Upper Tribunal (Immigration and Asylum Chamber) **Appeal Numbers: HU/11843/2019 HU/11846/2019**

THE IMMIGRATION ACTS

Heard at Field House (via Skype) On 1 February 2021 **Decision & Reasons Promulgated On 15 February 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

PUSHPA KARKI
RAJENDRA SHAHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Bantleman of counsel, instructed by Haque & Hausmann
For the Respondent: Mr Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are Nepalese nationals who were born on 25 April 1987 and 2 October 1983 respectively. They are married. Their three year old daughter is named as their dependant.

2. The appellants appeal against a decision which was issued by Judge P-J S White ("the judge") on 6 January 2020, dismissing their appeals against the respondent's refusal of their human rights claims. Permission to appeal was granted by Upper Tribunal Judge Blum.

Background

3. The appellants entered the United Kingdom on 20 April 2011. The first appellant held entry clearance as a student, the second appellant held entry clearance as her dependant. They were granted further leave to remain in the same capacities on two occasions. Their leave was due to come to an end on 15 June 2016, but the appellants made a further application before that date for leave to remain on compassionate grounds. The nature of the application was varied twice thereafter. When it came to be considered by the respondent, it was said to be an application for Indefinite Leave to Remain on compassionate grounds.

4. The respondent refused that application as it was for a purpose not covered by the Immigration Rules (paragraph 322(1) refers) and because the appellants did not meet the substantive requirements of the Rules, whether under paragraph 276B (long residence) or paragraph 276ADE (private life). The respondent did not consider there to be exceptional circumstances which warranted a grant of leave to remain outside the Rules with reference to Article 8 ECHR. She suggested that they should claim asylum if they maintained that they were at risk from a loan shark in Nepal.

The Appeal to the First-tier Tribunal

5. The appellants appealed against the refusal. Their appeal was due to be heard on 9 December 2019. Applications to adjourn the hearing were made on 4 and 6 December 2019. It was said in the first such application that the first appellant was unable to attend because she had an ectopic pregnancy and because she was suffering from severe back pain. Those applications were refused. When the judge came to hear the appeals, neither appellant appeared and they were not represented. The judge said this about the situation:

> [6] On 4th December 2019 the Tribunal received a written request for an adjournment of the hearing. This was on the basis that the first appellant was pregnant and going through a number of complications for which she had needed medical attention. The bundle had been lodged and the medical evidence in it revealed an attendance at the Urgent Care Service on 28th November with wrist and back pain, and a history of chronic back pain recently. It also noted the pregnancy. The application was refused on 5th December on the basis that there was no medical evidence that she was unfit to attend. On 6th December the application was renewed, with a statement from the first appellant that she was not fit to attend as a result of severe back pain. She said the hospital had advised complete bed rest but did not produce the letter. She said that her GP was on holiday and therefore could not provide a letter. That renewed application was refused on the basis that there was still no credible medical evidence of unfitness to attend.
>
> [7] The renewed application also said that if the adjournment were refused the appellants would wish the appeal to be decided on the papers available. It was therefore

> unsurprising that on the day of the hearing there was no attendance by or on behalf of the appellants. It was plain that they were aware of the hearing and absence and unrepresented by their own choice. I was satisfied that it was appropriate to proceed. The matter having been already listed for an oral hearing, I asked [counsel for the respondent] if he wished to make any submissions, but he confined himself to reliance on the reasons for refusal letter. I have taken account of everything I heard and read and shall refer to the evidence and submissions so far as necessary to explain my findings and reasons.

6. The judge then made findings which I can summarise fairly shortly. He was satisfied that the refusal under paragraph 322(1) was correct in law: [8]. There was no claim under Appendix FM, nor could there have been. The judge was not satisfied that there would be very significant obstacles to the appellants' reintegration to Nepal. The judge considered the claim that the appellants were in fear of a loan shark as part of his assessment of that claim under paragraph 276ADE(1)(vi) of the Rules. He noted that it had not been made in its proper form [12]; that there was an almost complete absence of detail to it [13]; and that the appellants had chosen not to attend to give evidence about this risk, which was said to include a threat to the life of their daughter: [14]. The judge noted that even if the first appellant was unfit to attend (which had not been shown), there was no reason given for the second appellant not attending the hearing to speak to that risk. There was nothing about the subject in the second appellant's statement and that there was an inconsistency in the statements: [15]. The letter from the first appellant's mother was not corroborative of the account and there was no other supportive evidence: [16]-[17]. The judge was not satisfied to the lower standard that there was any such threat: [18].

7. Addressing what he described as the balance of the claim at [19]-[24], the judge did not consider the remaining matters described in the evidence to establish a claim under paragraph 276ADE(1)(vi). The judge considered the claim that it would be too hot for the appellants' daughter in Nepal to be bare assertion, as was the claim that they would be too old to secure employment. There was no evidence to support the claim that the reconstruction in Nepal after the earthquake had been inadequate and, in any event, no weight could properly be attached to the document which purported to confirm earthquake damage to the family home. Taking all matters into account, including the first appellant's medical conditions, the judge did not accept that the threshold in paraph 276ADE(1)(vi) had been crossed.

8. As for Article 8 ECHR, the judge reminded himself that it was necessary to consider that claim outwith the Immigration Rules. He noted that the appellants had entered in 2011 and that they had a young child: [25]. He had regard, as a primary consideration, to the best interests of the appellants' daughter, and concluded that they were served by remaining with her parents: [26]. The public interest outweighed the private life claim which the appellants relied upon: [27]. The judge was

satisfied that the interference by the decisions was proportionate and the appeal was dismissed on Article 8 ECHR grounds accordingly: [28].

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal. The grounds of appeal which were presented to the FtT, as settled by the appellant's solicitors, complained that the judge had erred in proceeding without the appellants and that he had failed to consider the totality of their claim under Article 8 ECHR. Permission to appeal was refused by FtT Judge Boyes.

10. Grounds of appeal settled by Ms Bantleman of counsel were presented to the Upper Tribunal. The first ground was the same, albeit that it was fleshed out and Judge Boyes was criticised, correctly, for suggesting that the test was whether the judge's decision to proceed in the appellant's absence could only be challenged on appeal if he had acted in bad faith. The second ground was that the judge had erred in his self-direction regarding the burden of proof, in that he had suggested that the burden rested on the appellants, whereas the burden as regards proportionality lay upon the respondent.

11. Upper Tribunal Judge Blum granted permission with some hesitation, noting that the medical evidence in support of the adjournment application was rather unsatisfactory. On the facts, however, he considered it arguable that the judge's decision to proceed in the absence of the appellants was unfair. He considered ground two unmeritorious, but he granted permission on both grounds.

Submissions

12. In her admirably concise submissions, Ms Bantleman confirmed that the adjournment applications which had been made on 4 and 6 December 2019 had been supported by a discharge summary from Greenwich Urgent Care Team and nothing further. She reminded me that there was additional medical evidence in the appellants' bundle, however. She submitted that the Upper Tribunal should consider, on the basis of the evidence before the FtT, whether the judge's decision to proceed in the absence of the appellants was fair. The position, she submitted, was simple: the appellants had been denied the right to a fair hearing by a procedurally unfair decision. The judge had failed to consider whether the appeal could be justly determined in the absence of the appellants and he had failed to consider the over-riding objective. There were points taken against the appellants which the appellants had not had an opportunity to address.

13. Ms Bantleman accepted that the medical evidence from Greenwich UCC was 'not ideal', in that it did not state that the first appellant was unfit to attend the hearing. Even if the judge was not satisfied that the appellants were unable to attend, however, he should still have considered whether the appeal could be justly determined in their

absence. Given that the judge had concerns about their evidence and that they had no opportunity to address those concerns, he was required to adjourn the hearing to give them that opportunity. That was the case whether or not the first appellant and her solicitors had asked for the appeal to be heard in their absence.

14. I did not need to call on Mr Clarke to respond to Ms Bantleman's submissions. I indicated that the appeal would be dismissed for reasons which would follow in writing.

Analysis

15. By the time these linked appeals were called on before the judge on 9 December 2019, two adjournment applications had been refused on the papers. The first was refused by Designated Judge Shaerf, on the basis that there was no medical evidence that the first appellant was unable to attend the hearing.

16. The application was presented again, this time with a letter from the first appellant in which she stated that she had severe back pain and early pregnancy complications. She had attended hospital on a number of occasions. She stated that she had been advised by the hospital to take complete bed rest and that she was unable to provide a letter from her GP, who was on holiday. She asked the Tribunal to 'hold my hearing … on our submitted documents (paper hearing) as I am not well and fit to attend the tribunal'.

17. The appellants' solicitors renewed application was in the following terms:

> We write with reference to the above named in relation to their appeal hearing scheduled on 9 December 2019.
>
> Please find the statement of the appellant in support of this renewed application for adjournment; please note that there is no further medical evidence available. We would be grateful if the learned duty judge grants adjournment in the interests of justice and fairness.
>
> If the application is refused, we would respectfully ask to deal with the matter on a paper basis.
>
> We look forward to hearing from you shortly. Meanwhile, should you require any further assistance, please do not hesitate to contact us.

18. That application was refused by Designated Judge Peart, who noted that there was still no credible medical evidence that the first appellant was unable to attend.

19. I am bound to observe that the Designated Judges' decisions were necessarily correct on the evidence presented to them. The only medical evidence was a discharge summary from an Accident and Emergency department in Greenwich, which recorded that the first

appellant had presented there with backpain and had been diagnosed with an ectopic pregnancy[1] and sciatica. She had been prescribed co-dydramol, given 'advice on fluid intake and rest' and advised to attend the early pregnancy unit. There was no suggestion that she was unable to attend court or any other appointment. In any event, there was never any suggestion that the second appellant was unable to attend court for any reason. It was perfectly fair, in all of these circumstances, for the Designated Judges to refuse the applications for the reasons that they gave.

20. I make those observations by way of background because (as Ms Bantleman recognises), this appeal is against the decision which was reached by the judge following a hearing on 9 December 2019. At that hearing, there was no application to adjourn. There was no attendance by or on behalf of the appellants. The first appellant and the appellants' solicitors had invited the Tribunal to proceed on the papers and counsel for the respondent was content to rely on the letter of refusal.

21. The first question which arises, therefore, is whether it was fair for the judge not to adjourn the appeal of his own volition. I ask myself the question in that way because a decision which was procedurally unfair is erroneous in law and must be set aside: Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 WLR 2455. There is no requirement, as was suggested by the judge who refused permission in the FtT, to show bad faith on the part of the judge below, and whether a particular course was fair or not is a question of law. Ms Bantleman's submissions in these respects are correct.

22. It was certainly fair for the judge to proceed to determine the appeal in the absence of the appellants. He had been asked to do so by both parties and the medical evidence - from Greenwich UCC and in the appellants' bundle - continued not to establish that the first appellant was unable to attend the hearing. There was no evidence which began to establish (or even to claim) any reason that the second appellant was unable to attend the hearing. In her grounds of appeal and her clear oral submissions, Ms Bantleman states on instructions that the second appellant was required to stay at home to look after their young daughter but that was not said to the FtT and was not supported by any evidence. The only realistic conclusion – on the evidence presented to the judge – was that the appellants had decided not to attend the hearing, or to instruct their solicitors to do so. It was entirely fair, in those circumstances, for the judge not to adjourn the hearing of his own volition and to proceed (under rule 28 of the FtT's Procedure Rules) to hear the appeal in the appellants' absence. The judge's [7] shows clearly that he had that rule in mind; that he considered the appellants to have absented themselves through choice; and that he considered it 'appropriate to proceed'. Nothing more was required, in my judgment, and I reject the submission that the judge was required on the facts of this case to set out the over-riding objective in his written decision. He plainly had the relevant facts and the relevant considerations in mind.

[1] It appears likely that this was a misdiagnosis. The appellants' second child was born in June 2020 after a pregnancy which was described by Ms Bantleman, on instructions, as difficult.

23. There was no reason to think that the appeal could not be justly determined in the appellants' absence. Indeed, that was the course which the judge had been invited to take by the first appellant and the representatives. I reject the submission, made by Ms Bantleman at [25] of her grounds of appeal, that fairness 'demanded' that the appeal be adjourned so that the appellants could attend. The first appellant had asserted that she was unable to attend. There was no adequate evidence in support of that assertion. The second appellant had not asserted that he was unable to attend. Fairness did not demand that the hearing be adjourned in these circumstances, and the appellants – who were legally represented throughout – would have appreciated that their failure to attend would have denied them the opportunity to advance a positive case and to respond to concerns in the mind of the judge. The judge was plainly entitled to have concerns about the evidence, and to hold against the appellants their failure to attend the hearing in order to answer those concerns. That was not the result of an unfair procedure; it was the result of a choice which the appellants had made with the benefit of legal advice.

24. In all the circumstances, I consider the proper resolution of ground one to be clear. The judge's decision not to adjourn the proceedings of his own volition and to proceed with the hearing in the absence of the appellants was fair.

25. By her second ground, Ms Bantleman criticises the self-direction which appears at [4] of the judge's decision: "The burden of proof that they satisfy the requirements of the immigration rules, or that the decision breaches their human rights, rests on the appellants." It is submitted on behalf of the appellants that the burden of proof as regards proportionality, under Article 8(2), is on the respondent, and that the judge was wrong to direct himself as he did. Ms Bantleman did not seek to develop this ground in her oral submissions. She was correct not to do so, for the following reasons.

26. I accept the criticism of the self-direction but it cannot avail the appellants. I do not find the decision of the Immigration Appeals Tribunal in AY (Article 8 – Family life – Proportionality) Ivory Coast [2004] UKIAT 00205, which Judge Blum cited when granting permission, particularly helpful. Much water has passed under the bridge since then and it is absolutely clear that it is for the respondent to establish that an interference with an individual's human rights is lawful and proportionate: AB (Jamaica) v SSHD [2007] EWCA Civ 1302. It is equally clear, however, that the burden of proof as regards the engagement of Article 8 ECHR is upon an applicant. The judge's self-direction therefore applied too broad a brush to the incidence of the burden of proof as regards Article 8 ECHR.

27. It is nevertheless necessary to stand back and to read the decision as a whole. As I have recorded above, the judge determined that the appellants could not meet the Immigration Rules before proceeding to consider the application of Article 8 ECHR. He summarised dicta from leading cases at the start of [25] and he accepted – using language which was taken directly from Razgar [2004] 2 AC 268 – that the

decision to refuse the appellants' human rights claim engaged the article. The question he then asked was whether the interference was proportionate. The judge considered that question at some length, directing himself perfectly properly at [26] and [27], as regards the best interests of the appellants' child and the various facets of the public interest as reflected in s117B of the 2002 Act. At [28], he concluded that the private life of the appellants was not so strong as to outweigh the public interest. He was satisfied that the interference was proportionate.

28. Given the structure of this assessment and the manner in which the judge expressed his conclusions, I am entirely satisfied that the self-direction at [4] was merely infelicitous. The judge's conclusions on proportionality reflected a careful weighing of the relevant factors and the substance of that assessment demonstrates beyond doubt that the judge understood his task correctly. It is obviously to be recalled in this context that the FtT(IAC) is an expert Tribunal, tasked with administering a complex area of law in challenging circumstances. It is to be assumed that the FtT will understand the law and will get it right unless the decision under appeal demonstrates clearly that that is not so. Reading the decision under appeal with those dicta in mind, it cannot be said that the judge misunderstood his task; the substance of the decision shows the contrary to be the case.

29. I add this. I do not have before me a full account of the appellants' immigration history. I note that the ten-year anniversary of their entry to the United Kingdom is in April. Nothing I have said in this decision should be taken to find (or even to assume) that their residence up to this point has been continuously lawful. When an application for ILR on grounds of long residence is made, as it inevitably will be, it will be for the appellants to establish that their residence in the UK has been continuously lawful.

Notice of Decision

The decision of the FtT did not involve the making of an error on a point of law. The appellants' appeals are dismissed and the decision of the FtT shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
Date 01 February 2021