Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/12698/2018**
HU/12700/2018
HU/12705/2018
HU/12707/2018
HU/12709/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	Decision & Reasons Promulgated
On 11th December 2018	On 3rd January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

A K A D (FIRST APPELLANT)
D D E G (SECOND APPELLANT)
D S D G (THIRD APPELLANT)
D D S G (FOURTH APPELLANT)
D P C A G (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr C Bloomer of Counsel instructed by Parkview Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

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Introduction and Background

1. The Appellants appeal against a decision of Judge M Davies (the judge) of the First-tier Tribunal (the FTT) promulgated on 3rd September 2018.

2. The first Appellant is the wife of the second Appellant and they are the parents of the third, fourth and fifth Appellants who were born on 17th January 2007, 20th March 2011, and 1st April 2010 respectively. The first Appellant entered the UK on 25th March 2010 with valid leave to remain as a Tier 4 Student until 10th April 2012. Her husband and eldest child accompanied her. The two youngest children were born in the UK. On 21st September 2017 the Appellants applied for leave to remain in the UK based upon their family and private lives.

3. The applications were refused on 30th May 2018. The Respondent did not accept that the Appellants could satisfy paragraph 276ADE(1). In relation to the adult Appellants it was not accepted that there would be very significant obstacles to their integration into Sri Lanka. It was accepted that two of the children had lived in the UK continuously for in excess of seven years, but the Respondent's view was that it would be reasonable for the children to leave the UK and return to Sri Lanka with their parents.

4. It was not accepted that there were any exceptional circumstances which would justify granting leave to remain with reference to Article 8 of the 1950 European Convention on Human Rights outside the Immigration Rules. It was accepted that one of the Appellant's children suffers with autism and attends a special needs school, but the Respondent's view was that there was an autism centre in Columbo in Sri Lanka which specialises in education for autistic children and also offers speech therapy.

5. The appeals were heard by the FTT on 21st August 2018. The judge heard evidence from the first Appellant. The judge found the immigration history of the first and second Appellants and the eldest child to be significant. The judge found that the first Appellant had obtained leave to enter the UK by deception as she had never intended to return to Sri Lanka.

6. The judge accepted that the three children are in education in the UK and that the second child has extreme difficulties connected to autism and attends a special school and receives speech therapy.

7. The judge did not find that there would be any very significant obstacles to the Appellants' integration back into Sri Lanka. The judge found there were strong reasons for the Appellants being refused leave to remain on Article 8 grounds. Those reasons relate to their immigration history and the need to maintain effective immigration control. The judge found that if the Appellants had been given leave to remain they would benefit from their abuse of the immigration system.

8. The judge found that the Appellants could not satisfy paragraph 276ADE(1) and that there were no exceptional circumstances, and the appeals were dismissed.

9. The Appellants applied for permission to appeal to the Upper Tribunal raising a number of grounds, the most relevant being that the judge had not undertaken consideration of the best interests of the children, and had not considered whether it would be reasonable for the children to leave the UK, as two of the children had accrued in excess of seven years' continuous residence.

10. Permission to appeal was granted by Judge Grimmett of the FTT on 8th October 2018 who found an arguable error of law in that the judge had not considered the reasonableness test in relation to the children.

11. Following the grant of permission, the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, contending that the judge had not materially erred in law.

12. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

13. At the commencement of the hearing Mr Tan advised that he did not rely upon the rule 24 response, and conceded that the judge had materially erred in law by failing to carry out a consideration of the best interests of the children, and failing to consider whether it would be reasonable for the children to leave the UK.

14. I decided, in view of that concession, that I did not need to hear from Mr Bloomer as to error of law. Mr Bloomer suggested that it would be appropriate to set aside the decision of the FTT and remit the appeals back to the FTT to be heard afresh. Mr Tan agreed. I accepted that the concession made on behalf of the Respondent was rightly made and set aside the decision of the FTT and indicated that a written decision would be issued setting out my reasons.

My Conclusions and Reasons

15. I set aside the FTT decision for the following reasons. At the date of application for leave to remain on 21 September 2017 two of the three children had resided in the UK for in excess of seven years and therefore were qualifying children. At the date of the FTT hearing all three children

had resided in the UK for at least seven years and therefore all three were qualifying children.

16. The best interests of children are a primary consideration, but not a paramount consideration, and not the only consideration. The best interests of children can be outweighed by other considerations. The behaviour of the parents is not a relevant consideration when considering best interests of children. In my view the judge erred in not carrying out a specific consideration of the best interests of the children.

17. Once the best interests of the children had been considered, there should then have been a consideration as to whether it would be reasonable for the children to leave the UK. This was relevant to paragraph 276ADE(1)(iv) in relation to the two children who had accrued in excess of seven years' residence at the date of application, and also relevant to section 117B(6) in relation to all the children, because the third child had accrued seven years' residence by the date of the FTT hearing.

18. I find no adequate consideration of whether it would be reasonable for the children to leave the UK. The case law indicates that there would need to be strong reasons for finding that a child should not remain, if that child has accrued seven years or more continuous residence.

19. The judge considered section 117B of the Nationality, Immigration and Asylum Act 2002 at paragraphs 48 – 53, with the exception of section 117B(6) which relates to the same issue as in paragraph 276ADE(1)(iv) that being whether it would be reasonable for a qualifying child to leave the UK.

20. As there has not been a consideration of the best interests of the children or the reasonableness of them leaving the UK, the decision of the FTT is unsafe and contains a material error of law.

21. For those reasons the decision of the FTT is set aside. I have taken into account the submissions made by both representatives that it would be appropriate to remit these appeals back to the FTT to be heard afresh. I have considered paragraph 7 of the Senior President's Practice Statements and find that it is appropriate to remit the appeal back to the FTT because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade.

22. The appeal should be heard at the Manchester Hearing Centre and the parties will be advised of the time and date in due course. The appeals are to be heard by an FTT judge other than Judge M Davies.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeals are allowed to the extent that they are remitted to the First-tier Tribunal with no findings of fact preserved.

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

Deputy Upper Tribunal Judge M A Hall 11th December 2018

TO THE RESPONDENT
FEE AWARD

The issue of any fee award will need to be considered by the First-tier Tribunal.

Signed Date

Deputy Upper Tribunal Judge M A Hall 11th December 2018