IAC-BFD- MD

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29362/2014
IA/29365/2014
IA/29366/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 9th September 2015

Decision & Reasons Promulgated
On 9th October 2015

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SANATH MADAGODAGE WANIGARATHNA – 1ST APPELLANT
MANEL ROSS JAYAMALE JAYAWARDANA KOTTE ARACHCHIGE – 2ND APPELLANT
THARUSHI GEETHMA MADAGODAGE WANIGARATHNA – 3RD APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clark, Home Office Presenting Officer
For the Respondent: Ms J Fisher, of Counsel instructed by VMD Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeals of Mr Wanigarathna, his dependant wife Mrs Arachchige and daughter Miss Wanigarathna.

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2. The First-tier Tribunal allowed their appeals against the Respondent's decision of 22nd July 2014, refusing their applications for leave to remain in the United Kingdom on the basis of their private/family life under Article 8 ECHR outside the Immigration Rules.

3. For the purposes of this decision I shall refer to the Secretary of State as "the Respondent" and to Mr Wanigarathna, his wife and daughter respectively as "the first, second and third Appellants".

4. The Appellants are citizens of Sri Lanka born respectively on 13th September 1969, 19th July 1970 and 22nd July 1997. The first Appellant entered the United Kingdom with valid entry clearance as a student on 31st March 2010. His wife and daughter entered as his dependants on 13th May 2010. Leave was subsequently extended for all three Appellants, to expire on 31st May 2014. When the third Appellant entered the UK she was aged 12 years and therefore was enrolled in secondary school here. She had previously been educated in Italy attending an English speaking school there.

5. Before expiry of their extant leave, the Appellants applied for further leave to remain on the basis that the third Appellant wished to complete her secondary education in the UK. It was claimed that her education would conclude with A Level exams in June 2016. It would appear therefore that she embarked on her A Level at a time when any leave was precarious.

6. The Respondent refused all three applications on the grounds that none of the Appellants could meet the requirements of the Immigration Rules. The Respondent also considered that there were no exceptional circumstances on which to grant the first Appellant leave outside the Rules. Likewise the second Appellant could not meet the requirements of paragraph EX1; nor could she meet the residence requirements of paragraph 276 ADE.

7. The third Appellant's application for leave to remain in the UK had always been on the basis that she was the dependent child of a parent with limited leave to remain. Since her parents had not been granted further leave to remain, she too failed to meet the requirements of the Immigration Rules. Further as she was under the age of 18 years at that time, and had not lived here for over seven years, the Respondent considered it was not unreasonable to expect that her best interests lay in leaving the United Kingdom together with her parents as part of the family unit.

8. The appeals against the Respondent's decision were heard in the FtT on 16th March 2015 by Judge S Taylor. The judge heard evidence of the history of the first Appellant and his wife; it is correct to say however that most of the evidence put forward revolved around the third Appellant's wish to complete her secondary education in the UK.

9. The judge recorded that it was accepted by the first and second Appellants that they could not succeed under the Immigration Rules. He found there

was nothing exceptional in their circumstances, such as to engage Article 8. He said at [18],

> "… I am satisfied that the first and second appellants have not established a private life in the UK which would engage Article 8 ECHR. The first and second appellants have failed to demonstrate that they have established a family and private life in the UK of the magnitude which would engage Article 8 ECHR under the Razgar tests. Any family life is within the family unit and they would be removed together…"

10. He went on then to say, however at [19],

> "The only arguable case for granting leave outside of the Rules relates to the third appellant, who at the age of seventeen has had her entire education in Europe and in English…"

He then allowed the appeals of all three Appellants under Article 8.

11. The Respondent sought permission to appeal those decisions on the grounds that the Judge's approach to Article 8 was flawed; he had failed to adequately recognise the requirements of Appendix FM to 276 ADE of the Immigration Rules, had failed to take into account the Court of Appeal guidance in *EV (Philippines)[2104] EWCA civ 874* and had misapplied the case law in *CDS Brazil 2010 UKUT 305*

12. The grant of permission neatly sets out the issues before me.

> "The appellants are citizens of Sri Lanka whose appeals were allowed by the First-tier Tribunal Judge Taylor in a decision promulgated on 30 March 2015. The judge noted that the only arguable case for granting leave outside the Rules related to the third appellant who at the age of 17 had had her entire education in Europe and in English. In all the circumstances the judge allowed the appeal in respect of the first and second appellants as well as the third appellant.
>
> The grant of application point (sic) out various issues which the judge may not have considered.
>
> The grant of application point (sic) material differences in the facts of *CDS Brazil* and the present case and also that the judge failed to acknowledge what was said in *Patel* by the Supreme Court. Furthermore, the judge did not take into account *EV* and while he did refer to Section 117B of the 2002 Act did not sufficiently emphasise the public interest.
>
> It is fair to say that the points raised in the grounds are not points which the judge took into account in carrying out the necessary balancing exercise under Article 8, and not to do so was an arguable error in law."

Appeal before the UT

13. The appeals came before me on 9th September 2015 when I heard submissions on the error of law/remaking the decision. Mr Clark's submissions kept to the lines of the grounds seeking permission. He submitted that there were two distinct errors in the decision.

- The FtT has misapplied *CDS Brazil,* because the appellant in that case had been admitted to the UK specifically for the purposes of education. Therefore different rules applied for consideration. He accepted that CDS resolved that anyone who had entered the UK and embarked upon a course of study, having paid for that course of study, may have built up a private life within Article 8. In the third appellant's case she had entered as a dependant of her parent. Whilst it was accepted that she had been properly enrolled in secondary education because her parents had leave to remain, what distinguished her case from CDS is the relevant fact that she is not paying for her education. She is being educated at public expense at a time when her parents leave was precarious. Her case therefore had to be looked at in the context of *Patel and Others.*

- The Judge had erred in his Article 8 approach, because he had not justified departing from the Immigration Rules. He should have looked at, and been guided by, *EV (Philippines)* and *Patel and Ors [2013]UKSC 72*

14. Ms Fisher in reply handed in a skeleton argument containing a Rule 24 response. She accepted that none of the Appellants could meet the Immigration Rules. The thrust of her argument was that the Judge had correctly stepped outside the Immigration Rules and found, in essence, that the disruption to the third Appellant's education, would render it unreasonable or unjustifiably harsh for her to have to return to Sri Lanka before completing her secondary education. She could not remain here without her parents as they are a family unit. The grounds put forward by the Respondent amounted to little more than a disagreement with the Judge's findings.

15. She submitted further that the claim that the Judge had misapplied *CDS Brazil* misconstrues the point being made. The third Appellant's parents are working and whilst it is accepted that the third Appellant did not enter the UK as a student, nevertheless because her parents are working they are not a burden on the State.

16. So far as the failure to take into account *EV Philippines* is concerned, she countered this by saying that the Secretary of State had made no reference Section 55 Borders Act to *JO and Others[2014] UKUT 00517* in her consideration. She submitted there was no failure on the part of the FtT to take into account the public interest consideration set out in 117B of the 2002 Act, because on the contrary, mention was made of it at [20].

<u>My Consideration and Findings</u>

17. I am satisfied that the FtT Judge plainly erred in law in his decision. What the Judge did, it seems to me, was to apply what he considered to be a pragmatic and practical solution to the third Appellant's situation, rather than following a structured legal approach to the evidence.

18. The Judge's starting point in his consideration is found at [18], where after carefully outlining the evidence before him he said,

> "I am satisfied that the first and second appellants have not established a private life in the UK which would engage Article 8 ECHR. The first and second appellants have failed to demonstrate that they have established a family and private life in the UK of the magnitude which would engage Article 8 ECHR, under the Razgar tests. Any family life is within the family unit and they would be removed together."

19. The Judge then said at [19],

> "The only arguable case for granting leave outside the Rules relates to the third appellant, who at the age of seventeen has had her entire education in Europe and in English."

Nowhere do I see any reference to the guidance contained in the line of cases dealing with these points, starting with *Patel and Others, EV (Philippines) and Others.* Whilst the Judge cannot be criticised for not refering to it (since it was yet to be published) those principles were set out and confirmed in the UT decision of *AM (Malawi) [2015] UKUT 260.* The guidance contained in those cases tell us that the question to be posed in cases such as these ones, is whether it was reasonable to expect a child to follow its parents to their country of origin? In this case it is correct to say that the third Appellant although a minor at the date of decision was actually on the brink of adulthood. (Indeed by the time of the hearing before me she had reached the age of 18 years). Of course this means that the best interests of the child will form part of the equation in answering the question posed but I am satisfied from a reading of the Judge's decision, he failed to apply the appropriate test. Instead of making a rounded assessment as to the reasonableness of the third Appellant following her parents to Sri Lanka, he has treated any disruption to her education as a paramount concern which trumps all others.

20. For those reasons I find that the decision of the FtT contains error requiring it to be set aside.

<u>Remaking the Decision</u>

21. Whilst Mr Clark submitted that the decision could simply be remade on the evidence already available, it was Ms Fisher's request that should I find an error of law, then I should remit matters to the First-tier Tribunal for a re-hearing. She said this was so further evidence could be called. When I asked her to detail the further evidence however, she was unable to indicate, with clarity what there was that was not before the First-tier Tribunal. There was no suggestion that the circumstances in these appeals had changed in substance, since they were only heard March 2015. Accordingly I decided there was no reason why I should not proceed to remake the decision myself on the available evidence.

22. I start by considering the evidence concerning the first and second Appellants. The FtT made a clear reasoned finding that for them to return to Sri Lanka would cause any hardship, such as those envisaged by Article 8. It noted that the first Appellant had entered as a student; he could not progress as he would wish but that he was now employed as a chef. The FtT found that being a chef is a transferrable skill and noted that nothing was put forward to show why he would not be able to find employment on return to his own country. I find no reason to disturb those findings.

23. The second Appellant works in a family business. The only other family connection in the UK is with the second Appellant's adult sister. Likewise the FtT noted that nothing was submitted to show that a return to Sri Lanka for her would cause hardship. I see no reason to disturb those findings. They were not challenged in any event.

24. This leave the sole issue of the third Appellant's wish to continue being educated in the UK. The question to be posed is whether it is reasonable to expect her to follow her parents to Sri Lanka, bearing in mind that neither of her parents, nor she, could have entertained an expectation that any leave in the UK would be other than temporary and therefore precarious.

25. The third Appellant at the date of the FtT hearing was 17 years of age; a native of Sri Lanka. It is undoubtedly correct to say that as a minor, her best interests must lie in being with both her parents. She has been in this country for a little over five years. She speaks the Sinhalese language. Her evidence that she was not fluent in that language appears not to have been accepted by the FtT because at [19] it is noted that she speaks reasonable conversational Sinhalese.

26. In *EV (Philippines)* Lord Justice Lewison said this,

> 1. "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?
>
> 1. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.
>
> 1. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can

> outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

27. Whilst I accept that the FtT Judge considered the third Appellant's best interests, so far as I can see, he has done so without proper consideration and reference to the public interest which must play a part in the question of reasonableness. Further he has considered the third Appellant in isolation as it were from her parents.

28. The Judge says this at [19],

> "…Although the third appellant speaks reasonable conversational Sinhalese, I accept her evidence that a return to Sri Lanka would severely disrupt her education, at which she has shown excellent attainment , and that the opportunities available to her may be lost as a result of not being able to complete her secondary education in the UK…"

Even if her best interest were to remain here, those interests, albeit a primary consideration, are not determinative and have to be considered in the light of the countervailing factors such as the fact that both hers and her parents leave to remain has always been temporary and that there could never be any expectation entertained that she or they would be able to remain in the UK once any extant leave had expired. It was open to the third Appellant to apply for leave to enter or remain in the UK as a student (paying for her education) should she wish to continue it here. There was no reason shown why her parents could not find employment in Sri Lanka and support her from there.

29. For those reasons, and in the light of the guidance in *EV (Philippines),* I do not consider that it would be unreasonable to expect the third Appellant to leave the United Kingdom and return with her parents to Sri Lanka. Having so concluded, there is nothing further to consider by way of a wider Article 8 assessment and in these circumstances I find no evidence of any compelling circumstances justifying a grant of leave outside the Immigration Rules. I therefore allow the appeal of the Secretary of State and dismiss the appeals of all three Appellants against the Secretary of State's decision of 22nd July 2014 refusing them leave to remain.

Decision

30. The making of the decision of the First-tier Tribunal involved an error on a point of law which requires it to be set aside. The Secretary of State's appeal is accordingly allowed and I remake the decision by dismissing the original appeals of all three Appellants.

No anonymity direction is made

Signature **Dated**
Judge of the Upper Tribunal

Fee Award

As I have allowed the Secretary of State's appeal, it follows that I set aside the fee award granted to the Appellant.

Signature **Dated**
Judge of the Upper Tribunal