



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13146/2018

THE IMMIGRATION ACTS

Heard at Field House
On 22nd February 2019

Decision & Reasons Promulgated
On 11th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K. G.

(ANONYMITY DIRECTION MAINTAINED)

Respondent

Representation:

For the Appellant: Ms Z Bantleman, Counsel

For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Lal promulgated on 28th December 2018 allowing the Appellant's appeal on the basis of her protection claim to be recognised as a refugee and in respect of Articles 2 and 3 of the European Convention on Human Rights. I shall refer to the parties as they were before the First-tier Tribunal.
2. The decision of Judge Lal was appealed and permission was granted by First-tier Tribunal Judge Buchanan in the following terms:

“The Grounds of Appeal contend that the FTTJ arguably erred on the basis that he failed to examine any protection which the Nepalese authorities may be able to afford to a gay woman (paragraph 5); and failed to explain why family hostility would be enough to warrant international protection (also paragraph 5); and then failed to address issues of relocation (paragraph 6). It is contended that in the absence of these findings, the FTTJ fell into material misdirection of law.

It may be argued that the FTTJ's conclusion at paragraph 27 on the document ‘there is no doubt ... that were the appellant to be returned she would be at real risk of persecution from her family specifically as well as from the family of her ex-husband’ is, as contended by the respondent, insufficient to address the requirements to be met in a claim for international protection.

It is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision. I grant permission to appeal.”

3. I was not provided with a Rule 24 reply by the Appellant but was provided with a skeleton argument by Counsel which I took into consideration when reaching my decision.

Error of Law

4. At the close of the hearing I indicated that I did find that there was a material error of law in the decision such that it should be set aside, but only in relation to its outcome as is explained below. My reasons for so finding are as follows.
5. In respect of the Grounds of Appeal, the key complaints made are that Nepal has a progressive legal approach to same sex relationships as identified by the Human Rights Watch Report at Annex H of the Respondent's bundle, and that the judge failed to examine any protection the Nepalese authorities may be able to afford the Appellant and that there was no reason advanced as to why the authorities could not offer such protection, nor why in the alternative the Appellant could not relocate within Nepal. In respect of those grounds, Mr Walker relied on them without any further embellishment. Ms Bantleman valiantly tried to persuade me that the judge's findings at §§29 to 31 were sufficient to represent an *implicit* consideration that sufficiency of protection by the Nepalese authorities was unavailable thus resulting in the Appellant rightly being recognised as a refugee, and thus pointing to there being no need for consideration of internal relocation as a consequence. However, given the consideration of the risk upon return at §29 is said to give support for the conclusions reached on Articles 2 and 3 in respect of the Appellant's human rights, it is important to see what findings have been made with some care.
6. I pause at this juncture to note that the Secretary of State has not sought to challenge any of the findings made in respect of the Appellant being a gay woman and actively and openly enjoying that sexuality, and I also note that there was no challenge to the finding in §29 that the Appellant will not seek to deny or hide that active expression of her sexuality on return to Nepal.
7. Turning to §29 and its content, it is first said that the Appellant is an active gay woman and it is accepted that were she to be returned this would create a real risk

upon return. There is nothing that I can see in that sentence that necessarily points to any material error.

8. Continuing the First-tier Tribunal states that it accepts the evidence of the Appellant. Again, there is nothing there that I can see that points to any material error of law.
9. The final two sentences of §29 however are important in that this is all that remains in terms of the analysis of risk on return and sufficiency of protection by the judge, according to Ms Bantleman.
10. In the final two sentences the judge states that there is no doubt that the Appellant will not seek to deny the active expression of her sexuality – I pause to note that this has not been taken issue with and I accept this on its face – however, the judge then states immediately after that as follows: “At this point her fear of persecution and ill treatment will be well founded because of the presence of her family and her ex-husband. That is a significant risk factor to this Appellant”.
11. In my view, those sentences are insufficient to demonstrate a sufficiently reasoned conclusion on the ‘sufficiency of protection’ aspect of the protection claim, and consequently I do see force in the Respondent’s appeal, strictly on the grounds that the First-tier Tribunal has failed to *complete* its analysis of whether the Appellant is eligible for a grant of protection as a refugee or entitled to protection of her Articles 2 and 3 ECHR rights, in that the judge has performed an exemplary analysis up until this point, however has failed to analyse the sufficiency of protection and/or internal relocation factors that may remain and provide reasons to support the conclusion that he reached in this regard.
12. Looking at the skeleton argument that was before the First-tier Tribunal, albeit Miss Bantleman sought to persuade me that these two sentences were sufficient to contain the complete analysis of any sufficiency of protection, I note that paragraphs 81 to 84 of the skeleton argument of previous Counsel (before the FTT) did state include a separate section in the submissions made on behalf of the Appellant entitled “Sufficiency of Protection”, following which (at paragraphs 85 to 89 of that skeleton) there were further submissions regarding internal relocation. In that light, given the position taken by previous Counsel, that this was an issue that required explicit consideration (and thus being raised in a skeleton argument), I am afraid that I cannot see that these two sentences were sufficient to show consideration of the question of whether the Nepalese authorities are able to provide protection for the Appellant (notwithstanding that they have previously been unable to do so (which will form a necessary and important part of the consideration given to the sufficiency of protection assessment upon remittal).
13. Turning to Ms Bantleman’s skeleton argument, I accept the analysis that she has posited at paragraphs 6 to 14 of her skeleton argument. However, given the detailed analysis from paragraph 15 onwards entitled “Risk of State Actors” and the analysis at paragraph 27 onwards which considers authorities such as *Horvath* as well as the objective evidence that was before the First-tier Tribunal as well as the analysis at

paragraph 37 which concerns authorities such as *AH (Sudan)* regarding the internal relocation aspect (in the alternative), these paragraphs go to show that there is more that could be said, in relation to the topics of sufficiency of protection and internal relocation, and the consideration given thus far in §§29 to 31 of the decision are deficient.

14. In light of the above findings, I set aside §§29 to 31 of the First-tier Tribunal's decision *alone*, and make the observation that the finding that the Appellant's evidence has been accepted and that there is no doubt that she will not seek to deny the active expression of her sexuality on return to Nepal remain intact also.

Remittal to the same or a differently constituted bench

15. I have canvassed with the parties whether this matter ought not to go back before the same First-tier Tribunal Judge, given the nature of the material error of law is that there is simply an insufficiency of reasoning given to the remainder of the protection in human rights analysis made by the First-tier Tribunal Judge, whom has heard this matter and made a lawful assessment of the Appellant's claim as far as it goes.
16. Both representatives encouraged me to follow this course of action and agreed that the matter should be remitted to the First-tier Tribunal for completion of the consideration of the protection and human rights claims by Judge Lal specifically.

Notice of Decision

17. The appeal to the Upper Tribunal is allowed.
18. The decision of the First-tier Tribunal is set aside in relation to §§29 to 31 alone and this matter is remitted to be heard by First-tier Tribunal Judge Lal specifically.

Directions

- (1) The appeal is to be remitted to IAC Hatton Cross and is to be listed before Judge Lal.
- (2) A Nepalese interpreter is required.
- (3) No witnesses are expected to be called other than the Appellant.
- (4) The time estimate given remains at two hours.
- (5) The anonymity direction is maintained.
- (6) Before concluding this decision, I record that Ms Bantleman was keen to impress upon me that on the day of the hearing in this protection claim, the Secretary of State had served upon the Appellant an unpublished and 'secret' policy in relation to Nepal entitled "Country Background Note, Nepal (Version 1.0, August 2018)". This Note does in fact mention sexual orientation and/or gender identity at section 13 of the unpublished Country Background Note, which is of importance as it does conflict, to some extent at least, with the Human Rights Watch Report which the

Respondent sought to rely upon at Annex H of the Respondent's bundle in pursuing this onward appeal which Mr Walker did not place steadfast reliance upon. I asked Mr Walker whether this report was truly unpublished and all he could tell me was that according to its introductory note its purpose was that it should be considered by decision makers handling particular types of protection and human rights claims, such as the present one. With the assistance of the parties, I myself searched for this note online on the gov.uk website, however we collectively could not find it. I do not know whether it is published or not but I do commend the Presenting Officer at the First-tier Tribunal for having disclosed and served this document on the Appellant and having put it before the First-tier Tribunal and for disclosing all relevant information in the Secretary of State's possession.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Saini