IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/31859/2014
IA/31876/2014
IA/31883/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 April 2015	**On 14 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR INDIKA SAMPATH HETTIARACHCHIGE (1)
MRS PRIYANKA AMARASINGHE (2)
MASTER THINODH SANJULA HETTIARACHCHIGE (3)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr D Lemer, a solicitor
For the Respondent: Ms A Brocklesby-Weller, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING NO ERROR OF LAW

Introduction

1. The appellants are all Sri Lankan citizens. The first appellant (Indika) was born on 9 December 1975. His wife (Priyanka) was born on 4 September

1975 and their son (Thinodh) was born on 9 July 2004. The appellants have a further child called Temeena, who was born in the UK on 30th July 2009.

2. The appellants appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Pirotta – "the Immigration Judge") to uphold the respondent's decision to remove Indika. Priyanka and Thinodh are dependants on the application by Indika for a Tier 4 student visa but have separately appealed.

3. On 28 January 2015 Judge of the First-tier Tribunal Ransley gave them permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (FTT). That decision was made by the Immigration Judge on 13 November 2014 following a hearing at Birmingham on 7 November 2014.

Background

4. Indika first entered the UK on 10 July 2004 as a student. His entry clearance was due to expire on 30 October 2007 but he subsequently obtained further leave to remain as a student valid until 31 December 2008. On 19 December 2008 he submitted a further application to remain as a Tier 1 (Partly Skilled Work) Migrant but his application was varied so that on 19 January 2009 he sought permission to remain as a student. In any event, Indika's application to remain as a Tier 1 (Partly Skilled Work) Migrant was unsuccessful on 5 February 2009. However, the respondent subsequently accepted that the application should have been treated as a variation of the Tier 1 application and made it clear that any representations made in relation to that (amended) student application would be taken into account.

5. On 16 December 2011 the appellant's application for leave to remain as a student was refused. He appealed that decision which resulted in an oral hearing on 8 February 2012 at Hatton Cross. His appeal was allowed and the appellant's application was remitted back to the respondent for further consideration.

6. By a letter dated 25 July 2014 the respondent considered or reconsidered the student application submitted originally on 19 January 2009.

7. The respondent considered the student application and also an application on the basis that the appellants' removal from the UK would constitute a breach of their rights under the European Convention on Human Rights (ECHR).

8. The respondent gave her reasons for refusal as follows:

   (1) The respondent did not accept that the Cambridge College of Learning had issued the appellant with a genuine postgraduate diploma in business management and believed the appellant had used deception when he was seeking leave to remain in the UK on that basis.

(2) The respondent was justified in refusing the application under paragraph 322(2) of the Immigration Rules for this and the other reasons given.

(3) The application was submitted prior to the introduction of the points-based system but it was appropriate for the respondent to consider that system when judging the strength of the appellant's application.

(4) The respondent was not satisfied that the stated sponsor (the London College of Management Studies Limited) qualified as an institution capable of providing sponsorship since it had its licence revoked on 4 September 2012.

(5) As a consequence of the above the respondent was not satisfied that Indika had been accepted for a course of study provided by a bona fide private education institution and his application fell for refusal under paragraph 60(ii) of the Immigration Rules by reference to paragraph 57(1) (b).

(6) The respondent was not satisfied that Indika and Priyanka genuinely intended to leave the UK at the end of their studies but were intending to remain in the United Kingdom.

9. The respondent also considered the application on the basis that the appellant had formed a family life in the UK but considered the requirements of the Immigration Rules in R-LTRP.1.1(c) (d) of Appendix FM were not met and that the appellants did not qualify. Neither of the adult appellants' children, the youngest of whom was just over 5 at the time of the refusal, had lived in the UK for a sufficiently long time to qualify under that appendix. Furthermore, family life of the children could continue in Sri Lanka where there was a functioning education system. Furthermore, it had not been demonstrated that the removal of the children at the time would be anything more than an inconvenience. In any event, it was necessary and proportionate in the interests of maintaining proper respect of immigration control to remove the appellants.

The Appeal Proceedings

10. The appellants appealed that refusal to the First-tier Tribunal (FTT). The grounds of appeal state the respondent should only have considered the student application plus any representations about human rights. The children of the appellant were "innocent" and given their lengthy stay in the UK and schooling in the UK education system should not be required to return to Sri Lanka. The issues of deception were not agreed.

11. The appeal came before the Immigration Judge who dismissed the appeal on all grounds after hearing evidence and submissions by both representatives. In short, she was not satisfied that the appellants could succeed on the application under the rules given the application was based on a bogus qualification. Furthermore, the Immigration Judge was not satisfied that the appellants' Article 8 rights would be unlawfully interfered with if they were returned to Sri Lanka.

12. On 28 January 2015 First-tier Tribunal Judge Ransley gave permission to appeal because she thought the Immigration Judge had relied on her own research into the quality of education facilities in Sri Lanka. Indika was the lynchpin of family life and although the family could not succeed in showing ten years' lawful residence it was arguable that the judge applied too high a standard to the question of whether there was an unlawful interference with private or family life. Judge Ransley gave permission to appeal on all three grounds but considered that the second ground, which sought to attack the conclusion that it was not lawful of the Immigration Judge to place reliance on Indika's deception when looking at the other appellants' appeals, was thought by him to have "little merit". Before me all grounds were argued.

The Upper Tribunal Hearing

13. At the hearing I heard submissions by both representatives. It was submitted on behalf of the appellants that the Immigration Judge should not have relied on her own expertise with regard to material relating to the availability of education facilities in Sri Lanka which had not been placed before the parties. Secondly, it was submitted that Priyanka and Thinodh were not dependent on the first appellant. Their applications were in their own names so the grounds for refusing Indika's application were not present in their case. Paragraph 276B(iii) set out the factors that the respondent was entitled to take into consideration when having regard to the public interest in deciding whether it was undesirable for Indika to be given indefinite leave to remain. It was submitted these factors did not apply to the other appellants. They were not complicit, or were not shown to be complicit, in any deception. I was referred to paragraph 9 of the grounds of appeal to the Upper Tribunal where the appellant sets out the principle: that it is wrong to penalise a person for deception perpetrated by another (referring to the case of **AN (Afghanistan) v SSHD [2013] EWCA Civ 1189**). However, the fact the person in question had no entitlement to leave to remain under the Rules was itself a factor entitling the judge below to treat it as weighing heavily in the balance. It was pointed out on behalf of the appellants that the alleged deception here was as long ago as 2008/2009. Next I was referred to the public interest considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 (2002 Act) and in particular to sub-section (6) thereof , which was inserted by the Immigration Act 2014. Although the maintenance of effective immigration controls is to be regarded as being in the public interest in all cases a person who is not liable to deportation may not be removed where he has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. The qualifying child for the purposes of the sub-Section must be under 18 and must be a British citizen or have lived in the UK for a continuous period of seven years or more (see Section 117D(1)).

14. Mr Lemer's third point was that a low threshold applied to the establishment of private life and once a breach of Article 8 was established

the Immigration Judge had to go on and consider it. Delay can be relevant particularly where the Secretary of State's delay has resulted in the appellant establishing a stronger private life in the UK than would otherwise be the case. It would reduce the weight that could attach to the need to enforce effective immigration controls.

15. I was also referred to the case of **Moayed [2013] UKUT 00197** (referred to in paragraph 15 of the appellant's skeleton argument submitted at the hearing). Where children were affected by appeal decisions the starting point was that it was in their best interests to be with both parents and if both parents are being removed from the UK then the starting point suggests that so should dependent children. It is generally in the interests of children to have both stability and continuity and to grow up with the benefit of the cultural norms of the society in which they belong. Lengthy residence in a country other than the state of origin can lead to development of social and cultural ties which it is inappropriate to disrupt in the absence of a compelling reason to the contrary. Apart from the published policies and Rules the Tribunal noted that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children tend to focus on their parents rather than their peers and are adaptable. Short periods of residence without leave or the reasonable expectation of leave are unlikely to give rise to private life deserving respect in the absence of exceptional factors. In any event it was submitted on behalf of the appellant that because the appellants had extant leave, albeit possibly obtained on a dubious basis, it could not be said that Section 117B (4 – 5) (i.e. public interest considerations) were applicable to their circumstances.

16. Accordingly, it was submitted on behalf of the appellant that the FTT had made material errors of law such that it was necessary to allow the appellants' appeals.

17. The respondent on the other hand submitted that, whilst it was accepted the Immigration Judge should not have carried out her own research into the education system in Sri Lanka she was not, essentially, venturing into a contentious area. It was, apparently, accepted that schooling would be available in Sri Lanka. No evidence was placed before the Tribunal that it was not.

18. Secondly, the allegation that there had been ten years of lawful residence was not accepted. Generally Indika's application fell for refusal under paragraph 322(2). It was submitted that the lack of lawful residence in the UK on the part of Indika could not be ignored. Generally there were grounds for refusal under paragraph 276B (iii) as paragraph 322(2) of the Immigration Rules had been satisfied. It was accepted that in principle it was correct to assert, as the appellants had done, that it was incorrect to visit the sins of the parents upon their children. However, as a matter of fact false registration details had been used and I was invited to consider the applications jointly.

19. Finally, Ms Brocklesby-Weller referred me to paragraph 117B (6) of the Immigration Rules. It was submitted that this had to be read with sub-Section (1) thereof. Delay can cause an alteration of the balance to be applied when considering an immigration decision but there was no reason why if this family returned to Sri Lanka they could not establish new relationships. It seems that a psychological report was supplied to the FTT but that it was largely based on information provided by the parents (see paragraph 32 of the decision). It was submitted in all the circumstances that the case of **EB (Kosovo) [2008] UKHL 41** was not applicable to the facts of this case. I was also referred to the fact that the appellants' own bundle (at page 50) which had been before the Immigration Judge, contained evidence as to the availability of English language teaching in Sri Lanka.

20. It was inevitable given the deception that Indika had perpetrated that it would affect all dependants whether or not they were responsible.

21. Finally, the appellant submitted that there had been very significant delay in this case which led the Immigration Judge to a material error of approach. A new assessment would need to be carried out by a different judge if I found the error of law to be material.

22. At the end of the hearing I reserved my decision.

Discussion

23. Ground 2 of the grounds of appeal was not thought by Judge Ransley to contain any merit. Having considered this aspect of the Immigration Judge's decision carefully, I agree with that assessment. In particular, paragraph 23 of the decision was properly reasoned. The use of deception by Indika was a matter that the Immigration Judge was entitled to consider when she carried out her article 8 assessment, albeit that Thiondh ought not to be punished for his father's immigration history and the Tribunal was required to consider the welfare of Thiondh as a paramount consideration by virtue of section 55 of the Borders Citizenship and Immigration Act 2009 (section 55).

24. Grounds 1 and 3 of the grounds of appeal are more problematic. The respondent accepts that the Immigration Judge erred in considering objective country information which she did not share with the parties or give the appellants' representatives any opportunity to deal with. However, this error needs to be seen in context. The respondent gave full reasons for her refusal of further leave to remain in a letter dated 29 July 2014. She dealt with the contention that Thinodh could not speak English at page 3 of that letter. She explained that it was a requirement of the Immigration Rules that a student should leave the UK at the end of their studies. The fact that Indika and Priyanka had chosen not to prepare their son for life in Sri Lanka was their decision. However, there is an issue as to whether the respondent's decision adequately safeguards the need to promote the welfare of the children which I will come to later. As the

respondent pointed out in her Rule 24 response similar objective evidence was relied on in support of the refusal. In any event, this point is not thought to have been crucial given the fact that the family would be returning as one unit, the children's safety and welfare would be secured in Sri Lanka by the larger family unit and the respondent was entitled to conclude the degree of disruption to private or family life was not disproportionate given the legitimate aims of maintaining effective immigration control. The respondent also pointed out in her refusal that the children were not at that time at a critical point in their schooling and could make the transition to the Sri Lankan education system. I should add that I would question the extent to which the adult appellants do not speak Sinhalese at home, however desirable they consider it for their son to be educated solely in English. I am not persuaded that this point is of sufficient weight to be said to be material to the outcome of the appeal given that the adult appellants have precarious immigration status in the UK and must have assumed the need to return to their own country at the end of the visa Indika was granted on 13 October 2008. That application was based, it seems, on material obtained by deception. Having considered these points, I am not persuaded that they give rise to any material error of law.

25. I turn to the third ground of appeal. It was argued that the Immigration Judge had applied too high a threshold to the establishment of a private or family life in the UK and that the delay by the respondent in considering the appellants' application for further leave to remain was such that it prevented proper consideration of their cases. It is alleged that a low threshold applied to the establishment of Article 8 interference and that that low threshold had been crossed. I was referred to paragraph 41 of the decision, which suggested that the threshold had not been crossed because there was no cogent evidence that the respondent's decision interfered with their human rights. In the circumstances it is alleged the Immigration Judge erred in failing to consider the appellants' long period of residence in the UK and close connections with this country. It is also suggested that by reference to Section 117B(6) of the 2002 Act it would not be reasonable to remove a child (Thinodh) even if the maintenance of effective immigration controls was in the public interest having regard to the respondent's obligations under section 55.

26. I have carefully considered these arguments but again I do not accept that there was a material failure on the part of the Immigration Judge to approach this matter in the correct manner. At paragraph 41 she embarked on an analysis of Article 8 in the context of the Immigration Rules. I note that the Immigration Rules received careful consideration by the respondent in her refusal. Private life fell to be considered under paragraph 276ADE and for reasons given by the respondent the appellants did not qualify under that paragraph. Exceptional and compelling circumstances had to be shown before the matter could be considered outside the Immigration Rules. The fact that Indika had extended his stay in the UK by deception, the fact that the whole family would be returning as one unit and the fact that the welfare and interests of the child

appellant or his sister were not demonstrably damaged by that removal, justified the conclusion that the return of these appellants to Sri Lanka, the country in which they had all been born, was not disproportionate. Although the best interests of the child were a paramount consideration they were not the only consideration. Thus, even if the Immigration Judge applied too low a threshold to the establishment of private life I am satisfied that the overall conclusions were justified by the evidence. The need to enforce effective immigration control, although only one factor, was an important one on the facts of this case. Even if Section 117B (6) was fully considered it was reasonable in the circumstances to expect Thinodh to return to Sri Lanka with his parents.

27. As far as the delay in dealing with the applications is concerned this seems to have been exaggerated. The appellants have made a large number of applications over the year, including an application for judicial review in 2012. It is not the function of the Tribunal when commenting on delay to punish the respondent but to consider fairly whether removal is justified in a case where there has been excessive delay. In such a case it is not appropriate to attach excessive weight to the need for immigration control. However, as I have said, I am not satisfied that this was a case of excessive delay on the part of the respondent and the Immigration Judge was entitled to dismiss the points as she effectively appears to have in her decision.

Conclusion

28. Having carefully analysed the decision of the First-tier Tribunal I do not find any errors that were material such as would require the Upper Tribunal to interfere.

My Decision

28. The decision of the First-tier Tribunal does not contain any material error of law. Accordingly, the decision to refuse the appellants' appeals under the Immigration Rules and on human rights grounds was justified and stands.

29. There has been no challenge to the decision to make no orders for anonymity and no costs orders flowing from those decisions.

30. Accordingly, this appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Hanbury