



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15591/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2018

Decision & Reasons Promulgated
On 11 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LAXMAN PUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr R Wilcox, Counsel, instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Herbert allowing the appeal of the respondent under the Immigration Rules and under Article 8 of the ECHR.
2. For ease of reference the respondent will from now on be referred to as the applicant.
3. The applicant is a citizen of Nepal born on 1 July 1986. He entered the United Kingdom on 7 November 2009 with entry clearance as a Tier 4 (General) Student valid from 12 October 2009 to 30 August 2012. He was granted further leave to remain in the same capacity until 17 June 2011 and then until 19 January 2016 following a successful

appeal against the refusal decision of 29 April 2013. The appeal was allowed by a First-tier Judge on 7 May 2015. On 20 November 2015 the applicant's leave to remain in the UK as a Tier 4 Student was curtailed with immediate effect due to having submitted an invalid TOEIC certificate with his previous application of 24 August 2012.

4. On 26 January 2016 the applicant applied for leave to remain indicating the immigration route he wanted consideration under was the partner route as the partner of Miss Pabitra Pun, who was born on 12 June 1981, a Nepalese national in the UK with indefinite leave to enter. In addition, he stated that he has a family life with Miss Pun, a Nepalese national born on 12 June 1981 and their child, born on 1 January 2016. He stated that he has a private life based on his friends in the UK and that he has integrated into the norms and culture of the UK and if he were removed from the UK, it would prevent his family life. The application was refused on 1 June 2016. The applicant appealed and his appeal was allowed by First-tier Tribunal Judge Herbert.
5. The judge stated that the applicant's case was set out in the applicant's main bundle and his supplemental bundle containing his witness statements. The applicant accepted that he had wrongfully submitted an incorrect test. He expressed remorse for attempting to prolong his stay by submitting a false TOEIC test. He said he was in financial difficulties at the time and wanted to extend his stay and finish his studies in the UK.
6. He said his relationship with his wife began when they met in November 2013 and they got married in a Buddhist ceremony on 13 February 2015. He relies on his wife for financial, emotional and moral support. She works long hours notwithstanding the birth of their child to make sure that the family are fully supported. They do not rely at all on any public funding. They have lived together for a significant period of time. They have lived together at two addresses since they got married. He has a genuine and subsisting relationship with his partner, who is settled in the UK, and there are insurmountable obstacles to family life with his partner continuing outside the UK.
7. This is because his wife hardly has any ties in Nepal as her father passed away in 2010 and was living in the UK. His in-laws live in the UK, namely two sisters-in-law and one brother-in-law. His wife does not have any contact with their family in Nepal and therefore their immediate family is in the United Kingdom with each other and with their child, who is now a UK citizen. He said he is able to speak English and therefore is able to integrate fully into society here, which he has done in recent years.
8. He said his wife came to the UK in 2007 and now has indefinite leave to remain. She is employed full-time with Javelin Plastics, working some 37 and a half hours per week but works anything up to 70 hours per week in order to support her husband and daughter and has another part-time job as a cleaner. She said her mother and siblings and one stepsister are in the UK. She sees them regularly and they form part of an extended family.

9. Their daughter is now 22 months old. His wife would find it impossible to move to Nepal as she would lose her relationship with her mother and immediate siblings, her accommodation and employment and effectively her settled status in the United Kingdom would be undermined. Their daughter would effectively lose her UK citizenship.
10. In making findings of fact, the judge said the starting point of this appeal was a decision under the Immigration Rules. He found there was overwhelming evidence both documentary and otherwise before him to satisfy him that the applicant has a genuine and subsisting relationship with his wife, who is in the UK and is settled here. The judge said the key question was whether or not there were insurmountable obstacles to family life with his wife continuing outside the United Kingdom.
11. The judge had regard to the case of **Agyarko (in the application Agyarko) v Secretary of State for the Home Department** [2017] UKSC 11, which gives meaning to insurmountable obstacles as required by paragraph EX.1(b). The instructions direct the decision maker to consider the seriousness of the difficulties which the applicant and his or her partner would face in continuing their family life outside the UK and “whether they entail something that could not (or could not be reasonably expected to) be overcome, even with a degree of hardship for one or more of the individuals concerned”.
12. The judge said he had given some weight to the fact that if the applicant was removed from the UK, he would be separated from his family and would be forced to interact with his family without direct contact. His relationship with his daughter will be reduced to electronic means of communication. The judge said this cannot be in accordance with the Charter of Fundamental Human Rights Article 7 and Article 24(3), which direct that there is a necessity for direct contact of a child with both parents. The judge said this was underlined in the case of **Abdul (s.55 - Article 24(3) Charter of Fundamental Rights)** [2016] UKUT 00106. The judge stated that the UN Convention on the Rights of the Child states that national legislation should ensure that children should not be separated from their parents unless it is in his or her best interests. He also relied on **ZH (Tanzania) v SSHD** [2011] UKSC 4 where it was considered under what circumstances it was permissible to remove a deported non-citizen parent where the effect would be that a child who is a citizen of the UK would also have to leave. The judge also relied on other case law including **Zoumbas v Secretary of State for the Home Department** [2013] UKSC 74 and **Zambrano** [2012] UK 48 (IAC) which make it clear that the best interests of the child in an integral part of the Article 8 balancing exercise although not always the only primary consideration.
13. In the light of the principles derived from the case law, the judge found that under the Immigration Rules there are insurmountable obstacles to family life taking place outside the United Kingdom because the applicant’s partner has settled status in the UK and they have a daughter who is a UK citizen who would effectively be denied that citizenship should she be forced to leave with her father. It was invidious and would be an insurmountable obstacle for him to be removed should they both seek to remain in the UK and that removal would effectively be contrary to the child’s best

interests under Section 55 of the Borders and Citizenship Act. The judge found that the insurmountable obstacle would entail very serious hardship which could not be overcome simply by the whole family moving itself to Nepal and if the family were split it would very clearly be an insurmountable obstacle to their family life continuing.

14. Considering this matter outside the Immigration Rules, the judge found that there are exceptional circumstances that apply in this case as this is an applicant who is not a foreign criminal but has breached one important aspect of the Immigration Rules by fraudulently obtaining a TOEIC test score. Notwithstanding this, the judge found that the applicant's wife has settled status in the UK and has a child who is a UK citizen whose rights would be deeply affected should he be removed. Their circumstances are that the family would effectively be destitute, without accommodation, support or income to turn to. These are exceptional circumstances outside the Immigration Rules.
15. The judge then went on to consider Article 8 by relying on the five-stage test in **Razgar**.
16. The judge found that it would not be proportionate to remove the applicant as he is not a person who faces deportation as a foreign criminal. His wife has settled status in the UK and his child is a UK citizen child. They are economically active. The judge said he has also looked at Section 117B of the Immigration Rules where the maintenance of immigration control is clearly in the public interest. The judge said, however, that it is in the public interest when the person who seeks leave to enter or remain in the United Kingdom is able to speak English, is less of a burden on taxpayers and is better able to integrate in society. He found that the applicant now with his command of English and ability and knowledge to integrate satisfies the criteria in Section 117B. The judge found that whilst little weight should be placed on a private life established at a time when his immigration status was precarious, he took into account that the applicant is not liable to deportation. He also took into account that public interest does not require his removal according to Section 117B(6) where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. He found that as the applicant's child is a British citizen, it would not be reasonable to expect the child to leave the UK with his father.
17. Mr Tufan submitted that the judge allowed the case simply on the basis that there is now a British citizen child involved. He said the applicant is Nepalese, his wife is Nepalese and the child is of Nepalese descent. The judge treated the British citizen child as a trump card in contrast to **ZH (Tanzania)**, which says it should not be treated as such.
18. Mr Tufan submitted that there is no dispute that the applicant cheated in the TOEIC test. He admitted that he had wrongfully submitted an incorrect test. That was the reason why the respondent applied S-LTR.1.6 of Appendix FM to refuse his application on the basis that his presence in the UK was not conducive to the public good.

19. Mr Tufan submitted that in allowing the applicant's appeal simply on the basis that the child is a British national the judge failed to have regard to paragraph 64 of **VM (Jamaica) [2017] EWCA Civ 255**. The Court of Appeal held here that:

"The presence of the children in the UK does not, as a result of the operation of EU law, have to be treated as a fixed point for the purposes of the proportionality analysis under Article 8. It was legitimate for the FtT in the 2015 FtT decision to consider for the purposes of its Article 8 proportionality analysis whether the family unit could be expected to take the option, which EU law allows the Secretary of State to present to KB and the children, of relocating to Jamaica with VM."

Mr Tufan also relied on paragraph 63, which held: "... The reasoning in **FZ (China)** covers the present case and shows that, contrary to the view of the UT ... the possibility that KB and the children will choose to go to Jamaica with VM does not 'violate the fundamental precepts of EU law.'"

20. Mr Tufan submitted that the judge gave improper consideration to Section 117B. The judge only paid lip service to it at paragraph 27 of his decision. Mr Tufan submitted that in the Home Office guidance on Family Life: Appendix FM Section 1.0b it states:

"Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply. In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine the UK's immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."

21. Mr Tufan relied on this guidance to submit that because the applicant has admitted to cheating, his presence in the UK is not conducive to the public good.
22. Mr Wilcox submitted that it is not the case that the judge gave cursory consideration to the proportionality exercise. To make that submission is to focus too much on **Zambrano**, which, he accepted, leaves something to be desired.
23. He said that the judge considered Section 55 of the Borders and Citizenship Act at paragraphs 20 to 22. Whilst it is not immediately obvious, the judge attempted to align this jurisdiction's duty to the UN Convention of the Rights of the Child. The Convention at Article 24(3) recognises that a child has ongoing direct contact with both parents as detailed by the judge at paragraph 20. There would be a violation of this right if the child is required to be separated from one of the parents and that is why

we have EX.1 and Section 117B and that is why it is also in the guidance issued by the Secretary of State.

24. Mr Wilcox submitted that whilst the best interests of the child is not a trump card, that child is a British citizen nonetheless and according to **MA (Pakistan)** powerful reasons should be given as to why it would be in the child's best interests to leave the UK with one or both parents. This weighed heavily in the judge's mind and was evidenced by the judge's discussion of **Abdul** in the context of Section 55. Mr Wilcox said it was open to the judge on the basis of this analysis that it was not in the best interests of the child for her father not to be granted leave.
25. Mr Wilcox said the judge's decision at paragraph 22 indicates that there is a chance that the UK citizen child would lose her father, lose the benefit of UK citizenship because she is not permitted to remain in the UK with one or both parents. If she stays with the parent that has leave to remain she would be separated from the father and this would be a significant violation of Section 55 and the UN Convention Article 24(3) or the family unit goes to Nepal.
26. Mr Wilcox submitted that there is enough in the determination to show that the judge notwithstanding some lapses grappled with the most significant aspect of proportionality in his Section 55 analysis.
27. Mr Wilcox submitted that the applicant has admitted wrongdoing and expressed remorse. Relying on the guidance cited by Mr Tufan, Mr Wilcox submitted that the fraudulent test does not rise to significant or persistent criminal offences. It was therefore open to the judge to find that notwithstanding the applicant's offending, it would not be proportionate to remove him from the UK, having regard to his relationship with his wife and daughter and the circumstances they would find themselves in Nepal.
28. I find that the judge focused to a large extent on the best interests of the child of the applicant because she is a British national. I would not however go so far as finding that the judge simply allowed the appeal simply on the basis that there is now a British citizen child involved, as submitted by Mr. Tufan. I find that EX.1, Section 117B and the guidance issued by the Secretary of State embody this jurisdiction's duty to the UN Convention of the Rights of the Child. So, I failed to see the need for the judge to align this jurisdiction's duty to the UN Convention of the Rights of the Child, if that was what the judge was trying to do. We have Section 55 of the Borders and Citizenship Act, which incorporates the fundamental principles derived from this Convention and Articles 7 and 24(3) of the Charter of Fundamental Rights as well as many leading cases decided by the Supreme Court, the Court of Appeal and the Upper Tribunal in this area of the law to guide us.
29. I find that whilst the judge focused significantly on the child because of the child's British citizenship, the judge considered other reasons why it would not be proportionate for the applicant to be removed from the UK. The judge took into account that the applicant, although not a foreign criminal, is a person who has

breached an important aspect of the Immigration Rules by fraudulently obtaining a TOEIC test certificate. Notwithstanding the admission by the applicant of wrongdoing, the judge found at [22] that it would be invidious and wrong in law if the fault of the applicant in relying upon a fraudulent test score were to result in a significant detriment to a UK citizen child having to lose her father in circumstances that would clearly not be in the best interests of the child or in the family being removed to Nepal where she would effectively lose the benefit of her UK citizenship, and her mother would lose her settled status in the UK and where the mother would also lose her employment and accommodation. In the light of these cogent findings, I find that it was open to the judge to conclude that there would be serious interference with family life in the UK and there would be insurmountable obstacles to family life continuing in Nepal.

30. I find that the judge took into account the public interest in maintaining immigration control as set out in Section 117B of the Immigration Rules. There was no evidence to support the judge's finding that the applicant now has a command of English, given that the applicant did not give oral evidence. Nevertheless, as the applicant has been in the UK since 2009, he is likely to have the ability and knowledge to integrate in society as found by the judge. The judge took into account that the applicant is not liable to deportation. Whilst he has established his private life at a time when his immigration status was precarious, it was open to the judge in the light of the evidence to find that the public interest does not require his removal in the light of his genuine and subsisting relationship with his daughter, who is a qualifying child, and it would not be reasonable to expect the child to leave the UK.
31. For these reasons I find that the judge's decision does not disclose an error of law.

Notice of Decision

The judge's decision allowing the applicant's appeal shall stand.

No anonymity direction is made.

Signed

Date: 6 July 2018

Deputy Upper Tribunal Judge Eshun