite period until the end of May 2015 when she had finished her GCSE examinations to prevent further disruption and the likelihood of harm that that would cause to her future wellbeing. The judge found that in Sri Lanka there was a "perfectly reasonable operating educational system" (see [62]) and that this was not a case of comparing the quality of education available, nor about the right to ongoing future education, but whether it was reasonable at this particular stage to expect the Second Appellant to follow her mother, who had no right to remain in the country. The question the judge asked himself was that identified in **EV (Philippines) & Others v SSHD [2014] EWCA Civ 874** at [59]; that where the parent has no right to remain, the assessment must be made against that background and that the ultimate question would be: is it reasonable to expect the child to follow the parent with no right to remain to their country of origin? Contrary to the grounds, the judge did ask himself the question identified by **EV (Philippines)** and applied it to the specific factual matrix in this appeal.

24. In considering that question, the judge made an assessment of the evidence before him. He found that the Second Appellant was in her last six months study of her GCSE course and those examinations taken at the end of two years of study would be in May 2015. The evidence before him in the Appellants' bundle demonstrated that she had attended school in the UK since April 2013, having joined school in Year 9. The evidence in the form of early school reports in the bundle made reference to her having missed most of the GCSE course which the other students had begun, but that she had caught up and was making progress. The later reports made reference to some of the progress she has made at the time she was studying for her GCSE examinations and some grade predictions. He properly considered that Sri Lanka had a reasonably operating educational system, but that the particular circumstances the Second Appellant was in and the stage that she had reached, that it would be difficult for the last few months of her study to change to a new education system. Thus he concluded from the evidence before him that removal at this particular stage would be disruptive to her. The written grounds make no challenge that this was a finding that was not reasonably open to him to make. Having determined what were the best interests of the Second Appellant, a minor, he then turned to the question of whether the need for immigration control outweighed those best interests.

25. The Secretary of State submits that the judge, in considering that balance, misdirected himself as to the public interest considerations set out in Section 117B of the 2002 Act. At [63] it is plain that he did have regard to those public interest considerations set out in Section 117B when

considering the question of whether the need for immigration control outweighed the best interests of the Second Appellant and reaching an overall conclusion on the proportionality balance. Section 117B(1) made it clear that the maintenance of effective immigration control is in the public interest; a matter the judge made reference to as "the paramount one of which is the control of immigration" (see [59]). Sections 117B(2) and (3) make reference to the public interest considerations of being able to speak English and as to financial independence. Whilst the judge made no specific regard to those matters, it is not material to the overall consideration of the public interest question as there appears to be no dispute that the Second Appellant was able to speak English, given that she was being educated in the language, and that the Second Appellant gave English as one of the languages she spoke. As to financial independence it has to be seen against the factual background and the way that the case was advanced on behalf of the Appellants that they were not seeking to remain beyond the short period of time that was indicated by the judge, namely until the end of her examinations in May 2015. Thus contrary to the grounds, the judge did give the sufficient amount of consideration to the matters and the public interest considerations. As to Section 117B(5) and the issue of precariousness at [63] he recorded that little weight should be given to a private life established by a person at the time their immigration status was precarious and considered that factor.

26. Whilst the public interest considerations must be taken into account, the weighing of the factors are a matter for the judge applying them to the specific facts of the case. In this context, the judge was entitled to reach the conclusion and place in the balance that whilst the Second Appellant's private life was formed at a time when her immigration status was precarious, this was not a situation that the Second Appellant had brought upon herself, but was as a result of the decision taken for her by the First Appellant (see determination at [50], [62] and [63]) who had brought her to the United Kingdom and had made a claim for asylum. In this context the judge considered that the precariousness of her situation was not a result of her own actions but those of her mother and took into account what had been said in the decision of **Zoumbas** at [10] that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent". Having considered those matters, the judge concluded the balancing exercise at [64] and [65] stating:-

> "64. I conclude in the particular circumstances that the Second Appellant, having weighed the issues of proportionality, the facts of Section 117 coupled with the best interests of the Second Appellant and the current state of her education that it would be a disproportionate response at this juncture for the Second Appellant to be removed, notwithstanding the fact that I can see nothing whatsoever to prevent her removal following the completion of her GCSEs since she could follow the remainder of her education in Sri Lanka where there is a perfectly good functioning education system.

> 65. It follows from that clearly the First Appellant would be required to remain with the Second Appellant and in those circumstances the fact that I find the decision of the United Kingdom would breach the obligations under the 1950 Convention, any exceptional leave that is granted by the Respondent should only be for a very limited period and to cover the period when the Second Appellant will be taking her GCSEs in the United Kingdom only."

27. From those paragraphs it can be seen that the judge did properly take into account and apply Sections 117A-D and gave specific consideration to Section 117B(5), which in reality was the only relevant consideration and reached a conclusion on the proportionality balance that it would be disproportionate at this particular time to remove the Second Appellant and answer the question posed in **EV (Philippines)** that it was not reasonable or proportionate for the Second Appellant to follow her parent (the First Appellant) to Sri Lanka at this time.

28. It is plain from the way the case was advanced on behalf of the Appellants and the decision of the judge himself, that he, at no time, made a finding that there was any indefinite entitlement for the Second Appellant to continue her education in the UK, but that there was nothing to prevent the removal (and that of her mother) following the completion of her GCSEs, and that any leave granted to the Appellants by reason of the decision should be for a very limited period to put in effect his decision. In that context, he was not taking a contrary approach to that set out in **Zoumbas** or **EV (Philippines)**, but reached the conclusion that with a short period until the GCSEs were to be completed and the disruption that this would cause to her at this critical stage in her life, but even taking into account the public interest considerations it would be disproportionate to remove her.

29. For those reasons, I am satisfied that the decision of the judge discloses no error of law. The question is not whether I would have reached the same conclusion, but whether the conclusion reached was open to the judge to make on the evidence before him. I have concluded that it was and that in doing so the Secretary of State has not demonstrated any error of law in his approach. Thus the decision of the First-tier Tribunal shall stand.

30. In the Rule 24 response that was not served until shortly before the hearing began, there was an application for costs. No details are given in the Rule 24 response. In those circumstances, I indicated at the conclusion of the hearing that if an application for costs were to be made, it could be filed on the Tribunal and a copy served on the Secretary of State within seven days of the determination being received. The Secretary of State then has fourteen days to make any submissions by way of response and I will make a decision on any application that is made.

Notice of Decision

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

32. No anonymity direction is made.

Signed Date 22/1/2015

Upper Tribunal Judge Reeds