In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15387/2018
HU/15390/2018
HU/15391/2018
HU/15382/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st March 2019	**On 05th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

BINOD [K] (1)
GITA [S] (2)
[G K] (3)
[K K] (4)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr W. Rees of counsel
For the Respondent: Ms Cunha, a Home Office presenting officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Nepal who were born on 31 October 1977 (A1), 18 January 1989 (A2), 20 August 2013 (A3) and 21 April 2011 (A4). They Appeal to the Upper Tribunal with permission from First-tier Tribunal Judge Neville, given on second of January 2019.

The Appellants' Immigration History and Background

2. The first appellant entered the UK on 28 April 2008 with leave to remain until 8 April 2013, but that leave was curtailed with effect from 2 January 2011. The second appellant joined her husband in the UK on 19 October 2010 with valid leave to coincide with her husband's, the first appellant's. However, her leave was curtailed in line with her husband's, so she was due to leave on or immediately after 2 January 2011. Their children, the third and fourth appellants, were born in the UK.

3. The appellants, effectively, "went to ground" but on 8th of May 2018 they claimed that their protected human rights were engaged and that, although they had no right to be here, their children had been born in the UK and could not be expected to go to Nepal. Accordingly, they invited the respondent to give them leave to remain under article 8 of the European Convention on Human Rights (ECHR).

4. The respondent, in his decision dated 11 July 2018, considered that those protected human rights were outweighed by a range of other factors not least of which was the fact that the appellants had a precarious immigration status and, having regard to the provisions in section 117B of the Nationality, Immigration and Asylum Act 2002, and their failure to meet the requirements of the Immigration Rules, their applications were refused.

The appeal before the FTT

5. The appeal against the decision to refuse the appellants' human rights claims came before Judge of First Tier Tribunal Robertson on 9 October 2018. On 25 October 2018 she decided to dismiss the appeal on the grounds that the appellants did not meet the requirements of the Immigration Rules and having weighed up the best interests of the children (the third and fourth appellants) the judge nevertheless concluded that it was proportionate and in the public interest to remove the appellants to Nepal. Strong reasons doing so had been established on the facts. Accordingly, she dismissed the appeals.

6. The appellants decided to appeal to the UT. FTTJ Neville extended time for doing so and gave permission on the basis that the judge had arguably erred in considering the parents' adverse immigration history as weighing against the child appellants. In so deciding, Judge Neville referred to

paragraph 276 A.D. E (1) (vi) of the Immigration Rules and section 117 B (6) of the 2002 Act. Having regard to the provisions of section 117 B (6) and the case of **KO (Nigeria) [2018] UKSC 53**, which tried to explain that provision. The court held that the provisions of the Immigration Rules and the application of article 8 in the context of children must be judged against "best interests" requirements of section 55 of the Borders, Citizenship and Immigration Act 2009 (2009 Act). The court further noted that paragraph 276 A.D. E (1) (vi) did not import any requirement that the respondent should consider either the criminality or misconduct of a parent as a balancing factor. Section 117 B (6), in substance, incorporates the same requirements and there is also an absence of such a required balancing feature in relation to that provision.

The hearing

7. The appellant claims that the decision of the FTT contained a material error of law in that the judge had mistakenly referred to paragraph 276ADE (vi) when she meant to refer to 276ADE (iv) at paragraph 22 VI of his decision as paragraph 276 ADE (vi) refers to applicants for leave to remain who are "aged 18 years or above". More importantly he had placed excessive emphasis on the parents' immigration histories rather than the welfare of the children. He also queried the judge's finding that the child appellants had retained links to Nepalese culture, although I note that at paragraph 14 of the decision the judge noted that those relying on a Nepalese interpreter included the third appellant. The minor appellants had been born in the UK and had gone to school here. Mr Rees relied on several authorities including **KO [2018] UKSC 53** which was published very shortly before the decision in this case was promulgated. These included:

- **JG Turkey [2019] UKUT 72**
- **Zoumbas [2013] UKSC 74**
- **EV (Philippines) [2014] EWCA Civ 874**
- **MA (Pakistan) [2016] EWCA Civ 705**
- **MT and ET (Nigeria) [2001] UKUT 88** at paragraph 30.

8. Mr Rees particularly relied on the decision of Elias LJ in **MA (Pakistan)** at 36 where he said that:

> "Looking at section 117B (6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable

> to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."

9. He argued that there was nothing in the legislation under scrutiny about the importation of reasonable compliance with immigration rules where one is concerned with the welfare of children, whose interests, by virtue of section 55 of the 2009 Act, were a primary consideration. He said powerful reasons had to be shown for removing these children to Nepal and they had not been. **ZH Tanzania** remained good law. The decision had been infected by the judge's excessive reliance on the parents' immigration histories.

10. The respondent, on the other hand, submitted that the judge had been entitled to attach significant weight to the public interest. She submitted that the case of **KO (Nigeria)** broadly helped the respondent's case by stating that the interests of children had to be evaluated independently and "reasonably". It was clear on the case law that in considering adults' claims it was perfectly permissible to look at their poor immigration history. In this case they were unlawfully in the UK before they finally sought to regularise their status. The finding at paragraph 23 II of the decision that the evidence did not suggest "…ties to the wider community" as opposed to the "Nepalese diaspora" was plainly a finding open to the judge on the evidence. She also concluded that the child appellants would have learned enough Nepalese at home to be able to integrate in Nepal. A best interests assessment was carried out by the judge, who had in mind that strong reasons were required before it be reasonable to expect the minor appellants to leave the UK and return to Nepal, but the reasons were sufficiently strong here.

11. Mr Rees responded to say that the analysis in relation to the parents at paragraph 23 II decision was flawed. The finding at paragraph 23 I is also faulty. The findings at paragraph 23 of the decision were "tainted" by the problems Mr Rees had identified in relation to paragraph 22. In particular, to make the findings the judge had made in paragraph 22, V and VI, cogent reasons had to be found for removing a minor from the UK. I was also referred against paragraphs 15 and 16 of **KO**. The Supreme Court explained in those paragraphs that the parents' misconduct did not enter into the assessment of the child's welfare. Mr Rees also relied on the judgment of Lewison LJ in **EV (Philippines)** and said that the insufficient weight had been attached in relation to children primary interests in the paragraphs quoted above. In the light of the alleged material error of law, I was invited to remit the matter to the First-tier Tribunal for a rehearing.

Discussion

12. The present state of article 8 jurisprudence may best be described as in a state of flux, as the Supreme Court acknowledged in **KO**. However, it remains clear that the best interests of a child or children form an

important part of the balancing exercise under article 8. Indeed, where there are children involved, they are described as a "paramount consideration". As far as the best interests of an adult claimant are concerned, where they are exercising a private or family life in the UK, those interests need to be carefully balanced against the public interest in removal but where the child is involved paragraph 276 ADE of the Immigration Rules and section 117B (6) of the 2002 Act, respectively, make it clear, that the public interest does not require a removal of a child who has lived continuously in the UK for at least seven years or an adult appellant who has a genuine and subsisting parental relationship with a "qualifying child" where it would not be reasonable (and in the child's best interests) for that child to leave the UK. A "qualifying child" includes a child who has lived in the UK for a continuous period of seven years. The key issue here is whether the judge carried out a "best interests" assessment or whether she allowed the adverse view she reached of the adult appellants' immigration histories to influence that assessment.

13. The judge dealt with the issue of the children's welfare and was fully cognisant of the fact that here the family would be returning to Nepal as one family unit. Insofar as the child appellants did not have an adequate command of Nepalese, they would soon learn these languages and, in the case of the fourth appellant, she is described as a bright child who would pick up that language relatively well. Both child appellants could soon learn that language, the judge found. It is by no means a negative that the child appellants would pick up the language and culture of their parents. The judge provided a thorough review of the case law, the only exception being the Supreme Court case of **KO**, which was only published on the day the decision was signed by the judge.

14. The judge clearly found there are no unjustifiably harsh consequences to the minor appellants of their return with their parents to Nepal. That was a finding open to her on the evidence she heard. Furthermore, she gave full and adequate reasons for her decision. The judge clearly made no error of law in her analysis of the facts, being fully aware that the third and fourth appellants had both been in the UK since birth and in the case of the fourth appellant had been in the UK for seven years or more, having been born on 21 April 2011. Therefore, plainly the fourth appellant fell within paragraph 276 ADE (iv) which required it to be "reasonable to expect the applicant to leave the UK". The first and second appellants had family members in Nepal as well as family members in the UK. The judge did not accept that the first appellant would be unable to find employment there. The reference in the judge's decision to paragraph 276ADE (vi) should be a reference to paragraph 276 ADE (iv). When the whole of the decision is read, that the judge did not accept that the best interests of the child appellants lay with remaining in the UK and that although they had never been to Nepal, yet alone lived or been educated in Nepal, it had not been established on the evidence that they would suffer any social, educational, emotional or physical setback if they settled there with their parents.

15. Turning to the decision of the Supreme Court in **KO**, the court made it clear that each case turned on its own facts that a number of the cases reviewed, for example **EV Philippines** and **MA Pakistan** were concerned with cases where one parent had a right to remain in the UK and the other did not. In a number of the cases the father, a foreign criminal, stood to be deported and therefore the provisions of section 117C (5) were in issue. Under that section an exception to the usual deportation requirement applied where the deportation would have an unduly harsh impact on a qualifying child. That is not the case here, where both parents would be returning together to Nepal. **NS**, one of the cases considered by the Supreme Court, was a closer case to this one. There, both parents were to return to their own country because of their abuse of the Immigration Rules. As Lord Carnwath said, in paragraph 51, the expectation was that the children would return to their own country of Sri Lanka. Therefore, as far as the facts of this case are concerned, I do not consider that the case of **KO** changes the law.

Conclusions

16. This was a thorough and careful decision in which the judge reached clear conclusions according to the law. I have concluded that there was no material error of law in the decision of the First-tier Tribunal and accordingly that decision, to dismiss the appellants' appeals, stands.

Notice of Decision

The appeal is dismissed on asylum grounds/ humanitarian protection grounds / human rights grounds/ under the immigration rules.

No anonymity direction is made.

Signed Date 03 April 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 03 April 2019

Deputy Upper Tribunal Judge Hanbury