



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/18020/2015
IA/18021/2015
IA/18022/2015

THE IMMIGRATION ACTS

Heard at Field House
On 7th August 2018

Decision & Reasons Promulgated
On 5th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MIN [G] (FIRST APPELLANT)
AMRILA [G] (SECOND APPELLANT)
[S G] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms C Hulse (Counsel)
For the Respondent: Mr D Clarke (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellants are citizens of Nepal. The first and second are husband and wife and the third is their son. They appealed against the decision of First-tier Tribunal Judge S J Walker ("the judge") to dismiss their appeals against decisions by the Secretary of

State to refuse their human rights applications. At the conclusion of the hearing before me at Field House on 7th August 2018, I gave my decision that the decision of the judge contained no material error of law and so would stand. I explained briefly my reasons for so concluding and told the parties that my written decision would follow.

The Judge's Decision, the Grounds on which Permission to Appeal was sought and the Grant of Permission

2. The decisions giving rise to the appeals were made on 27th April 2015. As the applications for leave to remain were made on 11th February 2015, the appellants fell within transitional and savings provisions so that the appeals regime brought into force by the Immigration Act 2014 does not apply. The judge found (and this was not contested) that the first appellant arrived in the United Kingdom in March 2008 as a student and had valid leave in that category until 13th February 2015. The second appellant, his wife, entered the United Kingdom in March 2009 as a dependent spouse and had leave in that capacity, until curtailment following the expiry of her husband's leave. Their son was born in Nepal on 21st July 2008 and arrived here with his mother in March 2009. He returned to Nepal for a period of eighteen months which ended in June 2012. He then came back to the United Kingdom and has lived here with his parents since. At the time of the hearing before the judge in December 2017, the third appellant had been present continuously for just over five and a half years.
3. The judge made an assessment of the best interests of the third appellant, finding that these would be met by remaining in the United Kingdom with his parents. He noted that this was a primary consideration but not the determinative one. He found that all three appellants failed under the Immigration Rules ("the rules") and that there would be no significant obstacles to their integration into Nepal, on return. He went on to make an Article 8 assessment outside the rules and had regard to section 117B of the 2002 Act and guidance given by the Supreme Court in Agyarko [2017] UKSC 11. He took into account the earthquake in Nepal and the impact this would have on all three appellants. For the purposes of the assessment outside the rules, he reached a conclusion that none of the family members would face any unjustifiably harsh consequences on return to Nepal. Bringing all his findings together, he concluded that the public interest in immigration control outweighed the interests of all three appellants so that the balance fell to be struck in favour of the Secretary of State.
4. In the grounds in support of the application for permission to appeal, it was contended, first, that the judge failed to properly apply section 117B(2) and (3) of the 2002 Act. As the appellants had supported themselves and had not been a burden on the taxpayer, and as they could speak English, there were compelling circumstances in the case. Secondly, it was contended that the judge failed to properly consider exceptional circumstances arising from the length of time spent by the first and second appellants in the United Kingdom. Thirdly, and finally, it was contended that the judge failed to properly consider the best interests of the third appellant. He accepted that there would be disruption to his education if he were to return to Nepal but failed to properly consider the impact on his school and "general life".

5. Permission to appeal was granted only in relation to the third ground. So far as the first was concerned, the Designated Judge in Birmingham found that the ability of the appellants to speak English, for example, was a neutral factor in the light of Rhuppiah [2016] EWCA Civ 803. So far as the second ground was concerned, the length of time spent in the United Kingdom did not make the case exceptional. The Designated Judge found that the third ground had merit, in the apparent absence of findings regarding the best interests of the third appellant.
6. There was no rule 24 response from the Secretary of State.

The Submissions to the Upper Tribunal

7. Ms Hulse handed up a skeleton argument. She said that the assessment of the third appellant's case was not in accordance with the United Nations Convention on the Rights of the Child. The judge first found that his best interests were to remain in the United Kingdom but there was no detail and no balancing thereafter, so as to explain how the judge reached his overall conclusion. It appeared that certain assumptions were made but not sustained by reasons. The judge accepted that the family came from an area in Nepal which suffered as a result of the serious earthquake and the first appellant's family home was destroyed. The judge did not accept that the second appellant's home was destroyed but this appeared to be an unreasonable conclusion.
8. The judge's clear finding that the third appellant's best interests were to remain here with his parents appeared at paragraph 49 of the decision. In the balance on the other side of the scales there was no criminal activity and nothing to outweigh that finding. The best interests assessment required consideration of circumstances in Nepal as the family would need adequate accommodation and schooling. The inevitable result, if nothing were in the balance on the other side, was that refusal of leave would be disproportionate. The case could be distinguished from EV (Philippines), which concerned a family not long in the United Kingdom. The first appellant had now been present here for some ten years. All the family members fell to be considered together. The judge made no particular findings to show why the balance fell in the respondent's favour. He did not properly consider the difficulties the third appellant would face on return to Nepal. The child would suffer from being separated from friends and losing his education here. In the judge's reasoning from paragraph 52 onwards, although mention was made of section 117B of the 2002 Act, and of guidance from the Upper Tribunal, the decision did not reveal how it was that the judge decided where the scales tipped. He found that little weight should be given to private life ties but this could hardly apply in relation to the third appellant, a child. Precariousness had no real impact here.
9. Mr Clarke said that the decision was cogently reasoned throughout and contained no material error of law. The judge accepted that there would be some disruption, at paragraph 38 of the decision and the decision showed, contrary to what appeared in the grant of permission, that clear findings were made in relation to the third

appellant's best interests. The judge's approach in the present appeal was entirely consistent with guidance given in EV. The judge made a holistic assessment, taking into account the extent of integration by all family members here and the hardship they would face on return to Nepal. The judge's assessment was "textbook". The third appellant was not a qualifying child for the purposes of the 2002 Act.

10. The decision also showed that the judge maintained a focus on the third appellant and his education, which was not at a pivotal stage. The judge was not satisfied that educational facilities would not be available in Nepal. He went on to make findings about the need for accommodation and he fully engaged with arguments put on behalf of all three appellants. He looked at all the factors, having started with the best interests assessment. He was entitled to find that the impact on the third appellant of return to Nepal with his parents was not such as to show that the decisions under appeal amounted to a disproportionate response. At paragraph 52 of the decision, the judge moved to a conventional Razgar analysis. In relation to the best interests assessment, he took into account guidance from the Court of Appeal in MA (Pakistan), although that case was not on all fours with the present appeals as the third appellant was not a qualifying child. The judge made a clear finding in the light of the evidence regarding the third appellant's parents' wish for him to stay here with them. All the factors were pulled together and the judge gave each of them due weight. The conclusion that the public interest outweighed the interests of the appellants was open to him.
11. In a brief response, Ms Hulse said that the balance struck by the judge was wrong as there were no countervailing factors to set against the best interests of the third appellant. The earthquake in Nepal should have added weight to the appellants' side of the scales, with the difficulty in accommodation and employment in Nepal being relevant factors. The third appellant was nearly 10 years old and had some knowledge of Nepal but could not read or write Nepali.

Findings and Conclusions on Error of Law

12. My clear conclusion is that no material error of law has been shown in the judge's decision. He began, appropriately, with an assessment of the best interests of the third appellant, the child of the family although not a qualifying child for the purposes of the 2002 Act. At paragraph 49 of the decision, he found that the child's best interests would be met by remaining in the United Kingdom with his parents. However, in the paragraphs which then followed, he set out why it was that the overall balance led to dismissal of all three appeals. The best interests of the third appellant were outweighed. He began with a clear finding that the requirements of the rules were not met by any of the appellants, not least because the evidence showed that the family would not face unjustifiably harsh consequences on return, nor would it be unreasonable to expect them to return to Nepal. In so finding, the judge had clearly in mind Appendix FM and paragraph 276ADE of the rules. There were no very significant obstacles to integration, on return.

13. The judge moved on to make an assessment outside the rules, building into his analysis section 117B of the 2002 Act and having regard to guidance given recently by the Supreme Court in Agyarko. Paragraph 53 shows that he had the third appellant's particular circumstances, and the state of his education, clearly in mind. He had regard to guidance given by the Upper Tribunal in E-A [2011] UKUT 00315. He also took into account MA (Pakistan) [2016] EWCA Civ 705, as authority for the proposition that the public interest in maintaining immigration controls has weight.
14. He also had clearly in mind the earthquake in Nepal and found, at paragraph 58, that life in the affected area is likely to be more difficult than it was. However, the appellants need not return to that part of the country. Education would be available for the third appellant in Nepal and his parents had not shown, on the evidence, that they would be unable to find work and accommodation.
15. The paragraphs which followed the relatively early finding regarding the best interests of the third appellant explain carefully and thoroughly how the judge reached a conclusion that the child's best interests were outweighed. He assessed the circumstances of the family as a unit, all the while being aware of their individual and particular circumstances and he properly directed himself in relation to the rules, the statutory framework and the relevant authorities. The overall conclusion he reached was manifestly open to him in the light of the evidence before the Tribunal.
16. No material error of law has been shown in the decision, in relation to the grant of permission to appeal on the third ground. It follows that the decision of the First-tier Tribunal shall stand.
17. The judge made no anonymity order or direction and none has been requested. I make no order or direction on this occasion.

Notice of Decision

The decision of the First-tier Tribunal shall stand as it contains no material error of law.

Signed

Date on 4 September 2018

Deputy Upper Tribunal Judge R C Campbell