



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/20927/2014**

APPEAL NUMBERS:

**IA/20974/2014
IA/20979/2014
IA/20982/2014**

THE IMMIGRATION ACTS

**Heard at: Field House
On: 10 November 2014**

**Decisions & Reasons Promulgated
On 19 December 2014**

Before

**UPPER TRIBUNAL JUDGE ESHUN
DEPUTY UPPER TRIBUNAL JUDGE MAILER**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR NABARAJ PARAJULI
MRS SHARDHA SUBEDI PARAJULI
MASTER SUMANYU PARAJULI
MISS SUHANA PARAJULI
NO ANONYMITY DIRECTION MADE**

Respondents

Representation

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

**For the Respondents: Mr M Puar, counsel (instructed by MC
Brothers and Co)**

DECISION AND REASONS

- 1.** For the sake of convenience we shall refer to the appellant as “the Secretary of State” and to the respondents as “the Claimants.” The Claimants are all citizens of Nepal and are members of the same family. The first two Claimants are husband and wife and the third and fourth Claimants are their children.
- 2.** The Secretary of State appeals with leave against the decision of First-tier Tribunal Judge Ghaffar, in a determination promulgated on 20 October 2014, allowed the appeals of first, second and third Claimants under the rules and the fourth Claimant's appeal under Article 8 (Family Life).
- 3.** The Claimants appealed the decisions of the Secretary of State dated 28 April 2014 refusing the first Claimant's leave to remain as a student and the remaining Claimants as his dependants.
- 4.** A one stop warning was issued to the Claimants. They asserted in their grounds that they had established a private life in the UK.
- 5.** The first Claimant stated that he arrived in the UK in September 2006 as a student and that the second and third Claimants followed him about six months later. The third Claimant was two years old at the time and was nine years old at the date of the hearing.
- 6.** There was no challenge to the Secretary of State's decision regarding the first appellant's student application. He had not been able to demonstrate that he met the requirements of paragraph 245ZX(h)(a) of the Immigration Rules. The Tribunal upheld the Secretary of State's refusal in that regard.
- 7.** Judge Ghaffar had regard to the claim by the first Claimant, Mr. Parajuli, regarding the difficulty of his child, the third Claimant, obtaining admission to schools in Nepal as well as the difficulties he will experience as he has no writing or reading skills in Nepali (5).
- 8.** Moreover, the first Claimant had elderly parents in Nepal and could not provide support to the family. The second Claimant's family had relocated to America except for her elderly mother. Unemployment rates are high in Nepal. The second Claimant works in the UK which is not something that they would be able to do in Nepal.
- 9.** The first Claimant referred to his eight years' lawful residence in the UK. He worked part time for Tesco [5].

- 10.** Judge Ghaffar also had regard to the father's oral evidence that he had consulted more than 20 schools in Nepal and only received two replies. He claimed that his son would struggle at school [6].
- 11.** It was also established in evidence that the third Claimant had arrived in the UK in 2007. He and his father went for a visit to Nepal in 2010. The child wanted to return within four days. He was unable to communicate with his grandparents. There were no other family members there. The first Claimant confirmed that the schools he approached were private. If the children were to go to government schools, they would require Nepali to be spoken at all times. The first Claimant conceded during cross examination that he had been aware that at some stage he would have to return to Nepal.
- 12.** It was also established that the second Claimant travelled to Nepal with the fourth Claimant in 2011 to visit her mother. That is the only relative she has in Nepal.
- 13.** Judge Ghaffar dismissed the first Claimant's appeal under the relevant paragraphs relating to student applications.
- 14.** He went on to consider their appeals pursuant to paragraph 276ADE of the Immigration Rules. He found that the third Claimant had been in the UK continuously since his arrival here, eight years ago. He had completed all his primary education in the UK in English and was applying for entrance to a grammar school for the next academic year. [17]
- 15.** He found that the child would struggle significantly to adapt to life and school in Nepal. He had adapted to life in the UK in the time that he has lawfully resided in the UK. He therefore fell for consideration under paragraph 276ADE(iv) on the basis that he is under 18 years old; has lived continuously in the UK for at least seven years, and whether it would be reasonable in the circumstances to expect him to leave the UK.
- 16.** Judge Ghafar found that, given his age and the fact that Nepal is not a place he knows apart from a short visit with his father some four years ago, it was unreasonable to expect him to adapt to life there. He has developed his private life in the UK and had formed friends here. He thus found that it would be unreasonable to expect him to relocate to Nepal [17].
- 17.** He found with regard to the remaining Claimants that there would not be "significant obstacles in their integrating in life in Nepal" [18]. There would be difficulties but would not be significant as required by paragraph 276ADE(vi) which refers to there being "very significant obstacles" to an

applicant's integration into the country where he would have to go if required to leave the UK.

- 18.** Judge Ghaffar then considered the first two Claimants' appeals under the "parent route". He set out the requirements of paragraph 19. There were no suitability issues relating to the first and second Claimants. They met the requirements of E-LTRPT 2.2-2.4.
- 19.** He found that as it was unreasonable for their child, the third Claimant, to be required to leave the UK the parents also met the requirements under the rules [20].
- 20.** He accordingly allowed the first, second and third Claimants' immigration appeals [21].
- 21.** With regard to the fourth Claimant, he found that she is the child of parents who are entitled to remain in the UK. However, in order for her to be granted leave to remain, the family would need to meet the financial requirements, which they did not. Accordingly, he dismissed her immigration appeal [22].
- 22.** He then went on to consider whether there were exceptional circumstances with regard to the fourth Claimant's appeal outside the immigration rules. On the particular facts, he found that he was entitled to consider her claim outside the rules. He has ".....born in mind the authorities of Gulshan and Nagre" [24].
- 23.** The basis for that finding was that the fourth Claimant's family, namely her parents and brother, fulfilled the requirements of the immigration rules but she did not. She is only four years old. Accordingly, her appeal could be considered under "conventional Article 8 principles" [23].
- 24.** The Judge then directed himself in accordance with Razgar [2004] UKHL 27. The child enjoyed family life with her parents and brother. Refusing her leave to remain "....would result in an interference in their family life" [24].
- 25.** With regard to the issue of proportionality, the Judge had 'particular regard to s.19 of the Immigration Act 2014'. He found that the fourth Claimant could speak English and is financially dependent upon her parents, who are financially independent [24].
- 26.** He did not find it proportionate to remove her ".....in the light of the fact that the rest of her family are able to fulfil the requirements of the Immigration Rules" [24]. He moreover found that it is in her best interests to remain in the UK with her parents and brother. Accordingly her removal

would result in a disproportionate interference in their family life. Her appeal was therefore allowed on human rights grounds [28].

- 27.** On 6 November 2014, the Secretary of State was granted permission to appeal against the determination of the First-tier Tribunal Judge on the basis that it was arguable that the Judge did not have proper regard to the relevant authorities including Zoumbas v SSHD [2013] UKSC 74 and EV (Philippines) and Others v SSHD [2014] EWCA Civ_874, and that the findings regarding reasonableness may be flawed.
- 28.** The Secretary of State's reasons for appealing are set out in detail. It is asserted in ground 1 that the First-tier Tribunal Judge's application of reasonableness "is misguided". Although it may be in the child's best interests to remain here with his family member to benefit from schooling and to maintain friendships, this does not mean that it is unreasonable to require the third Claimant to leave the UK with his family.
- 29.** He could have no future right to access to education in the UK outside of the ability of his parents to comply with the immigration rules. In that respect, Zoumbas, supra, is relied on. In particular, reference was had to paragraph 24 of that decision where the Supreme Court noted that the children in that case were not British citizens, nor did they have a right to future education and healthcare in the UK.
- 30.** The Secretary of State also had regard to the Court of Appeal decision in EV (Philippines). Mr Tufan submitted that the length of residence does not constitute a trump card.
- 31.** The Secretary of State referred to paragraphs 59-61 from EV. The contention is that the parent Claimants could not succeed under the rules relating to students, and their success under Appendix FM is wholly dependent upon the finding of reasonableness in respect of their son, the third Claimant.
- 32.** It was not unreasonable to require him to leave the UK with the family unit and to adjust to life in Nepal. Mr Tufan contended that he has extended family there with whom he maintains contact, such as grandparents, who can assist him in settling into life there, as can his parents.
- 33.** It is further submitted that whilst the third Claimant may have spent a significant period of time in the UK, the duration of stay and studies do not establish unreasonableness 'determinatively'; they amount to factors which must be considered. Even if he may find it difficult to adapt to life in Nepal that does not in itself indicate unreasonableness.

- 34.** For the same reasons, the finding under Article 8 in respect of the fourth Claimant are also flawed. It is reasonable and proportionate to remove the whole family to Nepal as a unit. This does not constitute a disproportionate interference with the right to respect for family and private life.
- 35.** Mr Tufan submitted that sections 117A, B and C of the Nationality, Immigration and Asylum Act 2002 were in force. The provisions apply to all appeals heard on or after 28 July 2014 in respect of when the application or immigration decision was made. He submitted that the Judge did not consider s.117 at all. The Judge's findings in respect of the third Claimant are set out in the main at paragraph 17 of the determination. Moreover, it was not clear when the child entered the UK and whether seven years had been completed. Even if he had completed seven years, there was nothing unreasonable in requiring the Claimant to return with his parents, who have no right to remain.
- 36.** On behalf of the Claimants, Mr Puar submitted that the Secretary of State was now seeking to challenge the findings and was going beyond the grounds of appeal contained in the reasons for appealing. There has never been any challenge to the facts as found. In particular, it has never been disputed that the third Claimant has been here for seven years. It has been accepted by the Home Office that the first Claimant came in September 2006 and the remaining Claimants six months later, namely March 2007.
- 37.** The Judge was moreover entitled to accept the evidence given by his father that the third Claimant had been here for seven years as at the date of application in April 2014.
- 38.** Mr Puar submitted that the Judge has considered the claims of the first three Claimants under the Immigration Rules. He looked at the rules as at the date of decision. He considered the claims under Appendix FM from paragraph 16 onwards. He had regard in particular to paragraph 276ADE(iv) as it applied to the third Claimant. His findings at paragraph 17 are sustainable.
- 39.** Having considered the third Claimant's case he then considered his parents' applications under the parent route [19]. The findings at paragraph 20 are sustainable.
- 40.** As the fourth Claimant could not satisfy the rules, the Judge had to make a separate assessment as to the proportionality of his contemplated removal. This assessment was undertaken in the light of the fact that the rest of the family were able to fulfil the requirements under the immigration rules.

41. In addition the Judge had express regard to s.19 of the Immigration Act 2014 and made findings that the Claimant could speak English and was financially dependent on her parents who are in turn financially independent.

Assessment

42. We have had regard to the grounds of appeal relied on by the Secretary of State. The assertion is that the Judge's application of reasonableness was "misguided". The basis of that contention is that the third Claimant could have no future right to access education in the UK outside the ability of his parents to comply with the immigration rules. It is contended that he had no right to future education and care in the UK. Similarly, the Secretary of State relied on EV (Philippines).

43. However, we note that in EV, none of the family in that case had a right to remain in the UK. If the mother in that case were removed, the father had no independent right to remain. If the parents are removed, then it was entirely reasonable to expect the children to go with them [60].

44. However, Judge Ghaffar found that the third Claimant had been in the UK for seven years. That finding was not challenged as part of the lengthy grounds of appeal. It was the application of reasonableness to the facts that were said to be "misguided" - paragraph 1(b) of the reasons for appealing.

45. Accordingly, unlike the Claimant in EV, the third Claimant had an independent right to remain in the UK pursuant to paragraph 276ADE(iv). That was based on the finding that it would not be reasonable, in the circumstances found to exist, to expect him to leave the UK.

46. In the light of that finding the parents' claims were then considered under the parent route under the immigration rules. Judge Ghaffar found with regard to the parents that there were no suitability issues applicable. They met the requirements of E-LTRPT 2.2- 2.4. Paragraph EX.1 applied. He found that there was a genuine and subsisting parental relationship with the third Claimant, who is under 18; the child is in the UK; the child has lived continuously here for at least the seven years immediately preceding the date of application and, as already found, it would not be reasonable to expect the child to leave the UK.

47. It is asserted by Mr Tufan that the Immigration Judge did not consider the provisions of s.117A, B and C of the Nationality, Immigration and Asylum Act 2002.

- 48.** Section 19 of the Immigration Act 2014 came into force on 28 July 2014. That amended the 2002 Act by introducing a new Part 5A containing s.117 A, B and C. Those provisions, as already indicated, apply to all appeals heard on or after 28 July 2014 irrespective of when the application or immigration decision was made.
- 49.** However, part 5A only applies where the Tribunal considers Article 8(2) of the Human Rights Convention directly. The Immigration Rules already contain the public interest question.
- 50.** Insofar as the first three Claimants are concerned, therefore, Part 5A did not apply as the Judge upheld their claims under the Immigration Rules themselves. He did not consider their claims under the Human Rights Convention.
- 51.** Insofar as the fourth Claimant is concerned, as already noted, he did have regard to s.19 of the Immigration Act 2014 [24]. It was s.19 that amended the 2002 Act by introducing the new Part 5A.
- 52.** There is no contention that the application of s.19 of the 2014 Act was not properly considered or given effect to by Judge Ghaffar.
- 53.** With regard to the Article 8 findings of Judge Ghaffar, the Secretary of State has submitted that the findings were flawed, having regard to the earlier and erroneous findings under the rules. If it is reasonable and proportionate to remove the family to Nepal as a unit, then findings with regard to the fourth Claimant could not be upheld.
- 54.** We find that Judge Ghaffar was entitled to conclude on the basis of the evidence before him that the first Claimant had been in the UK continuously since his arrival, some eight years ago. The first Claimant asserted that he arrived in the UK in September 2006 and the second and third Claimants followed him some six months later. The third Claimant was accordingly two years old at the time. As at the date of the determination, however, he was nine years old.
- 55.** Judge Ghaffar has considered the fact that he has been here for some seven years; that he has completed his primary education here in English; that he is applying for entrance to a grammar school. He has only been in Nepal for a very short visit with his father some four years ago. The Judge found moreover that he would struggle significantly to adapt to life and school in Nepal, and that he has adapted to life in the UK since he has been here and that he has remained here lawfully.

- 56.** In finding that it would be unreasonable for the third Claimant to return, Judge Ghaffar also had regard to other factors as referred to in paragraph 5 of the determination. These include the fact that he has only been in Nepal for a very short visit with his father some four years ago; the difficulty of the Claimant's obtaining admission to schools in Nepal; the difficulties he would experience having no written or reading skills in Nepali; the fact that his father only has elderly parents there who cannot provide support to the family. His father had consulted more than 20 schools in Nepal and only received two replies. The child had not been able to communicate with his grandparents and there were no other family members there.
- 57.** His mother's family have relocated to America, apart from her elderly mother. Unemployment rates are high in Nepal. His mother works in the UK, which is not something that she would be able to do in Nepal. His father has worked part time for the last eight years.
- 58.** We do not find that the Judge's conclusion that it would not be reasonable to expect the third Claimant to leave the UK to be in any way irrational or perverse. Those are findings that are sustainable on the basis of the evidence before the Judge.
- 59.** In the event the consequent findings in respect of the remaining Claimants, including the Article 8 of the fourth Claimant are similarly sustainable.

Notice of Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material errors of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed

Dated: 17/12/2014

Deputy upper Tribunal Judge Mailer