Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-003544
On appeal from PA/52235/2021
[IA/06115/2021]

<u>THE IMMIGRATION ACTS</u>

Heard at Field House
On the 22 September 2022

Decision & Reasons Promulgated
On the 27 October 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL
& DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

A G R M
(ANONYMITY DIRECTION MADE)

<u>Appellant</u>

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: absent
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

<u>DECISION AND REASONS</u>

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity because this is a protection claim. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public

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to identify the appellant, without his express consent. Failure to comply with this order could amount to a contempt of court.

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hussain promulgated on 18 June 2022, which dismissed the Appellant's appeal on all grounds.

Background

2. The Appellant was born on 27 September 1980 and is a national of Nepal.

3. (a) The appellant entered the UK as August 2009, as a student with entry clearance valid until 28 February 2013. On 10 December 2012 the appellant applied for leave to remain in the UK as a tier 1 migrant. The respondent refused that application on 5 June 2015. The appellant appealed that refusal decision unsuccessfully and her appeal rights were exhausted on 2 August 2016.

   (b) On 26 April 2019 the appellant applied for leave to remain in the UK on article 8 ECHR grounds. The respondent refused that application on 27 April 2021. The appellant appealed against that refusal decision unsuccessfully. Her appeal was dismissed by a decision of the First-tier Tribunal (Judge Housego) promulgated on 31 January 2020.

   (c) On 16 March 2020, the appellant made a protection claim which the respondent refused on 27 April 2021.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge M B Hussain ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 19 July 2022 Judge Landes gave permission to appeal stating inter alia

> … The Judge made no explicit findings relating to "very significant obstacles to integration" and, arguably, such findings as there are, are insufficient. He did not consider in that context the effect of return to Nepal on the appellant's mental health given that she had been subject to abuse in Nepal, and did not consider whether the appellant would be able to access treatment in Nepal. It might be said that it would have been unlikely that the Judge would have made positive findings in the appellant's favour in that respect had he considered the matter given the tenor of the rest of his decision, but at the permission stage I cannot say that the matter is unarguable. The Judge did not make any findings about the appellant's daughters private life in the UK, but given the age of the child I cannot see that it would have made any significant difference in the proportionality balance.

The Hearing

5. The Appellant did not attend the appeal nor was she represented at the appeal, even though she is still represented by Law Lane, solicitors. Two

days before the appeal hearing the appellant made her own application for an adjournment, saying that she was too ill to attend the hearing. That application was refused on 21 September 2022. When that application was refused the appellant's solicitors renewed the application to adjourn on the basis that the appellant was not able to attend, and that her solicitors were less than interested in attending because they had not been placed in funds.

6. (a) Before the hearing started, Tribunal staff contacted the appellant's solicitors, only to be told that they did not intend to participate in the hearing. After the hearing had concluded, the appellant's solicitors sent an email containing the following

> Thank you for your email.
>
> Unfortunately, the client could not attend the hearing due to her medical conditions and we were unable to instruct anyone on her behalf as we did not have any funds on account and also due to the short notice.
>
> Once again, we apologise for the inconvenience this has caused.
>
> Should you need any further information please do not hesitate to contact us.

(b) We are satisfied that due notice of the appeal was served upon the Appellant. Both the appellant and her solicitors knew before close of business on 21 September 2022 the application to adjourn had been refused. The appellant's solicitors know that the appellant's attendance at this hearing is not necessary. Mindful of paragraph 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008 , we find that we can deal with this appeal fairly in the absence of the appellant and without the assistance of the appellant's solicitors.

7. For the respondent, Mr Kotas candidly expressed doubts about the quality of the Judge's article 8 proportionality balancing exercise, but suggested that we could remake the article 8 ECHR decision after hearing submissions. Mr Kotas provided a copy of the First-tier Tribunal's decision (promulgated on 31 January 2020) dismissing the appellant's earlier appeal on article 8 grounds.

8. Mr Kotas told us that the appeal is resisted in so far as it relates to the appellant's protection claim. He took us to the Judge's primary findings of fact in relation to the protection claim, but, when pressed, had to agree that the decision is difficult to defend. He formally resisted the appeal, but agreed that if we find a material error of law an entirely new fact-finding exercise in the First-tier Tribunal will be necessary.

Analysis

9. The Judge's findings of fact lie between [39] and [50] of the decision. At [39] the Judge says that the appellant's account is not inconsistent with the background materials, but there are good reasons for the respondent's decision. At [40] the Judge accepts the appellant's account.

The Judge takes the appellant's account at its highest, but does not explain why. The Judge does not explain why he accepts the appellant's account.

10. Because the Judge accepts the appellant's account, he accepts that the appellant has been beaten and abused, and that the appellant has been doused in kerosene, all because she married a man from a different caste. Having accepted that the appellant has previously suffered such mistreatment the Judge gives no consideration to paragraph 339K of the immigration which says

> The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

11. At [41] (having apparently accepted the appellant's account) the Judge is critical of the appellant's account. At [42] the Judge correctly says that he has to make findings about the risk to the appellant on return to Nepal. The Judge then embarks on speculation and appears to draw on his own opinions without explaining how those opinions were formed, and why those opinions should have greater weight than the background materials when considering whether the appellant's subjective fear is objectively well founded.

12. The result is that the Judge's decision is inadequately reasoned. The Judge races to conclusions at [46] without properly explaining how he reached those conclusions.

13. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

14. Between [47] and [49] the Judge considers medical evidence, and draws conclusions without explaining how he has reached those conclusions. In the first sentence of [49] the Judge considers the availability of medical treatment in Nepal, but there is no meaningful analysis in the Judge's decision of the sources of evidence speaking to availability of medical treatment. The Judge's conclusions about the availability of medical treatment in Nepal are unreasoned and unexplained.

15. In the respondent's review and in counsel's skeleton argument, both of which were placed before the Judge, there is reference to the earlier decision dismissing the appellant's appeal on article 8 ECHR grounds

promulgated on 31 January 2020. The Judge's decision makes no reference to that earlier decision, despite the fact that that should have been his starting point when considering article 8 grounds of appeal.

16. In Devaseelan 2002 UKIAT 00702**,** the Tribunal was concerned with a human rights appeal which followed an asylum appeal on the same issues. The Tribunal said that, in such circumstances, the first Tribunal's determination stands as an assessment of the claim the Appellant was making at the time of that first determination. It is not binding on the second Tribunal but, there again, the second Tribunal is not hearing an appeal against it. The Tribunal set out various principles: the first decision is always the starting point; facts since then can always be considered; facts before then but not relevant to the first decision can always be considered; the second Tribunal should treat with circumspection relevant facts that had not been brought to the first Tribunal's attention; if issues and evidence on the first and second appeals are materially the same, the second Tribunal should treat the issues as settled by the first decision rather than allowing the matter to be re-litigated.

17. The Judge's article 8 consideration is confined to [50] and [57] of the decision. The Judge does not consider section 117B of the Nationality, Immigration and Asylum Act 2002, even though the statute obliges him to do so. The Judge's decision is devoid of any meaningful article 8 assessment. It lacks a proportionality balancing exercise. The Judge does not consider whether or not the appellant can succeed on an article 8 assessment within the immigration rules, nor does the Judge consider whether or not there is reason to consider the article 8 grounds of appeal outwith the immigration rules.

18. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that in every balancing exercise, the scales must be properly prepared by the Judge, followed by all necessary findings and conclusions, buttressed by adequate reasoning.

19. The decision is tainted by material errors of law. We set the decision aside. None of the findings of fact can stand. We cannot substitute our own decision because a further fact-finding exercise is necessary.

Remittal to First-Tier Tribunal

20. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

    (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21. In this case we have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

22. We remit the matter to the First-tier Tribunal sitting at Taylor House to be heard before any First-tier Judge other than Judge M B Hussain.

Decision

The decision of the First-tier Tribunal is tainted by a material error of law.

We set aside the Judge's decision promulgated on 18 June 2022. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 29 September 2022

Deputy Upper Tribunal Judge Doyle

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.