Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/07481/2018**

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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2018	**On 01 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

MR T B W M
MRS L N S P
MISS N Y W
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Sowerby, Counsel instructed by Nandy & Co
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity direction under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in order to protect the anonymity of the Appellants. This direction prohibits the disclosure directly or indirectly (including by the parties) of the identity of the Appellants. Any disclosure and breach of this direction may amount to a contempt of court. This

direction shall remain in force unless revoked or varied by a Tribunal or Court.

2. This is an appeal against the decision of Judge Perry in which he dismissed the appeal of the Appellants against the decision of the Secretary of State to refuse their application for leave to remain in the United Kingdom on human rights grounds.

3. The application under appeal was refused on 14 March 2018. The Appellants exercised their right of appeal to the First-tier Tribunal. The appeal came before Judge Perry on 20 August 2018 and was dismissed. The Appellants applied for permission to appeal to the Upper Tribunal. Their application was granted by Designated First-tier Tribunal Judge MacDonald on 25 October 2018 in the following terms

> The Judge referred to numerous case law including **MA** which stated that seven years residence established a starting point that leave should be granted unless there were "powerful" and/or "strong" reasons to the contrary.
>
> The grounds of application note that the Judge accepted that the child was a qualifying child and there were no such powerful reasons as set out in **MA**.
>
> While the Judge gave clear reasons for his decision it is arguable, for reasons given in the grounds, that there were no powerful reasons why the child who has been in the United Kingdom for over ten years should be removed.

Background

4. The history of this appeal is detailed above. The Appellants are citizens of Sri Lanka born respectively on 4 November 1975, 28 August 1978 and 31 July 2009. The First Appellant arrived in the United Kingdom on 22 September 2005, the Second Appellant arrived on 5 February 2006 and the Third Appellant was born in the United Kingdom. The First and Second Appellants were married in Sri Lanka on 12 September 2005 (10 days before the First appellant's arrival in the UK) and the Third Appellant is their daughter and she has been continuously present in the United Kingdom since her birth. The First and Second Appellants both came to the United Kingdom as visitors and their leave to remain expired 6 months after their respective arrivals. The Third Appellant has never had leave to remain. On 17 August 2016 the Appellants submitted an application for leave to remain on human rights grounds. This application was refused on 14 March 2018 and is the subject of this appeal.

5. The basis of the Secretary of State's refusal was, essentially, three-fold. Firstly, the Secretary of State was satisfied that the Appellants did not meet eligibility and suitability requirements of the Immigration Rules. Secondly the Secretary of State considered that the requirements of paragraph 276ADE of the Immigration Rules were not met since there were no significant obstacles to the Appellants reintegrating into Sri Lanka. Thirdly the Secretary of State considered that there were no

exceptional circumstances justifying a departure from the requirements of the Immigration Rules which would render the refusal of the application a breach of Article 8 of the Human Rights Convention.

6. The appeal came before Judge Perry and was dismissed. It was accepted that the Appellants did not meet the requirements of the Immigration Rules and in any event there was no right of appeal under the Immigration Rules. The Judge found that the presence in the United Kingdom of the adult Appellants had been unlawful since their leave to remain as visitors expired more than 10 years previously. He did not accept the adult Appellants' account of being rejected by their families or that they were without ties to or a support network in their home country. He found that the best interests of the Third Appellant, a 'qualifying child' under section 117D Nationality Immigration and Asylum Act 2002, were to be with her parents and that it would not be reasonable to expect her to leave the United Kingdom with her parents when they return to Sri Lanka.

Submissions

7. At the hearing before me Mr Sowerby appeared for the Appellants. Mr Sowerby agreed that the issue centred upon the Third Appellant. She will be 10 years old next year and has never visited Sri Lanka. The Judge accepted that her return would be a culture shock and that any move would be disruptive and destabilising. However in referring to MA (Pakistan) [2016] EWCA Civ 705 at paragraph 47 of his decision the Judge acknowledges that leave should be granted unless there are powerful and/or strong reasons to the contrary. The Judge fails to identify any such powerful or strong reasons and this is an error of law. Mr Sowerby referred to KO (Nigeria) [2018] UKSC 60 at paragraph 17 which in turn refers to the Home Office IDI guidance. He added that the Third Appellant is currently studying for her 11 plus examination and would be eligible to apply for British nationality when she reached 10 years of age next year.

8. For the Respondent Ms Holmes said that this is a very thorough decision. The Judge goes through the relevant case law including MA (Pakistan), he considers the Home Office guidance and he is fully aware of the situation. At paragraph 42 he refers to the Third Appellant asking "when are we going home". There is no apparent error of law disclosed.

9. I gave an extempore decision dismissing the Appellants' appeal and give my written reasons below.

Decision

10. This case revolves around the position of a 9-year-old child and for that reason it is important to be very careful in the consideration of the circumstances. The child was born in the United Kingdom and has never

left the country; indeed, she would not have been able to do so as neither she nor her parents have had leave to remain and therefore if they had left they would not have been able to return. It is common ground that the child is a 'qualifying child' under section 117D Nationality Immigration and Asylum Act 2002, that neither she nor her parents have any lawful right to remain under the Immigration Rules and that the only issue is whether it is reasonable to expect the child to leave the United Kingdom by reference to section 117B(6).

11. In this respect there, in my judgement, is no doubt that the First-tier Tribunal Judge conducts an exhaustive assessment of the circumstances of the parents and the child and there was no suggestion either in the grounds of appeal or in oral submissions to the contrary.

12. The error of law which it is suggested occurred is that the Judge failed to identify powerful and/or strong reasons why the 9-year-old child having passed the seven-year threshold should leave the country as the Judge was required to do by MA (Pakistan). The grounds add that the Judge has failed to place sufficient weight upon the positive factors pertaining and has not made clear findings in respect of the prospects of integration.

13. This was a very carefully worded decision by Judge Perry. It is very detailed. I agree with Ms Holmes that the Judge refers and self directs to all the relevant case law including MA (Pakistan).

14. The starting point must be that the first two Appellants, the parents, have no right to be in the United Kingdom. They have had no right to be in the United Kingdom for almost the all the time that they have been here. Their immigration history shows that having arrived separately as visitors almost immediately after their marriage they have used subterfuge and other methods to prolong their stay in the United Kingdom. Their child was born in the United Kingdom during their unlawful stay. The conduct of the parents is not a matter that should be taken against the child and there is in my judgement no indication that Judge Perry fell into error in this regard. Nevertheless, it is beyond doubt that the best interests of the child are to remain with the parents. Nobody has suggested to the contrary. In the normal course of events the parents would not be here, they should not be here. Indeed the proposition is that the parents should be allowed to remain solely because it would be unreasonable to expect the child to leave.

15. The Judge went through the family circumstances painstakingly. He found that the parents were not telling the truth about lack of contact with Sri Lanka, that there was a family support network in Sri Lanka and that such support network did not exist in the United Kingdom. He found, contrary to the father's assertion, that the child spoke Sinhalese. Maybe she did not speak it as well as a person born and brought up in Sri Lanka, but the Judge found that was the language spoken by the family at home. The Judge found that there were cultural links to Sri Lanka. The Judge was aware of the position of the child so far as her education was concerned

and it has been pointed out by Mr Sowerby that she is being coached for the 11-plus exam which she is due to take in a little less than a year's time and she will then be changing schools. I assume, with her being aged 9 now, she would be moving from junior school to secondary school in Autumn 2020. Mr Sowerby also points to the fact that the child will be eligible to apply for British citizenship in July 2019 upon attaining the age of 10 years.

16. The best interests of the child are to remain with her parents. As Lord Carnwath points out in **KO (Nigeria)** at paragraph 19 (in reference to MA (Pakistan) whether it is reasonable to expect the child to follow the parent with no right to remain must be considered in the real world in which the child finds itself. In the real world these are parents who have no right to remain in the United Kingdom and who should be returning to Sri Lanka.

17. There are strong and powerful reasons why the child in this case should return with her parents. These reasons are clearly identified by Judge Perry in his decision. The family have strong cultural ties to Sri Lanka, they all speak the language, they have a family support network in that country. Judge Perry could have added, and for the sake of completeness I now add, that in terms of the Appellant's education this is the best time for there to be a change of school when there will be the minimum of disruption because the child is due to change school in any event. I would also add that the fact that the child will qualify to apply for British nationality in a few months' time is an irrelevant factor so far as the reasonableness of her return is concerned.

18. I find no error of law in the decision of the First-tier Tribunal Judge. This appeal is dismissed.

Summary of decision

19. Appeal dismissed. The decision of the First-tier Tribunal stands.

Signed Date: 16 January 2019

J F W Phillips
Deputy Judge of the Upper Tribunal