Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/00465/2016**

HU/00474/2016

HU/00482/2016

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 19 April 2018 **On 3 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

K M C G
A N G
B N G
(ANONYMITY DIRECTION MADE)
Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellants: Ms U. Miszkiel, counsel instructed by Jein Solicitors
For the Respondent: Mr T. Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Sri Lanka and comprise a mother and her twin daughters. The first Appellant was born on 7 November 1964 and her twin daughters on 28 June 2007. One of the twin daughters has Down's Syndrome and other health conditions. The other twin does not. It would

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seem that the three Appellants last entered the United Kingdom on 22 September 2012 and have remained in the United Kingdom since that time. This was on the basis of their dependency upon the husband of the first Appellant and father of the children, who was at that stage residing in the United Kingdom with leave to remain. The relationship subsequently broke down, it is said, in part because of his difficulty in accepting the disability of one of his daughters.

2. Applications for leave to remain were made and the most recent application was refused on 18 December 2015. An appeal was lodged against that decision and came before Judge of the First-tier Tribunal Freer for hearing on 4 August 2017. In a decision and reasons promulgated on 8 August 2017 the judge dismissed the appeal finding that it would be proportionate to expect the three Appellants to return to Sri Lanka.

3. An application for permission to appeal was made in time. The grounds of appeal dated 22 August 2017 and which are extensive, assert as follows:

(1) The judge erred materially in law by conducting his own post-hearing research without giving the parties any indication of that or the opportunity to comment. It was asserted this is contrary to the decision of the Tribunal in EG (Post-Hearing Internet Research) Nigeria [2008] UKAIT 00015. It was asserted that in the premises the Appellants have not had a fair hearing or further or in the alternative the judge could seem to be arguably biased;

(2) Ground 2 asserts that the judge failed to consider all the evidence before him with the most anxious scrutiny when considering paragraph 276ADE and Articles 3 and 8 of ECHR;

(3) Ground 3 asserts that the judge failed to assess adequately section 55 of the BCIA 2009 as a primary consideration in his decision;

(4) Ground 4 asserts that the judge has made unreasonable and irrational findings at [55] and [66] which impacted on his assessment of Article 8 both inside and outside the Rules and he has failed to assess with the most anxious scrutiny the EHC plan annual review dated 16 May 2017.

(5) Ground 5 asserts that the judge unreasonably failed at [68] to assess with the most anxious scrutiny the evidence submitted that there is inadequate Down's Syndrome screening in Sri Lanka.

(6) Ground 6 asserts that the judge failed at [64] to assess adequately the expert report of Mr Abdullah-Zadeh at bundle 3 pages 29 to 42, even though the report was corroborated by independent educational reports highlighted in the skeleton argument and oral submissions;

(7) Ground 7 asserts that the judge failed to assess adequately or at all the relevant considerations when assessing Article 8 outside the Rules; and

(8) Ground 8 asserts that the judge failed to make a finding whether the Respondent's refusal decision was in accordance with the law by virtue of its incompatibility with the judgment of Paposhvili v Belgium Application No.41738/10 referred to at [48] of the skeleton argument.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Cruthers in a decision dated 22 February 2018. Although the grant of permission to appeal is not restricted it focusses upon ground 1 and the allegation that the judge considered a website for a particular school in Sri Lanka, even though this had not been raised by either party either in the refusal decision or at the hearing, albeit the school itself was named in the refusal decision.

5. There was no Rule 24 response lodged on behalf of the Respondent.

Hearing

6. I heard detailed submissions from Ms Miszkiel, counsel on behalf of the Appellants. In addition to the judgment in EG (op cit) she also provided a copy of the judgment in Mengiste [2013] EWCA Civ 1003. In respect of the test for apparent bias at [4] of the judgment she asserted that it is still that based on Porter v Magill [2002] 2 AC 357 at [102].

7. She further sought to rely on the Practice Statements of the Immigration and Asylum Chambers of both Tribunals at 7.2. This provides as follows.

> *"Disposal of Appeals in Upper Tribunal*
>
> *The Upper Tribunal is likely on each such occasion…to proceed to remake the decision instead of remitting the case to the First-tier Tribunal unless the Upper Tribunal is satisfied that*
>
> *(a) The effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the parties' case to be put to and considered by the First-tier Tribunal or*
>
> *(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2 it is appropriate to remit the case to the First-tier Tribunal."*

8. Her position was that the decision was fundamentally flawed by virtue of procedural unfairness such that an error of law needed to be found and the appeal remitted back to the First-tier Tribunal for a hearing *de novo*.

9. Ms Miszkiel's primary submission is that it is clear from the judge's decision that he conducted post-hearing research in relation to Chitra Lane, which is a school or a children's resource centre in Colombo, Sri Lanka, which apparently provides treatment and support for children with Down's Syndrome.

10. Whilst reference was made in the refusal decision to that organisation the judge in his decision has gone further asserting as follows at *"70 and 71"*.

> *"70. The country evidence shows a real year on year improvement for DS children's outlook in Sri Lanka.*
>
> *71. I find that Chitra Lane school is well-able to take care of the child BN. The website link is now given: http://chitralane.org/childrens-resource-centre."*

11. Ms Miszkiel's point is that neither party had relied on the web link or the website of that organisation and it was clear that the judge had had regard to that evidence after the hearing as was evidenced by his comment that there has been a year on year improvement for children with Down's Syndrome in Sri Lanka. She further submitted that, in any event, that finding is not specified so it is not possible to know upon what evidence the judge was basing his conclusion in that respect and that that was not the position in terms of the evidence that was before him, primarily that submitted on behalf of the Appellant.

12. At [64] of his judgment the judge cites as follows:

> *"There is a debate about mainstreaming the severely disabled. It is a debate conducted on national and international levels and within it the experts disagree. I find there has been selective use of expert opinion for the Appellants. The particular material deployed here has its limitations and I am grateful to the HOPO for drawing some to my attention."*

13. Ms Miszkiel's point in relation to this is that the debate about mainstreaming the severely disabled was not raised by the Respondent either in the refusal decisions or in the Presenting Officer's submissions, nor was it raised in the Appellant's evidence which was that it is in the second Appellant's best interests for her to remain in the United Kingdom. She submitted that it is the conclusion that the judge has used in finding against the Appellants but it is not possible to know where it has come from.

14. At [91] and [92] of the judgment the judge holds as follows:

> *"91. Dozens of countries have worse mortality rates for Down's Syndrome than found in Sri Lanka, where matters are steadily improving. The mortality rate for Down's Syndrome in Sri Lanka*

has decreased by 2.6 per annum over many years of recent recorded history.

92. Life expectancy for people with Down's Syndrome in the UK has increased dramatically in recent decades – from 25 in 1983 to 60 today. If, for the sake of argument, the life expectancy was about 25 years in Sri Lanka that cannot pass the high hurdle in the case law not even in Paposhvili."

15. Ms Miszkiel's point was that mortality rates had not been provided to the judge by either party. but are cited and it is also not possible to verify these mortality rates or to know the source that they emanate from. Ms Miszkiel submitted that what should have happened is that the hearing should have been reconvened, instructions could have been taken from the experts instructed by the Appellant whose view was that the mortality rate was in fact quite high in Sri Lanka.

16. Ms Miszkiel further submitted the judge had fell into error at [86] of his decision where he finds as follows

"86. The case will be far stronger if made by a poor family. This is a wealthy family. The evidence is that they could afford servants when they last lived in Sri Lanka. The father is a dentist, a particularly well-paid occupation. Squints are often treatable during childhood. The cost of plastic surgery around the eyes of the child, if that is decided upon, is likely to be affordable."

17. Ms Miszkiel's submission in respect of this finding is that it was inappropriate for the judge to raise the issue of plastic surgery in respect of a Down's Syndrome child and it was a very unreasonable comment. She submitted it goes to the issue of stigma. If a child has to change her appearance by having plastic surgery around her eyes in order to avoid stigma on return to Sri Lanka then it must be disproportionate to expect her to return. Ms Miszkiel submitted it was disrespectful to the first Appellant who was upset and crucially the issue of potentially having plastic surgery was not raised by either of the parties and was something the judge had clearly looked at after the hearing and had then incorporated into his decision. She submitted the decision was fatally flawed by procedural unfairness. Ms Miszkiel continued with her submissions to the effect that all of this gave rise to the appearance of bias. She further in this respect drew attention to the judge's finding at [78]:

"78. I do understand the concerns about social stigma in Sri Lanka and the concept of karma (fruits of action) in that culture. However, it is a card that has been overplayed."

The judge then went on to give examples of why he considered this to be the case.

18. Ms Miszkiel submitted that this was clearly an unreasonable finding when one is dealing with a child who is disabled. She also drew attention to the fact that the judge's finding was contrary to the equal treatment bench book which assumes that all parties before the court are to be treated equally and that this does not appear to be the case in light of the finding at [78]. She also drew attention to further comments by the judge which she submitted were inappropriate and also potentially contradictory.

19. Examples of this that she relied on were at [2] where the judge held:

"2. I should emphasise that in Sri Lanka it is considered ill-omened to have a child with Down's Syndrome and the usual reaction is to think poorly of the family as it is the result of sin, bad karma, coming as some punishment for past misdeeds. That is of course not my own view; most people in the UK would want to take a charitable attitude towards such circumstances, I would have thought. I have very positive views of the Down's Syndrome (DS) people I have met in my life."

20. And at [11] the judge decided that anonymity was required because of hostility to the third Appellant in the Sri Lankan community, which has a significant diaspora in the United Kingdom.

21. In respect of stigma, Ms Miszkiel drew attention to her skeleton argument that had been before the First-tier Tribunal and which sets out evidence of such social stigma and which makes clear that the child would be subjected to hostility and would not have access to mainstream schooling. She submitted that the judge had failed to adequately assess the matters raised which go towards the assessment of the second and third Appellants' best interests and proportionality.

22. In respect of best interests, Ms Miszkiel submitted that the judge had clearly erred at [60] in his finding that:

"Section 55 BCIA has little effect on the outcome of these particular appeals and it largely implies that the children should stay with their mother as they surely will. It does not justify a wholesale exercise in country comparison which I have heard.

23. Ms Miszkiel submitted that this compounds the appearance of bias and was essentially unsustainable, in that it was erroneous to start by assuming that the two minor Appellants would stay with their mother and in fact one starts with the best interests consideration and then goes on to consider whether the children should return with their mother. She submitted it was in the best of the disabled child to remain in the United Kingdom in order to avoid social stigma and for example to avoid having to have plastic surgery. She submitted the judge had failed to take account of the evidence before him and at [67] failed to take proper account of the educational health care plan on the basis that it does not apply in Sri Lanka. However, there was also a report from Dr Perrera which the judge erroneously disregarded on the basis that he did not know anything about

matters in Sri Lanka when that was the very focus of the report. Both the evidence of Dr Perrera and John Abdullah-Zadeh were consistent with the educational health care plan report.

24. Ms Miszkiel sought to rely on the remainder of her grounds but submitted that if the Tribunal was in agreement in respect of ground 1 that that essentially would suffice in terms of indicating material error of law which would necessitate a hearing *de novo* before the First-tier Tribunal.

25. Mr Melvin submitted a copy of a previous decision dated 7 January 2014 in relation to an application made by the first Appellant for leave to remain as a parent in the United Kingdom. This decision refers to the fact that the second Appellant suffers from Down's Syndrome and asserts that she could receive treatment in Chitra Lane.

26. In his submissions, Mr Melvin submitted that the Respondent opposed the appeal in its entirety. He submitted that the only issue before the judge was whether there were facilities to treat a Down's Syndrome child in Sri Lanka. He compared the case to one where a person with Down's Syndrome had come to the United Kingdom as a visitor and utilised the NHS. He submitted that there was clear evidence within the judge's decision that the core issue was satisfied. He submitted that the evidence set out in the refusal letter was not being challenged and essentially what was being said is that the facilities in the United Kingdom are better. He submitted that the grounds created a fog but did not detract from the findings and were ultimately not material as they were doomed to fail or the appeal was doomed to fail on any aspect of the case law. He accepted that the point in respect of plastic surgery may have been better phrased. However, Mr Melvin submitted it was open to the judge to make the comment that the card has been overplayed in light of the judgment in <u>EV</u> (Philippines) which was analogous and where it had been found that the other family members were "piggybacking". Mr Melvin submitted there was no expectation on the part of the family that they would be able to remain in the UK. It was clear from the refusal decision that there was no evidence that education and treatment for those with disabilities was anything other than adequate. There was no indication that stigma can make a material difference to the findings. He denied there was any apparent bias on the part of the First-tier Tribunal Judge.

27. In reply, Ms Miszkiel took issue with Mr Melvin's submissions. She submitted that when the second Appellant arrived in the United Kingdom although she was 5 years and 3 months she had extremely limited language skills essentially those of a 15 to 18 month old child. Thus, it was unfair to assert that there were adequate facilities in Sri Lanka given the poverty of her language skills. She submitted that the Appellants came lawfully as the dependants of the father of the two younger Appellants and husband of the first Appellant. He subsequently abandoned them otherwise they would have remained lawfully as his dependants. She submitted they had a legitimate expectation that they would be able to remain in the United Kingdom for the duration of that leave. Once that was no longer possible they

made applications for leave to remain and the children's grandmother stepped in to look after the family.

28. Ms Miszkiel submitted that there are material errors of law and when one looks at the circumstances it cannot safely be said that the outcome would be the same given that there had not been a fair hearing. She submitted in those circumstances the issue of materiality does not come into it.

Findings

29. I find an error of law in the decision of First-tier Tribunal Judge Freer. For the reasons outlined in ground 1 of the grounds of appeal it does appear on the face of the decision and based on the fact there is no record of submissions or within the Respondent's refusal to show that the judge made his determination on the basis of the evidence before him, which he was obliged to do.

30. In EG (Post-Hearing Internet Research) Nigeria [2008] UKAIT 00015 the Tribunal held as follows at [5]:

> *"It is, however, most unwise for a judge to conduct post-hearing research on the internet or otherwise into the factual issues which have to be decided in a case. Decisions on factual issues should be made on the basis of the evidence presented on behalf of the parties and such additional evidence as the parties are aware of has been before the judge. To conduct post-hearing research on the internet and to face conclusions on that research without giving the parties the opportunity to comment on it is wrong. If such research is conducted and this determination gives absolutely no encouragement to such a process where an Immigration Judge considers the research may or will affect the decision to be reached then it will be the judge's duty to reconvene the hearing and supply copies to the parties in order that the parties can be invited to make such submissions as they might have on it."*

31. I accept Ms Miszkiel's submission that the judge appears to have conducted post- hearing research in order to determine the appeal and that is a clear error of law and contrary to the principle of procedural fairness. That is sufficient to set the decision aside and remit the appeal for a hearing *de novo* in accordance with paragraph 7.2 of the Practice Statement to the Tribunals.

32. In respect of the other grounds of appeals, I heard partial argument and it would seem that whilst those grounds have merit, it is not necessary for me to determine those grounds in light of my decision to remit the appeal for a hearing *de novo* on the basis of the first ground of appeal.

Decision

33. The decision of the First tier Tribunal is set aside and the appeal is remitted for a hearing *de novo* at Taylor House, not to be listed before First-tier Tribunal Judge Freer.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman Date 29 April 2018