IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002040
UI-2024-002042
First-tier Tribunal No:
PA/52698/2020
IA/00416/2021
PA/52700/2020
IA/00417/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

KYE – 1st appellant
KAE – 2nd appellant

(Anonymity orders made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss K Wass, Counsel
For the Respondent: Ms S Nwachuku, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 25 June 2024

The Appellants

1. The appellants who are twins are citizens of Sri Lanka both born on 23 May 2011. They appeal against a decision of Judge of the First-Tier Tribunal Khurram dated 21 November 2023 in which their appeal against

a decision of the respondent dated 23 November 2020 was dismissed. The respondent's decision under appeal refused the appellant's application for international protection made on 21 August 2018. The appellant's appeal had originally come before Judge of the first-tier Tribunal Thapar on 18 August 2021. That decision was set aside on appeal by the Upper Tribunal who remitted the appeal back to the First-tier to be heard a second time. Importantly certain findings made by Judge Thapar were preserved and were incorporated into the determination under appeal of Judge Khurram.

Anonymity.

2. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant has been granted anonymity, and is to be referred to in these proceedings by the initials KYE and KAE respectively. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant.

Failure to comply with this order could amount to a contempt of court.

The Appellant's Case

3. The appellant's case initially was that they feared persecution on return to Sri Lanka because their father had been abducted by militia and their mother had gone into hiding. These claims were rejected by Judge Thapar and that finding was preserved by the Upper Tribunal when the matter was remitted back to the First-tier. The appellants' case now is that it is in their best interests to remain in the United Kingdom where they are settled living with relatives here including a maternal aunt. It would be unjustifiably harsh if they were returned to Sri Lanka.

The Decision at First Instance

4. At [8] of the determination the judge set out the two issues which he had to decide. The first was an assessment of the children's best interests pursuant to section 55 of the Borders Citizenship and Immigration Act 2009. The second was if the appellant's did not meet the requirements of the immigration rules whether there were exceptional circumstances which would render refusal of leave to remain a breach of article 8 of the European Convention on Human Rights. The appellants argued that the breach would occur if such refusal would result in unjustifiably harsh consequences for the applicants, any other relative child or another family member whose article 8 rights would be affected by the decision to refuse.

5. The evidence before judge Khurram in the First-tier was substantially the same as the evidence before Judge Thapar save that there were updated witness statements. At [16] of the determination Judge Khurram set out paragraphs 20 to 34 of Judge Thapar's determination. Judge Thapar had not accepted the claim for international protection but she also went on to deal with the article 8 claim of the appellants. They were healthy with no reported medical or special educational needs. They had lived in Sri Lanka for most of their lives and could speak Tamil. They had lived with their grandparents and brother before their arrival in the United Kingdom.

6. Although it was said that the health of the appellants' maternal grandmother had deteriorated Judge Thapar noted that the appellants' maternal aunt disclosed that the grandmother was visited by a cousin and provided with assistance in obtaining a medical letter from Dr Elangkumarabahu dated 18 July 2021. The letter detailed treatment received by the maternal grandmother in 2013 and 2015. Although there was a reference to the maternal grandmother's health suffering such that she could not care for her grandchildren (the appellants), judge Thapar had noted that no specific information was provided regarding the exact nature of the grandmother's illness. Nor was there anything about the impact this might have upon her ability to care for the appellants' brother who remained in Sri Lanka living with the grandmother.

7. Judge Thapar attached little weight to the doctors letter. The maternal aunt told Judge Thapar that the grandmother was receiving treatment for depression but judge Thapar placed little weight on this evidence due to inconsistencies in the maternal aunt's evidence. The maternal aunt said it was difficult to obtain a medical report yet a letter from Dr Elangkumarabahu had been obtained. The appellants maintained contact with their brother and grandmother and would be returning to a known environment. There were no very significant obstacles to the appellant's integration in Sri Lanka.

8. Judge Khurram formed no better view of the maternal aunt than judge Thapar had done. Judge Khurram noted that the maternal aunt's evidence continued to be self-serving, inconsistent and vague. The maternal aunt was vague in her response to questions about the appellant's paternal family in Sri Lanka. There continued to be a lack of medical evidence in relation to the mental health condition of the grandmother. There had been a recent visit to Sri Lanka by the maternal aunt in September 2022 after the appeal hearing before Judge Thapar but before the Upper Tribunal hearing. Evidence could have been obtained then.

9. The judge also considered the impact of a return of the appellants on their cousin who was autistic with associated learning difficulties but otherwise generally healthy. There was nothing exceptional to this

relationship in terms of impact or dependency. The appellants were not at a critical stage of their education in this country nor had they lost their linguistic cultural and familial links to Sri Lanka which would be renewable upon return. After going through a balancing exercise at [21] to [22] of the determination the judge concluded that the decision to refuse leave in accordance with the immigration rules was a proportionate interference with family and private life here and would not cause unjustifiably harsh consequences. The judge dismissed the appeals.

The Onward Appeal

10. The appellants appealed this decision on five main grounds although ground 1 had a number of subheadings to it. The first part of ground 1 was that there had been a material misdirection in law. The judge had referred in his determination to little weight being given to the appellant's family life formed when they were in the United Kingdom unlawfully. The provision of section 117B of the Nationality, Immigration and Asylum Act 2002 referred to private life being given little weight where appellants were here unlawfully but that did not apply to family life. The judge had said that the appellants could stay in touch with their family in United Kingdom but that too was not the correct test. The test was whether family life with the aunt and uncle in the United Kingdom could continue once the appellants were removed. The Judge did not question whether there were features of the Appellants' private life that warranted the relevant provision in section 117B to be overridden.

11. Ground 2 argued that aside from the fact that the Appellants could not meet the Immigration Rules, no other reason was given by the judge for his finding that the public interest outweighed the appellants' best interests and the cumulative factors against their removal. Ground 3 argued that the Judge failed to provide any reasons why the family relationships in Sri Lanka were stronger than the family ties in the UK. Ground 4 argued that the judge was wrong to say that the grandmother could have visited a doctor during the maternal aunt's visit to Sri Lanka as the aunt was only there for 10 days spending only two days of that in Vavuniya (where the grandmother lived) itself. Ground 5 argued that it was irrational for the judge to require the Appellants' grandmother, an elderly and single woman to care for both the Appellants (two young girls separated once again from their parental figures) and their brother (who is not yet 18).

12. The grounds of onward appeal came before the First-tier Tribunal when permission to appeal was granted in part. Grounds 1 and 2 were found to be arguable given the judge's finding that it was in the appellants' best interests to remain in the United Kingdom. Permission for grounds 4 and 5 was refused as they merely sought to reargue the appellants' case and disclosed no arguable error of law.

13. The appellant's renewed their application for permission on grounds 4 and 5 and the application came before me on 5 June 2024. I refused permission stating:

> "There is no merit in either challenge. The appellants representatives and aunt in the United Kingdom had ample time to obtain relevant evidence, see [17(b)] of the determination. The appellants had been put on notice as to the inadequacy of the medical evidence as far back as the 2021 First-tier decision of Judge Thapar.
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> "As to the second issue (ground 5 in the appellants application), where it is said that the judge does not deal with the appellants emotional needs, [19] of the determination indicates that no such claim was advanced to the judge at the hearing, and see [28] of Judge Thapa's determination.
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> "Having said that, the grounds of onward appeal overlap significantly with each other since the core issue remains whether [Judge Khurram's] treatment in the 2023 determination of the best interests of the children is sufficient. The question of whether the First-tier judge made a material error of law on that issue remains to be decided."

The Hearing Before Me

14. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

15. Counsel for the appellants relied on the grounds of onward appeal which I have summarised above. If the appellants were returned to Sri Lanka they would be separated from parental figures. The First-tier judge had not assessed whether family life could continue following removal which was otherwise part of the proportionality assessment which had to be carried out. The judge had been too rigid in his application of the factors contained in section 117B of the 2002 Act. The judge's starting point was flawed even though at 21(c) the judge said he had tempered the provision of little weight considering the appellants were children and innocent victims of their carers' choices.

16. The judge did not explain why the public interest in this case was so strong as to justify removal. These were not appellants' whose immigration history could be held against them. It was incumbent on the First-tier to provide adequate reasoning why removal was appropriate in all the circumstances. The determination did not deal with that. The appellant's parents had been absent since 2018. The appellants had resided with grandparents before coming to the United Kingdom. For the last five years and 10 months they had been in the care of an aunt and

uncle in the United Kingdom. No reason was given why family relationships in Sri Lanka were said to be stronger than those in the United Kingdom.

17. In reply the presenting officer accepted that the judge was an error in saying that little weight should be given to family life but the First-tier judge had not weighed that against the appellants because the appellants were children see [21(c)] of the determination. The grounds were wrong to say that the judge had limited his analysis of family life to whether the appellants could stay in touch with the aunt and uncle. They could continue to go to Sri Lanka to maintain contact. Family members would still support the appellants. The judge had accepted that article 8 was engaged because the immigration rules were not met. The children's best interests were a primary concern but not the primary concern. The appellants were not at a critical stage of their education. It was not incumbent upon the judge to explain why the public interest was strong.

18. It was clear from the balancing exercise at [21] to [22] that the judge gave adequate reasons why the balance was in favour of the public interest. The children had been brought up by their parents and paternal grandmother and there was no error in that statement. Their brother remained in Sri Lanka. It was open to the judge to find strong ties. The appellants still speak Tamil. There was no error in the determination and the onward appeal should be dismissed.

19. In conclusion counsel noted the respondent's acceptance of the judge's error in relation to limited weight being given to the appellants' family life claim. The respondent argued that was not material because the judge had gone on to temper the weight to be placed but the appellant's case was that the judge's error could not be nullified by use of the word "temper". It was still problematic. On ground 3 and whether the appellants had stronger ties to Sri Lanka, there was insufficient reasoning for the proposition that there were strong ties to Sri Lanka for example by reference to the appellant's brother. He was not a potential caregiver. The brother was not 18 and therefore could not take proper responsibility for these appellants.

Discussion and Findings

20. This is a reasons based challenge to the judge's determination. The judge correctly relied on those parts of judge Thapar's earlier determination that had been preserved by the Upper Tribunal. The judge found, when considering the appellants' article 8 claim outside the immigration rules, that it was in the appellants' best interests to remain in the United Kingdom. Whilst that was a primary consideration of the tribunal it was not the primary consideration. There still had to be a proportionality exercise carried out using a balance sheet approach. The judge was in error in finding at paragraph 21(c) that the weight to be given to the

appellant's family life was limited because the appellants were here unlawfully. Was that error material?

21. The judge went on in the same subparagraph of the determination to significantly reduce the negative impact of the appellant's lack of status because he accepted that the appellants could not be held responsible for the fact that they had been living in the United Kingdom unlawfully. In those circumstances whilst the judge's understanding of the effect of unlawful presence on article 8 was incorrect, it was not a material error. This was because the judge, by tempering the effect of unlawful presence reduced its importance in the case. The effect of this was that the judge did not find that the appellants' family life claim was unimportant and he carefully examined what was in the appellants best interests. One can see from the detailed analysis of the article 8 family life claim that the judge recognised the importance of the article 8 claim.

22. The appellant's complaint is that the judge's reasoning is confusing. It would perhaps have been better if the judge had put matters more clearly than he did at [21(c]). Having said that, the overall questions to be asked are whether in assessing the appellant's article 8 claim outside the rules, has the judge considered all relevant factors and has he balanced the public interest against factors which are on the side of the appellants? In my view the judge has done that. The appellant's objections to the determination are largely disagreements with the findings of the judge rather than pointing to material errors of law. In a situation where the appellants were outside the immigration rules there was a public interest in the appellant's removal unless that public interest was outweighed by the factors which would tell for the appellant's. There was no basis for reducing the public interest, the issue was whether the factors on the appellants' behalf outweighed the public interest.

23. The judge employed a balance sheet approach at paragraphs 21 and 22. The judge's view was that the appellants had family members in Sri Lanka who would be able to look after them. The evidence about the inability of those family members to look after the appellants was not such as to enable the judge to find that there would not be proper care for them. The appellants argue that the judge by using the phrase that the appellants could "stay in touch" with their family in the United Kingdom did not apply the correct test in assessing whether there was a breach of article 8. However a fair reading of the determination shows that the judge considered more than merely staying in touch. At [22] the judge set out various ways that family life could be continued and the impact on that family life caused by the appellants' removal would be diminished.

24. The judge made clear that he had not found the grandmother to be unable to adequately care for the appellants. The appellants could

continue to be financially supported by those members of their family who remained in the United Kingdom. The United Kingdom based family members could continue to travel to Sri Lanka as they had done in the past and maintain face-to-face contact that way. The judge was also influenced by the existing family and cultural ties with Sri Lanka which the appellants already had. These would reduce any disruption that might be caused by moving from the United Kingdom back to Sri Lanka. Although the judge's wording has been criticised the important point is whether the judge understood what was necessary to maintain family life and this he has set out.

25. The grounds complain that the judge had an over rigid approach to the factors in 117B. This criticism is not made out because it is clear when reading the determination as a whole that the judge has considered factors for and against the appellants in his article 8 assessment and indeed has set out those matters in a balance sheet. This objection is a mere disagreement with the result. Overall I remind myself that the judge had the benefit of seeing the witnesses give evidence in particular the maternal aunt and was in a position to form a view as to the credibility or otherwise of the witnesses. The judge did not hold against the appellants actions for which the appellants as children could not possibly have been responsible such as their unlawful arrival in United Kingdom.

26. What the judge was balancing was the public interest in removal against the family life which the appellant's claim to have in the United Kingdom. Their argument is that by being removed to Sri Lanka they will have twice lost parental figures firstly when their parents went missing in Sri Lanka and secondly if they are removed from the United Kingdom. However the judge's view was that the grandmother would resume care of the appellants. She had been looking after them for several years after their parents went missing in 2018. It is not the case that the appellants will be sent back to be cared for by complete strangers. Rather they would resume the family ties which they had before their arrival in the United Kingdom. Ultimately the appellants had to show unjustifiably harsh consequences of removal and for the detailed reasons given by the judge they could not do this. In those circumstances I do not find that there was material error of law in the judge's determination and I dismiss the onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss both Appellants' appeals.

Appellants' appeals dismissed

Signed this 3rd day of July 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge