**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers: UI-2022-000627**

**UI-2022-000628**
**First-tier Tribunal Numbers: PA/52698/2020**
**PA/52700/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 31 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**
**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**K.E.**
**K.E.**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Miss K Wass, Counsel instructed by David Benson Solicitors Ltd
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**Heard at Field House on 27 July 2023**

**DECISION AND REASONS**

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

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Anonymity was granted by the First-tier Tribunal because the appellants are minors. We have not been asked to rescind that order and we consider that it is in the interests of the appellants that the order continues. 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 or any member of their family. This direction applies both to the appellants and to the respondent.

## Introduction

1. The appellants appeal against the decision of First-tier Tribunal (FTT) Judge Thapar (the judge) dismissing their conjoined appeals from the respondent's decision refusing their claim for international protection on asylum and human rights grounds.

2. Permission to appeal was granted on renewed application by Upper Tribunal Judge Blundell on 7 April 2022.

## Relevant Background

3. The appellants are nationals of Sri Lanka of Tamil ethnicity. They are twin sisters born on 23 May 2011.

4. The appellants arrived in the United Kingdom on 5 August 2018 and were received and cared for by their maternal aunt. They claimed asylum on 21 August 2018. The primary basis of claim was that their parents are known LTTE members and their family LTTE supporters. The appellants claimed that their father was abducted by a paramilitary group in 2018 and, in consequence, their mother went into hiding, following which the appellants and their brother were cared for by their maternal grandparents. Thereafter, a paramilitary group attended the maternal grandparents home looking for the appellants' mother. The appellants grandfather fearing for the appellants safety arranged for them and their brother to travel to the United Kingdom. Following their arrival in the United Kingdom the appellants' brother was returned to Sri Lanka. The appellants' brother continues to reside with his maternal grandmother in Sri Lanka; their grandfather having passed away on 24 October 2020.

5. Whilst the respondent accepted that the appellants' parents were members of the LTTE, and that their maternal aunt and two maternal uncles had been granted refugee status in the United Kingdom, she nonetheless did not accept that the appellants qualified for international protection or leave to remain on human rights grounds for the reasons asseverated in her refusal decision dated 23 November 2020.

## The Hearing Before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before the judge. The appellants were represented by Miss Wass (as they were before us). The appellants attended the hearing, but they were not called to give evidence and waited outside the hearing room. In her subsequent decision, the judge explained that Miss Wass confirmed that the appellants aunt had nominated herself as the appellants litigation friend for the purposes of the appeal, which was agreeable to all concerned and the judge. The judge heard evidence from the appellants maternal aunt and their cousin and submissions from the legal representatives.

7. In her decision promulgated on 18 August 2021 the judge did not accept that the appellants were at risk of persecution on return to Sri Lanka on account of their parents and their families association with the LTTE. The judge observed that there was no evidence that any paramilitary or armed groups had shown an interest in the whereabouts of the appellants' mother since 2018, and noted that their maternal grandmother and brother had not experienced any difficulties with the authorities post 2018 despite the family having a political profile. The judge noted that the appellants' maternal aunt, her husband and their children frequently visited Sri Lanka without experiencing any difficulties - the maternal aunt recently visited in 2020 and her husband in 2021. The judge thus held that the appellants would not be of any interest to the authorities in Sri Lanka on return.

8. The judge also considered the appellants claim contrary to Article 8 ECHR. Essentially, the claim was put on the basis that the appellants had an established family life with their maternal aunt and her family, and with extended family members in the United Kingdom. It was the evidence of the appellants maternal aunt that family life could not be replicated in Sri Lanka as the appellants maternal grandmother's health had deteriorated and she could not care for them. The claim was supported by a medical letter from a doctor in Sri Lanka dated 18 July 2021, which stated *inter alia* that she 'is suffering from post-traumatic mental illness' and detailed treatment she received 'in 2013 and 2015' (at [27]).

9. Whilst the judge accepted that the appellants had an established family and private life in the United Kingdom and answered the initial four questions posed in *Razgar* [2004] UKHL 27 in the affirmative, she gave detailed reasons for finding that the proposed interference with family and private life was proportionate and justified at [25] to [34]. For the convenience of exposition we summarise these in the order they appear in the decision as follows:

- The appellants have lived in Sri Lanka for most of their lives. They resided with their grandparents and brother before their arrival in the United Kingdom. They are not at risk in Sri Lanka;
- The appellants speak Tamil and have no health or special educational needs;
- The maternal grandmother is visited by a cousin of the maternal aunt who assisted her in obtaining a medical letter;
- The medical letter is brief and lacks detail. It contains no details of the exact nature of the maternal grandmother's illness, nor of the assessment undertaken, or of her future prognosis, what treatment she requires or is receiving, and the impact this has on her ability to care for the appellants' brother;
- The maternal aunt did not suggest that the maternal grandmother is unable to care for the appellants brother or that arrangements were being made for alternative care;
- The maternal aunt gave an inconsistent account about the treatment her mother received which undermined her credibility;
- The appellants had thus not established that they could not reside with their grandmother on return or that she was incapable of caring for them;
- The appellants attended a free school in Sri Lanka and could resume their education like their brother;
- The appellants are in contact with their brother and maternal grandmother. They all previously lived together as a joint family and so the appellants would be returning to a known environment and home;
- The family in the United Kingdon can continue to provide financial support upon the appellants return to Sri Lanka;
- There are no very significant obstacles to the appellants integration on return to Sri Lanka;
- Significant weight is attached to the maintenance of effective immigration controls which is in the public interest – s.117B(1);
- The appellants entered and remained in the United Kingdom without lawful leave and established a private and family life, which is thus afforded little weight;
- The appellants maternal aunt and her family can travel to Sri Lanka and continue family life upon the appellants return.

10. The judge thereby dismissed the appeal on Article 8 ECHR grounds.

**The Grounds of Application and Grant of Permission**

11. The grounds of application authored by Miss Wass raise four grounds of challenge: (i) failure to consider the best interests of the appellants, and by reference to s.55 of the Borders, Citizen and Immigration Act 2009 ("BCIA 2009"); (ii) failure to consider the appellants are minors who

cannot be taken to know their immigration statuses are unlawful/precarious, in the application of the 'little weight' provisions in s.117B of the Nationality Immigration and Asylum Act 2002 ("NIAA2002"); (iii) failure to consider important aspects of the evidence and, (iv) the making of erroneous findings in respect of evidence relating to the appellants maternal grandmother.

12. In granting permission Upper Tribunal Judge Blundell thought that grounds (iii) and (iv) were "less strong" but nonetheless granted permission on all grounds. Judge Blundell further observed in respect of ground (i) that it was a matter of concern that the judge had not alluded at all to the consideration of the best interests of the appellants, but remarked that the question of materiality was to be determined.

**The Hearing before the Upper Tribunal**

13. At the hearing Mr Avery conceded that there was a material error of law in respect of ground (i), namely, that the judge erred in her failure to consider the best interests of the appellants and by reference to s.55 of the BCIA 2009. Mr Avery noted that this issue was clearly raised in the appellants' skeleton argument before the judge and, in any event, she was under a duty to have considered it. Mr Avery was of the view that it could not be said that a consideration of the best interests of the appellants would have produced the same result. The error was therefore material.

14. The remaining grounds were not conceded by Mr Avery and so we invited Miss Wass to address us on grounds (ii) to (iv) as these grounds, if made out, were likely to have a bearing on which findings of fact could be preserved and, in turn, on the question of disposal.

15. In relation to ground (ii) Miss Wass helpfully referred us to the decision in *Miah (section 117B NIAA 2002 - children)* [2016] UKUT 131 (IAC), and she accepted that the public interest provisions in s.117B(1)-(5) of the NIAA 2002 applies to children, however, she submitted that the appellants as minors with no control over their statuses in the United Kingdom were factors that the judge ought to have considered as part of the balancing exercise, but did not do so.

16. Miss Wass dealt with grounds (iii) and (iv) compositely as they relate to the judge's treatment of the evidence in relation to the appellants' maternal grandmother. In her grounds of appeal Miss Wass avers that the judge erred at [26] in her consideration of the appellants maternal aunt's oral evidence that the maternal grandmother was visited by her [maternal aunt's] cousin. Miss Wass submits that the judge was selective in reciting the evidence and that she omitted to refer to the

maternal aunt's evidence that the cousin only visited 'when she finds time'. The judge's distorted consideration of the facts Miss Wass submitted led the judge to conclude that there was a contradiction in the evidence and to reject the claim that there were no supportive networks from extended family members in Sri Lanka.

17. In relation to ground (iv) Miss Wass submitted that the judge's findings at [27]-[28] were predicated on a mistake of fact and were unsupported by the evidence. She submitted that the medical letter stated that the maternal grandmother had been receiving treatment "since 2013" for her physical condition(s), which denoted continuing treatment, evidence which the judge failed to consider and was contrary to her finding at [ 27] that "the only recent reference to the maternal grandmother's health is that she suffering from post-traumatic mental illness..". Further, Miss Wass referred us to the witness statement of the appellants' maternal aunt at paragraph 22, her oral evidence and the medical letter in support of her submission that contrary to the judge's findings the evidence clearly supported the claim that the maternal grandmother was unable to care for the appellants brother.

18. Mr Avery in respect of Ground (ii) submitted that s.117B of the NIAA 2002 applied to the appellants, but he acknowledged that the judge did not consider the appellants position as minors in her consideration of the weight to be attached to the public interest more generally. Mr Avery submitted that he struggled to discern any error in respect of Ground (iii) and characterised it as a mere disagreement with the judge's findings. As for Ground (iv) Mr Avery submitted that the judge considered the medical letter and he drew our attention to the evidential deficiencies identified by the judge from that evidence, conclusions which he submitted were entirely based on the evidence.

19. As for the issue of disposal, Mr Avery invited us to preserve the judge's findings of fact and remake the decision on proportionality at a further hearing. Miss Wass proposed remittal to the First-tier Tribunal as the appeal was heard in 2021 and further evidence was required updating the position of the appellants and the circumstances of their maternal grandmother and brother in Sri Lanka.

## Discussion and conclusions

20. This appeal concerns the welfare of two minor appellants. At the date of hearing before the judge they were ten years old. They arrived clandestinely in the United Kingdom and live with their maternal aunt. It is uncontroversial that the appellants parents were members of the LTTE and have disappeared, and that, other family members in the United Kingdom are associated with that organisation and are recognised refugees. The judge gave comprehensive reasons for concluding that

the appellants are not at risk of persecution on return to Sri Lanka, which we summarised above at [7]. These findings are unimpeachable and are not challenged by the appellants. The grounds of appeal squarely take issue with the judge's consideration of the appellants Article 8 ECHR claim. We shall deal with each ground in turn below.

21. Ground (i). Mr Avery conceded that there was a material error of law relating to the judge's failure to consider the best interests of the appellants and by reference to s.55 of the BCIA 2009. It is trite that the best interests of a child must be considered as a primary consideration by reference to the circumstances of the child alone and is an integral part of the proportionality assessment under Article 8 ECHR, see: J*O and Others (section 55 duty) Nigeria* [2014] UKUT 00517 (IAC) and *Kaur (children's best interests / public interest interface)* [2017] UKUT 00014 (IAC).

22. It is appreciably clear from the decision that the judge did not consider the best interests of the appellants. The primacy of that consideration and the duties under s.55 feature nowhere in the decision. That omission is unfortunate as we recognise that the judge did consider the position of the appellants in the United Kingdom and in Sri Lanka. It is for that reason we consider that Upper Tribunal Judge Blundell remarked in his grant of permission that it is for us to determine whether the apparent error is material. We have therefore paused to reflect on Mr Avery's concession. On balance, albeit not without a little hesitation, we accept the respondent's concession that the judge erred in law in failing to consider the position of the appellants by reference to, and within the context of, the legal principles and statutory duties she was required to apply. The Supreme Court in *Zoumbas v SSHD* [2013] UKSC at [10](5) set out that:

> '*(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations'.*

Although the judge considered the circumstances of the appellants, the judge did not make an actual decision on their best interests. As the judge did not bear these principles in mind we agree that she failed to take into account a material consideration relevant to the balancing exercise under Article 8 ECHR, such that, for this reason alone the decision dismissing the appeal on Article 8 ECHR grounds is unsafe and cannot stand.

23. Turning to Ground (ii). This ground relates to the judge's consideration of the public interest provisions in s.117B(1)-(5) of the NIAA 2002. The judge as she was mandated to do considered these provisions at [35] and stated thus:

*"Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I place significant weight upon the principle of legitimate and effective immigration control. The Appellants arrived in the UK without lawful leave to enter and have remained in the UK since. The Appellants' private and family life was established at a time when the Appellants' statuses within the UK have been unlawful accordingly, pursuant to section 117B, I afforded this family and private life little weight."*

24. We agree with the representatives, as the cases of *Miah* and *Kaur* (supra) make clear, the factors set out at s.117B(1)-(5) apply to all, regardless of age. The judge was obliged to apply the provisions to the appellants. However, it is also clear from the authorities that all relevant factors must be weighed into the balance including age, and that the "little weight" provisions are not an "absolute, rigid measurement or concept". There is an inherent degree of flexibility. We agree with Miss Wass that the judge with a degree of rigidity adhered to applying the provisions without any recognition that factors such as age, parental dominance and the child's circumstances generally are material considerations and have a legitimate bearing upon on the issue of proportionality. Where proportionality is always a nuanced assessment, as part of a balancing exercise, we cannot be satisfied that the error compounded by the error found in Ground (i) would have made no difference to the judge's analysis. The appeal on Ground (ii) is made out.

25. Ground (iii) avers that the judge has been selective in her recitation of the appellants' maternal aunt's evidence that the 'maternal grandmother is visited by a cousin of the maternal aunt…' which appeared to contradict the claim that no network of support was available in Sri Lanka from extended family members. We did not understand Miss Wass was suggesting that the judge intentionally did so (there is no evidence to support that), and the ground is better formulated as a mistake of fact. The substance of that according to Miss Wass is that the judge omitted to consider the maternal aunt's oral evidence that her cousin only visited the appellants maternal grandmother "when she finds time". That evidence is not recorded in the decision. Miss Wass in her grounds of appeal relies on an extract from her notes as the source of that evidence, but as we observed at the hearing she is in difficulty in that regard. A full copy of her notes from the hearing have not been provided; no application has been made to disclose the record of proceedings in accordance with paragraph 12 of the Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal (May 2022) and, in any event, Miss Wass has not filed a witness statement in accordance with the guidance of the Upper Tribunal in *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC). In the circumstances, and in the absence of an

application being made, we decline to accept Counsel's extract of the evidence given at the hearing as the correct procedure has not been followed.

26. We observe, nonetheless, that if that was indeed the evidence of the maternal aunt we discern no error of law, let alone a material one. The evidence of the maternal aunt disclosed either way that there was at least one family member in Sri Lanka who visited the maternal grandmother, and the judge was fully entitled to weigh that evidence against the claim that there was no supportive network among extended family members in Sri Lanka. The judge balanced this against the inconsistent evidence of the maternal aunt and gave adequate reasons at [28] as to why her credibility was undermined. We are thus inclined to agree with Mr Avery that Ground (iii) amounts to a mere disagreement with the judge's findings. We find that Ground (iii) is not made out.

27. We reach the same conclusion in respect of Ground (iv) for similar reasons. We are not persuaded that the judge erred in her consideration of the medical letter at [27]-[28], and nor do we accept that her finding the appellants had failed to establish that their maternal grandmother was incapable of caring for them was not open to her on the evidence (at [28]).

28. Miss Wass contends that the impugned findings are essentially at [27] and submits that contrary to the judge's findings there was recent evidence of the maternal grandmother's physical health conditions as the medical letter referred to treatment "since 2013", and she further drew our attention to the doctor's statement therein that the maternal grandmother was unable to care for the appellants' brother.

29. First, although not drawn to our attention, we note from the evidence before the judge that there was in fact two medical letters from the same doctor dated 17 February 2021 (handwritten) and 18 July 2021 (typed). The judge referred only to the latter at [27] this letter being the most updated evidence before her, and which is the subject matter of Ground (iii). However, Miss Wass in her submissions only referred us to the former letter. Second, whilst we note that there are some insignificant and subtle differences between these two letters, both are loosely worded and the latter is replete with spelling mistakes, but nonetheless their content is substantially the same in detailing the appellants' maternal grandmothers physical and mental health conditions. As the letter of 18 July 2021 is the subject of contention in Ground (iv) we confine our consideration to that evidence.

30. Third, we consider that the judge correctly identified at [27] that the letter dated 18 July 2021 details treatment received by the maternal grandmother in 2013 and 2015. So much is clear from the opening six

sentences of that letter where details are given or her undergoing some investigations and reference is made to a hospital admission for heart related and thyroid issues. Whilst the letter does suggest that since 2013 she was "following up at medical clinic… (sic)" for "ischemic learte disease, dyslipidemia Hypertension…(sic)", no further details are provided of the dates of any follow-up appointment(s) or details of any further treatment. We do not agree that this evidence on any reasonable view could be interpreted as indicating that the grandmother was subject to ongoing treatment or review for any physical condition. We are entirely satisfied therefore that the judge was entitled to find that the "only recent reference to the maternal grandmother's health is that she is suffering from post-traumatic mental illness and that she cannot care for her grandchildren."

31. It is clear that from this citation of the evidence that the judge was plainly aware of the appellants claim that their grandmother could not care for them. The judge took that into account, but nonetheless gave ample reasons why she attributed little weight to the contents of this letter. Those particular findings are not challenged by Miss Wass. We find ourselves in agreement with Mr Avery that the judge was entitled to find as she did on the evidence before her.

32. Miss Wass lastly submits that the judge's concluding remarks at [27], that the maternal aunt did not suggest in her evidence "that the maternal grandmother is unable to care" for the appellants brother, is contrary to the evidence and thus vitiates her findings overall. We disagree. There are several difficulties with this submission. In directing our attention to the maternal aunt's evidence Miss Wass first relied on paragraph 22 of her witness statement, but taken at its highest she asserts that the grandmother "is struggling to look after herself and the Appellants' brother", she does not go as far as to state that she is unable to provide care.

33. Next Miss Wass relied on the maternal aunt's oral evidence, not referred to in the decision, the substance of which is paraphrased in the grounds of appeal. The evidence stated to have been given was to the effect that the appellants' uncle had to travel to Sri Lanka as the maternal grandmother was having problems looking after the appellants' brother. This submission however suffers from the same failings we identified in respect of Ground (iii) and we decline to admit it.

34. We are satisfied that it was open to the judge to conclude that the appellants had failed to establish that their maternal grandmother was incapable of caring for them and that this ground simply disagrees with that conclusion. We find that Ground (iv) is not made out.

## Conclusion

35. In summary, whilst in many respects the decision is structured, clear and detailed we have concluded that the decision is infected by legal errors in respect of Ground (i) and Ground (ii). We are satisfied that the judge did not conduct a proper proportionality assessment by a failure to factor into that assessment material considerations relevant thereto. In light of this, and having regard to the concession made by Mr Avery, the decision cannot be allowed to stand.

36. We set aside the decision of the FTT. We agree with Mr Avery that the factual findings that are not infected by legal error can be preserved. We preserve the primary findings of fact made at [20]-[32] and [34], but we recognise that these findings may need to be revisited in light of any updated evidence relied on by the appellants at a resumed hearing.

37. The question which then arises is whether this matter should be remitted to the FTT for redetermination, or whether it should be retained and remade in the Upper Tribunal. Miss Wass urged remittal to the FTT on the basis that two years have lapsed since the hearing before the FTT, and the evidence requires updating with further findings being necessary in light of that evidence. Mr Avery was of the view that the appeal could remain with the Upper Tribunal for remaking.

38. We have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the FTT to be remade. We have taken into account the case of *AEB* [2022] EWCA Civ 1512 and *Begum* [2023] UKUT 46 (IAC). At headnote (1) and (2) of *Begum* it states*:*

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*
>
> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."*

39. We take into account the history of the case and the circumstances of the appellants and given that the judge has not carried out a best interests assessment, which is critical nor adequately dealt with the assessment of proportionality, we consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the FTT.

## **Notice of Decision**

40. The decision of the FTT involves the making of material errors of law.

41. We set the decision aside.

42. We preserve the FTT's primary factual findings on the basis identified above.

43. The appeal is to be heard by a judge other than Judge Thapar.

Signed Dated 9 August 2023

R.Bagral
Deputy Upper Tribunal Judge Bagral