IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32344/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice Belfast	**Decision & Reasons Promulgated**
On 27 October 2015	**On 22 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MRS PURNAKALI KHATRI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M McTaggart, Counsel instructed by RP Crawford & Co Solicitors

For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 2 June 1971. She came to the UK on 27 April 2012 with leave to remain as a Tier 2 partner. After a grant of further leave, she applied on 11 March 2014 for leave to remain on Article 8 grounds.

2. On 31 July 2014 a decision was made to refuse to vary leave to remain, with a decision to remove the appellant under Section 47 of the Immigration, Asylum and Nationality Act 2006. The appellant appealed

© CROWN COPYRIGHT 2016

that decision and her appeal came before First-tier Judge Alis who determined the appeal 'on the papers', whereby the appeal was dismissed. Permission to appeal having been granted by a judge of the Upper Tribunal, the appeal came before me.

The Decision of the First-tier Tribunal

3. The First-tier Judge noted that the appellant and her husband have four children aged 19, 16, 14 and 11, and that her husband and children all have indefinite leave to remain granted on 26 June 2014. The appellant's husband obtained ILR having come to the UK as a work-permit holder and having lived in the UK for over six years.

4. Judge Alis concluded that the appellant does not meet the requirements of the Immigration Rules. Her application was considered under the transitional arrangements that govern paragraph 284 of HC 95, which require her to have an approved English language certificate. The appellant did not have the relevant English language certificate and there was no guarantee that she would have obtained it, which was relevant to 'evidential flexibility'. There was no evidence before the judge that the appellant had obtained that qualification. Although the appellant claimed that the respondent had her passport and therefore she was unable to book a test, the judge concluded that he had been given no evidence that she had made any request for her passport. In terms of the appellant's lack of the relevant English language qualification, the respondent's decision was found to be correct.

5. So far as the Article 8 Immigration Rules are concerned, the judge noted that when the appellant made her application for leave to remain neither her children nor her partner had settled status, but that situation changed on 26 June 2014.

6. The judge concluded that the appellant did now meet the eligibility requirements of the Rules as set out in Section E-LTRP because, with reference to E-LTRP1.2(b), her husband now has settled status.

7. Furthermore, it was not suggested by the respondent that the appellant cannot meet the financial requirements of the Rules. In any event, they had provided evidence of their income which indicated that those requirements were met.

8. On the other hand, the appellant was not able to satisfy E-LTRP4.1 because she did not have an approved English language test certificate. Accordingly, the appellant would have to establish that she met the requirements of EX.1 of Appendix FM, according to E-LTRP4.1(ix) (although he probably meant to refer to E-LTRP4.1 (d)).

9. After referring to various authorities on the issue of "insurmountable obstacles", the judge noted at [19] that the appellant and her children only came to the UK in April 2012 and have therefore only enjoyed family

life in the UK for a short period of time, not having come to the UK when the appellant's husband came to work in the UK. She remained in Nepal with the children. It was concluded that there were no insurmountable obstacles to family life continuing in Nepal.

10. So far as paragraph 276ADE is concerned, in terms of private life, the conclusion was that there are no "significant obstacles" to her integration in Nepal were she to be returned.

11. A further conclusion was that there were no exceptional or compelling circumstances which required consideration of the appeal outside the Immigration Rules, and under Article 8.

The grounds and submissions

12. The grounds make complaint about the respondent having failed to give the appellant the opportunity to obtain the relevant English language qualification. It is further argued that the judge's conclusions under the Rules in terms of family life, and under Article 8 proper, in terms of the proportionality of removal are flawed.

13. The submissions made before me reflected the fact that permission to appeal was granted on limited grounds only, with permission having been refused in terms of the appellant's failure to meet the English language requirement of the Rules. It was said to be arguable that the First-tier Judge had failed to factor into his assessment of the proportionality of removal the fact that the appellant's four children have indefinite leave to remain in the UK.

14. In submissions it was pointed out that EX.1(a) does not deal with minors who have ILR, although EX.1(b) does, in the sense that it refers to a partner who is a British citizen or "settled" in the UK. EX.1(a)(ii) includes the requirement that it would not be reasonable to expect the child to leave the UK. In other words, it was submitted that that was a much lower threshold to be satisfied than the requirement to be settled.

15. The children in this case do not come within EX.1(a) in terms of sub-paragraph (i) which is what the judge concluded at [16].

16. In considering insurmountable obstacles with reference to the appellant's partner, it was submitted that the judge had not dealt with what the insurmountable obstacles are in this case. The Rules at EX.1(b) do not deal with the issue of the relationship between the appellant and her partner and children. The judge had not identified the practical issues in terms of relocation with the appellant's husband and children, the matter only having been dealt with briefly at [19]-[20]. There was no appreciation of, and no weight given to, the fact of the children having ILR.

17. Although at [11] the judge had noted that the appellant's husband and children have ILR, that was not sufficient. There was no consideration of

circumstances which indicated that a consideration under Article 8 outside the Rules was required.

18. Family life in this case was established lawfully. Both the appellant and her partner are in employment and are not a burden on the state. These are factors relevant in terms of Section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). There is no allegation of any criminal conduct in this case.

19. The appellant's husband would have to go back to Nepal and give up all the benefits of living in the UK, for example in terms of employment, he having established himself lawfully. The practical possibilities of relocation are issues relevant to insurmountable obstacles.

20. There are four children, three of whom are still minors who have lived with their mother all their lives. The judge did not consider that in any proportionality exercise.

21. Mrs Saddiq submitted that it was apparent from [11] that the judge did take into account that the children have ILR. However, as was pointed out at [19], they have only been in the UK since April 2012. The judge set out the family's circumstances. They had established family life in the UK for only a very short period of time. The issue of ILR was correctly factored into the question of insurmountable obstacles at [20] where the judge said that the appellant and children have only been "settled here" for a limited period of time.

22. In any event, it was submitted that there was no evidence of any insurmountable obstacles given the short timescale since their arrival. No evidence on this issue was put before the judge and he could not therefore be criticised for not taking into account material that was not before him. There was no need for an assessment under Article 8 outside the Rules, which the appellant was not able to meet.

23. In reply, Mr McTaggart submitted that the phrase "settled here" at [20] could not realistically be taken to mean a reference to ILR given that that phrase was used with reference to the appellant and her children being settled here. The appellant, of course, does not have ILR. That phrase in reality therefore only meant to refer to length of time that they had been in the UK.

My assessment

24. Although arguably outside the ambit of the grant of permission to appeal to the Upper Tribunal, it was submitted on behalf of the appellant that the judge's decision does not demonstrate a legally adequate assessment of the issue of "insurmountable obstacles" to family life between the appellant and her husband outside the UK. It was argued that that assessment not only failed to identify the insurmountable obstacles in the

circumstance of this case, but also failed to take into account the fact of the children's ILR.

25. I am prepared to assume for present purposes that the grant of permission did not exclude argument on the issue of insurmountable obstacles, although it is stated in the grant by the Upper Tribunal Judge that there was no arguable error of law in the judge's assessment of the appellant's failure to meet the Immigration Rules. Nevertheless, the argument on behalf of the appellant is misconceived insofar as it suggests that the judge did not identify insurmountable obstacles. The fact is that the judge did consider the issue and found that there were no such insurmountable obstacles, because none were identified by the appellant.

26. Reference was made to the length of time that the appellant (and her children) had been in the UK, since April 2012, and that family life in the UK at least was relatively recent. At [20] the judge noted that the appellant and the children had spent the majority of their lives in Nepal and were supported by the appellant's husband whilst he was working in the UK.

27. I do not accept the contention that the judge failed to have regard to the fact that the appellant's husband and children have ILR. Under the subheading "My Findings" at [11] the judge started his assessment by giving the ages of the appellant's husband and their four children. In the very next sentence he stated that they each have ILR granted on 26 June 2014, noting that they were granted ILR after the appellant's application. In the final sentence of that paragraph there is an explanation of how the appellant's husband was granted ILR. The very first paragraph of the judge's assessment is all concerned with the fact of the appellant's husband and children having ILR. It could not be said therefore, that this was an issue that was not taken into account in the judge's assessment.

28. Furthermore, again at [15] the judge stated that when the appellant submitted her application neither her children nor her partner had settled status, but that since 26 June 2014 that situation had changed. It is noted that the respondent did not consider this when looking at the appellant's application. This further reference to their ILR reinforces my conclusion that the judge did have this in mind.

29. At [20] the judge stated that there was no evidence that had been presented to support the claim that there were insurmountable obstacles, and that whilst removal would be an interference he was satisfied that it was proportionate "having regard to the [short] period of time the appellant and children had been *settled here* and the length of time they lived in Nepal." It was submitted on behalf of the respondent that the reference to "settled here" is indicative again of the judge's having taken into account the ILR of the children. On behalf of the appellant it was argued that this could not be so because the phrase includes "the appellant and children" having been settled here, and the appellant does

not have ILR. It was therefore, only a reference to the length of time of their physical presence, it was submitted.

30. Whether or not that passage is an explicit reference to the ILR of the children, it is nevertheless recognition of a significant factor, namely the length of time that the children have been in the UK. At the time of the judge's determination, that was a period of just two and a half years. I do not consider that the phrase used in that paragraph rules out a further demonstration of the judge's cognisance of the ILR of the children, but in any event in my view that is adequately demonstrated with reference to the other passages to which I have referred.

31. I am satisfied that in the assessment of whether there were insurmountable obstacles to the continuation of family life in Nepal, the judge did take into account the fact of the ILR of the appellant's husband and children. Indeed, the argument before me was only in relation to a failure to factor in the children's ILR. Whilst the question of insurmountable obstacles will necessarily involve consideration of all factors having a bearing on that issue, I cannot see on the basis of the evidence presented to the judge that there is any error in his assessment of that issue. It may be that a better case on the issue of insurmountable obstacles could have been advanced before the judge, but the evidence upon which he based his conclusion was such that he was entitled to conclude as he did.

32. Similarly, I am satisfied that the conclusion that there were no compelling circumstances such as to require consideration of Article 8 outside the Rules is a conclusion that was similarly open to the judge, on the basis of the evidence put before him. Whilst I have doubt about the conclusion at [23] that the Rules in the appeal before him "are a complete code", no argument was advanced before me on that issue and any error in this respect is not in any event material.

33. It is important to remember that there was not and could not have been any decision to remove the children, who have ILR. The judge concluded that had the appellant provided the correct English language certificate she would have met the requirements of the Rules without difficulty. He found that there was no evidence that she had approached the respondent for her passport so that she could take a further English language test.

34. Even if it could be said that because the Rules do not cater for circumstances in which children have ILR and that the judge should have gone on to consider Article 8 proper and conduct a full proportionality assessment, it is impossible to see how, on the basis of the evidence put before the judge, the result could have been a conclusion in the appellant's favour. The only other factor not contemplated within the Rules is the ILR of the appellant's children. Whilst to some extent it can be taken as read that if they had to leave with the appellant they would suffer some disadvantage, I cannot see that on the basis of the material put before the judge the mere fact of the ILR of the children, or of the

appellant's husband for that matter, could have resulted in an outcome in the appellant’s favour.

35. Accordingly, I am not satisfied that there is any error of law in the judge’s decision and the decision to dismiss the appeal therefore stands.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Accordingly, the decision to dismiss the appeal stands.

Upper Tribunal Judge Kopieczek 20/01/16