Upper Tribunal
(Immigration and Asylum Chamber)

PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London
on 26 November 2015 and 19 January 2016

Decision promulgated on

Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Bruce

Between

PD
JR
NR

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Martin (of Counsel), instructed by Nag Law Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

In considering the conjoined Article 8 ECHR claims of multiple family members decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case.

DECISION AND REASONS (No 2)

INTRODUCTION

1. This is the decision of the panel to which both members have contributed. By our decision promulgated on 05 October 2015, we set aside the decision of the First-tier Tribunal (the "FtT"). That decision is annexed hereto at Appendix 1. We hereby remake the decision of the FtT.

FACTUAL MATRIX

2. Borrowing from, and augmenting somewhat, our earlier decision we outline the salient facts in the following way. The Appellants, all nationals of Sri Lanka, are a family unit consisting of mother, father and son now aged 14 years. This appeal has its origins in a decision dated 23 August 2014 of the Secretary of State for the Home Department (the "Secretary of State"), refusing the applications of the Appellants for further leave to remain in the United Kingdom. By its determination promulgated on 15 January 2015, the First-tier Tribunal (the "FtT") dismissed their ensuing appeal. The Appellants now appeal, with permission, to the Upper Tribunal.

3. The basic facts are brief and uncontroversial:

   (a) The first-named Appellant, the father, was granted clearance to enter the United Kingdom as a student in respect of the period January 2005 to October 2006. The other two Appellants were granted entry clearance as his dependents. All three entered the United Kingdom on 19 January 2005.

   (b) In respect of the period October 2006 to January 2010, all three Appellants were the beneficiaries of subsequent further grants of leave to remain.

   (c) From February 2010 the Appellants had the status of unlawful overstayers.

   (d) On 12 February 2013 an application for leave to remain invoking Article 8 ECHR was made.

   (e) This application was refused by the Secretary of State's decision dated 30 April 2013 which, following reconsideration, was affirmed by the index decision noted above.

4. The father of the family was the only one of the three Appellants who testified before us. Elaborating on his witness statement, which he adopted in full, he explained that having entered the United Kingdom in 2005 he studied for a total

period of seven years, achieving a qualification in Business Administration. Since then, during the past three years, his career has been static, being confined to the provision of occasional informal business advice to friends. The mother of the family has, recently, provided some informal and gratuitous beauty advice and services to close friends and family members. Neither has had any gainful employment since arrival in the United Kingdom. There is no evidence of any family income, illicit or otherwise. While the family have survived during a sojourn of some 11 years in the United Kingdom, how they have done so is not clear.

5. The father confirmed that the main focus of their claim is their son's education. The son has progressed successfully through the United Kingdom education system since the family's arrival in 2005. He is scheduled to undertake his GCSEs in September 2016. Since commencement of his second level education he has attended the same school. The family previously resided in Colombo, the capital city of Sri Lanka and would probably return to live there. Based on some evidently limited research into international schools in Colombo, the father has obtained some information about likely costs but none relating to curriculum. He asserted that their son has some familiarity with, but no fluency in, Sinhalese. At this stage of his education, the son's ambition is to qualify as a lawyer.

6. Taking into account the cross examination of the father and the submissions of the Secretary of State's representative, we can identify nothing contentious in the factual framework outlined above and shall proceed accordingly.

LEGAL ISSUES

7. In granting permission to appeal, Upper Tribunal Judge Perkins raised the question of whether "…… the rights of the third Appellant [the son] should have been considered first". The arguments of the parties' representatives focused mainly on this issue together with the test of reasonableness enshrined in paragraph 276 ADE (1)(iv) of the Immigration Rules (hereinafter "the Rules").

LEGAL FRAMEWORK

8. This has several components. We begin with paragraph 276 ADE of the Rules. This is one of an extensive series of provisions arranged in Part 7 in accordance whereof leave to remain in the United Kingdom may be granted by the Secretary of State. It was introduced with effect from 09 July 2012 and amended by HC532, with effect from 28 July 2014. The general subject heading is "Private Life", while the immediate cross heading is "Requirements to be met by an applicant for leave to remain on the grounds of private life". Paragraph 276 ADE (1)(iv) provides:

> "The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application the Applicant: ….

(iv) Is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK."

The ancestry of paragraph 276 ADE is worthy of note. It is one of several provisions which introduced new long residence rules. The "seven year rule" relating to children has a certain lineage, to which we now turn.

9. The first version was introduced in DP5/96, which required children to have been in the United Kingdom for ten years. This was reduced to seven years on 24 February 1999. The Immigration Minister (Hansard, columns 309/310) stated the following:

> "Children who have been in this country for several years will be reasonably settled here and may, therefore, find it difficult to adjust to life abroad.
>
> In future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children in the family who have been living in the United Kingdom continuously for seven or more years. In most cases, the ties established by children over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here …."

10. DP5/96 was considered by the Court of Appeal in NF (Ghana) v SSHD [2008] EWCA Civ 906. There the Home Secretary accepted she was bound by DP5/96 as amended. At [39] the Court set out the correct approach to the Ministerial policy:

> "For the future it seems to us inevitable that tribunals considering the impact of the Secretary of State's policy in relation to the passing of seven years residence on the part of a child of the family should:
>
> > (1) start from the position (the presumption) that it is only in exceptional cases that indefinite leave to remain will not be given, but
> >
> > (2) go on to consider the extent to which any of or a balancing of all the factors mentioned in the 1999 policy modification statement makes the case an exceptional one.
>
> It is only in such a way that the various documents can be reconciled into a single policy."

11. With effect from 09 December 2008, DP5/96 was withdrawn. This was accompanied by the following new Ministerial statement:

> "The United Kingdom Border Agency is withdrawing DP5/96… The original purpose and need for the concession has been overtaken by the Human Rights Act and changes to immigration rules. The fact that a child has spent a significant period of their life in the United Kingdom will continue to be an important factor to be taken into account by

case workers when evaluating whether removal of their parents is appropriate…"The withdrawal of DP5/96 and replacing it with consideration under the Immigration Rules and article 8 of the ECHR [European Convention on Human Rights] will ensure a fairer, more consistent approach to all cases involving children, whether accompanied or unaccompanied, across UKBA. Withdrawing the policy will also prevent those overstaying or unlawfully present in the UK having the benefit of a concession which does not apply to those persons who comply with the Immigration Rules and remain in the UK lawfully."

In EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 the Upper Tribunal stated:

"2. Guidance is also given on the assessment of the private and family life of a Zimbabwean national present in the United Kingdom for over 11 years with children born and/or resident most of their lives in the United Kingdom.

3. In the absence of countervailing factors, residence of over seven years with children well-integrated into the educational system in the United Kingdom, is an indicator that the welfare of the child favours regularisation of the status of mother and children".

12. Paragraph 276 ADE(1) (iv) of the Rules when first introduced, with effect from 09 July 2012, enunciated a rule which provided that the claims of children for leave to remain in the United Kingdom would succeed under the private life rubric of Article 8 ECHR if they could demonstrate a minimum of seven years continuous residence. The Ministerial "Statement of Intent" included the following, at [11]:

"**The Immigration Rules will reflect all the factors which, under current statutes and case law, can weigh in favour of an Article 8 claim**, e.g. a child's best interests, or against an Article 8 claim, e.g. criminality and poor immigration history. The Courts will continue to determine individual cases according to the law but, in doing so, they will be reviewing decisions taken under Immigration Rules which expressly reflect Article 8. If an applicant fails to meet the requirements of the new Immigration Rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8."

[Emphasis added]

The following passage in the statement, at [56], is also striking:

"The key test for a non-British citizen child remaining on a permanent basis is the length of residence in the UK of the child – which the Immigration Rules will set as at least the last seven years, subject to countervailing factors. The changes are designed to bring consistency and transparency to decision-making."

This provision was amended, with effect from 13 December 2012, in the following terms:

"(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant …

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) **and it would not be reasonable to expect the applicant to leave the UK**".

[Emphasis added]

Accordingly, since 13 December 2012, in applications for leave to remain based on Article 8 private life, it has not been sufficient for a child applicant to have accumulated seven years continuous residence in the United Kingdom. Rather, the applicant has also had to demonstrate that he or she could not reasonably be expected to leave the United Kingdom. We shall give consideration to the criterion of reasonableness *infra*.

13. The legal framework also contains certain provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), in particular section 117B which provides:

"117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

Given that the child member of the family unit constituted by these three Appellants has lived in the United Kingdom for a continuous period of seven years or more, he has the status of "qualifying child" within the Part 5A regime.

14. Section 117B(6) of the 2002 Act was considered recently by the Upper Tribunal. In Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), section 117B(6) was analysed and construed in [12] – [23]. This Tribunal expressed its conclusions in the following terms, at [20] – [21]:

"20. In section 117B(6), Parliament has prescribed three conditions, namely:

(a) the person concerned is not liable to deportation;

(b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and

(c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.

21. Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) – (3) do not apply."

15. The Upper Tribunal has also given consideration to the interplay between Part 5A of the 2002 Act and the Rules. In Bossade (Sections 117A – D: inter-relationship with Rules) [2015] UKUT 415 (IAC), this issue was examined at [30] – [52]. It was held that, ordinarily, it will be appropriate for the Tribunal to first consider an appellant's Article 8 ECHR claim by reference to the Immigration Rules. This exercise will entail determining whether the relevant substantive conditions are

satisfied by the person concerned. Part 5A has no role in this discrete process. Rather, as the provisions assembled in section 117A make abundantly clear, the Part 5A regime is engaged only if the court or tribunal finds that the impugned measure interferes with a person's right to respect to private or family life, thereby requiring examination and determination of the question of whether such interference is proportionate.

16. The applicable framework also has a policy dimension. In this context we draw attention to the Immigration Directorate Instruction ("IDI") of the Home Office entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes", published in August 2015. In doing so, we are mindful of the statutory genesis of all IDIs – paragraph 1(3) of Schedule 2 to the Immigration Act 1971 – and their status in the legal system, determined by the decisions in R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33 and Ishtiaq v Secretary of State for the Home Department [2007] EWCA Civ 386. In view of their relative bulk the relevant provisions of the IDI are assembled in an appendix to this judgment.

17. We refer particularly to (iii) of the IDI extracts reproduced in the Appendix hereto. In an earlier part of this discrete section reference is made to the Immigration Act 2014 and the new provisions of the 2002 Act. The sentence which we have highlighted is eyecatching, for two reasons. First, it is consonant with this Tribunal's decision in Bossade (supra). Second, the instruction which it contains is diametrically opposite to the submission advanced to us by the Secretary of State's representative.

THE CORRECT APPROACH

18. As noted above, all three Appellants entered the United Kingdom, as a composite family unit, in January 2005. The 11th anniversary of this event has just been reached. The third of the Appellants was then aged three years and has very recently celebrated his 14th birthday. Given that he has been residing continuously in the United Kingdom for some 11 years, he will secure the grant of leave to remain under paragraph 276 ADE(1)(iv) of the Rules if he can satisfy the requirement that "…. It would not be reasonable to expect [him] to leave the UK". As regards the other two Appellants, his parents, it is common case that neither can succeed in a claim under the Rules. Their claims are, therefore, based on Article 8 ECHR outwith the Rules.

19. Focussing on the terms of the grant of permission to appeal, we note in particular the following:

(a) All three Appellants were granted entry clearance together.

(b) They then entered the United Kingdom together.

(c) They have resided together as a family ever since.

(d) The further leave to remain application dated 12 February 2013 was a joint application. It was determined jointly, by a decision dated 30 April 2013.

(e) This latter decision was the stimulus for the initiation of judicial review proceedings, on 31 July 2013, in which all three Appellants had the status of claimants.

(f) The consensual outcome of the judicial review challenge resulted in yet another joint decision of the Secretary of State, dated 23 August 2014, wherein lie the origins of these conjoined appeals.

20. There is no statutory requirement, whether embodied in primary or secondary legislation, whereby the Secretary of State was obliged to determine the claim of the child first. Nor is there any such rule requiring the tribunal to do so in the context of the determination of these conjoined appeals. Furthermore, there is no stipulation in the Immigration Rules to this effect.

21. We consider that the answer to the principal question of law upon which permission to appeal to this Tribunal was granted lies in the public law framework within which the Appellants' applications to the Secretary of State were made and determined. One of the overarching principles of public law thereby engaged was the duty imposed on the Secretary of State to take into account all material facts and considerations. We consider that if the application of the third Appellant had been severed from the other two and determined in isolation from them, in some kind of vacuum, this would have given rise to a breach of this duty. It is the very essence of Article 8 ECHR claims based on the family life dimension of this Convention provision that there are relationships, bonds and ties joining together the members of the family unit in question. In circumstances where the claims of several family members coincide, it would be artificial and unrealistic to determine them on their individual merits, in a rigid sequence and in insulated packages, without reference to the other claims.

22. We further consider that if the third Appellant's claim had been severed from the other two and determined in isolation in the manner suggested, this would have contravened both public law principles and Article 8 itself**.** It would also have been in breach of the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act") which has been construed as requiring a properly informed evaluation of all material facts and considerations in assessing a child's best interests: see JO and Others (section 55 duty) [2014] UKUT 552 (IAC), at [11] especially:

> "…. properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus

equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long recognised standards of public law. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared."

23. In our judgment, the duty imposed upon the Secretary of State in the circumstances presented by the simultaneous advent of these three family members' claims jointly was, rather than engaging in a fiction of the kind mooted above, to process and consider the claims together and then determine them. This would avoid the manifest artificiality of applying the reasonableness test enshrined in paragraph 276 ADE (1)(iv) and s117B (6) of the 2002 Act in the purely imaginary world that the child's parents did not have claims, also based on Article 8, pending. Further, it would have been equally surreal to determine the parents' claims without reference to either or both of the other two. This is so not least because decisions of the kind required in the present cases involved, unavoidably, predictive evaluative judgments concerning the short and medium term futures of all three Appellants. The processing, consideration and determination of these three claims together would equip the decision maker with the information necessary to acquit the public law duty of making the decisions on as fully informed a basis as possible, in tandem with the section 55 duty, as decided in JO and Others (section 55 duty) [2014] UKUT 517 (IAC). Crystal ball gazing, which not infrequently opens the door to Wednesbury irrationality and the kindred public law misdemeanour of failing to take into account all material information and considerations, would thereby be avoided.

24. We would add that the approach advocated above does not detract from the general principle that in Article 8 ECHR cases it is appropriate for the decision maker and, on appeal, the tribunal to consider first whether the person's claim satisfies the relevant requirements of the Rules: the Bossade principle refers and see also paragraph 1.1 of the IDI (supra). We are further satisfied that the approach which we favour finds support in the decision in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874. We refer particularly to the connection between children and parents which Christopher Clarke LJ made in [33]. The Court of Appeal found that the overall conclusion of the tribunal judge which was, in substance, that it was reasonable to expect the three children concerned to continue to live with their parents and that all should return together to their country of origin, with the public interest in the maintenance of firm immigration control prevailing, was sustainable in law. In the language of Lewison LJ, to remain with their parents was "obviously" in their best interest: [60].

25. The application of the approach which we have espoused above would have led the decision maker to recognise that the only person who could conceivably succeed under the Rules was the son, the third Appellant, who satisfies the seven years resident requirement. However, at this point of the exercise, we consider that the decision maker could not then proceed to determine the son's application in isolation from the others, since the application of the criterion of reasonableness behoved the official to evaluate all three claims in the round and determine them together. The answer to the question of whether the son could reasonably be expected to leave the United Kingdom could not realistically or sensibly be answered without first examining what the future was likely to hold for all three family members.

The FtT's Decisions Re-made

26. In re-making the decisions of the FtT we begin by identifying the possible future scenarios for the three Appellants:

    (i) All three appeals are dismissed, in which event the Appellants will depart the United Kingdom together, the family unit intact, relocating to their country of origin, Sri Lanka.

    (ii) The appeals of the first two Appellants are dismissed, while that of the third Appellant succeeds. This could have the same result as scenario (i), being a matter of choice and decision for the three family members concerned.

    (iii) However, another possible scenario is that the appeals of the first two Appellants are dismissed and that of the third Appellant allowed, with the parents returning to Sri Lanka and the third Appellant continuing to live and study in the United Kingdom.

    (iv) The fourth scenario entails all three appeals succeeding, which will result in the perpetuation of the status quo in all respects.

27. We conceive it our duty to identify the most likely of these future scenarios before proceeding to apply the relevant legal rules and principles. Since the evidence bearing on the possible future scenarios was rather unsatisfactory and inconclusive, we convened a further hearing and received additional evidence. This exercise was revealing. It stimulated further evidence from the first Appellant, the father and a detailed letter from the third Appellant, the son. The latter contains the following eloquent passage:

> "My parents are the people who have supported me throughout my life ever since the day that I was born. They are there to support me through childhood to adulthood. My parents are irreplaceable and have a key role in my emotional strength and

wellbeing also as we are a close knit family. My parents provide for me as well as giving me a roof over my head."

28. We refer to the second of the three scenarios canvassed in [26] above. Based mainly on the further evidence received, we find without hesitation that to separate the third Appellant from his parents is not a viable proposal. He would not be left in the United Kingdom to reside with relatives or friends. Nor would he, for example, be attending a boarding school. Rather, he would be entirely reliant on publicly funded services, as the father's witness statement makes clear:

> "… We have [not] had time to get any information from Social Services as to what their position would be but our lawyers have told us that they would have a duty to house [the third Appellant] if we left him alone in the UK."

Thus we consider that there are only two realistic scenarios, namely all three appeals are either allowed or dismissed. No other configuration is appropriate in the circumstances.

29. Given that, of the three Appellants, only the third can conceivably succeed under the Immigration Rules, we turn our attentions to his claim at this stage. In doing so, we commence by evaluating the primary consideration of his best interests. The best interests of any child necessarily encompass a potentially broad range of factors bearing on multiple aspects of their life. In addition to the uncontentious factual framework rehearsed in [2] – [5] above, we have given consideration to a substantial quantity of documentary evidence, none of it contentious. To summarise, the third Appellant has, beginning at the age of three years, spent three quarters of his life in the United Kingdom. Throughout this period his life has been shaped by United Kingdom culture, values, pastimes, living standards, language and the prevailing education system. The third Appellant has participated in the latter during the past ten years. Critical milestones in both his personal and educational development have been passed and are now looming. We find, based on the evidence, that he is an intellectually gifted young man who has made excellent academic progress; he has a wide circle of friends; he is a member of the Army Cadets; and he engages in extra-curricular activities. His integration in United Kingdom society and culture is complete. We find further that his connections with his country of origin are minimal, extending barely beyond the facts that he is a person of Sri Lankan nationality who was born in that country and spent the first couple of years of his life there.

30. We conclude firmly that as regards those aspects of the third Appellant's life highlighted above, his best interests, viewed through the lens of Article 8 private life, would be served by remaining in the United Kingdom. The four dominant factors, summarised, are his length of residence in the United Kingdom, his full integration in United Kingdom society, his age and his minimal ties with his country of origin. We observe that this conclusion is expressly foreshadowed in the

Secretary of State's IDI, an instrument which, having the status of a material consideration, serves to inform the Article 8 private life analysis.

31. However, the assessment of the third Appellant's best interests from the perspective of his private life only is necessarily incomplete. We must also consider his best interests through the prism of his family life. He is an only child and we find that he has, vis-à-vis his parents, the bonds of love, affection, respect and dependency which one would expect of any child of 14 in a stable, settled family. This is not diluted by the truism that teenagers become progressively independent, resilient and self sufficient. In this context we refer to our assessment in [28] above. Viewed from the twin perspectives of the third Appellant's private and family life, the conclusion that his best interests would be best served by continuing to live in the United Kingdom, with his parents, follows inexorably.

32. At this juncture, we remind ourselves that the best interests of the third Appellant have, by statute, the status of a primary consideration. We are also mindful that our assessment of the best interests of the third Appellant is not determinative of the question posed by both paragraph 276 ADE (1)(iv) of the Rules and Section 117B(6) of the 2002 Act, namely whether it would be reasonable to expect him to leave the United Kingdom. This question cannot be answered without considering the parents' appeals, to which we now turn. At this juncture, we turn to consider the claims of the Appellant's parents, the first two Appellants. Their Article 8 claims cannot succeed under the Rules. They do not come remotely close to doing so. They can succeed only outwith the Rules, which involves them satisfying the test of compelling/exceptional circumstances prescribed in MF Nigeria (*infra*).

33. The main ingredients in the cases of the parents are that their presence in the United Kingdom was lawful during the first half of the 11 year period under scrutiny; they have been unlawful overstayers since early 2010; they are the parents of a teenage child who has lived continuously in the United Kingdom for 11 years; they have established private lives in the United Kingdom; they are law abiding and self-sufficient citizens; and they have spent most of their lives in their country of origin, Sri Lanka.

34. At this point of the analysis, we ask ourselves whether the dismissal of the parents' appeals would interfere with their rights to respect for their private lives. The answer is, clearly, affirmative. Since the impugned decisions are in accordance with the law and are in furtherance of a legitimate aim, namely the maintenance of immigration control, the next question to be addressed is whether they are proportionate. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof we are obliged to have regard to the considerations listed in section 117B. We consider that section 117B applies to these appeals in the following way:

(a) The public interest in the maintenance of effective immigration controls is engaged.

(b) There is no infringement of the "English speaking" public interest, given the uncontested finding that all three Appellants are fluent English speakers.

(c) While the economic self-sufficiency of both parents is not in dispute and we have no evidential basis for finding otherwise, we consider that this public interest must be engaged since the third Appellant has been, and will continue to be, educated at public expense and if all three Appellants remain in the United Kingdom they will have the capacity to access other publicly funded services and benefits.

(d) That part of the private lives established by the parents during the second half of their 11 year sojourn in the United Kingdom qualifies for the attribution of little weight only.

35. This brings us to section 117B(6), which provides:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> " (a) the person has a genuine and subsisting parental relationship with a qualifying child; and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

The third Appellant is a "qualifying child" by virtue of his length of residence in the United Kingdom.

36. We consider that where a court or tribunal reaches the stage of conducting the balancing exercise required by a proportionality assessment, as here, the two tests enshrined in section 117B(6) are to be considered and applied together. The application of the first test, namely whether the first and second Appellants have genuine and subsisting parental relationships with the third Appellant, yields a swift affirmative answer which is not contested on behalf of the Secretary of State. The second test poses the question of whether it would be reasonable to expect the third Appellant to leave the United Kingdom. This is a mirror image of the test contained in paragraph 276 ADE(1)(iv) of the Rules. We observe that neither this provision of the Rules nor Section 117(B)(6) of the 2002 Act featured in EV (Philippines), where the child concerned fell far short of the qualifying period of seven years and the claims therefore lay entirely outwith the Rules.

37. We further consider that the general passages in the Secretary of State's IDI (reproduced in [16]-[17] above), are in their essence, a faithful reflection of the

extensive Article 8 ECHR jurisprudence. Thus there is a long standing recognition that, with the passage of time, children progressively establish roots and integrate in the host country. This is the rationale of the "seven year rule". As the Secretary of State's guidance states:

> "The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years."

In our consideration of the third Appellant's private life in the United Kingdom, we have highlighted above the salient facts and factors. We balance these with the outcome of the forecast which must necessarily be undertaken, based on the premise of the entire family returning to Sri Lanka. On the one hand, this would be hugely disruptive for the third Appellant in particular and would decimate the friendships, relationships and activities that form the core of his private life. It would also obstruct his education, though not irredeemably so. It would involve his transfer to a society whose culture, values, norms and language are alien to him. Emotionally, it would undoubtedly be highly stressful. Furthermore, this fundamental transformation of his life and lifestyle would occur at an age which is recognised universally as of critical importance in every person's development.

38. On the other hand, taking into account his Appellant's age from a different perspective, coupled with his educational achievements, intellectual ability and the support of a stable family unit, this young man would, foreseeably, adapt over time. There is no suggestion that his health would be detrimentally affected or that there would be any irreparable rupture in his academic progress. Nor is it claimed that his career aims could not be achieved in his country of origin. This is a stable, educated and healthy family unit.

39. We remind ourselves that the test to be applied is that of reasonableness. Other legal tests which have gained much currency in this sphere during recent years – insurmountable obstacles, exceptional circumstances, very compelling factors – have no application in the exercise we are performing. Self-evidently, the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned.

40. Judicial decision making in the sphere of immigration and asylum law is rarely straightforward. The present appeals are no exception in this respect**.** We consider that the application of the reasonableness test involves a balance of all material facts and considerations. The application of this test will invariably be intensely fact sensitive, see EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, at [7] - [12], per Lord Bingham. Ultimately, the factors to which we give determinative weight are the length of the third Appellant's residence in the United Kingdom (some 11 years), which has spanned three quarters of his life; his deep

immersion in all aspects of life in this country; the critical stage of his personal and educational development which has been reached; his minimal connections with his country of origin; and the likelihood that he will make a useful contribution to United Kingdom society.

41. Furthermore, we must weigh the third Appellant's best interests, as we have assessed them, which have the status of a primary consideration. The main countervailing factor is that the first and second Appellants have no legal right to remain in the United Kingdom. Their immigration status is that of unlawful over-stayers. This is a factor of undeniable weight. However, it has been frequently stated that a child's best interests should not be compromised on account of the misdemeanours of its parents. See, for example, per Baroness Hale in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, at [20]-[21] and [35] and EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64, at [49]. Having regard to our predictive finding of the most likely future scenario for this family, we consider that there is a preponderance of factors impelling to the conclusion that it would not be reasonable to expect the third Appellant to leave the United Kingdom. Accordingly, his appeal succeeds under the Rules.

42. Having thus concluded, the effect of section 117B(6) of the 2002 Act is that the public interest does not require the removal of either parent viz the first and second Appellants. If and insofar as the application of section 117B(6), where it arises, requires a more elaborate and comprehensive exercise in certain cases than that which was considered sufficient in the particular context of Treebhawon, we refer to our analysis of the Part 5A regime in [35] above and, having done so, conclude that section 117B(6) should prevail, on the grounds and for the reasons elaborated extensively above.

43. Finally, given that the parents' appeals can only succeed outwith the Rules, we remind ourselves that the test to be applied is that of exceptional, or compelling, circumstances: see MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, at [42]. In our application of this test, we refer to, but do not repeat, our various analyses and findings above. The first of the two final considerations which we have identified is the unequivocal statement in section 117B(6) that the public interest does not require the removal of these parents given that they have a genuine and subsisting parental relationship with the third Appellant and our finding that it would not be reasonable to expect him to leave the United Kingdom. The second is that, given our findings above, the effect of dismissing the two parents' appeals would be to stultify our decision that the third Appellant qualifies for leave to remain in the United Kingdom under the Rules. Insofar as section 117B(6) requires a balancing exercise to be performed, we highlight our previous assessments and findings and, balancing everything, our overall conclusion is that the test of exceptional circumstances is satisfied. Thus the first and second Appellants' appeals succeed outwith the Rules.

DECISION

44. Accordingly, we re-make the decision of the FtT by:

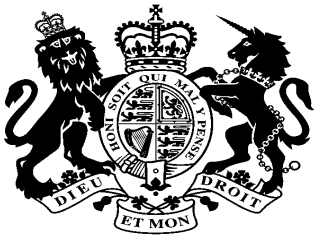
(a) allowing the first and second Appellants' appeals outwith the framework of the Rules; and

(b) allowing the third Appellant's appeal under paragraph 276 ADE(iv) of the Rules.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 21 January 2016

APPENDIX 1



Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House, London on 29 September 2015	**Decision given orally on 29 September 2015 and promulgated on** .....

Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Bruce

Between

PD
JR
NR

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Martin (of Counsel), instructed by Nag Law Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The Appellants, all nationals of Sri Lanka, are a family unit consisting of mother, father and son aged 13 years. This appeal has its origins in a decision dated 23 August 2014 of the Secretary of State for the Home Department (the "*Secretary of State*"), refusing the applications of the Appellants for further leave to remain in the United Kingdom. By its determination promulgated on 15 January 2015, the First-tier Tribunal (the "*FtT*") dismissed their ensuing appeal. The Appellants now appeal, with permission, to the Upper Tribunal.

2. The factual framework is uncontroversial and we summarise it thus:

   (a) The first-named Appellant, the father, was granted clearance to enter the United Kingdom as a student in respect of the period January 2005 to October 2006. The other two Appellants were granted entry clearance as his dependants. All three entered the United Kingdom on 19 January 2005.

   (b) In respect of the period October 2006 to January 2010, all three Appellants were the beneficiaries of subsequent further grants of leave to remain.

   (c) From February 2010 the Appellants had the status of unlawful overstayers.

   (d) On 12 February 2013 a joint application for leave to remain invoking Article 8 ECHR was made.

   (e) This application was refused by the Secretary of State's decision dated 30 April 2013 which, following reconsideration, was affirmed by the index decision noted above.

3. The FtT Judge noted in particular that the son has been living in the United Kingdom for some 10 years. He considered that the son's best interests would be safeguarded by the maintenance of the family unit. Next, per the following passage:

   > "*In view of the above I am satisfied that it is reasonable to expect the claimant's family as a whole to relocate to Sri Lanka.*"

   The Judge elaborated on this evaluative assessment, finding "*no exceptional reasons, such as any unusual medical condition or other particular need, why any of the family must remain in the United Kingdom*". Based on the prediction that the three Appellants would be removed from the United Kingdom together, the Judge pronounced himself satisfied that there would be no interference with their right to respect for family life. Next, under the rubric of private life, the Judge seems to have accepted

that there would be an interference. He concluded that any such interference would be proportionate. He identified the public interests in play as the maintenance of effective immigration controls and, in particular, the economic well being of the country. He made specific findings that the father had not paid income tax or national insurance on taxable income (earned as a consultant) and that the son "*has been educated at public expense when not entitled …..*" The formal disposal was a dismissal of the appeals under both the Immigration Rules and Article 8 ECHR.

4. The grounds of appeal concentrate substantially on the third-named Appellant. The Judge is criticised for inadequate consideration of this Appellant's life and circumstances, while focusing excessively on the parents. It is further contended that by virtue of section 117B(6) of the 2002 Act, the Judge erred in law in failing to assess the position of the child first. Permission to appeal was granted accordingly.

5. We have come to the conclusion that there is an obvious and indisputably significant error of law contained in the critical section of the judgment, namely that beginning at [37] and ending at [47]. The error of law is exposed by the formulation of a criterion of exceptional reasons in [42]. Mr Wilding realistically, though unavoidably, accepted that if the judge has formulated that criterion, or test, in the context of applying paragraph 276ADE(iv) to the appeal then a clear misdirection in law has been committed.

6. The question of construing the determination of the First-tier Tribunal is itself a question of law and a matter of law for this Tribunal. We are in no doubt that, considering these passages as a whole, the judge was still in paragraph 276ADE(iv) "territory" when formulating and purporting to apply this misconceived criterion set forth in [42]. We construe the determination as continuing to apply paragraph 276ADE through to the middle of [43], at which point the judge asks himself, for the first time, whether he should consider the case outwith the framework of the Immigration Rules. That is the point at which he proceeds to examine the appeal through that different lens. We are in no doubt that this is the correct construction of [43] and [44] in tandem. The decision is unsustainable in law for that reason.

7. There is a further clear freestanding error of law contained in [46] of the determination. We entertain no doubt that in [46] the judge purports to make a discrete finding that the first Appellant has not paid income tax or national insurance on his consultancy fees. That is, self-evidently, a finding adverse to all three Appellants. It raises the question of evidential foundation. The only place to search for that is in the determination itself and there is none to be found to underpin the finding, which springs as a veritable bolt from the blue as the decision draws to its end.

8. This abrupt finding also raises the question of procedural fairness. Was this factor, which was plainly considered adverse to the Appellants, canvassed at the hearing so as to enable the first Appellant the opportunity to deal with it? We find no indication whatsoever that it was. This is a further vitiating element in the decision.

9. It follows from this analysis that the determination of the First-tier Tribunal suffers from two material errors of law and we set it aside in consequence. We shall re-make the decision within the forum of the Upper Tribunal. There are two broad choices to be considered. One is that we proceed to consider the parties' written submissions and reserve our judgment. The second is that we re-list the case for some further argument and/or the reception of evidence, if that be the Appellants' intention, on another date in the near future.

[Having considered the parties submissions].

10. The appeal will be listed for further hearing, before the same panel of judges if possible, on a date to be notified in November 2015.

Leonard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 05 October 2015

APPENDIX 2

(i) The IDI contains, in paragraph 8.2.3.2, a short section relating to paragraph 276 ADE (1)(iv):

> "In order to meet these requirements, a child under 18 must have lived continuously in the UK for at least 7 years, discounting any period of imprisonment. Further information on continuous residence can be found in Section 8.2.3.5 below.
>
> The criteria set out in paragraph 276ADE(1)(iv) reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, by which we mean their best interests.
>
> The decision maker must have regard to the best interests of the child as a primary consideration (but not the only or the paramount consideration). They must fully consider the child's best interests.
>
> The decision maker must assess whether it is reasonable to expect a child to leave the UK under paragraph 276ADE(1)(iv), and must carefully consider all of the information provided in the application. Decisions must not be taken simply on the basis of assertions about the best interests of the child. All the relevant factors need to be assessed in the round.
>
> When considering paragraph 276ADE(1)(iv), the decision maker must refer to Section 11 of this guidance for further information on how to consider the best interests of a child and assessing whether it is reasonable to expect the child to leave the UK"

In a separate section, paragraph 11.2.4 of the IDI poses the following question:

> "Would it be unreasonable to expect a non-British citizen child to leave the UK?"

(ii) The following moderately prolix answer, which invites consideration in all its fullness, is supplied:

> "The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.

The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.

The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

Relevant considerations are likely to include:

a. Whether there would be a significant risk to the child's health
For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment will not be available in the country of return;

b. Whether the child would be leaving the UK with their parent(s)
It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK;

c. The extent of wider family ties in the UK
The decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life;

d. Whether the child is likely to be able to (re)integrate readily into life in another country. Relevant factors include:

- whether the parent(s) and/or child are a citizen of the country and so able to enjoy the full rights of being a citizen in that country;

- whether the parent(s) and/or child have lived in or visited the country before for periods of more than a few weeks. The question here is whether, having visited or lived in the country before, the child would be better able to adapt, and/or the parent(s) would be able to support the child in adapting, to life in the country;

- whether the parent(s) and/or child have existing family or social ties with the country. A person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there;

- whether the parent(s) and/or child have relevant cultural ties with the country. The caseworker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country. For example, a period of time spent living mainly amongst a diaspora from the country may give a child an awareness of the culture of the country;

- whether the parents and/or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice;

- whether the child has attended school in that country."

The last discrete segment of this section, under the rubric of "(**f**) Other specific factors raised by or on behalf of the child", states:

> "Parents or children may highlight the differences in the quality of education, health and wider public services or in economic or social opportunities between the UK and the country of return and argue that these would work against the best interests of the child if they had to leave the UK and live in that country. Other than in exceptional circumstances, this will not normally be a relevant consideration, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education or training to provide for their family on return, or if Assisted Voluntary Return support is available."

(iii) Within the "Introduction" section of the IDI, we have identified an interesting passage. It is stated at pages 5 – 6 [paragraph 1.1]:

> "This guidance must be used by decision makers considering applications under the family and private life Rules in Appendix FM and paragraphs 276 ADE(1) – DH. **First, the decision maker must consider whether the applicant meets the requirements of the Rules and if they do so leave under the Rules should be granted.** If the applicant does not meet the requirements of the Rules, the decision maker must move on to consider whether, considering all the factors raised by the application, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the applicant or their family such that refusal would not be proportionate under Article 8. If there are exceptional circumstances, leave outside the Rules should be granted. If not, the application should be refused."
>
> [Emphasis supplied]