IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03330/2020
HU/03337/2020 & HU/03333/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Remotely by Microsoft Teams	
On 22 November 2021	**On 25th January 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS COLOMBA THANTHRIGE CHIRANTHI PRASANDI DE SILVA
MS AMBROSU KANKANAMALAGE KAVITHMA LONETHMI DE SILVA
MS AMBROSU KAKANAMALAGE ONELI SENITHYA DE SILVA
(Anonymity Direction Not Made)

Respondents

Representation:
For the Appellant: Mr Ahmad, Senior Home Office Presenting Officer
For the Respondents: Ms Pinder, Counsel instructed by York Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against a decision of First-tier Tribunal Judge Atreya sent on 28 May 2021, allowing the respondents' appeals on Article 8 ECHR grounds against a decision dated 13 February 2020, refusing their human rights claims. First-tier Tribunal Judge Kelly granted permission on 1 July 2021.

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2. For ease of reference, I will refer to the appellant as the Secretary of State, the first respondent as either the first respondent or ‘the mother’, the second respondent as the second respondent or the ‘elder daughter’ and the third respondent as either the third respondent or ‘the younger daughter’ and all of the respondents together as ‘the family’.

3. The hearing was held remotely. Both parties requested an oral hearing and did not object to the hearing being held remotely. Both parties participated by Microsoft Teams. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. There were no connectivity issues and neither party complained of any unfairness.

Background

4. The respondents are a mother and her two daughters all citizens of Sri Lanka born on 24 June 1977, 2 May 2002 and 31 October 2004 respectively. The family entered the UK on 17 April 2015 as dependents of the first respondent’s husband who was a Tier 2 Migrant. Their visas expired on 30 December 2019. He left the UK in to take up employment in Belgium via an inter-company transfer scheme. The remaining family members stayed in the UK as by that time the two daughters were at a crucial stage of their education. The family applied to remain in the UK on human rights grounds on 21 December 2019. The father visited the family in the UK on 2 occasions, but further visits were hampered by the pandemic.

5. The application was refused on 16 July 2019 on the basis that the respondents did not meet the requirements of the immigration rules in respect of family or private life and that there would be no unjustifiably harsh consequences as a result of their removal which would render the decision a disproportionate breach of Article 8 ECHR. In particular, the Secretary of State noted the short period of time the respondents had been in the UK, the fact that their private life had been built up at a time when their immigration status was precarious and the fact that the father had come to the UK on a temporary visa. The view of the Secretary of State was that the family knew they might not be able to remain in the UK and in any event could have made alternative arrangements for the two daughters to be educated.

The decision of the First-tier Tribunal

6. At the hearing, the judge heard evidence from the mother and both daughters. She also had before her evidence of their current educational status and attempts to arrange for the younger daughter to be educated in Belgium and Sri Lanka and the difficulties involved in that. At the date of the hearing the elder daughter was studying architecture at university in the UK and the younger daughter was in her Year 11 GCSE year.

7. The judge took into account that the family had entered the UK lawfully and had a good immigration history. The judge accepted the evidence of the mother and the older daughter that it would not be possible for the younger daughter to be educated in Belgium because in a state school she would need to be educated in Flemish and the private schools were unaffordable. She also accepted that there was a different educational curriculum in Sri Lanka. The judge found that the younger daughter had formed a significant private life in the UK in terms of her residence and identity and that if she had to leave the UK her education would be severely disrupted and that this would have a serious negative impact on her. The judge found that there would be unjustifiably harsh consequences for the third respondent to return to Sri Lanka at this point in her education and that it would not be in her best interests. She found that mother's appeal should be allowed on Article 8 ECHR grounds because she is the carer of the younger daughter. The judge allowed the appeal of the elder daughter under the immigration rules on the basis that there would be very significant obstacles to her integration in Sri Lanka and she allowed the appeal of the mother on the same basis.

8. The judge then carried out a balancing proportionality exercise under Article 8 ECHR and allowed all three appeals on Article 8 ECHR grounds.

Appeal to the Upper Tribunal ('UT')

9. At the hearing Mr Ahmad for the Secretary of State relied on the grounds as drafted which were very brief.

    (1) *Inadequate reasons*

    The judge did not provide adequate reasons why the appeals were allowed. The judge does not address the "insurmountable obstacles" (sic) or the unjustifiably harsh consequences preventing the respondents returning to Sri Lanka or moving to Belgium. The children had not been in the UK for 7 years and they were aware of the possibility of the return to Sri Lanka or return to Belgium following the husband's change of employment circumstances.

    (2) *Misdirection in law*

    The judge failed to apply Patel & Ors v SSHD [2013] UKSC 7 in which it is said that the opportunity for a promising student to complete his course in this country, however desirable in general terms is not in itself a right protected under Article 8. It is asserted that the issue of education was the sole reason pursued in these appeals.

Permission to appeal

10. Permission was granted by First-tier Tribunal Judge Kelly which is worded as follows;

> "The grounds state that the Tribunal made an error of law by failing to have regard to (a) the provision of 117B of the Nationality, Immigration and Asylum Act 2002 that requires little weight to be attached to private life established at a time when a person's immigration status is precarious and (b) the fact of a person's desire to enter or remain in the UK for the purpose of study will not usually engage their rights under Article 8 ECHR".

11. The grant of permission does not refer to the other pleaded ground of appeal but does not limit the grant of permission.

Discussion

General comments

12. At the outset of this discussion, I make various observations. Firstly, the grant of permission appears to have somewhat enlarged the original grounds of appeal. It is not asserted in the grounds that the judge failed to take into account the 'little weight' provisions of 117B or misdirected herself in respect of 117B, nor is it asserted that the judge failed to give sufficient weight to the public interest. The judge appears to have granted permission on a ground which was never pleaded.

13. Secondly, the grounds do not take any issue with the factual findings of the judge. There is no allegation that the judge has made a material error of fact in relation to the evidence, nor is there any assertion that the decision meets the high threshold of irrationality.

14. Thirdly the grounds do not separate out specific errors in relation to any of the individual respondents but are drafted generically.

<u>Ground 2 - misdirection in law</u>

15. I turn first to ground 2 and the assertion that the judge has misdirected herself in law specifically in respect of the right to education and its interface with Article 8 ECHR.

16. It is asserted that the right to education is not a "protected right" under Article 8 ECHR and that the judge has misdirected herself in this respect. The respondent refers to <u>Patel v SSHD</u> [2013] UKSC 72 and specifically to [57] in which Lord Carnworth states:

> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in Pankina for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8,

which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8”.

17. I infer that this ground must relate to the younger daughter because the judge has given weight to the fact that she was in the final year of her GSCE courses and wanted to go on to undertake her A levels in the UK and the submission on her behalf was that were she to leave the UK there would be a significant detriment to her education which would set her back in her studies.

18. Additionally in his oral submissions Mr Ahmad argued that the judge had not given adequate reasons for finding why private life was engaged at all and why it was significant given the short length of time the family had been in the UK and the fact that they came on a temporary visa.

19. I note and take into account that the original decision by the Secretary of State does not assert that the family have not established private life in the UK, rather it asserts that any private life has been established at a time when the family’s status was precarious, and they could relocate elsewhere. Further it is apparent at [23] that the respondent did not make detailed submissions and relied on the reasons for refusal letter. No argument appears to have been made by the Secretary of State during the appeal about the right to education not being a protected right and unsurprisingly in these circumstances the judge did not deal with this as a separate heading in the decision.

20. At [28] the judge manifestly finds that the younger daughter has established private life in the UK. She states as follows:

> “Focusing on the third appellant, she is a child who has established significant private life in the United Kingdom through her long residence and that she has had her secondary school life in the United Kingdom. Her ties to the UK are significant and engage Article 8 ECHR because her identity and key years of her education has been in the UK (right to respect for family and private life)”.

21. Elsewhere at [38] the judge additionally states:

> “I find that she is British in identity as evidenced by the way she spoke to me about the stage of education she is at and her hopes to be a criminal barrister practising as a barrister in the UK. I find that the majority of her social development and personality has been developed in the UK whilst at secondary school between 11-16. Even if she can speak the language and lived in Sri Lanka before, she identifies with British identity and culture as evidenced by the way she expressed herself and her long-term view of living and working in the UK”.

22. Ms Pinder for the family conceded that the decision could have been better structured, however submits that from reading the decision in a holistic way it is apparent that the judge has given reasons in different places as to why she considers the younger daughter’s private life engages Article 8(1) and why it is so strong.

23. It is not in dispute that the younger daughter arrived in the UK in April 2015 at the age of ten and that by the date of the appeal hearing she was 16 and had lived in the UK for 6 years. It was also agreed that her entire secondary education was in the UK and that by the date of the appeal hearing, she was in Year 11 just about to undertake her GSCE's.

24. I am not in agreement with Mr Ahmad that the judge's finding that the younger daughter has private life in the UK is solely by virtue of her education in the UK. I am satisfied that the appellant's daughter's education in the UK formed only part of the reasons why the judge considered that the younger daughter's residence engaged Article 8(1) in respect of private life. The judge manifestly has considered that the younger daughter has spent a significant part of her formative years in the UK, developing her personality at that time and her social connections. She expressly refers to the younger daughter identifying with British identity and culture which is manifestly why the judge considers the private life to be so strong.

25. It is trite law that private life incorporates social ties, relationships, identity and physical and moral integrity. Although a right to respect for private life does not include a right to study per se, clearly study and education can form part of an individual's private life in terms of building up social ties, relationships and identity.

26. The authority of Patel quoted by the Secretary of State relates, I find, to a different scenario. This authority was considering the "near miss" principle in respect of the immigration rules. Two of the appellants were individuals who had entered the UK as adults on student visas with the specific intention of studying and were not able to meet the requirements of the immigration rules in order to obtain further leave to remain as students for procedural reasons. Lord Carnworth endorsed the decision of Stanley Burnton LJ in Miah v SSHD [2013] QB 35 that there is no "near miss" principle or "sliding scale" whereby the Article 8 ECHR proportionality assessment takes into account the extent by which an appellant has failed to meet the immigration rules because of the need to respect the predictability, consistency and fairness of the immigration rules. However, Lord Carnworth also emphasised that the starting point of any Article 8 ECHR consideration is the failure to meet the immigration rules in accordance with Huang v SSHD [2007] 2 AL 167 and that all factors can be taken into consideration.

27. I find that the scenario considered by the judge in Patel is a very different scenario to that considered by the judge in this appeal. Here the judge was considering the situation of a minor who had been brought to the UK by her parents and had grown up in the UK since the age of ten, forming her identity here which involved undertaking her secondary school education in the UK. It is manifest that the judge has decided that the younger daughter's private life includes not only her education but her identity and ties to the UK built up over a 6-year period of residence in her teen years.

28. I am not satisfied that the judge has misdirected herself in law by treating the right to education as a right protected by Article 8 ECHR. There is no reference by the judge to Article 2 to the First Protocol and the judge's consideration of Article 8 ECHR private life went much further than a mere consideration of the appellant's education in the UK as can be seen for the reasons she gave for finding that Article 8 ECHR is engaged.

29. The Secretary of State original grounds do not challenge the judge's finding that Article 8 ECHR is engaged in respect of the third respondent's private life, although the oral submissions take issue with the reasoning. In my view the judge has given adequate reasons which are set out above and I also note that the threshold of engagement with respect to Article 8 ECHR is low in accordance with AG v SSHD (Eritrea) [2007] EWCA Civ 801. The judge had regard to the sea of evidence before her and was properly open to conclude that Article 8 (1) was engaged for the reasons she has given.

30. I am not satisfied that this ground is made out.

Ground 1 - Inadequate reasons

31. As I have already stated this ground was not well drafted and does not particularise why the reasons given by the judge for finding that there would be unjustifiably harsh consequences to the third respondent are not adequately reasoned. In his oral submissions, Mr Ahmad for the Secretary of State amplified the grounds. He sought to argue that it is not apparent from the decision why the Secretary of state lost and that the judge did not engage with the counter arguments put forward by the respondent in the reasons for refusal letter.

32. His submissions in my view also attempted to introduce a new ground of "irrationality" but this was not pleaded in the original grounds and permission was not given on this basis. Nor did he seek permission in the appeal hearing to amend the grounds of appeal.

33. The Secretary of State did not challenge the factual findings made by the judge in respect of the younger daughter's lack of opportunity to complete her education either in Sri Lanka or in Belgium. It is not submitted that the judge misunderstood the evidence in this respect, nor that this finding was irrational or not open to her on the evidence before her.

34. The judge's factual findings from [24] onwards were based on the entirety of the evidence before her which the judge explicitly states at [5] and [6]. The judge gave reasons for accepting the family's evidence at [25] where it is stated:

> "I find both the first and second appellants (mother and oldest daughter) to be reliable and truthful because they gave evidence in a straightforward and honest way without evasion or exaggeration. Both the appellant (the mother) and the second appellant speak (the eldest daughter) spoke English

> fluently. I heard the second and third appellant speak English and they both spoke it fluently with a strong London accent".

35. The judge had before her evidence of the mother's attempts to find educational provision for her daughter to finish her GCSEs' in either Belgium or Sri Lanka. The judge accepted the mother's evidence that it would not be possible for the younger daughter to complete her education in Belgium without significant disruption because there were no state English language schools. The younger daughter would be obliged to learn Flemish from scratch setting back her education by years and private schools in Belgium were not affordable. The judge also accepted the mother's evidence that the curriculum was different in Sri Lanka and so the younger daughter would not be able to take her GSCE's and again would face a significant disruption to her education. She refers to the evidence regarding education in Flanders at [31] which she states is at pages 14 to 16 of the bundle of evidence.

36. The judge makes her findings at [30] where she states:

> "I accept the first appellant's mother's evidence that whether the family go to Belgium or Sri Lanka their education would be severely disputed because although there are English speaking medium schools in Sri Lanka and/or the schools in Belgium either require to learn in Flemish or do completely different curriculums for different qualifications. The issue here is not that the children will be deprived of an education but more that their education will be severely disrupted and/or set back for a number of years. There is evidence that she would have to do a different curriculum and a different type of exam which might set her back academically".

37. There was also evidence before the judge from the head of Year 10 at the younger daughter's school who identified that there would be a serious negative impact on the third respondent's life if she has to leave the UK.

38. I am satisfied that the judge gave adequate reasons for the finding that there would be severe disruption to the younger daughter's education should she leave the UK.

39. It is also not submitted by the Secretary of State that there is any legal error in the judge's finding that it is in the best interests of the third respondent to remain in UK to continue her formal education to the age of 18 and not start her education again in another country.

40. Thus far, I can find no error of law in the judge's reasoning. I also do not agree that the judge did not engage with the Secretary of State's arguments. The Secretary of State in the decision letter argued that it would be possible for the younger daughter to complete her education elsewhere and the judge has addressed this argument at [30] to [32] to explain why this is not the case. Her findings are cogent, sustainable and based in the evidence.

41. The judge then having recognised the fact that the younger daughter cannot meet the immigration rules turns to the Article 8 ECHR proportionality assessment. She directs herself correctly to Razgar v SSHD [2004] UKHL 27 and Agyarko v SSHD [2017] UKSC 11. The judge was manifestly aware of the need to strike a fair balance between the strength of the public interest and the impact on the individual's family or private life.

42. It is not submitted by the Secretary of State that she has misdirected herself improperly in respect of the Article 8 ECHR steps.

43. Earlier in the decision at [29] the judge has noted that the younger child has not met the 7-year residence test.

44. The judge gives weight to the public interest in maintaining immigration control at [34] and gives weight to the fact that the younger daughter cannot satisfy the immigration rules in the same paragraph describing this as a "significant" factor against her. She again refers to this at [35]. The judge then correctly directs herself to section 117B of the Nationality, Immigration and Asylum Act 2002 at [35]. She identifies as neutral factors the fact that the family speaks English and that there is no burden on the taxpayer.

45. The judge does not specifically refer to the 'little weight' provisions in the decision, however she was manifestly aware that the younger appellant's father came to the UK in a temporary category as she states this at [10] and at [36]. She has referred to the correct statutory provision at [35]. It is inconceivable that an experienced immigration judge would direct herself to a provision and then not apply it correctly. I remind myself of the principles set out by Lady Hale at [30] in AH (Sudan) v SSHD [2007] UKHL 49 in this respect. A considerable degree of deference must be given to a specialist Tribunal which will be assumed to have directed itself appropriately even if the decision is not perfectly expressed or a judge has not expressly set out every step.

46. Further, although 'little weight' should be given to a private life built up at a time when an immigration status is precarious, this is not the same as no weight as set out in Rhuppiah v SSHD [2018] UKSC 58 where it is said at [49] in respect of the "little weight" provisions.

> "it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question".

47. The judge makes the point that the younger daughter was brought to the UK as a child and has spent her formative years in the UK. The judge's finding that having spent 6 years here and identifying as a British child she has formed strong private life is not challenged.

48. The judge then carries out a balancing exercise weighing in positive factors against the public interest factors. She notes that the father paid

taxes and contributed to the economy and that it is in the best interests of the child to remain in the UK to complete her education.

49. In my view, the judge has adequately explained to the reader why she has made the findings she has and why she finds that the best interests of the child and positive factors outweigh the public interest in maintaining immigration control.

50. I am not satisfied that the Secretary of State has made out the grounds of appeal in respect of adequacy of reasons in relation to the third appellant. I am not satisfied that the decision in respect of the third appellant is inadequately reasoned nor that the judge has misdirected herself in law. The grounds amount to a complaint that the judge has not given sufficient weight to the public interest and a disagreement with the judge's ultimate conclusion.

51. The grounds argue that the judge has also given inadequate reasons for her findings that there would be very "insurmountable obstacles" to the mother and elder daughter returning to Sri Lanka. In the grounds this is a bare assertion without any specific pleadings. At the outset it was agreed that the relevant test was in fact that of "very significant obstacles".

52. In his oral submissions Mr Ahmad amplified this argument. He submitted that the judge did not take into account the arguments of the Secretary of State. There was a failure to acknowledge that the mother and elder daughter had previously lived in Sri Lanka and were familiar with the language and culture and a failure to acknowledge the short time they had resided in the UK.

53. The judge deals with the mother at [46]. I note firstly that at [42] the judge has already allowed the appeal of the mother outside of the immigration rules on the basis that it would be a disproportionate breach of Article 8 ECHR for her younger daughter to leave the UK and therefore the mother needs to remain in the UK with her as the person with parental responsibility and as her carer. I agree with Ms Pinder again that the structure of the decision could have been better, but a poor structure does not in itself amount to an error of law.

54. In any event at [46] the judge acknowledges that the mother is familiar with Sri Lankan language and culture and has lived in Sri Lanka for the majority of her life. The judge has manifestly taken this factor into consideration. The grounds do not argue that her conclusion is irrational. The judge's reasons for finding that there are very significant obstacles are that the education of her children would be seriously disrupted, her children would be uprooted particularly her youngest child which would have an adverse impact her as would the fact that her children are both depressed. The judge also considered the fact that the mother's husband was resident in Belgium, the appeal was decided mid pandemic and the mother was shielding due to her ill- health including high blood pressure, diabetes and cholesterol. Although the Secretary of State may not agree

with these reasons, I am satisfied that the judge did give adequate reasons.

55. Similarly, at [44] the judge gives reasons why there would be very significant obstacles to the second respondent integrating to Sri Lanka, which include her integration into the UK, her identification as British having also lived and been educated in the UK as a child, her degree studies in the UK in architecture and her cultural, emotional and intellectual attachment to the UK. The judge then goes on at [48] to carry out a further proportionality balancing exercise and finds that given the very specific factual circumstances in the appeals, the private lives of all three respondents outweigh the public interest.

56. I emphasise once more that the grounds and legal submissions did not challenge any of the judge's factual findings.

57. I also note and take into account again that the grounds specifically did not plead that the judge had misdirected herself in law in respect of the issue of 'very significant obstacles' and that permission was not granted on this basis. Nor did the grounds plead irrationality in respect of the judge's findings on 'very significant obstacles' and nor was permission granted on this basis. Irrationality is a very demanding legal concept with a high threshold.

58. In this respect I have had regard to the guidance of Lord Justice Jackson at [32] of Latayan v SSHD [2020] EWCA 191 where he states;

> "I would however comment on the additional submissions made by Mr Ó Ceallaigh as recorded at paragraph 28. Any counsel appearing for the first time on an appeal will seek to refresh the arguments so as to present them in the most persuasive way, and I do not criticise counsel for his efforts on behalf of this Appellant. Nor should a party be penalised for drafting grounds of appeal concisely. However, these arguments were not pleaded at all on this appeal and in my view they cannot be raised now. An appeal court can entertain a new argument of law where that is in the interests of justice (though it will be slow to do so) - Miscovic v Secretary of State for Work and Pensions [2011] EWCA Civ 16 per Elias LJ at [69], Sedley LJ at [109-112] and Moore-Bick LJ at [134] - but these arguments relate entirely to an assessment of the facts and they cannot fairly be raised on the hoof. They are not Robinson-obvious points that the tribunals or court could be expected to appreciate for themselves in a case where the Appellant was represented by counsel. As my lord, Lord Justice Singh, said in Talpada v The Secretary of State for the Home Department [2018] EWCA Civ 841 at [69]:
>
> > "Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise, there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

59. If the Secretary of State believed that the judge had misdirected herself in law to the issue of 'very significant obstacles' or that the judge's finding

that there were "very significant obstacles" was irrational, this should have been pleaded in the original grounds.

60. The decision is perhaps generous but was firmly rooted in the evidence.

61. In this respect I take into account the words of Reed LJ in Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [62];

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

62. I also remind myself of the comments of Carnworth LJ in Mukarkar approved by the Supreme Court in MM (Lebanon) 2017 SC10 that;

> "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new... However on the facts of a particular case the decision of a specialist tribunal should be respected".

63. It may have been that another judge (perhaps even myself) would have taken a less generous view in respect of the proportionality of the decision to remove the respondents, but the alleged generosity of this decision does not render the decision unlawful.

64. I am satisfied that there was no error in the judge's decision.

Conclusion

65. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

Decision

66. The decision of the First-tier Tribunal allowing the appeal is upheld.

Signed	Date

UTJ Owens
Upper Tribunal Judge Owens **12 January 2022**