Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/18798/2019**
& HU/19819/2019

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 15 August 2022	**On the 22 August 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MT
NL
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkin, instructed by City Heights Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing the appellants' appeal against the respondent's decision to refuse their human rights claim, it was found, at an error of law hearing on 17 September 2021, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside with directions for it to be re-made.

2. The appellants are citizens of Nepal, born on 3 November 1982 and 22 September 1990 respectively, and are husband and wife. The first appellant entered the UK on 8 July 2009 with leave to enter as a Tier 4 student and was granted further periods of leave until 31 July 2017. After an unsuccessful application for leave as a Tier 2 general migrant, he applied for leave to remain as a Tier 1 Entrepreneur, but his application was refused, and the refusal was maintained on an administrative review. The administrative review process ended on 10 October 2017. He then made various unsuccessful applications for leave outside the immigration rules and applied on 6 June 2019 for indefinite leave to remain on 10 years' long residence grounds. The second appellant entered the UK on 5 May 2016 with leave to enter as a Tier 4 dependent partner to 31 July 2017 but was refused further leave in line with the first appellant. She made a human rights claim on 6 June 2019 on the basis of her family life with the first appellant and their daughter who was born on 4 September 2018 in the UK.

3. The first appellant's application was refused on 4 November 2019 and the second appellant's application was refused on 22 November 2019. The respondent considered that the first appellant could not meet the requirements of paragraph 276B(i)(a) of the immigration rules as he had not accrued 10 years of continuous lawful residence in the UK, and considered that he was not eligible to apply as a partner or parent under Appendix FM. The respondent considered further that he could not meet the requirements in paragraph 276ADE(1) of the immigration rules on private life grounds and that there were no exceptional circumstances outside the immigration rules. The second appellant's application was similarly refused under Appendix FM and paragraph 276ADE(1) of the immigration rules, and under Article 8 outside the rules.

4. The appellants appealed against the respondent's decisions and the appeals were heard in the First-tier Tribunal on 9 December 2020 by First-tier Tribunal Judge A M Black. Reliance was placed before the judge upon the appellants' daughter's food allergies and the second appellant's mental health concerns in arguing that their removal would breach their human rights under Article 8 of the ECHR. It was also argued that the first appellant ought to succeed on long residence grounds under paragraph 276B. Both appellants gave oral evidence before the judge. It was conceded on behalf of the appellants that they could not meet the requirements of the immigration rules for the purposes of Article 8 and that the only issue under the rules was the first appellant's ability to meet the requirements of paragraph 276B on long residence grounds.

5. Judge Black found that the first appellant could not succeed under paragraph 276B on long residence grounds and noted the concession that neither appellant could meet the criteria under Appendix FM or paragraph 276ADE. The only issue therefore was whether there were exceptional circumstances outside the immigration rules. The judge noted the appellants' claim that their child, who was aged 2 at the time, was allergic to certain milk products, and she accepted that the child had a dairy intolerance. She found, however, that that did not have a significant detrimental impact on her general physical or mental health. The judge noted that the second appellant was

suffering from anxiety and depression and that she had been receiving cognitive behavioural therapy (CBT) that year and was taking medication, but found that there was no suggestion that her mental health had a detrimental impact on her care for her child or on her own daily life. The judge found that the child's best interests were best served by her remaining within the family unit. Whilst it was claimed that substitute milk products of the type being taken by the appellants' child were not available in Nepal, there was no evidence before the judge to confirm that or to suggest that other similar products were not available, and the judge found that there would not be a significant detrimental impact on the child's health were the family to return to Nepal. The judge noted that the second appellant had previously worked as an accountant in a private school in Nepal and found there to be no evidence to suggest that her mental health was such as to preclude her taking employment. The judge considered that the first appellant would be able to work in Nepal and that the skills and experience gained in the UK would assist him in finding work. The judge found that the appellants would be able to support themselves and their daughter financially in due course and that they had family in Nepal who could provide accommodation and support in the interim. The judge concluded that the appellants' circumstances were not exceptional and found that the interference with their protected rights was proportionate to the public interest. She accordingly dismissed the appeals.

6. Permission to appeal against that decision was sought to challenge the judge's decision under paragraph 276B and, in relation to her findings on Article 8, on the grounds that she had failed to make findings on the evidence which had been relied upon in support of the claim under paragraph 276ADE(1)(vi) and had otherwise made flawed findings.

7. Permission was initially refused in the First-tier Tribunal, but was subsequently granted in the Upper Tribunal on the basis that the judge had arguably failed to make findings on the evidence relating to the issue of very significant obstacles to integration in Nepal.

8. At an error of law hearing before Upper Tribunal Judge Owens, it was conceded on behalf of the appellants that the grounds relating to long residence were not strong, and Judge Owens found that those grounds were not made out. However, in light of a concession from the Home Office Presenting Officer that the judge had materially erred in law by failing to make findings on the evidence relating to difficulties the appellants would face in Nepal and had failed to make a finding as to whether there were very significant obstacles to integration in Nepal, Judge Owens set aside that part of the judge's decision. Judge Owens made clear directions as to which parts of the judge's decision were nevertheless preserved.

9. The matter was then adjourned and listed for a resumed hearing. Following a further adjournment, the matter came before me, by which time the respondent had consented to the appellants relying upon Article 3 in addition to the matters previously argued. The appellants were relying upon a supplementary appeal bundle together with smaller supplementary bundles

and some loose documents, within which there was various medical evidence including a psychiatric report from Dr Saleh Dhumad, a consultant psychiatrist.

Appeal hearing and submissions

10. At the hearing both appellants gave oral evidence. Mr Hawkin requested that the second appellant be treated as a vulnerable witness in accordance with the presidential guidance and I was therefore careful to ensure that she was comfortable giving her evidence and that she was treated accordingly.

11. The first appellant confirmed that his daughter was able to drink some milk alternatives and that she was now eating solid food in any event. He confirmed that she could understand Nepalese when he and his wife spoke to her in that language but that she could only speak a little Nepalese and spoke English as her main language. The appellant said that he had completed his "A" levels in Nepal and his Masters in the UK and had done some private tutoring in English to primary school children when he was living in Nepal. As for his claim to his wife's difficulties accessing health care in Nepal, the appellant confirmed that that was due to the cost. He said that he had no house or property in Nepal and would have to live in the streets if he went back, although he said that his father lived in a village and that one of his brothers lived with his father and he confirmed that his family would not see him destitute. The appellant said that if he was single he would have no problem returning to Nepal, but he would not be able to support his wife and daughter financially if they went back. People would call his wife insane due to her mental health problems and he had no money for treatment. He had debts to settle as he had borrowed money from friends and had credit card debts. He was in contact with his family but they were sometimes reluctant to take his calls as they did not accept his inter-caste marriage.

12. The second appellant gave evidence that her mental health issues began when they started having problems with their immigration status and as a result of their financial problems. She suffered from anxiety and depression and fell seriously ill during the Covid period. She had worked for KFC in the UK. She had had some CBT sessions and her therapist had told her that (s)he would contact her GP about further sessions. She had hospital appointments coming up for knee, chest and back pain. She had worked as an assistant accountant in Kathmandu for two or three years. She could not recall when she last had contact with her family but believed that it was a year ago. She had tried to contact her mother. Her family would not help her if they returned to Nepal.

13. Mr Whitwell then made submissions before me. As regards the Article 3 claim in relation to the second appellant, he submitted that it fell at the first hurdle set out in AM (Article 3, health cases) Zimbabwe [2022] UKUT 131, as the evidence did not show that she had discharged the burden of establishing that she was "a seriously ill person". He referred me to the medical evidence in that regard and submitted that the psychiatric report from Dr Dhumad did not explain how it was concluded that there was a moderate risk of suicide and did not show that the second appellant was seriously ill. As for the question of very significant obstacles, the appellants' daughter was able to tolerate types of milk other than dairy and was on solid food in any event and there were no obstacles to her integration in Nepal. The first appellant had previously worked

as a private English tutor in Nepal and the second appellant had worked as an assistant accountant, so both could find work again. They did not need to rely on their families for support. They could not meet the requirements of paragraph 276ADE(1)(vi) and there were no exceptional circumstances outside the immigration rules.

14. Mr Hawkin relied upon the report from Dr Dhumad which confirmed the second appellant's suicide risk and which in turn engaged Article 3. He submitted that the medical evidence, including further, recent, evidence produced at the hearing, was all consistent with the second appellant having serious mental health problems. He submitted that the test in Y & Anor (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362 was met. As for Article 8, Mr Hawkin submitted that the child's allergies, taken together with the appellants' estrangement from their families owing to their inter-caste marriage, the second appellant's mental and physical health issues and the long absence from Nepal, were all sufficient to demonstrate very significant obstacles to integration for the purposes of paragraph 276ADE(1)(vi). He submitted further that the best interests of the appellants' child, to remain in the UK with her parents, were not outweighed by other considerations and therefore their removal would be disproportionate.

Discussion

15. As stated above, Upper Tribunal Judge Owens noted that it had been conceded on behalf of the appellants at the First-tier Tribunal that they could not meet the requirements of Appendix FM or paragraph 276ADE(1) of the immigration rules, but she nevertheless set aside that part of the decision of the First-tier Tribunal relating to paragraph 276ADE(1) because of the concession made by Mr Walker, the presenting officer before her. In so doing she made it clear that Judge Black's findings were preserved in various respects and Mr Whitwell relied on those preserved findings.

16. In addition to the finding that the first appellant was unable to meet the long residence requirements of the immigration rules, the relevant findings which were preserved were firstly in regard to the appellants' child, where Judge Black found, in summary, that whilst it was accepted that the child had a dairy intolerance, that did not have a significant detrimental impact on her general physical or mental health and her best interests were best served by her remaining within the family unit. Secondly, in regard to the second appellant, Judge Owens preserved the finding that the second appellant was suffering from anxiety and depression and that she had been receiving CBT in 2020 and was taking medication, but that her mental health did not have a significant detrimental impact on her care for her child or on her own daily life, although it had some impact. Further, that the second appellant previously worked as an accountant at a private school in Nepal.

17. In re-making this decision I have considered all the evidence that was previously before Judge Black as well as the further evidence relied upon. As already mentioned, Mr Hawkin produced a supplementary appeal bundle containing the majority of the evidence, together with further small

supplementary bundles and some loose documents handed up at the hearing. I have read the appellants' statements and considered their written and oral evidence, and have had regard to their accounts of the difficulties they would face on returning to Nepal.

18. I am in agreement with Mr Whitwell that the evidence produced since the First-tier Tribunal's decision does not take matters significantly further and certainly fails to go anywhere near establishing that the second appellant was "a seriously ill person" for the purposes of the test in AM (Zimbabwe) in order to engage Article 3. Mr Whitwell took me through the medical evidence in the appellants' appeal bundle and I have considered that evidence myself.

19. With regard to the second appellant's physical health, I note the letter at page 59 of the appellants' bundle from her CBT therapist, dated 13 November 2020, confirming that many of her physical symptoms were in fact a product of her anxiety which was, in turn, triggered by the Corona virus and a period of illness in March 2020. Aside from that, the medical evidence confirms at page 61 (dated 6 October 2021) "no clinically relevant findings" in relation to her small bowel; at page 62 (11 November 2021) that her "endoscopy recently was unremarkable" and her "biopsies were normal"; at page 64 (dated 20 November 2021) that she had a benign colonic polyp; at page 72 (dated 1 December 2021), that her recent colonoscopy was "unremarkable" and that "colonic biopsies were normal"; and at page 73 (dated 5 January 2022), that her CT chest, abdo-pelvis showed "no sinister abnormalities". The remaining medical evidence consisted largely of appointment letters, including two appointment letters submitted by Mr Hawkin at the hearing. Plainly there is no evidence of any serious medical conditions.

20. Much reliance was placed by Mr Hawkin on the psychiatric report of Dr Dhumad at page 32 of the appeal bundle. That report referred to the second appellant's stress factors as being her immigration status and financial difficulties, as well as her concerns about her own health and her daughter's health, yet I note with regard to the latter that the supporting evidence was that there were no serious concerns in either respect. The report was based upon one interview, via video-link, where the second appellant reported to Dr Dhumad about her anxieties and worries. I have to agree with Mr Whitwell that the report, whilst referring to there being a moderate risk of suicide, fails to give any proper reasons for so concluding and, further, that the report fails to explain how Dr Dhumad was qualified to comment on health care in Nepal, as he sought to do at [12.2]. In the circumstances the weight to be given to the report is limited. It seems to me that the letter from the appellant's CBT therapist at page 59, as mentioned above, whilst dated a year earlier, is far more helpful in setting out the position, being based upon a more substantial knowledge of the second appellant. The most recent evidence consists of a letter handed up at the hearing dated 17 June 2022 from a high intensity CBT therapist at Time to Talk Health, which simply confirms the appellant's referral to their service on 2 September 2021 for help with "possible health anxiety due to experiencing high levels of anxiety" and confirms her CBT sessions since 6 April 2022. I find nothing in those reports to support a claim that the appellant's mental health or risk of suicide approaches anywhere near to

meeting the tests in AM (Zimbabwe), MY (Suicide risk after Paposhvili) Occupied Palestinian Authority [2021] UKUT 232 and J v Secretary of State for the Home Department [2005] EWCA Civ 629.

21. As for the evidence relied upon to show a lack of adequate treatment in Nepal, I have had regard to the document at page 31 of the bundle, a letter from "Best care medical & diagnostic center" from a Dr Yadav, but I do not consider it to be particularly helpful and find it to be of limited evidential value, since it makes generalised statements without detail or supporting information and provides little, if any, information as to how the author, an orthopedic and trauma surgeon, is qualified to comment on mental health services in Nepal. I note that the letter refers to "most" mental healthcare having to be paid for out of pocket, which suggests that there is some healthcare available, but there is simply no qualification of the statements provided and no elaboration on the subject.

22. As such I find no satisfactory evidence to suggest that the second appellant would not be able to access treatment or medication, if required, in Nepal. Whilst the country evidence produced shows that medical treatment and access to such treatment is not at the level experienced in the UK, it does not suggest that there are no services available to the appellant. Indeed, the Home Office Country Background Note for Nepal at page 87 of the appeal bundle confirms that the government provides free basic health care. It is clear that the second appellant has no serious physical conditions requiring treatment, but in any event, there is no evidence to suggest that she could not be treated if there were further issues. As for her mental health problems, there is no evidence to show that she requires psychiatric intervention in any event. She has never required such intervention and has simply had a few sessions of CBT therapy which have come to an end. There is a suggestion that she may require further sessions, but no evidence that her GP has confirmed that a further referral is required. Accordingly, there is no evidence to suggest that the second appellant comes near meeting the threshold to engage Article 3 and I reject that part of her claim.

23. With regard to the question of very significant obstacles to integration, I find that there is likewise no merit in such a claim. As stated above, neither the appellants' daughter nor the second appellant has any serious medical issue and there is no evidence to suggest that adequate treatment would not be available in Nepal in any event. The appellants' daughter has an allergy to certain milk proteins but is able to tolerate alternative types of milk and in any event is now able to eat solid food. The second appellant suffers from severe anxiety, but since that is largely as a result of her uncertain status, it may well recede once her position is more settled. In any event her condition is not sufficiently serious to impede her daily life. Both appellants have qualifications from Nepal and the UK as well as previous work experience in Nepal; the first appellant as an English tutor for primary school students and the second appellant as an accountant in a private school, and there is no reason why they would not be able to find employment again on return to Nepal. They both have family in Nepal and the first appellant accepted, irrespective of his claim that his family disapproved of his marriage, that they would not see him destitute.

The appellants may have access to some financial support from the UK government on return to Nepal (as Mr Whitwell indicated), but in any event would be able to find employment to bring in an income to provide them with support and enable them to start paying off any debts they still owed. The appellants refer to problems owing to their inter-caste marriage but have presented no evidence to suggest that that would put them at risk or cause significant problems in their daily lives in Nepal. Although the first appellant has lived in the UK since 2009 (and the second appellant since 2016), they both spent the majority of their lives in Nepal and would be familiar with the customs and practices of that country. They both speak the language, and their daughter can comprehend the language, but in any event would quickly learn it as she is only 3 years of age. Her best interests lay in remaining with her parents and she is of an age where her ties do not go beyond her family unit. Although she attends a nursery in the UK (see page 202 of the appeal bundle) there is no real reason why she could not settle into a nursery, and then school, in Nepal.

24. Accordingly, the evidence does not demonstrate that there would be any significant obstacles to the appellants and their daughter integrating into life in Nepal, and certainly no very significant obstacles in the terms set out in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 and Parveen v The Secretary of State for the Home Department [2018] EWCA Civ 932. They cannot meet the requirements of the immigration rules under paragraph 276ADE(1) or otherwise and neither is there any evidence to suggest that there are other exceptional or compelling circumstances justifying a grant of leave outside the immigration rules on wider Article 8 grounds. As discussed above, the best interests of the appellants' daughter lie in remaining within the family unit. Even if those interests were best served by her remaining in the UK, that is only marginally so given her young age and the limited ties she has to the UK. The public interest factors in section 117B of the Nationality, Immigration and Asylum Act 2002 do not provide much weight in the proportionality assessment in the appellants' favour, given that their private and family life was established when they had limited leave or no leave, they are not financially independent, and they have been residing in the UK as overstayers for a number of years. Although they have lived in the UK for some years, especially in the case of the first appellant, and despite the weight to be given to the best interests of their daughter, the public interest clearly outweighs their own interests. Their removal from the UK would not be disproportionate and would not breach their Article 8 human rights.

25. The appeals are therefore dismissed.

DECISION

26. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision by dismissing the appellants' appeals on Article 3 and 8 grounds.

Anonymity

The anonymity order made previously in the Upper Tribunal pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 is maintained.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 17 August 2022