



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/22954/2012
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THE IMMIGRATION ACTS

Heard at Birmingham

On 10th June 2014

Determination

Promulgated

On 3rd July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

**MARIUM TEHSEEN MIRZA
TEHSEEN AZHAR MIRZA
AMEENA TEHSEEN MIRZA**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Martin instructed by Malik Law

For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The history of this appeal is somewhat complex. The first Appellant, who is from Pakistan, applied on 4th April 2012 for further leave to remain as a Tier 1 (Post-Study Work) Migrant. The second Appellant is her husband and the third Appellant their daughter. The application was refused on

28th September 2012 as the first Appellant's degree certificate had been awarded on 6th July 2012, after the date of application. An appeal against that refusal was dismissed by First-tier Tribunal Judge A W Khan, in a determination promulgated on 2nd January 2013, both under the Immigration Rules and with regard to Article 8 ECHR. The Appellants applied for permission to appeal, which was granted by Upper Tribunal Judge Gill. The appeals came before the Upper Tribunal (Upper Tribunal Judge Moulden) on 19th April 2013. In the light of the then recent determination by a panel chaired by the President, Blake J, of **Khatel and others (s85A; effect of continuing application) [2013] UKUT 44 (IAC)** Judge Moulden allowed the appeals under the Immigration Rules. The Respondent then sought permission to appeal to the Court of Appeal.

2. On 18th July 2013, in response to that application, Upper Tribunal Judge Peter Lane issued directions. He referred to the subsequent judgment of the Court of Appeal in **Prasad Raju and others v SSHD [2013] EWCA Civ 754**, which had overturned the determination in **Khatel**. Pursuant to Upper Tribunal Procedure Rule 45(1)(b) it was proposed (a) to set aside the determination of the Upper Tribunal in the present case; and (b) to substitute a fresh decision to dismiss the Appellants' appeal against the variation decision but allow the appeal against the Section 47 removal decision; and (c) to do so without an oral hearing. The directions continued by stating that any party wishing to object to the proposed action was to do so in writing within ten days.
3. In response to those directions, which had been sent to the Appellants and their then solicitors on 19th July 2013, the first named Appellant replied in person objecting to the decision being set aside and commenting that she understood that the issue was being further appealed to the Supreme Court, that the Respondent's policy had not been clear and that some Applicants had been granted leave in similar circumstances. The matter was listed and came before me. Although technically the Respondent remains the party seeking to appeal the decision of Upper Tribunal Judge Moulden in the interests of continuity and simplicity I will continue to refer to the parties by the titles ascribed before the First-tier Tribunal and at the hearing before Judge Moulden.
4. At the commencement of the hearing it became apparent that the decision of Upper Tribunal Judge Moulden had not in fact been set aside and the application for permission to appeal to the Court of Appeal remained outstanding. I was referred to Upper Tribunal Procedure Rules 45(1)(b) and (2). It appeared from the Tribunal records that the directions made by Upper Tribunal Judge Lane on 18th July 2013 had been wrongly recorded as setting aside the decision of Upper Tribunal Judge Moulden. There followed a discussion between the representatives. Mr Martin on behalf of the Appellants said it appeared inevitable to him, in the light of the case law binding on the Tribunal that the decision of Upper Tribunal Judge Moulden should be set aside. The representatives agreed that the

Tribunal, in exercise of the power of review, should set aside that decision and the appeal should be re-decided.

5. Mr Martin on behalf of the Appellants said that there had in fact been no further appeal from the decision from the judgment of the Court of Appeal in **Raju** to the Supreme Court and it was difficult for him to argue that the award of a degree after the making of the application should carry any weight. There was an initial issue of the treatment of other persons in the same position but there was no persuasive evidence before me in that respect. The remaining matter was Article 8 ECHR. Mr Smart for his part said that the application for permission to appeal to the Court of Appeal had not referred specifically to Article 8. However I noted that this issue had been dealt with by Mr Khan and had been the subject of the application for permission to appeal to the Upper Tribunal. When she had granted permission to appeal Judge Gill had also granted permission in respect of Article 8. As the decision of Judge Moulden had now been set aside I came to the view that Article 8 was still potentially in issue. I was now looking at whether the determination of Judge Khan revealed any errors on points of law.
6. I had before me the Respondent's bundle and the bundle put in by the Appellants' solicitors under cover of a letter of 6th June 2014, which included a statement made in November 2012 by the first Appellant. Mr Martin argued that the decision under appeal was defective as there had been no reference to the best interests of the third Appellant, a child born in this country on 26th May 2011. He argued that the refusal notice had been defective because it had not referred to the child and the matter should be sent back to the Secretary of State for consideration.
7. In response Mr Smart said there was no material error in the judgment in the determination of Judge Khan. He referred to the Tribunal determination in **T (s.55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483 (IAC)** to the effect that it was for the judge to consider issues regarding the child. Judge Khan had mentioned the child several times; she had been only 18 months old at the time of his determination and her best interests were to be with her two parents. There had been no argument put forward regarding legitimate expectation and allegations of lack of fairness or inconsistent decision making fell far short of establishing material errors of law. He relied upon the reported Tribunal determinations of **Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610 (IAC)** and **Nasim and others (Article 8) [2014] UKUT 00025 (IAC)**. He accepted that the removal decision purportedly made under Section 47 of the Immigration, Asylum and Nationality Act 2006 could not be sustained.

8. There have been varying decisions on the issue of the relevance of the award of a qualification under the Tier 1 (Post-Study Work) Migrant category. Judge Khan based his decision on **NO (Post-Study Work - award needed by date of application) Nigeria [2009] UKAIT 00054**. Upper Tribunal Judge Moulton relied on **Khatel**. The binding authority now appears in **Raju**. In the light of those changing elements of guidance it is not surprising, although it is unfortunate for the Appellants, that there had been differing decisions. In the light of **Raju** I have no doubt that in fact the decision reached by Judge Khan was correct and Mr Martin was unable to put any material before me which could have affected that view. The argument on legitimate expectation and on alleged inconsistency of decision making are both dealt with in **Nasim and others** (paragraphs 28 to 36) and for the reasons set out in that determination cannot assist the Appellants.
9. With regard to Article 8 Mr Martin referred to the best interests of the young child born on 26th May 2011. Judge Khan dealt with Article 8 fairly briefly. He had referred earlier in his determination to the birth of the child. When finding the decision under appeal to be proportionate to the legitimate aim of immigration control he found there would be no breach of family life because that would be resumed in Pakistan and the child would return with her parents. There was no indication either in the first Appellant's statement or in argument that the child would in any way be placed at disadvantage by returning with her parents to Pakistan. Her mother is a well-qualified professional person.
10. It is now clear from various determinations and judgments that the best interests of children will normally be with their parents. I refer by way of example to **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** and to the judgment of the Supreme Court in **Zoumbas v SSHD [2013] UKSC 74**. Although Judge Khan did not expressly refer to the best interests of the child being a primary consideration in his deliberations there was no evidence before him to indicate that returning with her parents would be anything other than in her best interests. There is similarly no evidence to that effect before me now. As at the date of the hearing before Judge Khan the child was only 18 months old and even now she is only 3 years old. I accordingly come to the view that there was no material error in the determination of Judge Khan with regard to the Immigration Rules or Article 8 ECHR.
11. Mr Smart accepted that the removal decision purportedly made under Section 47 of the 2006 Act, having been made before that section was amended, was not in accordance with the law and to that extent the decision of Judge Khan is set aside.

Decisions

- (1) As proposed by Upper Tribunal Judge Peter Lane in his directions of 18th July 2013 and with the agreement of the parties the determination of Upper Tribunal Judge Moulden is set aside.
- (2) For the reasons as set out above the determination of Upper Tribunal Judge Khan did not contain a material error of law in respect of his decision dismissing the appeals under the Immigration Rules and under Article 8 ECHR.
- (3) The removal decision under Section 47 of the Immigration, Asylum and Nationality Act 2006 was not in accordance with the law and to that limited extent the appeal is allowed.
- (4) As the substantive appeal was dismissed a fee award is not appropriate.

Signed

Dated 01 July 2014

Deputy Upper Tribunal Judge French