Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/15893/2016
HU/17192/2016, HU/17194/2016

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 16th April 2018	**On 26th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

RBD
MR
RRB
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr H Kannangara of Counsel
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against a decision of Judge Juss of the First-tier Tribunal (the FTT) promulgated on 8th March 2017.

2. The Appellants are Sri Lankan nationals. The first Appellant born 18th September 1985 is the husband of the second Appellant, who was born on 10th July 1986, and the father of the third Appellant who was born in the UK on 13th October 2015.

3. The first Appellant entered the UK as a student on 18th December 2009. His leave to remain was subsequently extended until 19th April 2015. The first and second Appellants have not had leave to remain in the UK since 19th April 2015. The third Appellant has never had leave to remain in the UK.

4. On 23rd December 2015 the Appellants applied for leave to remain in the UK, relying upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration rules. The basis of the application was the medical condition of the third Appellant.

5. The applications were refused on 3rd June 2016 and the Appellants appealed to the FTT.

6. The FTT dismissed the appeal which caused the Appellants to apply for permission to appeal to the Upper Tribunal.

7. The grounds seeking permission are summarised below.

8. The main argument in the appeal before the FTT was that the best interests of the third Appellant, who was a child, would be served by allowing her to stay in the UK due to the multi-organisational support she is currently receiving. The third Appellant suffered brain damage at birth.

9. The FTT made reference to a medical report prepared by Dr Johnson, noting that it was stated of the third Appellant “she has progressed in so many areas of development” and “things are in a steady state”. The FTT noted that a follow up appointment was made in May 2018, and that medication was available in Sri Lanka.

10. It was contended that the FTT was wrong in its assessment of Dr Johnson’s report, and that Dr Johnson referred to the multi-organisational support that the Appellant was receiving in order to make progress, and it was clear that the support work was not yet at an end. The third Appellant has complex physical needs. There is a need for multi-organisational support. It was submitted that the FTT had failed to consider the reason that Dr Johnson was referring to the progress that the child was making.

11. It was submitted that the FTT was wrong in finding that a follow up appointment was not needed until May 2018, and the appointment was required in May 2017.

12. It was accepted that medication taken by the third Appellant in relation to seizures was available in Sri Lanka, but the main point was that the multi-organisational support available in the UK would not be available in Sri Lanka.

13. The case law referred to by the FTT related to Article 3 medical cases, not Article 8 cases. The appropriate test was proportionality. It was submitted that the FTT decision lacked adequate reasoning and the FTT failed to properly consider the evidence.

14. Permission to appeal was granted by Judge G A Black and I set out below, in part, the grant of permission;

> "2. The grounds assert that the FTJ erred in failing to properly assess where the best interests of the child lie having regard to expert evidence of Dr N Johnson which set out the medical and developmental progress made by the child who had suffered brain damage at birth and who benefited from a multidisciplinary approach.
>
> 3. The decision and reasons makes clear that the FTJ had in mind the need to consider section 55 Borders, Citizenship and Immigration Act 2009 [9]. However the FTJ's focus in the assessment was on the medical evidence rather than the wider interests of the child. It is argued that the appeal was put on the basis that the overall development of the child would suffer if she were to be returned to Sri Lanka. The FTJ took into account the medical report dated 23rd November 2016 however it is arguable that the FTJ failed to consider the wider best interests of the child in the context of her development following a multi-disciplinary approach. All grounds are arguable."

15. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the grounds seeking permission to appeal had no merit, and amounted to a disagreement with the adverse outcome of the appeal. It was submitted that the FTT considered all the evidence and had not erred in law.

16. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision should be set aside.

The Oral Submissions

17. Mr Kannangara relied upon the grounds contained within the application for permission to appeal. He submitted that the best interests of the child would be to remain in the UK where she currently has support from a number of organisations, and the same support would not be available in Sri Lanka. It was submitted that Dr Johnson was in fact not the only paediatrician involved in her care.

18. While it was accepted that medication taken by the third Appellant was available in Sri Lanka, the main point, not appreciated by the FTT, was that the level of support in the UK would be much greater than available in Sri Lanka.

19. On behalf of the Respondent Mrs Aboni relied upon the rule 24 response. She submitted that although the decision of the FTT was fairly brief, the FTT engaged with the evidence, and considered the care needs of the third Appellant. The FTT made findings open to it on the evidence, and concluded that the best interests of the third Appellant as a child, do not outweigh other considerations such as the public interest.

20. By way of response, Mr Kannangara submitted that the FTT had not considered all the evidence.

21. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

22. The challenge made on behalf of the Appellants, is that the FTT did not adequately consider the best interests of the third Appellant as a child. It is well-established that the best interests of a child are a primary consideration, but not a paramount consideration and not the only consideration. The best interests of a child can, depending on the circumstances, be outweighed by other considerations.

23. It was accepted by the Appellants that they could not satisfy the requirements of the Immigration rules. That of course does not mean that the appeal must be dismissed. The Supreme Court in paragraph 48 of Agyarko [2017] UKSC 11 confirmed the principle that if an Appellant could not succeed by relying upon Article 8 within the Immigration rules, but refusal would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave should be granted outside the rules on the basis that there are exceptional circumstances.

24. In this case I do not accept that the FTT did not consider all the evidence. The FTT set out in paragraph 9 the submissions made on behalf of the Appellants, and made reference to the evidence relied upon, in relation to the medical condition of the third Appellant. There is specific reference to the submission that a multiagency approach is important and would be absent in Sri Lanka. The FTT set out the submission that the issue "is not just availability of medical treatment per se but the overall development prospects of this child that is in issue. It is in that context that the section 55 duty should be evaluated."

25. The FTT referred to Dr Johnson's report as being dated 28th February 2017 which in my view is a mistake, as it is clear that the report referred to is in fact the report typed on 16th December 2016. The FTT was therefore wrong to refer to a follow up appointment being arranged in May 2018. As the report was typed on 16th December 2016, the follow up appointment was to be in May 2017. That however is not a material error of law.

26. The FTT was aware of the multi-agency approach, and did not err in considering Dr Johnson's report. The FTT recognised that Dr Johnson recorded that the third Appellant had progressed in so many areas of

development, and was aware that there were other medical professionals involved.

27. The FTT did not err in finding at paragraph 13 that "there is evidence of availability of treatment in Sri Lanka." The FTT made specific reference to the Respondent's refusal decision dated 3rd June 2016 which set out the availability of medical treatment, and was entitled to find that the Appellants had not submitted evidence to show that treatment would not be available.

28. The FTT found that the best interests of the third Appellant would be to remain with her parents, and my reading of the decision is that the FTT took the view that although medical treatment would be of a higher standard in the UK, it would not be disproportionate for the third Appellant to return to Sri Lanka where treatment was available, and therefore applied the correct test, which is considering whether the Respondent's decision was proportionate.

29. The FTT did not specifically refer to section 117B of the Nationality, Immigration and Asylum Act 2002, which contains considerations that must be taken into account when considering Article 8, but I am satisfied that the FTT had in mind the considerations contained therein. There is specific reference at paragraph 13 to the "economic wellbeing of the country". The first and second Appellants have had no leave to remain in the UK since April 2015. The public interest has to be considered, the third Appellant has had considerable treatment provided by the NHS, funded by the British tax payer.

30. I therefore conclude that the FTT applied the correct principles, and did not find that removal of the Appellants to Sri Lanka, the country of which they are citizens, would result in unjustifiably harsh consequences, given the availability of medical treatment for the third Appellant. Therefore the FTT found that the Respondent's decision was proportionate and I find no material error of law within the decision of the FTT.

Notice of Decision

The making of the decision of the FTT did not involve the making of an error of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

Anonymity

I make an anonymity direction because this appeal involved considering the best interests of a child. 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. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 16th April 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 16th April 2018

Deputy Upper Tribunal Judge M A Hall