Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04152/2016
HU/04160/2016
HU/04167/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 March 2018

Decision & Reasons Promulgated
On 6 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

(1) MRS L J K W
(2) MR N R K A M
(3) MISS S T K M A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss A Patyna, Counsel
For the Respondent: Mr L Tarlow, HOPO

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Jerromes to dismiss their appeals against the decision of the respondent refusing to grant them leave to remain on Article 8 family and/or private life.

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2. The appellants are all nationals of Sri Lanka. The first and second appellants are married and have two children. Their eldest child, [S], was born on [ ] 2009 and is now 7 years old. Their youngest child [J] was born on [ ] 2013 in the United Kingdom. Both children are Sri Lankan nationals.

3. The first appellant entered the UK on 6 May 2010 as a student. The second appellant and third appellant [S] entered the UK on the same day as her dependants.

4. The first appellant completed her course of study and on 31 March 2014 she was awarded a Graduate Diploma in Healthcare Management. When [J] was born the first appellant had no opportunity to continue her studies.

5. The second appellant is employed at Tesco Express as a team leader. He has worked there since 12 October 2012. His income is £1,100 per month. They pay £600 rent per month and are in receipt of tax credit.

6. [J] has been diagnosed with *"exceptional medical conditions"* and has had surgeries and course of treatments. These were highlighted by the judge at paragraphs 20 to 26. Because of [J]'s medical conditions, it is likely that as he gets older, the gap between him and his peers will widen. It was said that if the family return to Sri Lanka, *"all the medical proceedings will be disrupted causing adverse effect to the development of the child"*. At the hearing, the second appellant was asked if he had made enquiries about suitable facilities in Sri Lanka; he replied that he had spoken to a doctor and facilities were available but some needed to be paid for. He also said that [J] was not on any medication. The second appellant confirmed that with the exception of the genes test, the issue was not whether facilities were available but whether they could pay for the facilities.

7. The first appellant was asked under cross-examination if [J]'s conditions were life threatening and she accepted that they were not. She said she was worried about how people will look at [J] in Sri Lanka and it will upset and ruin her and the children. The second appellant said he has not told anyone at home about [J] because of the negative way people in Sri Lanka think about such things. He knows this because a member of his sister-in-law's family has a disabled 13-year-old son.

8. Submissions were made on behalf of the appellants that it was not reasonable to expect [S] to leave the UK as it is in her best interests to remain in the UK. She is attending school and is doing well with excellent attendance. In May 2017 [S] will have been living continuously in the UK for seven years. She has spent over half her life here, including the *"better part of her formative years"*. Her education, hobbies and friendships will all be severely disrupted; she does not speak or write Sinhalese. They cannot imagine [S] being able to reintegrate into Sri Lankan society. If they moved back to Sri Lanka they would be in a tremendously difficult financial situation as they would not be able to support themselves and this is a life threatening factor for [J].

9. The judge heard evidence from Ms Anne Marie Brooks who is employed at the Archbishop Lanfranc Academy Nursery in Croydon as Team Leader/Special Educational Needs Co-ordinator. She has worked there for nine years. She gave evidence that [J] has been attending the nursery since 6 September 2016. She stated that due to his complex medical issues and individual needs he is eligible for High Level Needs Funding. She also said that [J] has an individual educational plan and has professional keyworkers working alongside his parents and the nursery to ensure he receives the specialist care that he needs. Ms Brooks said she has done some research about facilities in Sri Lanka and has come across a UNICEF report. From this she understands that there are some specialist centres but the tendency is to integrate SEN children into mainstream schools and she fears that [J] would become lost in the system. She said that [J]'s needs would increase as he gets older and the gap widens between him and his peers. He may develop behaviour problems due to his frustration with difficulty in communicating.

10. There was a significant volume of documentation in relation to [J]'s various medical issues before the judge. The judge listed the documents at paragraphs 41 and 42. These included letters from various medical professionals.

11. At paragraph 43 the judge accepted the appellants' immigration history. She also accepted in light of the respondent's assertions that Sri Lanka has a functioning education system which the children would be able to enter. In light of Ms Brooks' evidence the judge accepted that with regard to [J] there are some specialist centres but the tendency is to integrate SEN children into mainstream schools. The judge also accepted that [J] undoubtedly suffers from a number of medical conditions which are comprehensively rehearsed in the supporting documents from various medical professionals.

12. In conclusion the judge found that Sri Lanka has a healthcare system capable of assisting and providing treatment for [J]'s conditions and suitable medical treatment is available. She accepted that his medical care would initially be disrupted but found that provision is available in Sri Lanka, albeit at a cost. She did not accept that on return there was a risk of a decline in his condition(s) which would result in intense suffering or a significant reduction in his life expectancy.

13. The judge found that the appellants still have family and other ties in Sri Lanka. The first appellant has four brothers and a paternal uncle in Sri Lanka and they have returned to Sri Lanka on at least two occasions, most recently in 2013 to attend a wedding. She found also that as the second appellant previously worked as a chef in Sri Lanka for about ten years, and in the absence of any supporting evidence, the judge found that there was no reason to conclude he would be unable to find work on return to Sri Lanka either as a chef or similar to his current role with Tesco.

14. The judge accepted on the evidence that in Sri Lanka there is some stigmatisation of people with disabilities and that this will exacerbate the appellants' difficulties in

adjusting to life in Sri Lanka. She did not accept that the level of stigmatisation will be so severe as to ruin their lives, as is set out by the first appellant.

15. The appellants have not challenged any of the above findings.

16. Their challenge is to the judge's finding that although it would be in the best interests of [S] and [J] to remain in the UK, it would not be unreasonable to expect them to leave the UK.

17. The judge, relying on **Azimi-Moayed and others**, held at paragraph 50(v) that at 3 and 7 years old, [J] and [S] remain largely reliant on their parents and their world is still very much focused on them. At paragraph 50.3, weighing up all the factors that were before her, the judge held that relocation to Sri Lanka would not involve any separation of family life and limited disruption to their private life given their young age. She went on to say:

> *"However, it must be in [J]'s best interests to remain in the UK given the significant professional support he is receiving in the UK and the disruption (although not cessation) of that support if he relocates to Sri Lanka. It is also (marginally) in [S]'s best interests to remain in the UK in view of the fact that she has been here six years and has established a limited degree of private life and her first language is English."*

18. The judge went on to say at paragraph 51 that whilst having concluded that it is in the children's best interests to remain in the United Kingdom, in determining whether or not it is reasonable to expect the children to leave the UK, she must also consider the wider public interest factors.

19. She considered that the first and second appellants have been overstayers since 22 September 2014. However, they have made efforts albeit belatedly to regularise their immigration status and this is not therefore a factor which weighs heavily. She noted that [S] and [J] have been educated at public expense. [J] is being treated by the NHS at public expense. The second appellant has in the main been supporting his family but they have had recourse to public funds (tax credits) and it is reasonable to assume they will continue to do so. She noted that there were no issues with regard to the first or second appellant's character. Both the first and second appellants speak fluent English. Having weighed up all the above factors, the judge was satisfied that it would be reasonable for both [J] and [S] to go to Sri Lanka. The fact that [J] is in receipt of high level care from a number of medical professionals in the UK, does not outweigh the public interest factors as adequate care is available in Sri Lanka. It follows that it would also be reasonable for [S] to go to Sri Lanka.

20. The judge concluded by saying that the decision does not interfere with the family life of the appellants as they will be returning as a family unit. She accepted however that the decision interferes with their private life given the length of time that they have been in the UK. She accepted that the interference with their private life is more than merely technical or academic and Article 8 is engaged. Her decision however is in accordance with the law and in pursuit of a legitimate aim that there should be a system of immigration control which is enforced is necessary in a well-ordered

society in the interests of all. Based on an overall consideration of the facts, the judge was satisfied that the decision is proportionate to the legitimate aims pursued and does not breach the Article 8 rights of the appellants and/or [J] for reasons given at paragraphs 54 and 55. That the appellants have failed to demonstrate that [J] is likely to suffer degrading and inhuman treatment likely to reach the very high threshold in Article 3 if he returned to Sri Lanka. Although [S] has now been in the UK for seven years, and is a qualifying child, and has a genuine and subsisting relationship with her parents, it would not be unreasonable to expect [S] to leave the UK.

21. The judge further found that the appellants have failed to demonstrate that [J] is likely to suffer degrading and inhuman treatment likely to reach the very high threshold in Article 3 if returned to Sri Lanka. He is not critically ill and close to death. There is no risk of a decline in his condition which would result in intense suffering or a significant reduction in life expectancy. There is adequate medical care available in Sri Lanka.

22. The judge accepted at paragraph 55 that life on return to Sri Lanka may be hard against that he is mandated to weigh the very significant burden arising from [J]'s treatment and the cost of educating both children.

23. Miss Patyna relied on "Counsel's note" which she had prepared for the hearing. She said the sole ground of appeal is that the judge erred in her assessment of whether it would be reasonable for the third appellant ([S]) to be removed from the UK in the context where she is a qualifying child within the meaning of Section 117B of the Nationality, Immigration and Asylum Act 2002 ("highlight the 2002 Act"). She argued that the judge failed to have regard to the authority of **MA (Pakistan) v SSHD [2016] EWCA Civ 705** and consequently failed to recognise the weight to be attached to the seven year period of [S]'s residence in the UK, and treat it as a starting point to leave being granted unless there are strong reasons to the contrary.

24. Miss Patyna accepted that the seven-year Rule was acknowledged by the judge when she said at paragraph 50.2(v) that the seven-year threshold in Appendix FM recognises that over time children start to put down roots and integrate into life in the UK. At 3 and 7 years old, [J] and [S] remain largely reliant on their parents and their world is still very much focused on them. Miss Patyna submitted that this finding fell short of the requirements at paragraph 46 of **MA (Pakistan)** where the Court of Appeal held that after such a period of time the child would have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. She submitted that there was no further recognition by the judge of the seven year period being a powerful factor against removal and/or a starting point for leave to be granted in the absence of strong reasons. The judge failed to recognise the strength of the ties and roots developed over that period.

25. Miss Patyna submitted that the judge's comment about the seven-year period is immediately diluted by her reference to **Azimi-Moayed [2013] UKUT 00197 (IAC)**

which predates **MA**. She said this is followed by the judge's failure to draw a proper distinction between the position of [S] who has been in the UK for seven years and [J] who has not but the judge then finds that both children's world is very much focused on their parents. Miss Patyna submitted that it must be incorrect to say that because the younger child has to go then the first child has to also go. It was incumbent upon the judge to differentiate [S]'s position from that of [J] because she is a qualifying child.

26. Miss Patyna said that the judge said there were public interest factors but did not say that they were strong and powerful. At paragraph 51.1(i) the judge considered that the first and second appellants have been overstayers since 22 September 2014 but that they had made efforts rather belatedly to regularise their immigration status. However the judge found that this was not a factor which weighed heavily against them. The judge said the children were being educated at public expense and that [J] was being treated by the NHS at public expense. Miss Patyna said that these factors were not so powerful. The seven year Rule recognises the educational links and the fact that they would be publicly educated in any event. She submitted that the reasons given by the judge were not powerful enough.

27. Mr Tarlow submitted that the seven-year Rule is not a determinative factor. It is merely a factor of some weight. He submitted that the grounds were a disagreement with the reasoned and valid findings made by the judge. The judge carefully took into account the educational needs and medical evidence. At paragraph 54.3 the judge said the first and second appellants have put down roots in the UK in the full knowledge that their stay here is at best precarious and little weight should be given to private life established when a person is in the UK unlawfully or their immigration status is precarious. Mr Tarlow submitted that taken as a whole, the determination was sound. The judge has balanced the needs of the family, in particular the child with medical issues, against the public interest and has come to a conclusion that is open to her to make. He submitted that the public interest outweighs the interests of the family.

Findings

28. I accept that the judge did not make reference to **MA (Pakistan)** in her decision. However, I was not persuaded that the judge made an error of law as I found that her approach was not dissimilar to the approach adopted by the Court of Appeal in **MA (Pakistan)**.

29. I have highlighted the evidence that the judge accepted and her findings. The judge's finding that it would be in the best interests of the children to remain in the United Kingdom has not been challenged. It is the judge's finding that it is not unreasonable for the whole family including [S] and [J] to go to Sri Lanka that has led to this challenge by the appellants. In reaching her findings the judge considered the wider public interest factors. She listed these factors at paragraph 51.1. The judge did not place too much weight on the immigration status of the first and second

appellants. She said that [S] and [J] have been educated at public expense. Whilst I accept Miss Patyna's submission that a child who has been here seven years would be receiving an education in the UK, I agree with the judge that the education would be at public expense. I note that the Court of Appeal said at paragraph 46 that after such a period the child would have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. Nevertheless, the Court of Appeal went on to say that this may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. I find that this part of the judgement resonates with the judge's finding that at 3 and 7 years old, [J] and [S] remain largely reliant on their parents and their world is still very much focused on them.

29. I accept that children being educated at public expense is a factor common to most cases involving the seven year Rule, and should not on its own be treated as powerful/significant to outweigh the starting point that leave should be granted. However, this was not the only wider public interest factor that was considered by the judge.

30. I was not persuaded by Miss Patyna's submission that the judge's reasoning that [J]'s medical care at public expense is a factor in favour of removal (and to be taken account in the assessment of reasonableness of [S]'s removal) is an approach that is unfair and discriminatory in respect of [S]'s position. It was open to the judge to take this evidence into account when considering the wider public interest factors. Just as the judge was entitled to take into account that the family has had recourse to public funds when Section 117B(3) requires that those seeking to remain under article 8 of the ECHR should be financially independent and are not a burden on the taxpayer.

31. I was not persuaded by Miss Patyna's submission that the judge failed to distinguish between [S]'s position and [J]'s position. I find that the judge dealt with each child separately. The judge held that [S] has lived in the UK for seven years and is a qualified child; that her parents have a genuine and subsisting relationship with [S]. I note that there was not much evidence about [S], other than her age, length of residence and education in the UK. There was much more evidence about [J]. I find that the judge may not have devoted a paragraph or two to considering only [S]'s circumstances, but I find that this was not an error because on the limited evidence in respect of [S], I find that the judge's findings were sustainable. In any event, the argument that because [S] she has lived in the UK continuously for seven years and that it would be unreasonable to disrupt her life here and her education raises [S]'s position to that of being the determinative factor, it is not. It is a factor to be taken into account in the wholistic consideration of this appeal.

32. I find that the judge balanced the needs of the family and the children against the public interest and came to a conclusion that was open to her to make.

Notice of Decision

33. The judge's decision dismissing the appellants' appeal shall stand.

34. The appeals of the appellants are dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed Date: 29 March 2018

Deputy Upper Tribunal Judge Eshun