Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30411/2014
IA/30412/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 May 2015	**On 28 May 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASHABEN SUNILKUMAR BRAHMBHATTI

First Respondent

ADITI SUNILKUMAR BRAHMBHATTI

Second Respondent

(ANONYMITY ORDER NOT MADE)

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr R. Pennington-Benton, Counsel instructed by Farani Javid Taylor

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. We find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Introduction

1. For the sake of convenience this decision will refer to the parties as they were before the First-tier Tribunal albeit that the Secretary of State is technically the appellant in this particular appeal. The respondent was granted permission to appeal against the decision of First-tier Tribunal Judge Suffield-Thompson (hereafter the judge), which was promulgated on 02 January 2015. The judge allowed the appellants' appeal against the respondent's decision to refuse to grant them leave to remain on human rights grounds and to remove them from the UK under section 10 of the Immigration Act 1999.

2. The first appellant is a citizen of India whose date of birth is 29 November 1974. The second appellant is her dependent daughter. She is also a citizen of India whose date of birth is 16 January 1997. The first appellant entered the UK on 04 October 2009 with entry clearance as a student. Her husband and the second appellant entered the UK on 18 September 2010 with entry clearance as her dependents. The first appellant subsequently separated from her husband who she believes has returned to India. She was granted further leave to remain as a student until 25 August 2014. On 02 February 2012 the respondent sought to curtail the appellants' leave to remain. However, at the hearing Mr Tufan confirmed that his records showed that the letter was returned. Whether the appellant's leave to remain as a student was properly curtailed and when she came to know about the decision is not a matter that is necessary for this Tribunal to determine for the purpose of this appeal. Certainly by 02 August 2013 the appellant seemed to be aware of her precarious status because an application for leave to remain was made on human rights grounds. The application was refused in a decision dated 23 July 2014 on the ground that they did not meet the requirements of the immigration rules and there were no exceptional circumstances that justified granting leave to remain outside the rules.

3. The First-tier Tribunal heard the appeals on 22 December 2014. The judge set out the appellants' immigration history in full as well as the details of their private and family lives. The judge concluded that the appellants did not meet the requirements of the immigration rules but then went on to consider whether there were matters that were not adequately covered by the rules that could nevertheless properly engage their right to private and family life under Article 8 of the European Convention on Human Rights (ECHR) outside the immigration rules. The judge made reference to the five-stage test in *Razgar v SSHD* [2004] UKHL 27 and concluded that the appellants had formed a private and family life in the UK and that removal would interfere with their rights in a sufficiently grave way as to engage the operation of Article 8. The judge then went on to consider factors that might be relevant to the proportionality of removal and made findings relating to the best interests of the second appellant, who was at that stage still a minor, with reference to the Court of Appeal decision in *EV (Philippines) v SSHD* [2014] EWCA Civ 874. The judge then concluded

that removal would be disproportionate in all the circumstances of the case.

4. The grounds of appeal argue that the judge failed to attach little weight to the appellants' private lives as required by sections 117B(4) and 117B(5) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The judge failed to take into account the fact that the second appellant was not a "qualifying child" as defined in section 117D NIAA 2002. The grounds went on to argue that the judge failed to apply the principles set out in *EV (Philippines)* properly and failed to have regard to the Supreme Court decision in *Zoumbas v SSHD* [2013] UKSC 74. The judge erred in failing to find that, as a non-British child, it was in the child's best interests to return to India with her mother. Permission to appeal was granted on the basis that it was arguable that the judge may have erred in the application of section 117 and that the judge may have given insufficient weight to the requirements contained in section 117B(4)-(5) and the case law cited in the grounds.

5. The matter came before us to determine whether the First-tier Tribunal erred in law.

Submissions

6. Mr Tufan relied on the grounds of appeal. He submitted that having concluded that the appellants failed to meet the requirements of the immigration rules the judge then failed to give adequate reasons for going on to consider Article 8 outside the immigration rules. When asked for submissions in relation to whether the judge had applied section 117B(4)-(5) NIAA 2002 properly he said that he relied on what was said in the grounds. He questioned whether the judge could have reasonably arrived at the decision on the facts but when asked whether the respondent now wanted to put forward a perversity challenge Mr Tufan merely said that the judge had "not made a good job of it".

7. In response Mr Pennington-Benton submitted that the grounds amounted to little more than a complaint about the findings of fact made by the judge. He said that it was a fact sensitive assessment. No doubt other judges might have come to a different conclusion on the same facts but that did not amount to an error of law. The judge had heard the witnesses and formed an opinion as to how integrated they were in the UK. He took us to various points in the decision where he said the judge clearly had the immigration history and precarious nature of their position in the UK in mind when coming to the decision. He submitted that section 117B only required a judge to consider whether little weight "should" be given to a private life established while a person is in the UK unlawfully or if their immigration status is precarious. The wording did not say that a judge "must" give little weight to those matters. It was compatible with a judge's duties under section 6 of the Human Rights Act 1998 to take it into consideration but it could not be a mandatory requirement. He submitted that whether the leave was properly curtailed or not the judge had dealt

with the issue of the appellants' precarious position in the UK in several places in the decision. The grounds of appeal did not allege that the judge did not consider the issue but merely complained that the judge did not give the weight that the respondent wanted. He submitted that did not amount to an error of law and asked us to uphold the decision.

Conclusions

8. We have considered the First-tier decision, the grounds of appeal and submissions in full and conclude that the decision did not involve the making of an error of law for the following reasons.

9. Although the judge did not make specific reference to the reasons for going on to assess the case outside the immigration rules it is clear from what is said in paragraph 54 of the decision that the judge took into account all the circumstances of the case as well as the best interests of the child before coming to the conclusion that there was sufficient reason to consider the case outside the immigration rules. We are satisfied that this was sufficient to move on to the second stage assessment outside the immigration rules.

10. It is clear from the decision that the judge set out the appellants' immigration history in some detail and was fully aware of the fact that the respondent sought to curtail their leave after the sponsor licence was revoked from the college at which the first appellant was studying (paragraph 3). The judge also took into account the respondent's submission that the appellants' status was precarious since she stopped studying under the terms of her student visa in 2012 (paragraph 39). It seems that the appellants' representative at the hearing also conceded that "the first appellant had no legal right to be here after 2012 and that her position has been and still remains precarious" (paragraph 43).

11. The judge then correctly referred to the five stage test in *Razgar* and went on to make clear findings as to the best interests of the child involved in the case with reference to relevant authorities including *EV (Philippines)*, *ZH (Tanzania)* and *Zoumbas*. In paragraph 64 of the decision the judge set out a number of reasons why it was in the best interests of the child to remain in the UK including the fact that she was at a significant stage of her education and that she had become westernised and would find it difficult to revert back to the cultural expectations of being a young woman in a culture with different moral and religious values. The judge also noted that the appellant's daughter had no home or close family ties in India but in contrast has a home in the UK, a network of friends and was "totally integrated into the British way of life". We find that the respondent's grounds in relation to this issue amount to little more than a disagreement with the weight that she would like to have been placed on the best interests of the child. The findings were fully reasoned and open for the judge to make on the evidence and they could not be described as perverse or irrational. The fact that the judge did not refer to section 117B(6) is immaterial because, as the respondent points out, the second

appellant is not a "qualifying child" within the meaning of section 117D NIAA 2002.

12. The public interest test contained in section 117B NIAA 2002 is only relevant to what weight should be given to the public interest considerations in so far as it might form part of the overall balancing exercise relating to the proportionality of removal. The statute makes clear that a judge must have regard to those factors where relevant. In *Dube (ss.117A-117D)* [2015] UKUT 90 the Tribunal found that a judge must take into account the considerations set out in section 117 but it would not be an error of law to fail to refer to each section in turn; what mattered was "substance not form".

13. The grounds also seek to challenge the alleged failure of the judge to consider section 117B(4) (private life established while in the UK unlawfully) or section 117B(5) (private life established at a time while immigration status is precarious). For the reasons given above we are satisfied that the issue of the appellants' immigration history and the precarious nature of her status formed part of the arguments at the hearing and the judge clearly had in mind that issue when the decision was made.

14. At the hearing there was some brief discussion as to the meaning of the term "precarious" but shortly after we concluded the hearing it became apparent that the Tribunal had just issued a new reported decision in *AM (s.117B) Malawi* [2015] UKUT 0260. The Tribunal found that section 117B(4) and 117B(5) clearly intended a distinction to be made between those who had formed a private life in the UK while they were here unlawfully and those who had formed a private life in the UK while their "status is precarious". The Tribunal concluded that "precarious" status included those people with lawful leave to remain who would be required to make a further application for leave at the end of the period and in certain circumstances may even include those whose Indefinite Leave to Remain or even British citizenship might fall to be revoked through fraud or criminal activity.

15. While it is possible that there might be a technical argument as to whether the decision to curtail the appellants' leave to remain was properly served we did not hear detailed argument on this and do not seek to resolve that issue in this appeal. Given the concession made by the appellants' representative it is clear that the judge proceeded on the assumption that the appellant was without lawful leave from 2012. On the facts of the case the appellant had limited leave to remain and then possibly remained without lawful leave for a period of time after 2012. The circumstances would come within the terms of both section 117B(4) and 117B(5) but both provisions require a judge to approach the matter in the same way by giving "little weight" to a person's private life that has been established in such circumstances when considering the overall balancing exercise.

16. However, the precarious nature of the appellants' status was not the only issue that had to be weighed in the balance in this case. The judge quite clearly also considered the best interests of the child, which are a primary consideration. While the best interests of a child are a weighty consideration they are capable of being outweighed by the cumulative effect of other factors. We are satisfied that the judge took into account a number of relevant factors relating to best interests in paragraphs 63-64 of the decision that were open to the judge to consider in the circumstances of this particular case. The judge took into account the relevant authorities and it seems quite clear from the conclusion contained in paragraph 68 of the decision that the best interests of the second appellant were weighed against the fact that their status had been precarious as well as all the other relevant facts. After having heard from the witnesses and after considering all the evidence as a whole the judge concluded that removal would be disproportionate.

17. While it is possible that another judge would have come to a different conclusion on the facts of this case, for the reasons given above, we are satisfied that there is nothing in the judge's reasoning that could be described as perverse or that discloses a material error of law. The grounds amount to little more than a disagreement with the judge's findings. For these reasons we uphold the First-tier Tribunal decision.

18. The decision of the First-tier Tribunal did not involve the making of an error of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 27th May 2015

Upper Tribunal Judge Canavan