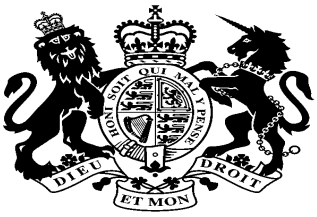


Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04593/2018
HU/04596/2018
HU/04597/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3 January 2019	**On 7 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMANTHA [S]
RANSINI [N]
[K S]
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Walker (Senior Presenting Officer)
For the Respondent: Mr R Solomon (counsel for Jein Solicitors)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 31 October 2018 allowing the appeals of Samantha [S],

Ransini [N] and [KS], citizens of Sri Lanka born on 29 March 1980, 28 July 1986 and 22 July 2014 respectively, themselves brought against the Respondent's refusal of their human rights claims of 5 April 2018.

2. Mr [S] entered the UK as a Tier 4 student in June 2010, with leave until August 2014 ultimately. His wife joined him in July 2011; [KS] was born here. The parents' leave was curtailed on 25 May 2012 when Mr [S]'s Sponsor college's licence was revoked. They applied for leave on human rights grounds, and though that application was refused in July 2013, their appeal was successful, and they were granted leave to remain until 7 April 2017. On 5 April 2017 they made an application on Article 8 grounds, whose refusal leads to these proceedings.

3. The First-tier Tribunal recorded the basis of the human rights claims. [KS] was a surviving twin, her sibling having been still-born. [KS] had serious health problems, congenital heart disease, moderate and severe pulmonary stenosis accompanied by a dysplastic pulmonary valve, and resolved and patent ductus arteriosus; she had also been diagnosed with autistic spectrum disorder. She was under bi-annual and tri-annual reviews for her medical conditions, the next being due in mid-20198, and received special one-to-one assistance in pre-school given her specific needs as an autistic child.

4. The First-tier Tribunal accepted the family's contention that no equivalent care regime would be available to [KS] in Sri Lanka. It noted that it was well known that autistic children do not cope well with change and would prefer to maintain their established routines. Inevitably that regime would be seriously disrupted in this case, given that it was highly unlikely that any equivalent arrangements would be available in Sri Lanka that were suitable or conducive to her needs; indeed, the country evidence indicated that she would face some degree of social ostracism there for cultural reasons. Her physical health needs were presently managed under the supervision of medical, healthcare and educational specialists, and its disruption would foreseeably lead to a downward spiral in her overall health and well-being, which would inevitably be contrary to her best interests.

5. Thus the First-tier Tribunal accepted that [KS]'s best interests were for her parents to remain in the UK and to continue assisting with her present care regime.

6. The Tribunal noted that the family had previously been granted leave on private and family life grounds, with a view to permitting Mr [S] to complete his UK studies. There had then been a radical change of circumstances, after which his ambition to do so was postponed due to the life-challenges the family faced, albeit he credibly maintained an intention to resume studying here if possible. It was the family's firm intention to return to Sri Lanka once that was done, as they anticipated that things would improve in the next few years, presuming that [KS]'s health regime secured

some overall improvement in her circumstances, such that it might be realistic to source suitable care for her autism.

7. As to the statutory considerations under section 117B NIAA 2002, the parents could speak English and had had no recourse to public funds during their time here; they were self-financing. [KS] had of course used the NHS, but that was in the context of the family consistently holding valid leave, under section 3C of the Immigration Act 1971 or otherwise. Their leave had been consistently precarious, but that was only one factor to be balanced overall.

8. The First-tier Tribunal concluded that the family's departure would occasion a disproportionate interference with their private and family life, and allowed the appeals.

9. The Secretary of State appealed, arguing that the First-tier Tribunal had erred in law. By allowing the appeal under Article 8 ECHR, in the light of case law suggesting there was a similar threshold that linked Articles 3 and 8 ECHR in health cases, the Judge had effectively found that the family's circumstances would amount to inhuman and degrading treatment, which, given the high threshold for such cases to succeed, was an inadequately reasoned conclusion. Furthermore the evidence of the family that they would contemplate a return to Sri Lanka in the future was inconsistent with their stance as to the non-availability of adequate medical treatment there.

10. The First-tier Tribunal granted permission to appeal on 13 November 2018 stating that it was arguable that the Judge's conclusion was inadequately reasoned.

11. Mr Walker relied on the grounds of appeal, which he concisely developed without materially adding to their written content. Mr Solomon responded that an Article 8 claim involving a child did not have to surpass the high threshold of *N v UK*. In *JA (Ivory Coast)* [2009] EWCA Civ 1353 the Court accepted that lawful residence where leave to remain was granted in the context of full knowledge of a person's health situation might differentiate the case from the norm. Numerous factors shown to be relevant by *EV (Philippines)* had been properly identified and balanced in the Tribunal's conclusions. The duty to give reasons had been adequately discharged, to the standard identified in decisions such as *VV*.

Findings and reasons

12. "Reasons" challenges are brought sufficiently often as to have generated a significant volume of authority as to their ambit. As noted by Beatson LJ in *Haleemudeen* [2014] EWCA Civ 558 §35, 37:

> "What is required is that the reasons must give sufficient detail to show the parties and the appellate tribunal or reviewing court the principles upon which the lower tribunal has acted, and the reasons that led it to its decision, so that they are able to understand why it reached its

> decision. The reasons need not be elaborate, and need not deal with every argument presented … judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined and it should not be assumed too readily that the tribunal misdirected itself because not every step in its reasoning is set out in it".

13. Similar thinking is shown in the UT decision cited by Mr Solomon, *VV (grounds of appeal)* [2016] UKUT 53 (IAC):

> "24 ... even if the matter relates to a substantial issue or principal controversial issue, it is essential for an appellant to show either that the judge has simply failed to resolve that dispute, in other words there is a gap in the reasoning on that point, or alternatively, that even though the issue has been dealt with, the reasoning is so unclear that the Tribunal is satisfied that it may well conceal a public law ground of challenge (see e.g. *Save Britain's Heritage* at [1991] 1 WLR at page 168). Likewise in the *South Bucks DC* case Lord Brown reiterated (at [2004] 1 WLR at page 1964) that an Appellant must show "a substantial doubt as to whether the decision-maker erred in law ...". But he then added "such adverse inferences will not readily be drawn".
>
> 25. In *South Bucks DC the* House of Lords approved (at paragraph 33) the well-known statement by Sir Thomas Bingham MR that an issue as to whether the reasons for a decision were inadequate "is to be resolved ... on a straightforward reading [of the decision] without excessive legalism or exegetical sophistication." The degree of particularity required for reasoning will depend entirely on the nature of the issues which have been raised by the parties for the judge to determine (paragraphs 28 and 36).
>
> 26. We also note that at paragraph 35 Lord Brown said that the restatement of the relevant legal principles in *South Bucks DC* should "serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons a challenge" and tend to discourage such challenges."

14. It would be very difficult to hold that there is any inadequacy in the Upper Tribunal's reasoning based on the detail with which its conclusions are expressed. Several factors are identified, including the statutory considerations set out in section 117B of the Nationality Immigration and Asylum Act 2002, and their relevance to the Tribunal's conclusions are given careful attention. It is very hard to see how the Secretary of State could seriously maintain that those reasons are incomprehensible. Their gravamen is that this appeal involves a vulnerable child with an unusual combination of health and developmental problems arising from a combination of serious physical ailments plus a relatively high degree of autism, and that the impact on the child of relocation to a country where she has not previously lived and where she has no experience of the culture of schooling would be unduly traumatic.

15. So in reality it can be see that the Appellant's grounds of appeal amount to a disguised challenge that the First-tier Tribunal misdirected itself as to the appropriate legal test; it is not the quality of the reasoning, but the understanding of the law, that is in truth challenged as deficient.

16. Health cases are to be assessed, when brought under Article 3 ECHR, by reference to the critical authorities, *D v United Kingdom* (1997) 25 EHRR 31 and *N v United Kingdom* (2008) 47 EHRR 39, and the preceding House of Lords decision in the latter case, *N* [2005] UKHL 31. The governing authority on the application of those tests is *GS (India)* [2015] EWCA Civ 40, where Laws LJ stated that the ratio decidendi of *N* in the House of Lords was plain enough:

> "36. What was it then that made the case exceptional? It is to be found, I think, in the references to D's 'present medical condition' (para 50) and to that fact that he was terminally ill (paras 51: 'the advanced stages of a terminal and incurable illness'; para 52: 'a terminally ill man'; para 53: 'the critical stage now reached in the applicant's fatal illness'; Judge Pettiti: 'the final stages of an incurable illness'). It was the fact that he was already terminally ill while still present in the territory of the expelling state that made his case exceptional." (per Lord Hope)
>
> …
>
> "69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity." (per Lady Hale)

17. The threshold as applied in the UK may in due course be revisited at Supreme Court level, having regard to the decision in *Paposhvili v. Belgium* (Application no. 41738/10; 13 December 2016), but for now the ruling of the House of Lords applies.

18. The Upper Tribunal in *GS and EO* summarised other aspects of the established case law regarding to health and human rights:

    (a) The cases of children were one of the "recognised departures from the high threshold approach" [85](7)(c);

    (b) It "is the practical availability of the treatment rather than its theoretical availability which is important", a question to be established on the evidence: [85](4)(e).

19. The foregoing aims to summarise the salient case law regarding Article 3 ECHR in health cases. Moving on to the relationship between human rights and health in the private life context, the Strasbourg Court in *Bensaid v United Kingdom* 44599/98 [2001] ECHR 82 §46: "Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's

case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, § 36)."

20. Moses LJ in *MM (Zimbabwe)* [2012] EWCA Civ 279 §23: "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8".

21. The operation of these various considerations in the case of children whose private life includes a health dimension is summed up by Maurice Kay LJ in *SQ (Pakistan)* [2013] EWCA Civ 1251:

> "21. *ZH (Tanzania)* demonstrates the central role of the best interests of a child in an Article 8 case. The archaeology is as follows. International treaty obligations, in particular Article 3(1) of the CRC have developed a consistent theme. Article 3(1) provides:
>
> > "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
>
> 22. Section 11 of the Children Act 2004 obliges a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. Initially, the immigration authorities were excused from this obligation because this country had entered a general reservation to the Convention in relation to immigration matters. However, things changed with the enactment of section 55 in 2009. It requires that, in relation to immigration, asylum and nationality, the Secretary of State must make arrangements for ensuring that those functions
>
> > "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."
>
> The wide significance of this was explained by Baroness Hale in paragraph 24 of her judgment in *ZH*:
>
> > "This means that any decision which is taken without regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of Article 8(2). Both the Secretary of State and the tribunal will therefore have to address this in their decisions."
>
> To require that the best interests of the child are "a primary consideration" does not mean that those interests must always prevail. As Baroness Hale went on to say (at paragraph 33):
>
> > "In making the proportionality assessment under Article 8, the best interests of the child must be a primary consideration. This

> means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that."
>
> …
>
> 26. What this case demonstrates is that in some cases, particularly but not only in relation to children, Article 8 may raise issues separate from Article 3. In *JA (Ivory Coast) v Secretary of State for the Home Department* [2009] EWCA Civ 1353, an adult succeeded under Article 8 (but not Article 3) in a health case. Sedley LJ emphasised (at paragraph 17) that each of the two Articles "has to be approached and applied in its own terms". The leading authorities of *D* and *N* were distinguished on the basis that, in both of them, the appellants' presence and treatment in this country "were owed entirely to unlawful entry". JA's appeal was allowed and her case remitted because of the potential significance of the fact that, following her lawful entry and subsequent diagnosis of HIV+, she had been granted further exceptional leave to remain for treatment. Although no separate Article 8 issue arose in *D* or N, it plainly did in *JA*."

22. It is clear from the passages above that the cases of children may raise different considerations from those of adults, whether assessed in the context of inhuman and degrading treatment or by reference to private life; it is also apparent and that Article 8 ECHR involves a different focus of enquiry than does the assessment of Article 3.

23. Having completed this rather lengthy preamble, it becomes possible to analyse the Secretary of State's grounds of appeal. The first authority cited is Sales LJ in *MM (Zimbabwe)* [2017] EWCA Civ 797, who, having cited the decision of Moses LJ in (the similarly named case) *MM* (itself cited above), stated:

> "42. In our case, the FTT found that MM could not succeed under Article 3, because MM could not satisfy the stringent test applicable under that Article. In those circumstances, I consider that the FTT erred in holding that MM could nonetheless succeed in his claim under Article 8, even though it was based on the same basic point that MM would suffer a deterioration in his mental health by reason of the non-availability to him in Zimbabwe of the drugs which have been effective in the United Kingdom in restoring him to sanity. The FTT did not identify any strong Article 8 claim by MM independent of his claim to benefit from medical treatment, of a kind contemplated in *MM (Zimbabwe)* in the passage quoted above. The FTT also failed to apply the same stringent test under Article 8 as it had applied under Article 3."

24. The SSHD also draws attention to the reference in *AM (Zimbabwe)* to the decision in *GS (India)* [2015] EWCA Civ 40, which at §6 Sales LJ equated to having "brought the test under Article 3 and the approach under Article 8 into close alignment". It is notable that in *GS (India)* §45, 86, Laws LJ stated

> "the core value protected by Article 8 is the quality of life, not its continuance. Life itself is protected by Article 2. And it requires no sophisticated philosophy to tell us that central to the quality of life is the capacity to form and enjoy relationships. Other elements referred to in these authorities, such as gender identification, name, sexual orientation, sexual life and mental health are self-evidently integral to that same capacity.
>
> …
>
> If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm."

25. Underhill LJ alongside him (in *AM*) stated §111 of Moses LJ in *MM*:

> "There are possibly some ambiguities in the details of the reasoning in that passage, but I think it is clear that two essential points are being made. First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the "no obligation to treat" principle."

26. *SL (St Lucia)* which the Secretary of State's grounds of appeal also cites is on all fours with these passages.

27. The Secretary of State's essential argument is that there is a close equiparation in the case law governing health claims brought by reference to Articles 3 and 8. There is some truth in this assertion, in so far as the claim involves health considerations alone; private life claims do not provide for any lowering of the threshold, where they turn solely on a treatment "gap" between the UK and abroad.

28. However, there is a real difference between private life claims and Article 3 cases when it comes to cases that turn on a broader array of considerations. The First-tier Tribunal was plainly alive to this distinction. Its decision was not driven by a simple treatment differential between the UK and Sri Lanka; it was a detailed combination of factors, ranging from the likelihood of social ostracism and the relatively extreme impact of significant change on an

autistic child who has become accustomed to a particular care and educational regime, that concerned the First-tier Tribunal.

29. So it can be seen that this was not a case which turned on the absence of adequate medical treatment abroad. Indeed, given the reliance on the difficulties facing an autistic child following relocation, and the possibility of ostracism, it is clear that "*the capacity to form and enjoy relationships*" was central to the relevant reasoning. There was no error of law here.

30. The Secretary of State also complains of the approach of the Judge below to the possibility that the family would relocate to their country of origin in the future. As I remarked at the hearing, this is a surprising challenge, as it is customarily thought that the fact that leave is sought for a limited rather than indefinite purpose would count in favour of the migrant's side of the balance rather than weighting the scales against them.

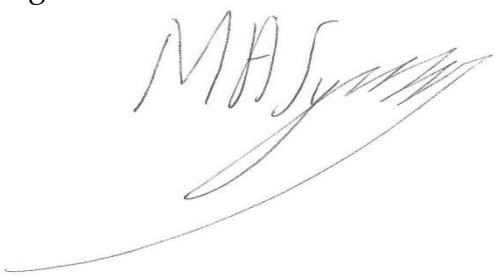
31. In any event, I do not accept that there was any tension in the Tribunal's findings here. It recognised that the present practical necessity for this family, to secure the daughter's welfare, was to remain in the UK, albeit that they held a longer term aspiration to return to Sri Lanka if that became possible in the fullness of time. It seems to me that he First-tier Tribunal did not make inconsistent findings: it merely recognised that a future wish to return might co-exist with a present recognition of that possibility being presently out of the question.

32. There being no error of law in the decision below, I accordingly dismiss the appeal.

Decision

The appeal is dismissed.

Signed Date 28 January 2019



Deputy Upper Tribunal Judge Symes