Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12969/2018
HU/12973/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2019	**On 31 December 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

DEEPA [T]
DINESH [T]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M West, Counsel, instructed by Liberty Legal Solicitors
For the Respondent: Ms K Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against the decision of Judge of the First-tier Tribunal Coutts (the judge), promulgated on 19 June 2019, dismissing their joint appeals against the respondent's decision dated 31 May 2018 refusing their human rights claims.

Background

2. The appellants are both nationals of Nepal. The 1st appellant was born on 5 July 1989 and the 2nd appellant was born on 11 August 1983. They both entered the UK on 31 December 2009, the 1st appellant as a student, the 2nd appellant as her dependent. They were granted further periods of leave, the last being valid until 30 March 2016. They have two dependent children, both of whom were born in the UK. The eldest child was 5½ years old at the date of the First-tier Tribunal hearing and the other child was 3 months old. On 16 March 2018 the appellants applied for leave to remain on human rights grounds. The applications were refused on the basis that the appellants did not meet the requirements of the immigration rules (either in respect of their private lives, applying paragraph 276ADE, or in respect of their family lives, applying Appendix FM) and that there were no exceptional circumstances outside the immigration rules such that a refusal to grant leave would breach Article 8 ECHR. The appellants each appealed the respondent's decision pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

3. The judge considered a bundle of documents running to 74 pages produced by the appellants and which included, inter alia, statements from both appellants, municipal letters from Nepal relating to the damage to their respective family homes caused by the 2015 earthquake, evidence of the 1st appellant's educational qualifications and evidence confirming their oldest daughter's attendance at primary school. The judge heard oral evidence from the appellants and set out the basis of their appeal (they were now integrated in the UK culture and had developed friendships, that if they were allowed to stay they would be able to develop their skills and not be a burden on society, and that the 2015 earthquake left both families homes damaged and uninhabitable with their respective families living in temporary accommodation made from mud and stone that was vulnerable and susceptible to adverse weather conditions and not even adequate for the family members who were living in them). The judge referred to a number of relevant authorities and accurately set out the burden and standard of proof.

4. At [31] the judge found the appellants to be credible witnesses. At [34] – [36] the judge found that there were no 'very significant obstacles' to the appellants' return to Nepal and gave reasons for his conclusion. One of the reasons, contained at [35], was that both appellants had family remaining in Nepal who could assist them with their relocation and provide support. From [37] onwards the judge considered the Article 8 appeal outside the immigration rules. At [38] the judge identified the relevant private and family life relationships in play, and at 39 he indicated that the issue for his consideration was that of proportionality. At [40] he indicated that his starting point was the best interests of the children, which was a primary consideration.

5. At [41] the judge stated,

> "The appellant's [*sic*] eldest daughter is 5 and half years old. I was told that she enjoys school and has made a number of friends. I was also told that she would be upset and find it emotionally difficult if she had to leave United Kingdom [*sic*] and relocate to Nepal as she has known no other life than here."

6. At [42] the judge stated,

> "Any disruption with the appellants' eldest daughter's life, such as relocating to Nepal, is bound to be difficult for her at a young age."

7. At [43] the judge stated,

> "However, she would be relocating there with her parents and younger sister and has family there that she regularly speaks to you [*sic*] on the telephone in Nepalese. There are also schools in Nepal that she would be able to attend, as her parents did, and there is no reason why any disruption caused by relocating to Nepal cannot be managed by her parents with emotional support as they are currently doing."

8. The judge then took account of other factors such as the appellants' private lives having been established when their immigration status was precarious (which would attract little weight under statutory provisions), but noting that they had always resided lawfully, were not involved in any wrongdoing, spoke good English and were, in principle, capable of being financially independent.

9. At [48] the judge concluded,

> "However, I am not satisfied that these factors are enough to outweigh the public interest in maintaining an effective immigration control. The appellants can continue their private life in Nepal and can keep in touch with any friends or connections made here at a distance. The same applies to their eldest daughter with the friends she has also made here."

10. The appeal was dismissed on the basis that there was no disproportionate interference with Article 8.

The challenge to the First-tier Tribunal's decision

11. The written grounds are discursive. The first ground contends that the judge failed to discharge his duty under s.55 of the Borders, Citizenship and Immigration Act 2009. There was said to be insufficient consideration of the oldest daughter's physical and mental health, emotional, social and behavioural development, and no consideration of the family's lost home or the risk of 'potential woman and child trafficking'. I pause at this stage to note that there was no medical evidence relating to the eldest daughter's physical and mental health, no independent evidence relating to her social and behavioural development, and no independent evidence relating to any risk of trafficking placed before the judge. The first ground reiterated the loss of the family home and that the various family members were living in temporary accommodation

build of stone and mud that was vulnerable in nature and susceptible to adverse weather conditions.

12. The 2nd ground contended that the judge only considered the appeal under the immigration rules "… but failed to apply discretion vested in him." I pause again to note that the judge demonstrably considered the appeal outside of the immigration rules (see [37] et seq).

13. In granting permission to appeal Judge of the First-tier Tribunal P J M Hollingworth found it arguable that the s.55 factors were not adequately considered by the judge and that his balancing exercise contained an insufficient analysis of relevant factors.

14. In his skeleton argument produced for the error of law hearing, which was written with greater clarity than either the grounds of appeal or the grant of permission to appeal, Mr West argued that the judge failed to properly address issues relevant to the 'best interests' assessment as set out in **EV (Philippines) [**2014] EWCA Civ 874 and that he failed to properly consider the consequences of the credible evidence that the appellants' family homes were destroyed by the earthquake. The circumstances in which the children would find themselves was relevant to the assessment of their best interests which was, in turn, relevant to the proportionality assessment under Article 8 when determining whether there were exceptional or compelling circumstances. In his oral submissions Mr West contended that it was not open to the judge to find that the appellants family members could provide support and assistance in light of their accepted evidence to the contrary.

15. In her submissions Ms Everett invited me to find that the judge's positive credibility findings did not mean that he had to approach the appellants' fears on the basis that they would be realised and that most of the points upon which Mr West relied were an attempt to re-argue the appeal.

16. I reserved my decision.

Discussion

17. There is no merit with the second ground of appeal. It is clear from [37] onwards that the judge did consider the appeal outside of the immigration rules. At [37] the judge reminded himself of the principles established in **Razgar** [2004] UKHL 27 and applied those principles finding that Article 8 was engaged in respect of the private lives established by the appellants and that the issue he had to determine was one of proportionality [39]. The judge weighed up a number of relevant factors including the best interests of the children and the public interest factors in s117B of the Nationality, Immigration and Asylum Act 2002 (including the precarious nature of the appellants' residence, their proficiency in English and their ability to be financially independent), and concluded that these were insufficient to outweigh the public interest [48]. The judge's approach cannot be impugned.

18. I now consider whether the judge erred in law in his approach to the best interests of the appellants' children. The judge expressly referred to his s.55 duty [27] and the authority of **ZH (Tanzania)** [2011] UKSC 4 [26]. The judge properly noted that the best interest of the children was 'a primary consideration' [40]. When assessing the best interests of the children, and in particular, the 5½ daughter, the judge took account of relevant factors including her age, that she enjoyed school and had made friends, and that she would be emotionally upset if told that she has to leave the UK [41]. As the judge stated at [42], "Any disruption" to the eldest daughter "such as relocating to Nepal, is bound to be difficult for her at a young age." At [43] the judge properly noted that the family would be removed as a single unit and that the oldest daughter had extended family in Nepal with whom she was in communication. The judge noted that there were schools in Nepal, a point not refuted by the appellants. The judge also found that any disruption caused by relocation could be managed by the appellants.

19. There is no basis for contending that the judge failed to adequately take into account the factors identified at paragraph 35 of **EV (Philippines)**. The judge was unarguably aware of the age of the oldest child [17] and he must be taken to have been aware that she had resided in the UK all her life. The judge was aware that the eldest child was at school [18] and he must have been aware that she had started primary education. The judge recorded evidence that the oldest child was in regular communication with her grandparents on the telephone and that she understood some but not all of the Nepalese that was spoken to her [17] & [43]. The judge found that any disruption to the oldest daughter caused by the relocation could be managed with the emotional support of her parents [43]. There was little other evidence of the nature and extent of the oldest daughter's private life. I am satisfied that the judge did take account of the factors relevant to an assessment of the oldest daughter's best interests.

20. At the heart of the appellant's appeal is the contention that the judge failed to consider the conditions in which the appellants' children may find themselves given that their accommodation was destroyed in the 2015 earthquake, and that this was relevant when assessing their best interests and consequently whether there were compelling circumstances outside the immigration rules such that the refusal to grant the appellants leave to remain would result in unjustifiably harsh consequences for them and their children.

21. I accept that the judge did not explicitly address the issue of accommodation for the family on return to Nepal, although it is something that he had in mind – see [13]. The evidence relating to the nature of any temporary accommodation that may be available to the appellants was however limited. There was a letter from a Nepalese municipality indicating that the 1st appellant's family home was "fully devastated" by the earthquake and that her family were treated as earthquake victims, and a letter from another municipality indicating that the 2nd appellant's family home was "partially destroyed". The letters made no reference to the temporary accommodation in which the appellants' various

family members lived. The appellants provided no independent evidence or background evidence that any temporary accommodation in respect of which they may be required to live on their return to Nepal would be unsuitable for their two daughters, or that such accommodation would significantly impact on the safety and welfare of the children. The description of the temporary accommodation occupied by the appellants' grandparents and siblings was very general. Their accommodation was made from stone and mud and was susceptible to adverse weather conditions. There were no photographs of the accommodation occupied by the appellants' families. The appellants failed to produce any independent evidence as to the amenities available, including the availability of electricity and water. The burden of proof rested on the appellants and it was incumbent on them to produce sufficiently detailed evidence of the likely conditions that awaited them if they were forced to reside in temporary accommodation.

22. The judge found, in any event, that there was no reason the appellants would be unable to find employment to support themselves and their children [36]. The judge acknowledged the evidence that the 1st appellant undertook a hotel training course in Nepal, and that she obtained a master's degree in marketing in the UK together with qualifications including a postgraduate diploma in business and marketing strategy and a diploma in tourism ([9] & [12]). The judge also acknowledged that the 2nd appellant had worked in the hotel industry in both Nepal and the UK as a safety engineer ([9] & [12]). Even if the appellants had to resort to temporary accommodation, the judge's findings indicated that they would be capable of finding employment and that they would therefore be able to move into more permanent accommodation.

23. The judge's reference at [35] to the appellants' families being able to provide them with assistance with their relocation and support is vaguely phrased. It would have been preferable if the judge had clearly stated what type of assistance and support he anticipated could be provided given the appellants' evidence that their respective families were themselves living in temporary accommodation and would be unable to provide financial support. There was however no evidence suggesting that both appellants' families could not provide other practical and emotional support support and there was no evidence that the 2nd appellant's elder brother, who had retired from the Indian army and was living in Nepal, was incapable of providing temporary accommodation or financial support. I once again note that it was for the appellants to provide evidential support for their contention that the conditions on return to Nepal would be such as to make it in the children's best interests to remain in the UK, and to render the removal of the family a disproportionate interference with Article 8. The appellants failed to provide a sufficient evidential basis and, on the basis of the limited evidence adduced by them, the judge would not have been entitled to find that the removal of the family unit was capable of constituting a disproportionate interference with Article 8.

24. For the reasons given above I am not satisfied that the judge has erred on a point of law such as to require his decision to be set aside.

Notice of Decision

The appeals are dismissed.

D. Blum

Signed Date 17 December 2019
Upper Tribunal Judge Blum