Upper Tribunal Appeal
Immigration and Asylum Chamber

Appeal Numbers: IA/25646/2015
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THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 22nd of March 2017	**On 8th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR YAKDEHIGE PRASANNA CHAMINDA FERNANDO (1)
MRS NADEESHA PRABHANI SABARAGAMU KORALALAGE (2)
[Y Y] (3)
[Y S] (4)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Nazim of counsel
For the Respondent: Ms A Holmes, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this decision, I will continue to refer to the parties by their designations before the First-Tier Tribunal (FTT).

2. In addition to the main appellant (the first appellant) there are three other appellants listed above. The other listed appellants, his dependants, are as follows:

    - NADEESHA DOB 11 March 1982 – his wife;
    - [YY] DOB [ ] 2007 – his son;
    - [YS] DOB [ ] 2013 – his daughter.

3. This is an appeal by the above respondent against the decision of First--Tier Tribunal Judge Telford (Judge Telford) promulgated on 29 September 2016. The respondent alleges that in the Judge Telford failed adequately to assess the evidence in relation to the proportionality of the decision to remove the appellants from the UK, having regard to the requirements of section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

Background

4. The first appellant, who was born on 6 July 1973, is a citizen of Sri Lanka. He claims to have entered the UK illegally on 3 March 2007. He used agents to travel to the UK with the assistance of a false Sri Lankan passport in the name of AJITH PEREIRA.

5. The first appellant applied for asylum on 6 March 2007, the first day that he was served with illegal entrant papers. Shortly after that he submitted an asylum claim, on 30 March 2007 his asylum claim was refused. His appeal against the asylum refusal was dismissed on 14 June 2007. On 21 June 2007, his appeal rights were exhausted. The appellant then remained in the UK. He later applied for further leave to remain based on his family/private life (10 years), which was refused with no right of appeal on 22nd of January 2015.

The appeal proceedings.

6. The appeal to the FTT was dated 9 July 2015. In his grounds the first appellant claims that the rights of "the child of the family" ([YY]) would be breached if the family were returned to Sri Lanka. In particular, under the provisions of paragraph 276 ADE (IV) it would be a "clear breach of their human rights" to remove the 2nd appellant ([YY]) because he had been born in the UK on 18 September 2007. He also claimed that the best interests of "the child" – a reference to master [YY] – were best advanced by continuing to allow him to reside in the UK and it was necessary for the respondent to allow him to do so to secure his best interests in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act). The first appellant and his spouse also claimed to fall within "exception one" of appendix FM as they were the parents of [YY], a child who was under the age of 18 years and who had lived in the UK since birth. They claim that he had lived in the UK

continuously for at least seven years immediately preceding the application and to have a genuine and subsisting parental relationship with that child. Accordingly, the child, and consequently his parents, could not be removed to Sri Lanka. The appellants claimed that they ought to be granted leave to remain in the UK on the grounds that [YY] had established a private or family life here, having been born in the UK. The first appellant claimed that by virtue of the fact that [YY] had been born in the UK and have been here for more than 8 years it was an unlawful and unreasonable interruption to his family life to be compelled to leave the UK to return to Sri Lanka.

7. Judge Telford considered that section 85 (5) of the 2002 Act allowed him to consider not only the circumstances pertaining at the date of the decision but also, as this was any 'in country' application, any matters relevant at the date of the hearing. Judge Telford found that the first appellant had established that he qualified under paragraph 276 ADE of the Immigration Rules. Further, or alternatively, the first appellant fell within article 8 of the European Convention on Human Rights (ECHR) and it would be a breach of those rights to remove him and his family.

The hearing

8. At the hearing the appellant was represented by Mr Nazim, a member of bar. The respondent was represented by Ms Holmes, a Home Office presenting officer.

9. Ms Holmes submitted the judge did not deal correctly the case of **MA Pakistan [2016] EWCA Civ 705.** In that case, the Court of Appeal had to consider the reasonableness of the requirements placed on applicants by the new Immigration Rules in the context of paragraph 276 ADE and section 117E (6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act'). She said that the appellants had come to the UK illegally in 2007. The third appellant had been born in the UK but there were no obvious difficulties in the family relocating to Sri Lanka. The third appellant would continue to have loving parents, who would continue to nurture him for his remaining years of childhood. This is not a case where there would be an excessive interference with the child's upbringing. There was no adequate explanation given by the Immigration Judge as to why the merits of this case fulfilled the requirements of article 8 of the ECHR. I was particularly referred to paragraph 46 of **MA** where reference is made to the extent of social, cultural and education links formed by the child of an illegal immigrant. Whilst significant weight would always attach to the child's interests it does not follow that leave to remain must be granted. Ms Holmes also submitted that it was not unreasonable, having regard to the case of **EV (Philippines)** [2014] EWCA Civ 874, to attach significant weight to the need for proper immigration control. Ms Holmes went on to point out that the Court of Appeal in **MA (Pakistan)** considered the case of **Zoumbas** [2013] UKSC 74. In that case, the Supreme Court decided that no consideration should be treated as inherently more significant than another. While judges may approach the question of proportionality in

different ways and it is always important to understand what the child's best interests are, there is no substitute for careful consideration and examination of all relevant factors. The first and second appellant's children are not to be blamed for the conduct of their parents, but that did not mean that the public interest in enforcing immigration control was of no weight.

10. Mr Nazim referred me to his instructing solicitor's response under rule 24 of the Upper Tribunal (Procedure) Rules 2008. It had been pointed out in that document that:

    a) That the immigration judge directed himself properly having regard to the fact that the third appellant (YAKDEHIGA) was aged 9 ½, having been in the UK since he was born on the 18 September 2007;

    b) The Immigration Judge accepted this evidence, as he was entitled to. He concluded that the appellants had formed a family life in the UK;

11. Paragraph 276 ADE (iv) of the Immigration Rules clearly gave effect to the principle that a child who has been continuously in the UK for at least 7 years would be entitled to leave to remain on the ground that he has established a private life in the UK. This would be because such a person would have established ties and there were no would be no proper grounds for removing him. This would constitute a disproportionate interference with family life. It was accepted that the 7-year period was the starting point but it would not be appropriate to treat a child is having a precarious status merely because that was the case in relation to his parents' immigration status. Later in his submissions Mr Nazim made the additional point that it was only a matter of months before the third appellant would be eligible to apply for British citizenship (this arises after 10 years). There was uncertainty at the hearing as to the extent to which delay was relevant. I pointed out that based on the Home Office refusal there appeared to be delay between 2007 when the asylum claim was rejected and subsequent appeal, which failed, and the application for further leave to remain in 2014. Subsequent investigations revealed that there was an attempt in 2010 to treat this case as a 'legacy case'. However, that the application did not get anywhere. In summary, Mr Nazim asserted that the judge was entirely entitled to conclude the interests of the third appellant outweighed other considerations having regard to the requirements of paragraph 276 ADE (1). The appellant had lived in the UK for more than 7 years. I was referred to the case law, including the decision by the President in **PD (Sri Lanka) [2016] UKUT 00108**. It was asserted that the facts in **PD Sri Lanka** were very similar to those in this case.

12. The respondent briefly replied to assert that Judge Telford had not given proper weight to the public interest, barely mentioning it in her decision. I was referred to paragraph 41 and paragraph 42 of **MA**. A child was not to be held responsible for the moral failings of his parent but the public interest in effective immigration control was a proper matter to put in the balance. Furthermore, the fact that the welfare of a child was one of the

balancing factors, it did not lessen the importance of immigration control. I would also referred to paragraph 47 in that case. The best interests of the child are a well-established concept but could not be divorced entirely from the conduct and immigration history of the parents in the sense that having made a careful analysis of the nature and links to the UK child and the country to which the child is to return forms part of the best interests' assessment. The fact that the child's welfare would be better advanced in the UK does not automatically result in the reasonableness question being answered in favour of the child, having regard to the need to balance the need proper immigration against that. Paragraph 54 of that decision was also referred to. There is nothing illogical in the notion that the child's best interests do not necessarily mean it is unreasonable for him to the returned to his parents' home country.

13. At the end of the hearing I decided that it was necessary to take more time to consider the matter before deciding whether there was a material error of law in the decision of the FTT. Both sides agreed if I did find a material error of law I could go on to decide the case on the evidence before the FTT. Mr Nazim said that this was subject to my consideration of a supplemental bundle, which was received during the hearing. If I did that, I would, he acknowledged, have all relevant matters before me.

Discussion

14. The first appellant has now been in the UK for approximately 10 years during which time two of his children have been born, [YY] and [YS]. The present application is on the basis that the appellants have formed a private or family life here. They did not seek to maintain that they qualified under the Immigration Rules and, in particular, under paragraph 76 A D E of those rules. However, they maintained that the respondent should allow their application under of the ECHR. On 26 June 2015 the respondent rejected that application for reasons given in the refusal letter. However, the appeal to the FTT was successful.

15. The reasons given by Judge Telford for deciding that the appellants' appeals should be allowed under the Immigration Rules or "under human rights" are somewhat sparse. It seems the Judge Telford was satisfied that it would be "unreasonable" to return the whole family given the fact that the third appellant had lived in the UK continuously for a period of 7 years. Accordingly, Judge Telford considered that section 117 B (6) of the 2002 Act applied in that it would be unreasonable to return the third appellant to Sri Lanka and "therefore the whole family" ought to be allowed to stay here. She was not satisfied that this was a case where the economic interests UK, in the enforcement of proper immigration controls, justified the interference with the third appellant's private or family life.

16. It is important to note that section 117 A of the 2002 Act requires a tribunal to "have regard" to the "public interest considerations" in section 117 B of that Act. Section 117 D (6) provides an exception to the usual

requirement that it is in the public interest and in the economic interests of the UK that a person who is not financially independent, for example, should be required to be leave the UK. That sub-section provides:

"(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.]"

A "qualifying child" is defined by section 117 D as "a person who is under the age of 18 and who…

(b) has lived in the UK for a continuous period of seven years or more".

17. Judge Telford, having referred to the relevant legislation and a number of the important cases, including **Razgar**, nevertheless failed to apply the most recent case law, including **MA**. In that case, which in fact involved a number of different appeals, Elias LJ said that an interference with private or family life would only be justified in a case to which section 117 B (6) applied where there are "sufficiently strong countervailing public interest" factors such as to place the case within article 8 (2). However, he went on to consider the question of reasonableness. In particular, the court rejected the notion that once it is established that it is in the "best interests" of the child to remain UK it must necessarily be unreasonable to remove that child from this country. The fact that the child has been in the UK for seven years is a factor which is required to be given significant weight. However, this does not mean it outweighs other considerations. The public interest in immigration control may override the best interests of the child. The only other point that must be borne in mind is that a child will not be blamed moral failings of his parent. But that too did not mean that the immigration history was irrelevant. Overall, the court thought that "even if the child is best interests are to stay, it may still be not unreasonable to require the child to leave. This will depend on a careful analysis of the nature and extent of the links in the UK and the country where it is proposed he should return" (paragraph 47).

18. Judge Telford described the respondent's duty as being the "onerous and to some unpopular but respected duty of upholding the law in terms of immigration". However, Judge Telford failed to consider whether in fact the public interest in the enforcement of proper immigration controls was a consideration of great importance in the case before him. It was, I find, a material error of law not to embark upon the "careful analysis of the nature and extent of the links in the UK and the country where it is proposed he should return" before the tribunal concluded that the respondent had breached her international obligations under the ECHR. Accordingly, the decision of the FTT must be set aside.

19. On proper analysis, the FTT ought to have found that even if the third appellant had established the requisite period continuous residence he formed part of the family unit which together would be returning to Sri Lanka. As the respondent says in her grounds of appeal, the fact that the child appellant was born in the UK and had lived here for more than 7 years was one important factor, but it had to be put into the balance. An assertion had been made in the application that the third appellant only spoke English, but it seems likely that the two adult appellants both spoke Sinhalese (their native tongue) at home and at least probable that the two children would have picked up some of their parents mother tongue. In any event, children quickly absorb the language and culture into which they are immersed. As the third appellant is presently aged 9, and the fourth appellant only aged 3, it seems likely that they will quickly absorb the language and culture of their parents' native country, which is now at peace after years of civil war. There is nothing in the family's likely circumstances in Sri Lanka that I have seen which would render its return to Sri Lanka unduly harsh or difficult for the family. There are obvious disparities between the UK and Sri Lanka, which have been pointed to by the appellants, but Sri Lanka has a functioning educational and healthcare system which would be able to provide a reasonable level of care for the whole family. In addition there are other family members to whom the family could turn for support.

20. In my judgment, the first appellants' poor immigration history, abuse of the immigration system and the lack of any real difficulty in all the appellants relocating as a family unit to Sri Lanka, constitute factors which render the respondent's decision to refuse leave to remain reasonable. The need for effective immigration control, including the need to give proper weight to the public interest in balanced affordable immigration, does appear to constitute a factor of overriding importance. It is not the will of Parliament as expressed in the Immigration Rules to permit uncontrolled immigration by those who do not qualify under those rules.

Conclusion

21. The decision of the FTT contains a material error of law such that it is necessary for that decision to be set aside. I have gone on to re-make the decision. This has been based on the evidence presented to the FTT, as requested by the parties, as supplemented by the most recent bundle.

Decision

22. The respondent's appeal to the UT is allowed. The decision of the FTT is set aside. The following decision is substituted:

    1) The appellant's appeal to the FTT is dismissed under the Immigration Rules;

2) The respondent the appellant's appeal to the FTT is dismissed on human rights grounds.

23. No anonymity direction is made.

Signature

Signed W.E.HANBURY

Date 22nd May 2017

Deputy Upper Tribunal Judge Hanbury

Fee Award

I have dismissed the appeal and therefore there can be no fee award.

Signature William Hanbury

Dated 22nd May 2017