



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

Appeal Numbers: IA/48361/2013
IA/48372/2013
& IA/48383/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 10 December 2014**

**Determination Promulgated
On 12 December 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

**Secretary of State for the Home Department
[No anonymity direction made]**

Appellant

and

**Pradumna Raj Sharma
Rahana Thapaliya Sharma
Sunniva Sharma**

Claimants

Representation:

For the claimants:

Mr A Hussain, instructed by Cubism Law

For the appellant:

Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Hollingworth promulgated 2.10.14, allowing the claimants' appeals against the decisions of the Secretary of State, dated

6.11.13, to refuse their applications to vary leave to remain as a Tier 2 (General) migrant and dependant wife and child, and to remove them from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 24.6.14 and 9.9.14.

2. First-tier Tribunal Judge Froom granted permission to appeal on 14.11.14.
3. Thus the matter came before me on 10.12.14 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Hollingworth should be set aside.
5. In granting permission to appeal, Judge Froom found it arguable that the judge erred by misdirecting himself in law in the manner described in the grounds seeking permission to appeal, all of which may be argued. In particular, it is arguable the judge failed to recognise the limited pull of private life factors in the case of appellants who were in the UK for temporary purposes, as explained in *Patel* and *Nasim*.
6. I was presented at the hearing with a plethora of relevant case law:
 - (a) Nasim and others (Article 8) [2014] UKUT 00025 (IAC);
 - (b) E-A (Article 8 -best interests of child) Nigeria [2011] UKUT 315 (IAC);
 - (c) Zoumbas v SSHD [2013] UKSC 74;
 - (d) EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874;
 - (e) R (on the application of Esther Ebum Oludoyi & Ors) v SSHD (Article 8 - MM (Lebanon) and Nagre IJR) [2014] UKUT 539 (IAC);
 - (f) IO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC).
7. I have considered all of these case authorities and taken them into account, together with the skeleton argument of Mr Hussain, dated 9.9.14, and the submissions of the representatives before me.
8. For the reasons set out herein, I found that the decision of the First-tier Tribunal was vitiated by errors such that it could not stand and had to be set aside and remade. Having made that decision at the hearing before me I then heard further submissions from the representatives of the appellant and the claimants. Mr Hussain did not seek to adduce any further evidence. At the conclusion of the hearing I reserved my decision on the remaking of the appeal, which I now give.

9. As the decision in the case, and indeed the conclusion of the hearing, did not take place until September and October 2014, the First-tier Tribunal was required to take into account section 117B of the 2002 Act.
10. The relevant background to the appeal can be summarised as follows. The first claimant entered the UK in 2005 as a student. Leave was subsequently extended on a number of occasions until 14.10.13. Two days before the expiry of leave the first claimant applied for further leave to remain as a Tier 2 (General) Migrant, with his wife and child applying as his dependants.
11. The application was refused on 6.11.13 because, first, the first claimant failed to demonstrate and provide evidence that he had taken and completed a UK recognised degree qualification, or equivalent, as required by paragraph 245HD(d) of the Immigration Rules. Second, he failed to qualify for the necessary 30 points under Appendix A because the educational sponsor providing the Certificate of Sponsorship (COS) had not performed an appropriate resident labour market test as defined in Appendix A and the Codes of Practice under Appendix J.
12. The grounds of appeal to the First-tier Tribunal raised only in general terms that the decision was not in accordance with the Immigration Rules; unreasonable; and contrary to the claimants' human rights.
13. At the First-tier Tribunal hearing it became clear that the first claimant was still studying, although he worked for a brief period of time. He claimed that he had been badly advised by legal advisers in making a Tier 2 application. However, he had made no formal complaint.
14. The First-tier Tribunal Judge does not deal with the Tier 2 part of the application and reached no conclusion about the same. At §13 it appears that counsel for the claimants conceded that they did not meet the Rules. I can only assume that means both those Rules in relation to the Tier 2 application and those in relation to private and family life contained in paragraph 276ADE and Appendix FM. The judge's attention was drawn to section 177B.
15. In considering the decision as a whole, I find that the judge has conflated the family and private life issues in the case, and in the process failed to take sufficient account of the public interest in the article 8 private and family life assessment, having decided at §19, following Gulshan, that there were good grounds for going on to consider article 8 outside the Rules on the basis that the decision was unjustifiably harsh.
16. Even before embarking on the article 8 assessment, the judge had At §17 the judge purported to allow the appeal on the basis that the Secretary of State had not considered section 55 of the Borders Citizenship and Immigration Act 2009 in respect of the two children of the family, then aged 5 (the third

claimant) and 3, but not a claimant. It is not necessary for the judge to make such a finding and allow the appeal on that basis, as he can apply the correct law and consider the best interests of the children within the parameters of the appeal hearing before him, as he purports to have done at §27. If the judge was going to allow the appeal on the basis that the decision of the Secretary of State was not in accordance with the law, then the correct approach should have been to allow the appeal on the limited basis so that it remained for the Secretary of State to make a decision which is in accordance with the law, effectively sending the decision back to the Secretary of State.

17. In IQ the President held that the duty imposed by section 55 required the decision maker to be properly informed of the position of a child affected by the discharge of an immigration act function. "Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors." This and "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."
18. Whilst the judge was right to consider as a primary factor the best interests of the children, the way in which this was done in the decision amounted to an error of law. In deciding at §17, before embarking on the article 8 assessment, that the appeals should be allowed on the basis of the failure of the Secretary of State to consider section 55, the First-tier Tribunal pre-judged the Razgar 5 step assessment and in particular the proportionality balancing exercise. Nothing was being balanced against those best interests and no account was taken of the public interest before the decision was made.
19. The judge then went on from §18 to allow the appeals on what he described as a further and separate basis, namely article 8 ECHR, the consideration of which followed from §22 onwards.
20. At §25 the judge found the first four criteria of Razgar were met, without explaining in what way the removal decision created such interference with either family or private life so as to engage article 8 ECHR. The judge appears to have concentrated on finding that there was family life in the UK, which was not in issue in the appeal. The claimants would have been removed together to Nepal, where they would be able to continue their family life.
21. In relation to proportionality, section 117B had been drawn to the judge's attention and at §24 he stated that he had applied the criteria, Given the contents of §26 it may be that the judge had section 117B in mind at that state.

22. At §27 the judge returned to section 55 and found that it would be “wholly undesirable” to uproot the five year old child from the school environment on the basis that the child would be “transferred to an environment with which she was unfamiliar to a degree which would not be in her best interests without full and proper preparation for the transition. However, as previously suggested, neither at this point nor elsewhere in the decision does the judge take any proper account of the public interest in requiring removal from the UK as part of the proportionality balancing exercise.
23. In relation to children, the Court of Appeal at §35 of EV (Philippines) set out factors to be considered in assessing the best interests of children. These include: (a) the age; (b) the length of time that they have been here; (c) how long they have been in education; (d) to what extent they have become distanced from the country to which it is proposed that they be returned; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.” The Court of Appeal went on to emphasize the “strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex-hypothesi, the applicants have no entitlement to remain.”
24. In ZH (Tanzania) Baroness Hale stated that what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. If all the factors weighed in the best interests overwhelmingly in favour the child remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it.
25. One of the difficulties with this decision is that whilst the judge has given every consideration to the best interests of the children, there was no reference to the countervailing factors, or consideration that their best interests are undoubtedly going to be to remain with their parents and whether that included returning with their parents to Nepal and the culture and society of the family. The judge also seems to have ignored the fact that neither parents nor children are British citizens and have no rights to education or other benefits of life in the UK. Whilst the third claimant is in school, at the young age she and her sibling are, their primary focus will have been around the family home in which their mother, at least, speaks Nepalese and immersed in the culture of their parents’ and their own nationality.
26. In Zoumbas, Lord Hodge in submitting the unanimous judgement of the Supreme Court stated at §24 that,

“No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the UK so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into UK society would have been predominately in the context of that family unit.”

27. Lord Hodge could have been speaking of the children in the present appeal, as much of what was stated applies to them. Obviously, removal from schooling in the UK will cause some disruption, but at their young age that is necessarily going to be temporary and very limited. With respect to the First-tier Tribunal Judge, nothing about their circumstances suggests anything other than one might expect of the dependant children of students present in the UK on a strictly temporary basis. In the circumstances, it is difficult to see how the best interests of these children were such as to require them to be allowed to remain in the UK on the basis of their private life under article 8.
28. To similar effect is the decision of the Upper Tribunal in E-A, where at §40 the Tribunal noted that although the children in that case (who had just started primary school) had been in the UK for a considerable period of time, “the nature and degree of private life that they have forged is such that it is still of a very personal, intra-family nature in the main, with the focus on the home and family, although they have begun to take their first tentative steps toward socialisation and the world outside the family.” At §42 the Tribunal recognised that whilst a move to Nigeria would require some adaptation to a new home, new school and church, “we see no reason why that should not be a positive experience for the children who will be supported by their parents.” The Tribunal went on to note the factors that made such a move easier. At §43 the Tribunal stated, “It is important to recall that although the appellants may all have been here lawfully, they came to the UK for a temporary purpose with no expectation of being able to remain in the UK. The third appellant happened to be born in the UK whilst her parents were here for a temporary purpose. The expectation was that they would all return to Nigeria once the first appellant’s studies were completed. Those who have their families with them during a period of study in the UK must do so in the light of that expectation of return.”
29. That leads me on to the absence of consideration in the decision of matters relevant to the private life rights of the adult claimants. Following Nasim and Patel, it is clear that whilst each case must be considered on its own merits, the temporary presence of an immigrant in the UK for the purpose of study or work does not normally give rise to a degree of private life the

interference of which caused by removal would be sufficiently grave to engage article 8(2). Article 8(2) has limited utility in such cases which are far removed from the physical and moral integrity of the individual.

30. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."
31. The panel considered at length article 8 in the context of work and studies. The respondent's case was that none of the appellants could demonstrate removal would have such grave consequences as to engage article 8. §57 of Patel stated, "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right... The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."
32. At §14 of Nasim [2014], the panel stated:

"Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control."
33. The panel pointed out that at this point on the continuum, "the essential elements of the private life relied on will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country, (§15)" and (§20) recognised "its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed

interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).”

34. Absent from the decision of the First-tier Tribunal is reference to any of the case law cited above.
35. In the light of the case law it is difficult to see on what basis the First-tier Tribunal could find that there was a breach of the first claimant’s private life rights. Between §28 and §30 the judge recites the educational and career ambitions of the first claimant and seems to find that the public interest would be met by allowing him to continue to complete his studies. The judge also described his desire to work for a year in the UK as an entirely justified aspiration.
36. However, he has no legitimate expectation of being able to remain and no right to study or work in the UK. The length of time the claimants had been in the UK was a relevant factor, as was the extent of integration into society during the years they have been in the UK. But the fact remains that their presence here was always intended to be temporary. There was a route for leave to remain in the capacity of student for further studies, but he had not applied for it and there was no credible evidence to support his claim that he had been badly legally advised.
37. Further, the judge had taken no account of the fact that the claimants had not been able to meet any of the Rules for leave to remain, whether as a Tier 2 migrant and dependants or under Appendix FM or paragraph 276ADE of the Immigration Rules. I find that the judge failed to apply the relevant case law to the facts of the case and to recognise that the claimants could have had no legitimate expectation of being able to remain in the UK except in accordance with those Immigration Rules. Article 8 is not intended to be a one-stop-shop shortcut to compliance with the Immigration Rules. There is no reason on the facts of this case why the claimants could not continue to develop their private life in Nepal and maintain such associations and friendships they may have made in the UK through modern means of communication. It is commonplace that not only friends, but close family members relocate to different areas of the world far apart from each other, but keep in touch with each other.
38. It is not clear at this stage of the decision whether the judge was considering private or family life factors, but by §32 the judge found there would be a breach of the first claimant’s rights and a breach of the second claimant’s family life rights. The judge also found there would be a breach of the children’s article 8 family life, on the basis that the family should remain together. It is not clear why or for what purpose the judge devoted such a significant proportion of the consideration to whether or not family life

existed, which was not in issue. Quite how there could be a breach of family life given that they would be removed together is difficult to see. The judge then went on to purport to give a recommendation that the claimants be permitted to remain for two years, which is a matter for the Secretary of State. The judge appears to have made no acknowledgement that family life could continue in Nepal, with the entire family together.

39. For the reasons set out above, I find that the decision of the First-tier Tribunal contained such errors of law that it cannot stand and must be set aside. Having set it aside, I heard further submissions from the representatives of the claimants and the Secretary of State and reserved the decision in the appeal.
40. It is obvious, for the reasons stated, and Mr Hussain conceded, that the claimants cannot, even now, meet the requirements of Appendix FM or paragraph 276 of the Immigration Rules.
41. Since the First-tier Tribunal hearing, the first claimant has continued to study and completed further exams. He has two further exams outstanding, however, the college will not let him return unless he can demonstrate he has leave. As his leave continued pending the series of appeals, there is no reason why the first claimant could not have continued, at least until the outcome of this appeal.
42. Mr Hussain seemed to place considerable reliance on the fact that the first claimant has property and investments in the UK. He also relied on the fact that the claimants had not broken the law or relied on public funds. However, those factors do not outweigh or diminish the public interest in removal. I find it a rather surprising assertion that a person should have a greater claim to remain under article 8 because they have property and investments in the UK.
43. I bear in mind that the first claimant has come close to completing his studies, but again I have to point out that if he wanted to remain in that capacity he should have made an application for that on the correct form. He has no inherent right to study in the UK or remain for work except in strict accordance with the Immigration Rules. I do not know why he has not made such an application before now, even whilst these proceedings were pending. I find the complaint that he was badly advised entirely unsatisfactory, especially since he has failed to make any formal complaint about the conduct of his case. The fact that it may well be still open to the claimant to make a further application for leave to remain as a student must surely be relevant to the proportionality of the decision to refuse the Tier 2 application and in consequence seek to remove the claimants.
44. As Judge Hollingworth did, I also take full account of the best interests of the children in relation to section 55, and take into account the same factors

set out by the First-tier Tribunal decision. However, in the light of their ages and circumstances it is very clear that their overwhelming best interests are to return to Nepal with their parents, remaining in the family unit. For the reasons set out above in some detail, I do not accept that any private life rights they may have acquired through limited exposure to life in the UK can sensibly be considered to outweigh the very strong public interest in enforcing immigration control. Neither is there any basis for considering that the family life rights could amount to a basis for permitting them to remain when they cannot meet the requirements of the Rules to do so.

45. In relation to section 117B I consider that the claimants' position in the UK is precarious and thus limited weight should be given to any private life accrued in the UK. Whilst there is extant leave by virtue of section 3C, it has been plain for some time that the first claimant could never meet the requirements of Tier 2 and without an application for leave to remain as a student, he can only expect to be required to leave the UK.
46. In my view, taking all the evidence and the submissions together, in the round, it is very clear that neither family nor private life interference is sufficiently grave as to engage article 8. Even if I am wrong on that, I further find, for the reasons set out above, that in the proportionality balancing exercise between on the one hand the rights of the claimants individually and as a family and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control, the decision is entirely proportionate and not disproportionate to the claimants' rights. Neither can the decision be considered as unjustifiably harsh, or it be otherwise unreasonable to expect the claimants to return to Nepal and continue their family and private life there.

Conclusion & Decision

47. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision by dismissing the appeal of each claimant on all grounds.



Signed:

Date: 11 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed and thus there can be no fee award.



Signed:

Date: 11 December 2014

Deputy Upper Tribunal Judge Pickup