Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
UI-2021-000376 [HU/03280/2020]
UI-2021-000377 [HU/03283/2020]

THE IMMIGRATION ACTS

Heard at Field House
On the 30 November 2022

Decision & Reasons Promulgated
On the 05 January 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SHRADDHA DONGOL
UTSHUB THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. West, Counsel, Instructed by Capital Solicitors LLP
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 28 June 2021, First-tier Tribunal Judge R. Hussain ("the judge") dismissed the appellants' appeals against the Secretary of State's joint decision dated 13 February 2020 to refuse their joint human rights claim, made on 3 April 2018. The appeal was brought

under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellants now appeal against the decision of the judge with the permission of Upper Tribunal Judge Grubb.

Factual background

3. The appellants are citizens of Nepal. The first appellant, Shraddha Dongol, was born on 20 November 1986. She entered the United Kingdom on 14 May 2011 with leave as a student, which was initially extended until 30 December 2015, although later curtailed to expire on 5 April 2015. The second appellant, Utshub Thapa, was born on 30 November 1985. He was granted leave as the first appellant's dependent and entered the UK on the same day. He held leave in line with hers, until its curtailment on 5 April 2015. The appellants remained in the UK and made two human rights claims to the Secretary of State, in 2015 and 2017. They were refused in circumstances not attracting a right of appeal exercisable from within the United Kingdom. On 3 April 2018 the appellants made a further human rights claim to the Secretary of State. Their joint claim was refused, and it was the refusal of that claim that was under appeal before the judge.

4. The appellants claimed that their circumstances in Nepal would be such that they would face "very significant obstacles" to their integration. They had been in this country since 2011, are estranged from their families in Nepal, and, since they have been unable to complete their education in this country, would be unable to find work. They also have a son, A. He was born in the UK on 20 August 2016 and has never been to Nepal. A is severely autistic and requires specialist educational provision and treatment, none of which would be available in Nepal.

The decision of the First-tier Tribunal

5. It is common ground that the judge's decision featured a number of typographical errors and mistakes of fact. On the first page, the judge's title is listed in the following way:

"**FIRST-TIER TRIBUNAL JUDGER. HUSSAIN**"

6. The first appellant is listed beneath as follows:

"**Mrs Shraddha Dongo!**"

7. Paragraph 9, entitled "Issues in the Appeal", states that the respondent's "decisions" (note, there is only a single, joint decision) were dated 4 September 2018 and 15 October 2010. Neither date is correct; the Secretary of State's sole decision was dated 13 February 2020, and the appellants were not to arrive in the United Kingdom until 14 May 2011.

8. Turning to the substance of the decision, the judge set out some of the evidence, and summarised part of the appellant's case. He said at paragraph 17 that,

> "… when coming to the UK both respective parents [of the appellants] assisted them financially towards their initial tuition and living costs. Consequently I find that that [sic] can turn to their respective families for help or assistance in reintegration."

9. The appellants' financial supporters in this country, their friends, would be able to support them in Nepal, the judge found. They would not face very significant obstacles to their integration, and neither appellant could meet the requirements of paragraph 276ADE of the Immigration Rules.

10. The judge commenced the Article 8 ECHR analysis at paragraph 19, beginning with a lengthy analysis of a number of Article 8 authorities, culminating in the five questions identified by Lord Bingham at paragraph 17 of *Razgar* [2004] UKHL 27. Having addressed each of the *Razgar* criteria, at paragraph 25 the judge addressed factors under section 117B of the 2002 Act. He found that there was a public interest in removing the appellants, since they could not satisfy the requirements of the Immigration Rules. He concluded that they were not financially independent, because they relied on the support of friends. Their private life attracted little weight, since the appellants' immigration status had always been precarious, at best. There were "powerful reasons" weighing in favour of the appellant's removal. The judge moved onto reasons in favour of the appellants being permitted to remain in the UK and addressed himself concerning the approach to be taken to assessing the best interests of A, by reference to a number of well known authorities on the topic. Having done so, he reached the following findings:

> "34. The appellant's [sic] have a 5-year-old son, Aaron. He is said to have additional learning needs due to Autism. The Child Assessment report (AB/ 23) identifies some of the areas of concern in Aaron's development which appear to be with communication and social interaction. However, he attends a mainstream secondary school and the report suggests a number strategies that his parents can employ to overcome such developmental concerns. There is no reason why the same strategies cannot continue to be employed in Nepal. Both Parents are Nepalese nationals with no right to remain in the UK. Aaron is otherwise in good health. There will be little or no interruption to his education as it is not at a critical stage such as in the middle of exams. In any event children change schools at various stages of their lives and thereby have periodical stages when there is a change of classmates, new teachers and environment. It is, therefore, highly unusual for a child in the UK itself to complete the entirety of their education within one school. There is no reason to believe that a return to Nepal would have any adverse impact upon his development and performance. 1 accept that the appellant would want the best education for his children, however having regard to EV(Philippines) I find that it is in their child's best interest to accompany the appellants and return to the country of the appellants' origin where he is able to enjoy the benefits of full citizenship.

> 35. For the above reasons I find that it would not be unreasonable for the Aaron, and this family as a whole, to continue their private and family life in Nepal . Clearly it would be difficult for the appellants to leave behind friendships that may have been formed but bearing in mind the public interest requirements of Section 117B I conclude that the decision in this case was and is proportionate."

11. The judge dismissed the appeals.

Grounds of appeal

12. There are four grounds of appeal:

a. Ground 1: The judge made errors of fact. For example, at paragraph 17, the judge incorrectly stated that *both* families of the appellants had contributed towards their tuition fees, whereas it had only been the first appellant's family who had provided assistance.

b. Ground 2: The judge failed to engage with the detailed bundles submitted by the appellants.

c. Ground 3: The judge placed undue weight on A's attendance at a mainstream school.

d. Ground 4: The judge failed properly to consider the best interests of A and did not consider the extensive documents pertaining to his particular care and development needs.

13. In granting permission to appeal, Judge Grubb observed that grounds 1, 3 and 4 had the most merit, and commented that the appellants' strongest argument was that the best interests of A were not properly assessed.

Submissions

14. On behalf of the appellants, Mr West submitted that the structure of the judge's decision implied that he had reached the decision to dismiss the appeal *before* having considered the best interests of A. As for A's best interests assessment, A is in a mainstream school but has been allocated a single teacher, but has a detailed "individual education plan", and has benefited from being allocated a single teacher and support from the SENCO (special educational needs coordinator). The judge's glib assessment that A's best interests will be unaffected upon his return to Nepal failed to engage with the material before him. A's poor social skills are challenging and are well documented in the materials that were before the judge, yet there are very few references to those broader materials, submitted Mr West.

15. In relation to ground 1, Mr West submitted that there were key points in the evidence before the judge concerning the appellants' prospective circumstances in Nepal that he simply did not consider. For example, the second appellant's parents had died, and their death certificates were in

the materials before the judge, yet the judge failed expressly to address the significance of their deaths in his broader findings that the appellants would have family contacts and support upon their return. The judge's findings concerning those family members who would be available to assist the appellants failed to take into account the inter-caste marriage between the appellants, which, he submitted, would deter family members and friends from assisting. It wasn't surprising, submitted Mr West, that someone from a higher caste, such as the first appellant, wouldn't encounter difficulties with the second appellant's family since they were in a lower caste. Difficulties would be more likely to arise in relation to the appellant from a higher caste seeking to rely on broader family support, in light of the inter-caste marriage. The appellants also lost their family home in 2015 to an earthquake, which the judge failed to consider.

16. For the Secretary of State, Mr Whitwell submits that most of the appellants' criticisms of the judge's decision are, properly understood, disagreements of fact and weight. He characterised the judge's findings at paragraph 34 as "bold" but submitted that they were not unlawful.

THE LAW

17. It is trite law that the best interests of the child are a primary consideration in any assessment in this jurisdiction. In *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, Christopher Clarke LJ said at paragraph 35:

> "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

18. An error of fact may amount to an error of law. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraph 9 Brooke LJ summarised the main bases upon which findings of fact may be contaminated by an error of law in the following terms:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
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> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;

vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

DISCUSSION

19. While this tribunal does not expect a counsel of perfection from judges of the First-tier Tribunal, there is merit to Mr West's submission that the judge concluded that the appellants' removal was in the public interest *before* he addressed the best interests of A. Since A's best interests were to be a primary consideration, it is surprising that the judge did not make findings on that issue at an early stage in his analysis, once he had established the factual matrix upon which such findings would be based. Instead, the findings concerning A feature at the very end of the decision, once the judge appears already to have decided the main issues, including the public interest in the appellants' removal. The analysis of A's best interests, far from being a primary consideration, has the appearance of being an afterthought.

20. Of course, a decision of the First-tier Tribunal should be read in the round, on the assumption that the judge knew what he was doing. Whether the decision involved the making of an error of law requires is a question of substance and not merely form. In isolation, the above structural points may not be sufficient in this case to merit a conclusion that a decision involved the making of an error of law such that it must be set aside. It is necessary to scrutinise the reasoning of the judge's analysis of A's best interests.

21. I accept Mr West's submissions that the judge's analysis of A's best interests fails fully to engage with the complex needs experienced by this child. This is not simply a disagreement of weight, but a recognition that the judge failed to engage with the full spectrum of care needs experienced by A. A's educational needs are not presently met by A's parents being able to engage in a number of "strategies", as the judge put it, but rather a careful and multi-faceted package of adjustments and special provision by the school, accompanied by speech and language therapy. A's teachers provide him with a significant degree of 1-1 oversight during the school day, working in tandem with termly speech and language therapy reviews with the NHS Central and North West London Children's Integrated Therapy Service. The judge did not address how the appellants would be able to replicate the multi-disciplinary support currently provided by a number of different professionals, and so presumably concluded that, even without such support, the appellants' removal would nevertheless be consistent with A's best interests. The judge's appeal to the fact that "in any event, children change schools at various stages of their lives…" and that it is "highly unusual for a child in

the UK itself to complete the entirety of their education within one school" fails to engage with the case-specific factors at the heart of A's needs and comes perilously close to introducing a notional "normal" comparator child.

22. Much of the judge's analysis of A's best interests reads as though it is a proportionality analysis of why, notwithstanding A's best interests (whatever they are), those best interests are outweighed by the factors already identified by the judge as militating in favour of the appellants' removal. While it may well be that the judge would have been entitled to conclude that A's best interests were capable of being outweighed by the cumulative force of all other factors militating in favour of the appellants' (and his, A's) removal, it is important that such analysis is founded upon a proper analysis of the child's best interests taking into account, for example, the factors highlighted by Christopher Clarke LJ in *EV (Philippines)*.

23. Mr Whitwell very fairly acknowledged that the judge's analysis at paragraph 34 was "bold". That was an observation that was accurate in as far as it went, but it did not go far enough: the judge failed to engage with the relevant considerations arising from the materials before him and reached findings concerning A's best interests in a way that gives the appearance of being included to support substantive public interest findings that had already been made. I find that ground 4 is made out.

24. The remainder of Mr West's submissions veer towards the territory of a disagreement of fact and weight. There is some force to his submissions that the judge's typographical and factual errors deprive the decision of the deference that an appellate tribunal would normally extend to a first instance judge. In light of the need for accuracy when reaching findings of fact concerning the appellants' prospective in-country circumstances in Nepal, upon which to found an accurate assessment of A's best interests, I consider that the decision should be set aside in its entirety, and remitted to the First-tier Tribunal to be reheard afresh, by a different judge.

Notice of Decision

The appeal is allowed.

The decision of Judge R. Hussain involved the making of an error of law and is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal to be heard by a different judge.

No anonymity direction is made.

Signed Stephen H Smith Date 7 December 2022

Upper Tribunal Judge Stephen Smith