



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20772/2019
HU/24204/2018

THE IMMIGRATION ACTS

Heard remotely via video (Teams)
On 28 May 2021

Decision & Reasons Promulgated
On 11 June 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PREM BAHADUR KHADKA
ALISHA SHARMA
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the appellant: Mr A Tan, Senior Home Office Presenting Officer

For the respondents: Mr Z Jafferji, counsel, instructed by Greenwich Solicitors

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Microsoft Teams. A face to face hearing was not held all issues could be fairly determined in a remote hearing.

DECISION AND REASONS

Background

1. The Secretary of State for the Home Department (“appellant”) appeals against the decision of Judge of the First-tier Tribunal R A Singer (“the judge”) promulgated on 25 January 2021 allowing the human rights appeals of Mr Prem Bahadur Khadka (“the 1st respondent”) and Ms Alisha Sharma (“the 2nd respondent”) against the decision of the appellant dated 3 December 2019 (in respect of the 1st respondent) and against the decision of the appellant dated 16 November 2018 (in respect of the 2nd respondent) refusing their human rights claims.
2. The respondents are both nationals of Nepal. The 1st respondent arrived in the UK on 20 December 2008 as a student. He was granted further periods of leave and last had lawful leave to remain on 11 April 2017. The judge found that he had accrued 9 years and 4 months of continuous lawful residence until 11 April 2017 and this finding has not been challenged. On 13 April 2018 the 1st respondent made an out-of-time human rights application which was eventually varied to become an application for Indefinite Leave to Remain (“ILR”) under paragraph 276B of the Immigration Rules (which was also a human rights claim). The refusal of this human rights application on 3 December 2019 is the first relevant decision under appeal.
3. The 2nd respondent entered the UK on 26 April 2012 as the dependent of the 1st respondent who, at the material time, was a Tier 1 (Post Study) Migrant. She was granted further periods of leave to remain as the dependent of the 1st respondent. She made a human rights claim on 13 April 2018 based on her relationship with the 1st respondent and their child, AK, who was born in the UK on 30 April 2014. This human rights claim was refused on 16 November 2018 and is the 2nd relevant decision under appeal.
4. In her decisions the appellant was not satisfied that either of the respondents met the requirements for leave to remain based on their Article 8 private lives as expressed in paragraph 276ADE(1)(vi) of the Immigration Rules. Nor was the appellant satisfied that the respondents met the requirements of Appendix FM of the Immigration Rules, relating to family life relationships. Noting the age of the respondents’ child and the fact that he had not resided in the UK for at least 7 continuous years, the appellant was not satisfied there were exceptional circumstances outside the Immigration Rules that would cause the respondents’ removal to constitute a disproportionate interference with Article 8.
5. The respondents appealed the appellant’s refusal of their human rights claims to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

6. The judge had before him several bundles of documents prepared by the appellant and by the respondents. The judge heard oral evidence from both respondents, who adopted their statements and who were then questioned by both representatives.
7. At [20] the judge accurately set out the relevant legal framework for the assessment of human rights appeals and the correct standard and burden of proof. At [25] the judge reminded himself that he must have regard to the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 and that he also had to treat the child's best interests "as a primary consideration, under s.55 of the Borders, Citizenship and Immigration Act 2009."
8. When determining whether the respondents met the requirements of paragraph 276ADE(1)(vi) the judge set out factors both in favour of and opposing the existence of 'very significant obstacles' (the relevant legal test). One of the factors in the respondents' favour, identified at [29(b)], was a finding that their child's skills in the Nepalese language had diminished rather than improved since he commenced primary school and that, if he attended school in Nepal, the child would struggle initially, which could result in further difficulties for the respondents. Weighing up the competing factors, the judge found however that neither respondent fulfilled the requirements of paragraph 276ADE(1)(vi) and that that they would not face 'very significant obstacles' to their integration in Nepal.
9. The judge proceeded to consider the factors set out in s.117B of the Nationality, Immigration and Asylum Act 2002. At [35] the judge noted that s.117B(6) did not apply as the child was not a 'qualifying child' as understood in s.117D (the child was approximately 3 months shy of his seventh birthday and had not resided in the UK for a continuous period of at least 7 years).
10. At [37] the judge again directed himself that the welfare and best interests of the child was "a primary consideration." In subparagraphs (a) to (u) the judge set out factors relevant to the assessment of the child's best interests. The judge noted, *inter alia*, that the child had been born in the UK and had lived here his whole life, that he had never visited Nepal and that his parents had not been back for many years (although the 2nd respondent still had family there). The judge further noted that the child was not British, that he was still young and dependent on his parents although he had started to develop his own private life via his attendance at nursery and primary school, and that the child's connection with Nepal could be developed given his parent's connections and cultural and linguistic ties and that he was sufficiently young to be able to adapt to life in Nepal (although it would not be easy for him and he would face linguistic challenges which were likely to set him back in his schooling). The judge again noted the child's linguistic abilities (that he was likely to speak some Nepalese) and referred to some evidence relating to the diagnosis of an

eye condition, and that requiring him to leave the UK would result in the loss of educational opportunities available to him here. A relevant factor in the best interest's assessment was where the parents were expected to reside given that it was generally reasonable for children to reside with their parents (by reference to KO (Nigeria) v SSHD [2018] UKSC 53). The judge alluded to the relevant factors detailed in EV (Philippines) v SSHD [2014] EWCA Civ 874, the need for a "real world" assessment given that the two respondents were expected to leave the UK and the child would be going with them, and that the child had no significant health or behavioural problems and that he would not be neglected if he was removed to Nepal.

11. At [38] the judge stated:

"Weighing everything, it is, I find, more in [AK's] best interests to continue to be brought up by both of his parents together as a family unit in the UK and to continue his education here, more than require him to leave the United Kingdom with his parents and live in Nepal. That is the scenario which would best safeguard and promote his welfare."

12. From [39] onwards the judge engaged in an Article 8 assessment outside of the Immigration Rules. The judge found that both respondents had established private lives in the UK and that the critical issue was whether the decisions to refuse their human rights claims were proportionate or disproportionate under Article 8. The judge indicated that his proportionality assessment had to be evaluated by reference to the factors set out in s.117B of the Nationality, Immigration and Asylum Act 2002.

13. At [40] and [41] the judge again noted that the child was only three months away from being a "qualifying child" and then cautioned himself against adopting a "near miss" argument (with reference to Patel [2013] UKSC 72 and SS (Congo) and Ors [2015] EWCA Civ 387). At [43] the judge again reminded himself that the child was not a "qualifying child", and at [44] the judge set out an extract from the appellant's published policy guidelines "*Family life (as a partner or parent), private life and exceptional circumstances Version 12.0*", published on 31 December 2020. At [45] the judge indicated that, had the child been a "qualifying child", and having regard to the judge's findings regarding the child's best interests, he would have found that it was not reasonable to expect the child to leave the UK and go to Nepal. The judge again reminded himself however that the child was not a "qualifying child" and that he had to assess matters as of the date of his decision.

14. At [46] to [48] the judge rejected an argument advanced by the respondents' representative relating to the existence of a claimed "historical injustice". Then at [49] the judge set out factors weighing in favour of the appellant and the Article 8 proportionality balancing exercise. The judge noted that Article 8 was not a general dispensing exercise, that the Immigration Rules reflected the responsible Ministers assessment, at a general level, of the relative weight of the competing factors that would strike a fair balance under Article 8, and that

considerable weight had to be attached to the Secretary of State's policy under the Immigration Rules and the fact that the respondents did not meet the requirements of the relevant Immigration Rules. The judge additionally noted that family life between the respondents and their child could continue in Nepal and that it would be possible for them to live with the child's maternal grandparents.

15. At [50] the judge then set out the points in the respondents' favour. There were four principal points. The first point related to the child's best interests. The judge reminded himself that it was in the child's best interests that he continue to live in the UK with both of his parents. The judge once again noted that the child's best interests were "a primary consideration in the balancing exercise, but they are not the only consideration and can be outweighed by other factors." The judge noted that the child had spent his entire life in the UK and was nearly 7 years old, and that he had considered the relevant jurisprudence relating to the "near miss" argument in respect of s.117B(6). The second point related to the individual private lives developed by each of the respondents whilst in the UK, albeit that those private lives had been developed whilst they were here precariously. The judge indicated that he applied little weight to it, as required by s.117B(5). The judge nevertheless accepted that the respondents had established a network of friends in the UK and that the private lives they had established was deserving of some respect. The third factor considered by the judge was the nature and length of each respondent's residence in the UK. The judge indicated that he had given this factor some weight in the balancing exercise because each of the respondents had lived in the UK for a substantial period of time and their child was born here nearly 7 years ago. The fourth point considered by the judge was that the 1st respondent had studied in the UK and achieved numerous qualifications, including an MSc in Information Systems Management, and had also passed the life in the UK test, and had worked in the UK when he had a right to do so.
16. At [51] the judge stated:

"Weighing the arguments in striking a balance between the competing public and individual interests on both sides, and having regard to the normative guidance in s.117B above, I find the scales fall on the side of both of the [respondents]. I find that the circumstances of each of their cases, particularly given [AK's] best interests, when considered alongside the length and nature of his and his parents residence, are sufficiently compelling to outweigh the [appellant's] public interest in controlling immigration. Evaluating the evidence as a whole, the refusal of the [1st respondent], and the removal of the [2nd respondent], is unjustifiably harsh and disproportionate under Article 8 ECHR, I find."
17. The judge consequently allowed the appeals on human rights grounds.

The challenge to the judge's decision

18. The grounds of appeal, amplified by Mr Tan's oral submissions, argue that the judge made a material misdirection of law. The grounds contend that the judge erred in law by treating the child's best interests as a "trump card". It is argued that the judge elevated the consideration of the child's best interests from "a primary consideration" to "the primary consideration above that of the public interest, despite reminding himself that other considerations must be made." The judge's balancing exercise was consequently flawed and unreliable. The judge essentially conflated the "best interests" assessment with question whether it was reasonable for the child to leave the UK and approached s.117B(6) on the basis that the child's best interests were the sole relevant consideration. The judge's approach was not consistent with long established Article 8 jurisprudence on the importance of considering all relevant factors 'in the round'. The grounds focus on a single factor in the "best interests" assessment [37(u)] relating to the loss of educational opportunities to the child in submitting that the judge erred in concluding that the child's "best interests" were to remain in the UK. The grounds did not raise a rationality challenge, a point confirmed by Mr Tan during the 'error of law' hearing. The appellant's grounds did not therefore contend that the judge's decision was perverse or one that was not rationally open to him, but that, in reaching his decision, the judge misdirected himself in respect of the applicable legal principles.
19. I indicated at the conclusion of the hearing that, whilst the judge's conclusion was undoubtedly generous, it did not disclose any legal error within the terms advanced by the appellant in her grounds.

Discussion

20. No issue has been taken with the judge's actual assessment of the child's best interests at [37]. In this paragraph the judge identified a number of factors properly relevant to the best interests assessment (see EV (Philippines)). Contrary to the assertion in the grounds of appeal, a careful examination of the judge's decision discloses his acute awareness that the child's best interests was "a primary consideration" and not "the primary consideration". The judge specifically self-directed himself in respect of the correct test at [25], [37], and again at [50(a)].
21. A consideration of the content and structure of the judge's decision confirms that the judge was not merely paying 'lip service' to the appropriate test but applied it in practice. The judge's assessment of the child's best interests was conducted prior to and separately from the judge's subsequent proportionality assessment, which began at [39]. Significantly, at [50], the judge made clear that the child's best interests was only one of the factors relevant to his assessment of the points in the respondents' favour when he undertook his proportionality assessment. In addition to the child's best interests, the judge additionally took into account the private lives established by the respondents, the nature and

length of their residence in the UK, and the 1st respondent's achievements in the UK. The assessment at [50], and the conclusion at [51] indicates that the judge did not regard the child's best interests as a "trump card" but that it was "a primary consideration" in his assessment. At [51] the judge again indicated that the proportionality assessment fell in the respondents favour having regard not only to the child's best interests but also to the length and nature of the respondents' residence.

22. Whilst the judge's proportionality assessment was certainly generous, the grounds of appeal did not contend that his conclusion was perverse. There has been no rationality challenge to the judge's decision in the Wednesbury sense and I am not satisfied that his conclusion was one that no reasonable judge, properly directing himself on the facts and the law, would have been entitled to reach. The decision does not disclose a material misdirection. The appeal by the SSHD is dismissed.

Notice of Decision

The judge did not make an error on a point of law.

The Secretary of State's appeal is dismissed.

D. Blum

Signed
Upper Tribunal Judge Blum

Date 1 June 2021