



**Upper Tribunal
Immigration and Asylum Chamber
IA/04405/2015**

Appeal Number:

IA/04399/2015

THE IMMIGRATION ACTS

Heard at Field House

Decisions and Reasons

On 23 April 2018

Promulgated

On 03 May 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

**MANOJ KHADKA
ISHWORI PANDEY
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Responde

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DETERMINATION AND REASONS

Representation

For the Appellant: Ms M Chowdhury, Counsel instructed by Imperium Group Immigration Specialists

For the Respondent: Ms Z Ahmed, Senior Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to the respondent by First-tier Tribunal Judge Chohan on 3 January 2018 in respect of the determination of First-tier Tribunal Judge

Moller who allowed these joint appeals under the rules and on article 8 grounds by way of a determination dated 22 November 2017. For convenience, I refer to the parties as they were before the First-tier Tribunal.

2. The appellants are husband and wife and are Nepalese nationals born respectively on 28 November 1987 and 12 May 1993. The first appellant entered the UK on 18 January 2010 as a tier 4 student and obtained further leave until 30 October 2014. He married the second appellant in January 2014 and she then entered the UK in May 2014 as his dependant.
3. It appears that at some point the appellant approached an organisation by the name of Amita Solutions which purported to be a recruitment agency as well as immigration advisers. He sought their assistance in finding providing employment and then in obtaining Tier 2 leave for him and an application under the points based scheme was made prior to the expiry of his leave. It then transpired that Amita Solutions defrauded the appellant and many others and that they had provided him with a false CAS and so the appellant then varied his application to one for leave on private and family life grounds. This was considered by the respondent both under and outside the rules and refused on 20 January 2015 in eligibility and suitability grounds and because no exceptional circumstances were apparent.
4. The appellants appealed and at a review hearing at Taylor House in May 2017, the respondent conceded that the appellants had been victims of fraud and withdrew her reliance on suitability grounds.
5. The appellants now have two children; a son born on 7 October 2015 and a daughter born on 26 September 2017.
6. The respondent's criticism of the judge are that he placed too much weight on the possibility that the appellants may have to give evidence at a future trial relating to the prosecution of Amita Solutions, that this was not a factor which should have played such a significant role in the judge's assessment and decision making and that his findings on the family being without work and destitute on return to Nepal and his subsequent conclusion that it would not be in the children's best interests to leave the UK, were all inadequately reasoned and not shown as having been based on any evidence.

Appeal hearing

7. At the hearing before me I heard submissions from both parties. Ms Ahmed expanded upon the grounds and argued that the judge placed far too much weight on the possibility that the appellants may need to give evidence at a future trial when there was nothing to suggest that this would be the case. She submitted that even if such evidence were to be required, the appellants would be able to

seek entry clearance to return for that purpose. She submitted that the judge found that the appellants would have no support and that there would be significant obstacles on return but there was no consideration of the very significant obstacles test and no consideration of the length of time they had both lived in Nepal. The consideration of the best interests of the children was also flawed. Again, the judge had not explained what he had based his conclusions on. Without any evidence, they were speculative. Ms Ahmed relied on EV (Philippines)[2014] EWCA Civ 874 and Miah (s.117B – children) [2016] UKUT 131 for what factors were relevant in consideration of these matters.

8. Ms Chowdhury responded. She submitted that the judge had focused on the possible future trial because the respondent had refused the claim on suitability grounds and therefore he was required to consider that issue. He considered that the appellants would have no employment on return and that there was a risk of destitution on return. As the children were both born after the application had been made, he considered their best interests as at the date of the hearing. The appellants had been living here for 8 years (this was corrected to less than 4 years for the second appellant at my intervention) and the fact that they had been victims of fraud was found to be a compelling circumstance.
9. Ms Ahmad, in reply, submitted that the judge's findings were speculative. There was no indication as to the evidence relied on to support them and no reasons given.
10. That completed the hearing. I reserved my determination which I now give with reasons.

Findings and Conclusions

11. I have considered the evidence before me and the submissions made. The determination is short and contains but a brief analysis of the issues. That need not necessarily be a problem but in this case, the analysis is lacking. Despite what Ms Chowdhury argued, it is plain that the judge placed great emphasis on the possibility that the appellants may have to give evidence in the future at a criminal trial even though there was no evidence to confirm this would be necessary.
12. Ms Chowdhury sought to defend the judge's reliance on that factor (at paragraphs 44, 45, 48, 49, 52, 53, 56 and 64 by submitting that he had to engage with it because of the respondent's refusal on suitability grounds. With respect there is no merit in that submission. That ground of refusal had been withdrawn before the matter even came before Judge Moller and so apart from the summary of the background given at paragraphs 2-5, there was no further need to dwell on this and certainly not to the extent of several other relevant considerations (as the case law identifies) which were completely disregarded.

13. The respondent is also entitled to complain about the inadequacy of the findings and a lack of reasoning. The judge finds that the appellants will be without work on return but so would all other appellants returning home after some years away. With the qualifications and experience obtained here, they would be well placed to look for employment on return. There is no evidence to support the finding that they faced a risk of destitution. No reasons are given for this conclusion and the evidence is that the appellants have family in Nepal. The first appellant at least has been back to visit and indeed returned for his marriage thereby showing he still has a social and cultural connection with his country of origin. Their children are very young indeed and have no private/family life outside of their parents. They can be expected to return with them and there is nothing to indicate that it would not be in their best interests to do so. The appellants have both spent the majority of their lives in Nepal. The second appellant had lived here less than 4 years. The first appellant, although having entered in 2010, was aware that he was coming for a temporary purpose and any private life established here (which is unspecified) was established during a time when his and his wife's stay was precarious and carries little weight. None of these matters have been taken into consideration.
14. It follows that the judge's findings are inadequately reasoned and that insufficient reasons were given for his conclusions.
15. I set aside the entire determination and remit it for re-hearing to another First-tier Tribunal Judge. No findings are preserved.

Decision

16. The First-tier Tribunal Judge made errors of law such that his decision must be set aside and re-made by another judge of that Tribunal at a future date.

Directions

17. No later than five working days prior to the resumed hearing, the appellants shall file and serve a skeleton argument and full statements of evidence.
18. Any other documentary evidence relied on and which has not already been submitted must also be filed within the same time frame.
19. A hearing time of 2 hours shall be allocated as agreed by the parties. Should an interpreter be required the appellants shall notify the First-tier Tribunal of their requirements as soon as they receive the notice of hearing.

Anonymity

20. I was not asked to make an anonymity order and in any event see no reason to do so.

Signed:

A handwritten signature in black ink, appearing to read 'R. Kekić' with a period at the end. The letters are cursive and somewhat stylized.

Dr R Kekić
Judge of the Upper Tribunal
23 April 2018