



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20318/2019

THE IMMIGRATION ACTS

Heard at Field House  
On 26 November 2021  
Extempore

Decision & Reasons Promulgated  
On 09 December 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MS KHANDO TENZIN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Kumar, solicitor, Capital Solicitors

For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Richard Wood promulgated on 21 June 2021 refusing her human rights claim which is in turn based on her relationship with her partner, it being argued that she meets the requirements of Appendix FM of the Immigration Rules and/or that she meets the requirements of paragraph 276ADE(1)(vi) of the Rules. The judge dismissed the appeal.

2. It is important to recall that the appellant is officially regarded as stateless. It is not in doubt that she is originally of Tibetan origin nor is it in doubt that her husband is also of Tibetan origin having been granted refugee status in the United Kingdom and later naturalised as a British citizen.
3. The judge heard evidence from the appellant's partner and had regard also to a previous decision in respect of the appellant's asylum claim, that is the decision of Judge Walker referred to at paragraphs 20 to 23 of the judge's decision. It is important to recall at this point that Judge Walker had not accepted the appellant's account that she had been born in Tibet and did not accept that she had used a false birth certificate stating that he was born in India; he found that the birth certificate in question was not false and that she had been born in India. He also found that she had not made reasonable attempts to renew her identity certificate and found that she was in a position to obtain the necessary documentation to return to India.
4. The judge accepted that family life existed but concluded having had regard to paragraphs EX.1 and EX.2 of Appendix FM that there were not in this case insurmountable obstacle by which is meant very significant difficulties would be faced by the applicant or partner in continuing family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner. The judge also considered that the requirements of paragraph 276ADE were met out and found also that the appellant's removal from the United Kingdom would not be in breach of Article 8 of the Human Rights Act having done a full analysis pursuant to Razgar [2004] UKLH 27 as set out at paragraph 38 onwards of the decision. In doing so he applied also Section 117B of the Nationality, Immigration and Asylum Act 2002.
5. The appellant sought permission to appeal on five grounds:
  - 1) there had been multiple incorrect factual errors made in the decision;
  - 2) the judge had failed properly to apply the estoppel principle;
  - 3) there had been an unrealistic expectation of the British partner emigrating to India
  - 4) an improper application of the premise of the Devaseelan [2002] UKIAT 702 principle; and
  - 5) a material misapplication of Section 117B of the 2002 Act.
6. I deal with each of these in turn.
7. Ground 1: Four specific incidences are recorded in the grounds as errors which it is said that the judge made. First, that at paragraph 9 that a detailed Record of the Proceedings had been made available to the parties, which was not the case. Second, that there was an error and that the judge had recorded that there was no evidence other than what had been before Judge Walker. Third, the judge had thought that this was an entry clearance case, paragraph 19, and fourth, noted that the appellant had been born in Nepal at paragraph 41.

8. The judge did incorrectly state that a detailed Record of Proceedings had been made available to the parties, his characterisation of the evidence as not being different from that before Judge Walker is at best incorrect, he erred in concluding that this was an entry clearance case and erred in noting that the appellant had been born in Nepal. I asked Mr Kumar to take me to any indication that these had been material. With the exception of the possibility with regard to new evidence going to the Devaseelan point to which I will turn in due course, I find that the mistakes which are to say the least unfortunate had no material effect on the outcome for the following reasons.
9. Mr Kumar was unable to take me to anything that would have been arisen out of a failure to provide a detailed Record of the Proceedings. The paragraph 19 to which the grounds refer is clearly an unfortunate use of a template by the judge, is that it refers to him having to consider the best interests of any children which is clearly an irrelevant consideration here and should not have found its way into the decision but it does not appear to have affected it in any way. Finally as Mr Kumar accepted if you were to substitute the word Tibet for Nepal at paragraph 41 then there would be nothing objectionable to record what the judge said at paragraph 41.
10. I have considered whether cumulatively these errors amounted to an error of law. I accept that the judge has not given proper heed to the facts and has made errors and I have no doubt that as a result the appellant is dissatisfied with what has been done, but I am not satisfied that the errors in this decision are such as to affect the substance of the decision or to amount cumulatively or individually to an error of law affecting the outcome of the decision and therefore I reject ground 1.
11. Ground 2: after some discussion Mr Kumar withdrew this ground. He accepted fairly that there is no authority for the submission that estoppel applies in immigration law and I consider that that is sensible in the light of BK Afghanistan [2019] EWCA Civ 1358 which is binding authority. It is to say the least unfortunate that the Secretary of State wrongly issued a biometric residence card indicating that the appellant had been granted leave when that was not the case. It is not necessary for me to decide for the purposes of this appeal of whether that was in fact a grant of leave given that it was withdrawn and the appeal proceeded in any event. Indeed, had it been a grant of leave that could have been relied upon then of course there could have been no appeal against the decision.
12. Ground 3. This has given me some concern as the judge appeared to assume that the appellant's partner would be able to join her in India. After some discussion it transpired that he would be able to go there lawfully and whilst Mr Kumar took me to SSHD v Kamara [2016] EWCA Civ 813 and submitted that, as a British citizen it would be unfair to expect the appellant's husband to go to live in India as he would not be able to have the rights he has as a British citizen, I am not satisfied that that either taken singularly or cumulatively with the other difficulties that the appellant and partner might find are sufficient to meet the tests set out in EX2. The test there is not the same as the tests set out in 276ADE and thus accordingly the issues of integration are not relevant in respect of the husband. I accept that there will be

difficulties and indeed the judge did accept that there would be difficulties but in essence what is set out at paragraph 3 is in reality simply little more than a disagreement with the findings of fact reached by the judge.

13. With regard to the findings at paragraph 30, these must be looked at in the round. The judge sets out the law properly at [27] and sets out the evidence at [28], [29] and [30]. This demonstrates that the judge did consider evidence other than that which was before Judge Walker and thus there can be no materiality to the apparent error identified above in ground 1. I conclude that the judge was entitled to reach the conclusions he did about the difficulties of integration. Whether I would have reached the same decision is not the issue. The point is that the judge gave adequate and sustainable reasons for his findings.
14. Ground 4: it is simply unarguable that because this was not an asylum claim that the decision in Devaseelan does not apply. As Mr Kumar accepted it was legitimate for the judge to have regard to findings of fact made by a previous Tribunal, both as to fact and also as to credibility. It is simply not arguable that in the circumstances where there has been such an appeal, where relevant findings have been made as to the appellant's place of birth and documentation and similar matters, that these should be taken forward and the judge was properly entitled to take those into account and properly apply the decision set out in Devaseelan.
15. Ground 5. The judge was as he noted bound by Section 117A of the 2002 Act to take Section 117B into account. He was required to attach little weight to the appellant's private and family life given that they both had been established whilst her presence here had been precarious. Weight is of course a matter for the judge and it simply cannot be argued that too much weight was given to that or too little weight to the fact that the appellant had pursued lawful means of staying in the United Kingdom, having had leave to be here for a significant time. It is clear that the judge was aware of that and in reality it cannot properly be argued that the judge erred in concluding as he did that there was a strong public interest in having an efficient and effective system of Immigration Rules and on the facts of this case that removal was proportionate.
16. For these reasons and despite Mr Kumar's detailed submissions I dismiss the appeal

### **Notice of decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed

Date: 1 December 2021

*Jeremy K H Rintoul*  
Upper Tribunal Judge Rintoul