



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17684/2016
HU/17686/2016
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THE IMMIGRATION ACTS

Heard at Field House
On 4th May 2018

Decision & Reasons Promulgated
On 15th May 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

UMESH [S]

MINU [S]

[US]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss I Sriharan, Counsel instructed by PN Legal Services

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a Nepalese family which is husband, wife and child born respectively in February 1974, April 1976 and April 2007. There is, in fact, a second child born more recently in the United Kingdom but that child does not feature in relation to the appeal. The husband arrived in the United Kingdom on 23rd May 2008

with entry clearance as a student and was joined by his wife and son in July 2010 and they were granted leave in line with the husband. That was subsequently extended until June 2012. A further application to remain as a Tier 1 (Post-Study) Student was refused, however further leave was applied for and granted in August 2014 until 26th December 2015. That leave was curtailed to expire in September 2015 and no-one has been able to tell me why. Before that leave expired in September 2015 an application was made on the basis of private life which was considered on both private life and family life grounds by the Secretary of State. The Secretary of State refused that application in January 2016 and certified it as clearly unfounded such that there was no right of appeal.

2. Following a judicial review application the Secretary of State made a further Decision in July 2016, again refusing the application but on this occasion giving a right of appeal. In that Decision consideration was given to the best interests of the child and the Secretary of State found that the best interests of the child were to remain with the family and there was nothing to suggest that it was not in the child's interests to return with his parents to Nepal where they would be returning as a family unit. That refusal was appealed to the First-tier Tribunal and at a hearing in Birmingham on 11th September 2017 Judge Chohan heard the appeal. He found also that the best interests of the child were to live with the parents and found it reasonable for the child to return to Nepal with his parents.
3. There was an application for permission to appeal to the Upper Tribunal which was granted by a Judge of the First-tier Tribunal and the matter came before me to decide an error of law on 3rd April 2018. On that date I found that there had been an error of law in the First-tier Tribunal's Decision in the consideration of the reasonableness test as set out in MA (Pakistan) [2016] EWCA Civ 705 and I adjourned the matter at the Secretary of State's request because her representative wanted to make written submissions and rely on case law.
4. Thus the matter came back before me today and I am considering two issues, namely where the best interests of the child lie and if the best interests of the child are to remain in the United Kingdom, whether it would be unreasonable to expect him to leave the United Kingdom and return to Nepal with his parents.
5. In written submissions Mr Melvin makes the point that there was no evidence before the First-tier Tribunal that the child had made any relationships outside of the family. I am aware that before the First-tier Tribunal the Appellants were not represented and there was a gap in evidence in terms of what was happening in relation to the said child. However, I note that the child was 3 years of age when he came to the UK and is now 11. He has had the entirety of his primary education in the UK and is now in year 6 and is aged 11. He will be leaving primary school this year and going to secondary school in September and I am informed that one has been identified. It is without doubt that the child during his time in primary school will have formed relationships with classmates, he may well have formed relationships with other people outside of school. I am not told whether he has taken part in any extracurricular activities, he may have done. However, it is simply not credible that during his time in primary school he will not have formed a private life in the UK. Mr Melvin also

makes the point that he speaks Nepalese as do his parents and that he has in fact been back on a visit to Nepal. That is undoubtedly right. However his entire education thus far has been in English and following the English education system. One small visit to Nepal will not have made that country any more familiar to him and if he left at the age of 3 his memories of that country I find would be minimal, if indeed he has any. It is also inevitable that during his time in the United Kingdom he will have become firmly integrated into life in the UK and therefore I find that his best interests lie in firstly living with his parents and his younger sibling, and secondly, to live with them in the United Kingdom.

6. Having identified that that is where his best interests lie, I then have to consider whether it is reasonable as required by Section 117B(6) for him to leave the United Kingdom. Mr Melvin relies on various cases in his written submissions, the most recent and pertinent to my Decision being MA (Pakistan). In MA (Pakistan) the lead judge was Lord Justice Elias and the paragraphs relied upon by Mr Melvin are 46 and 47. At paragraph 46 it says and I quote:

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled ‘Family Life (as a partner or parent) and Private Life: 10 Year Routes’ in which it is expressly stated that once the seven years’ residence requirement is satisfied, there need to be ‘strong reasons’ for refusing leave (paragraph 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child’s best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment”.

I will pause there to confirm that I have found, considering it is a primary consideration, that the child’s best interests are to remain in the UK with his parents.

7. Lord Justice Elias goes on at paragraph 47 to say that:

“Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child’s best interests are in favour of remaining. I reject Mr Gill’s submissions that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child’s best interests to dictate the outcome of the leave application, it would have said so. The concept of ‘best interests’ is after all a well established one. Even where the child’s best interests are to stay, it may still not be unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not

be considered, however, would be the conduct and immigration history of the parents”.

Again I pause there to confirm what I have already said that this child left Nepal at the age of 3 and will have I find minimal, if any, memory of that country. As far as he is concerned the UK is his home.

8. Lord Justice Elias goes on at paragraph 49 to say:

“The fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary”.

9. The written submissions do not really refer to powerful reasons and I asked Mr Melvin to clarify those for me. The powerful reasons he relies upon he says are immigration control and the economic benefits of the United Kingdom. He submitted that the parents have put in applications that have no prospect of success to piggyback on the child and referred to the economic costs for the United Kingdom of the children, indeed the whole family remaining in the UK. He argued that putting in an application with no prospect of success is a deceptive application and he argued that putting in the judicial review application was tantamount to deception and should be looked at in that way. On that basis he argued that the behaviour of the parents in this case outweighs the best interests of the qualifying child.

10. I regard that as a very bad submission. The parents in this case have not in any way breached the Immigration Rules, they came with leave, the leave was extended, they made a further application before that leave expired as they were entitled to do. The law of this country allows people to make applications and it allows people to challenge what they believe to be bad decisions by way of judicial review. That is what happened in this case. Whether the judicial review was compromised or found in their favour, I know not, however the Secretary of State then made an appealable Decision which is the one before me. They have therefore been at all times in the United Kingdom with leave either as granted by the Secretary of State or Section 3C leave. There is absolutely no wrongdoing on the part of the parents, there is nothing adverse in their immigration history which could possibly amount to behaviour which would outweigh the best interests of the child. The interests of immigration control are present of course in every case, that on its own does not amount to a powerful reason to outweigh the best interests of the child as clearly Lord Justice Elias had in mind in MA (Pakistan), and for those reasons I find that it would not be reasonable to expect this child to leave the United Kingdom and clearly he cannot remain on his own and therefore the appeals of all three Appellants are allowed on Article 8 grounds.

11. There has not been any request for anonymity, and I do not consider one is necessary.

Signed

Date 10th May 2018

Upper Tribunal Judge Martin

TO THE RESPONDENT
FEE AWARD

As the appeal has been allowed I have decided to make a fee award of any fee which has been paid.

Signed

Date 10th May 2018

Upper Tribunal Judge Martin