



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15839/2019
HU/15843/2019
HU/15845/2019

THE IMMIGRATION ACTS

Heard at Field House by UK Court Skype
On 6 October 2020

Decision & Reasons Promulgated
On 15 December 2020

Before

UPPER TRIBUNAL JUDGE OWENS

Between

JGSS
KRR
EGRS
(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Spurling, Counsel instructed by Juris Law
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants appeal against the decision of First-tier Tribunal Judge Head sent on 6 March 2020 dismissing their appeals against the decision of the Secretary of State

dated 1 March 2019 refusing their human rights claims. Permission to appeal was granted by Upper Tribunal Pitt on 12 August 2020.

2. The hearing was held remotely. Neither party objected to the hearing being held by video. Both parties participated by UK Court Skype. I am satisfied that a face to face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Both parties confirmed that the hearing was fair.

Anonymity

3. I make a direction for anonymity because E is a vulnerable child with significant disabilities. I consider that in these circumstances, it is proportionate to protect his identity to prevent any further harm to him.

Background

4. The appellants are all nationals of the Philippines. They are a family consisting of father, mother and child. The first and second appellants arrived in the United Kingdom in July 2010. The third appellant was born in the UK on 1 October 2013. A second child L who is not an appellant in this appeal was born on 5 September 2017.
5. The first and second appellants initially had valid leave as students until 2013. In January 2013 the appellants applied for leave to remain outside of the immigration rules. The application was initially refused on 8 October 2013 and then refused again on 16 September 2016. The appeal against that decision was dismissed on 8 December 2017 ("the 2017 decision"). On 8 October 2018 the appellants applied again for leave to remain outside the rules on the basis of their Article 8 ECHR right to family and private life in the UK.
6. The third appellant, E, the eldest child of the family has Down's Syndrome and is profoundly disabled with significant needs. The appellants' position is that because of the severity of the child's condition, and the lack of specialist treatment he would receive in the Philippines, returning him to the Philippines would have a seriously detrimental effect on his ability to communicate, his mental health and his ability to participate in society. He would also be subject to discrimination. It would be unduly harsh to remove him to the Philippines and the balance of proportionality should fall in his favour.

The decision of the Secretary of State

7. The Secretary of State considered that the appellants did not meet any of the requirements of Appendix FM in respect of family life. There would be no very significant obstacles to the appellants returning to the Philippines because the first and second appellants have cultural, family and social ties to the Philippines and can assist their children to integrate to the Philippines. It was considered that there

was no medical evidence that medication and treatment would not be available to E. It would neither be a breach of Article 3 ECHR nor Article 8 to remove E to the Philippines on medical grounds. It is in the best interests of E to remain with his parents. It is not a disproportionate breach of Article 8 ECHR to remove the appellants to the Philippines.

The decision of the First-tier Tribunal

8. The appeal proceeded by way of submissions only. It was conceded by the appellants that the child was not a “qualifying child” in accordance with section 117B(6) of the Nationality, Immigration and Asylum Act 2002.
9. The judge’s starting point was the 2017 decision in which it was found that it would not be disproportionate to Article 8 ECHR to remove the family from the UK. The judge considered the Independent Social Worker (“ISW”) report and concluded that the child does not communicate at all and had recently adapted to a change of school in the UK which indicated the child’s ability to adjust. The judge found that there were facilities in the Philippines to meet the child’s specific needs and given the extent of his learning difficulties it is unclear how his learning and understanding level would be negatively impacted or how the child’s learning capacity would not be maximised. The judge concluded that the family would be returning to the Philippines together and could reside near facilities to assist their son. The judge concluded that there was no evidence before him which could lead her to depart from the findings of First-tier Judge Callow in the 2017 decision.
10. The judge found that there are no very significant obstacles to integration in the Philippines given that the first two appellants had lived there most of their life, that English is the official language and that there is support and facilities available for children with Down’s Syndrome. The judge found that it was reasonable to expect the children to leave the UK. The judge turned to Article 8 ECHR outside of the immigration rules. The judge referred to the best interests of the child and then considered the factors for and against removing the appellants. The judge concluded that the public interest in maintaining effective immigration control outweighed the appellant’s private life in the UK and that removal of the appellants was proportionate to Article 8 ECHR.

The Grounds of Appeal

11. The appellant advances several grounds of appeal.

Ground 1 - Failure to take into account evidence in respect of the child’s ability to communicate/Inadequate reasons/Error of fact

The judge has erred in consideration of the supporting evidence. The judge has failed to take into consideration all of the evidence before her of E’s educational, medical and psychological needs. The judge failed to give due regard to the entirety of the documents, thereby coming to conclusions which could not be supported by

the evidence as a whole. Alternatively, the judge failed to give adequate reasons for rejecting this evidence.

Ground 2 - Failure to take into account evidence in respect of the availability of medical treatment/Inadequate reasons

The judge erred in her approach to the evidence of the availability of treatment in the Philippines which included further evidence in respect of the availability of services which was not before the previous judge including passages in the ISW report with regard to the provision of treatment and services. Alternatively, the judge failed to give adequate reasons for rejecting this evidence.

Ground 3 - Failure to take into account material matters

The judge failed to give any consideration at all to the discrimination and social stigmatisation that E would face as a consequence of his Down's syndrome upon return to the Philippines. This evidence was ignored by the judge.

Permission to appeal to the Upper Tribunal

12. Permission was granted by Upper Tribunal Judge Pitt on the basis that it was arguable that an error of law arises from the approach to the medical and social circumstances evidence concerning E's difficulties and his needs and treatment, for example his use of Makaton, which is a sign language rather than a spoken form of communication, and the real options for specialist treatment in the areas of the Philippines where his family live and that arguably the judge erred in not taking into account the country evidence provided on the discrimination in the Philippines towards those with special needs.

Rule 24 response

13. The respondent did not produce a rule 24 response.

Discussions and Conclusions

Ground 1

Failure to take into consideration relevant evidence in relation to E's special needs/failure to give adequate reasons for rejecting evidence/making an error in the findings on the evidence before her.

14. The judge considered E's ability to communicate at [31] to [40]. When assessing E's ability to communicate the judge had regard to the ISW report. At [36] the judge states:

“Unfortunately, there was no updated evidence referenced by the ISW, indicating that Evan is in fact successfully communicating using Makaton or that he is familiar with and responding well to the use of Makaton to communicate. The reports seem to

indicate that E does not communicate at all. There was nothing from E's current school to confirm his use of Makaton." (My emphasis)

15. At [37] the judge continues:

"I note at page 9 of the ISW, the ISW confirms that he was unable to engage directly with E and that it was only thought (sic) the first appellant's focussed help and support that E was able to draw. There was no indication that the ISW was able to use Makaton or that E's family communicated with E using Makaton during the course of the assessment."

16. At [38] it is said:

"page 15 of the ISW report it states: "E has severe learning disability, his learning and understanding level is that of a 0 to 12 month old child, in contrast to his current age of 5."

17. And at [39]:

"At page 25 of the ISW report the ISW states: "E is unable to express his views directly due to his learning difficulties and communication difficulties. As he is non-verbal it has not been possible to have any discussions with him to ascertain his views."

18. Mr Spurling's submission was that the judge failed to consider all of the evidence before her in relation to E's ability to communicate, focussing exclusively on the ISW report rather looking at the evidence before her holistically. The judge's finding at [36] is that E cannot communicate at all. Mr Spurling submits that this is a clear error of fact because there was evidence before the judge of E's ability to communicate.

19. Mr Spurling also submitted that the judge had confused the words "verbal" with "communication" and failed to take into account that communication can also be non-verbal.

20. Mr Diwnycz did not make any submissions in respect of this ground and did not defend the respondent's position.

21. I am satisfied that there was additional evidence before the judge in respect of E's ability to communicate. For example, in the Hampshire County Council "Specialist Teacher Advisory Service: Hearing Impairment Report" dated June 2017 it is specifically identified that "E is developing communication skills". Moreover, the report very clearly identifies that "Makaton should be used to support spoken language at all times" and that E would benefit from "use of Makaton (all staff and family)". Importantly the "Short Speech and Language Therapy Report and Therapy Target Sheet" compiled by Karen Noakes dated 19 October 2018 (which post-dates the 2017 decision) specifically addresses the fact that E is using Makaton in his daily life. She states that: "E is using a limited number of Makaton signs such as 'milk', 'finish', 'biscuit', 'more', 'food' and 'mummy' and 'daddy'" and that "he

has used the Makaton sign for 'finished' to indicate he didn't want to do an activity."

22. In June 2017 E was being encouraged to use Makaton. By 30 January 2019, eighteen months later, a second report was prepared by Hampshire County Council which stated that:

"E is using the PECS and responding to the pictures really well; he got frustrated when he was told we were going to one place and then got delayed – he was ready to go! LING sounds were demonstrated using laminated cards; this is an activity similar to E's activities bag and he is ready to start listening now."

23. From [32] to [40] the judge sets out the evidence of the independent social worker. There is no reference to the report by Karen Noakes.

24. The judge of course is not required to set out or refer to all of the evidence before her and in general it should be assumed that a specialist judge has given consideration to the evidence in the bundle. Further I am conscious that it is not in general appropriate to interfere with a decision where adequate reasons have been given and the reasons for the decision are tolerably clear. Nevertheless, I am satisfied from the judge's comment at [13] that the judge considered that E cannot communicate at all and that this finding was at odds with the evidence which the judge set out at [40] where she quotes the ISW report, which states:

"He is non-verbal in terms of communication. He does not have familiarity to any other language than English, in the sense that he is familiar with commands given in English in the use of Makaton sign language."

25. Although quoting this paragraph, the judge manifestly failed to state what significance she gives to the fact that E is familiar with English commands and responds to a mixture of English words and UK Makaton and her finding at [13] fails to acknowledge that communication can be non-verbal as well as verbal.

26. At Annex 10 the judge was provided with an article on the Makaton website which confirms that in different countries there are different Makaton languages and that the language used by the deaf community in each country is different from the next, even in English-speaking countries. American Makaton is different from UK Makaton, which is different from Australian Makaton. There is also no reference to this evidence in the decision.

27. I agree with Mr Spurling that there was evidence before the judge which indicated that E had made progress in non-verbal communication since the last appeal and that he is able to communicate on a basic level using UK Makaton. There was also evidence in the ISW report and elsewhere that he is familiar with the English medium.

28. I am satisfied that the judge erred in her approach to the evidence in respect of the level of E's communication and that this is a material error because the judge's view

of the level of E's communication skills fed into her assessment of (a) what change there had been since the previous appeal which was held on 10 November 2017, (b) an assessment of E's best interests and (c) the impact on him of a potential lack of treatment and any discrimination he would be subject to in the Philippines.

Ground 2 – failure to take into account evidence in respect of the lack of availability of treatment in the Philippines/ inadequate reasons

29. The ISW in his report at pages 16 to 19 sets out extracts from the Education Health and Care Plan (“EHCP”) which provides a number of recommendations in respect of the comprehensive package of support that E requires due to his very complex needs which include, inter alia, specialist expertise in an appropriate language-rich environment where all teachers and surroundings are able to follow the same alternative and augmentative communication techniques; access to a consistent speech model in a quiet environment; and one-to-one support to support his learning, development and keep him safe, one to one support to assist him to use Makaton signs and specialist provision that offers the opportunity to incorporate life, independent and self-care skills.
30. At [48] the judge finds:

“I find that there are facilities available to E to meet his specific needs, I accept that it might be that those facilities are expensive and are not identical to the ones available in the UK”. (My emphasis)
31. The judge's finding is based on an analysis of a letter from E's paediatrician Louise Wight which is said to be identical to the letter provided to FtT Judge Callow.
32. It is Mr Spurling's submission that the judge overlooked the evidence of the ISW at pages 20 to 22 of the report where he goes into some detail about the availability of specialist provision in the Philippines based on his own research. The ISW's conclusion is that there are limitations in facilities and resources for people with disabilities in the Philippines and at page 20 that there is very unlikely to be tailor-made services in any of the state run facilities in the Philippines.
33. In particular, the judge is also said to have overlooked the evidence from the Cagayan Valley Medical Centre, from the Dean of the College of social work from the University of Cagayan and a from a licensed social worker Kriszelle Balisi. In summary the evidence from these individuals is that facilities in the rural areas where E's parents are from are not equipped with services that cater to Down's Syndrome cases, some provision is available in urban areas but waiting lists are lengthy and private treatment is very expensive.
34. Mr Diwnycz did not make any submissions on this point.
35. I am satisfied that the judge's assessment of what treatment is available to E in the Philippines fails to take into account or give adequate reasons for rejecting the evidence of the ISW and other evidence provided in respect of what support is

available to E in the Philippines. In particular, it is difficult to see how the judge made the finding that E would be able to access facilities to meet his specific needs. I am satisfied that this is an error on the part of the judge which also impacted her finding that he was not able to depart from the findings of FtT Judge Callow at [56] since at [28] of FtT Judge Callow's decision there is reference to a complete lack of any evidence before him of what treatment or facilities would be available to E in the Philippines. There was new evidence before the judge, which if she had taken it into account, could have potentially resulted in a finding that she was able to depart from those earlier findings.

36. Mr Spurling also submitted that following on from this error the judge failed to make adequate findings on the effect on E of not receiving the specialist treatment he requires.
37. The views of the judge on the effect on E of moving to the Philippines are set out at [48] where the judge states:

"However, the evidence presented from the ISW confirms that in the summer of 2019, when Evan was five years and 8 months, having attended pre-school since the age of three, his learning and understanding level was that of a 0-12 month child. It is therefore unclear how, if E utilised the facilities available in the Philippines, why his learning and understanding level would be negatively impacted or that E's learning potential would not be maximised".

38. The implication is that the judge considers E to be so disabled that the provision of treatment and facilities would make no difference to him. I am satisfied that this view fails completely to engage with the professional opinion of the ISW who at having prepared a lengthy report reaches the conclusion:

"based on over 30 years' experience of working with people with a wide range of disabilities including Down Syndrome, I believe without the necessary stimulation and support E will be at risk of not only backsliding but his progress will be hampered, therefore not maximising his full potential."

39. The ISW's opinion that it was in E's best interests to remain in the UK was as a result of a five-hour consultation, examination of the EHCP and the expert's own knowledge of working with individual's with disabilities. The report contained conclusions about the impact on E of returning to the Philippines including a lack of stimulation which meant the difference in being able to increasingly communicate rather than ceasing to communicate altogether, the risk of him suffering depression, the barriers to him participating in society and the risk of stigmatisation. The ISW stated specifically at page 20:

"that it is worth emphasising that the provisions identified within the EHCP if they were not considered to be beneficial to the local education social care and health authorities would not have identified and invested in such resources for E".

40. It is not recorded that the respondent challenged in anyway the expertise of the ISW or the contents of the report. In these circumstances, I am satisfied that the

judge's conclusion at about the impact the lack of treatment would have on E is flawed in that the judge failed to explain or give adequate reasons for rejecting the conclusions of the ISW. This is relevant to the assessment of the best interests of the child and the Article 8 ECHR proportionality assessment and is material to the outcome of the appeal.

Ground 3 – Failure to take into account the evidence on the discrimination E might suffer in Philippines

41. Finally, in respect of the issue of discrimination, Mr Diwnycz for the respondent acknowledges that there is a complete failure by the judge to make any reference to the evidence in the bundle that E would suffer stigmatisation and increased discrimination in the Philippines and the effect on him of this. This was set out in the report of the ISW and Ms Balisi the social worker. The ISW's opinion of the effect of this on this severely disabled appellant is not factored at all into the decision and is relevant to the assessment of the best interests of the child and the Article 8 proportionality assessment. I am satisfied that this also amounts to a material error.
42. I accept Mr Spurling's submission that had the judge taken into account properly the evidence from the ISW in respect of stigmatisation, that she may well have formed a different conclusion. There was a failure to take into consideration and evaluate all of the evidence, there was a failure to make findings on material issues and there was a failure to provide adequate reasons for rejecting evidence.
43. Mr Diwnycz for the respondent did not seek to defend the decision in any way, other than to state that the decision was in my hands and to point to the fact that there is no Country Policy and Information Note on the Philippines and that he had no strong arguments to counter the grounds of appeal.
44. During the appeal Mr Spurling also drew my attention to a potential error which was not pleaded in the grounds of appeal in that there is no concrete finding on whether it is in E's best interests to remain in the UK. At [64] the judge refers to Section 55 Borders, Citizenship and Immigration Act 2009.
45. The judge then goes on to say:

"It could be said that other things being equal it was in the best interests of E and L that they and their parents stayed in the United Kingdom and they continued with their lives here uninterrupted. But other things are not equal. The boys are not British citizens and as such have no right to future education and healthcare in this country. Like in the case of Zoumbas the boys are part of a close-knit family with educated parents and of an age where their emotional needs can only be fully met within immediate family unit."
46. I also note that there is potentially an error of law in this approach because the judge appears not to have made a firm finding based on the evidence before him of whether it is in E's best interests to remain in the United Kingdom or not with

regard to his individual circumstances and without consideration of his parent's or his own immigration status. Indeed, when the judge turns to [68] and [69] where she balances up the various factors in the proportionality exercise, the best interests of the children do not feature either in factors in favour of removing the appellants or in factors in favour of maintaining the family life in the United Kingdom.

47. For all these reasons, I am satisfied that the decision is vitiated by an error of law and should be set aside in its entirety because I find that the factual findings are flawed.

Disposal

48. Both parties agreed that given the extent of the factual findings which need to be made, the appeal should be remitted to the First-tier Tribunal to be heard de novo in front of a judge other than FtT Judge Head. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, I am in agreement with this course of action because of the extent of the factual findings required.

Decision

49. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

50. The decision of the First-tier Tribunal is set aside in its entirety.

51. The appeal is remitted to the First-tier Tribunal to be heard de novo by a Judge other than First-tier Tribunal Judge Head.

Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules, the Upper Tribunal makes an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed *R J Owens*

Date 9 December 2020

Upper Tribunal Judge Owens