IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001868

First-tier Tribunal Nos: HU/52354/2022
IA/04080/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Mr Dinesh Karki
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Iqbal (Counsel)
For the Respondent: Mr Terrell (Senior Home Office Presenting Officer)

Heard at Field House on 1 August 2023

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Bartlett, promulgated on 3rd May 2023, following a hearing at Taylor House on 26th April 2023. In the determination, the judge allowed the appeal, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nepal, and was born on 11th February 1988. He appealed against the decision of the Respondent dated 24th March 2022, refusing his application for leave to remain in the UK.

The Appellant's Claim

3. The Appellant is in a relationship with a Ms Dhungana, also a Nepalese citizen with no right to remain in the UK, with the two of them having entered into a religious marriage on 11th December 2021. Ms Dhungana, however, has serious health issues which arose in May 2022, despite her young age, after the parties had entered into a relationship in 2015. This requires kidney dialysis on an everyday basis, and that with a prospect of a kidney transplant operation awaiting her, it is argued that this would not be available for the Appellant and his wife to be able to access in Nepal. The Appellant accordingly seeks leave to remain in the UK on the basis of Article 8 ECHR, outside the Immigration Rules, because the interference with his private and family life by the adverse decision of the Respondent, would be disproportionate to the lawful and legitimate aim of the Secretary of State maintaining immigration control. The standard of proof, as is well-known in these cases, is that of a balance of probabilities, which the Appellant maintained he could achieve.

The Judge's Findings

4. The judge began by referring to the background to the Appellant's claim, because the Appellant had alleged that he had suffered historic injustice arising from the TOEIC tests, which had led to the Appellant's refusal of leave to remain in the UK outside the Immigration Rules on 26th October 2016. The judge disposed of this swiftly. The Appellant had not relied on a fraudulent ETS certificate in any applications to the Respondent and since 15th February 2021, the Respondent had given an undertaking that "in line with the written ministerial statement, where a fraudulent ETS certificate was obtained but was not relied upon, in any immigration application, Home Office systems must be updated, and a note made that no further action is to be taken" (at paragraph 16).

5. The judge then dealt with the Appellant's Article 8 application. He noted that his wife had also applied to remain in the UK on human rights grounds because of her ill-health although no decision had yet been made by the Respondent on her application. The judge referred to the Appellant's wife's condition as follows:

> "Despite her young age, Ms Dhungana, was unfortunate to suffer from extremely high blood pressure which has resulted in severe kidney damage and some heart damage. She is receiving treatment to keep her blood pressure under control. She has stage 5 kidney disease, as a result she is undergoing peritoneal dialysis. This means that she carries out dialysis at home herself every day. The fluids are delivered to her home on a monthly basis so that she can carry out the treatment. She is also on the waiting list for a kidney transplant and only joined the waiting list approximately 2 months ago. If she was unable to perform dialysis she would die within a week or two." (Paragraph 12).

6. The judge went on to note that, "The type of dialysis that Ms Dhungana is currently undergoing is not available in Nepal but there was no evidence before me that the other type of dialysis which is carried out approximately three times per week would not be suitable for her" (paragraph 13). Evidence was heard by the judge from the Appellant that "in Nepal the cost of the transplant operation was beyond their reach and the difficulty with transplants in Nepal is that they only really take place using a donation from a family or friend" (paragraph 14). The judge went on to observe that "The appellant and Ms Dhungana are entirely

financially supported in the United Kingdom by friends who pay their rent and all of their living costs." (Paragraph 15).

7. Against that background, the judge then proceeded to conclude that "the appellant is in a genuine and subsisting relationship akin to marriage with Ms Dhungana", and that "She suffers from very serious ill-health." The judge observed that "with dialysis she has a life expectancy of 5 to 10 years and with a transplant 10 to 15 years", and that "She is a young woman and this is obviously a very distressing and difficult situation for her to find herself in" (paragraph 31). The judge then did note that Ms Dhungana was without leave in the United Kingdom", but that her dialysis, which she undergoes every day, is to be seen in the context of: "the other effects of ill-health which includes the effects of having stage 5 kidney disease, heart problems, abnormally high blood pressure which needs controlling and the emotional difficulties with dealing with all of these problems at a relatively young age". This is such that, "it would very difficult for her to manage without the appellant" (at paragraph 32).

8. This being so, the judge concluded that "there would be an interference with her article 8 rights to both a private and family life if the appellant was removed from the United Kingdom". This is because the judge did not consider that she would be able to manage alone "and the onerous burden of her care cannot be carried out by her alone and she has no other sufficient assistance with care", particularly as "she could receive extra social care and extra care through the NHS but this would not assist with the significant emotional care that she needs". The result was that "this interference would be disproportionate in all circumstances" (paragraph 32).

9. In coming to his decision, the judge had regard to Section 117B of the 2002 Act and made it clear that, "I find that the appellant is financially independent and he is able to speak English which are neutral factors", but that "he has formed his relationship with Ms Dhungana when he had no leave to remain in the United Kingdom or at best at the start of the relationship his leave was precarious", so that "little weight can be given to his private life or his relationship with her" (paragraph 33). The appeal was allowed.

Grounds of Application

10. The Respondent's Grounds of Appeal state that the judge engaged in a material misdirection of law when dealing with Article 8. The judge had concluded that the Appellant did not meet the requirements of the Rules under paragraph 276ADE. He had concluded that the Appellant was able to return to Nepal. However, he then made a freestanding Article 8 finding without any basis to it. He had failed to consider the public interest reference in Section 117B and failed to give consideration to the cost to the NHS of the dialysis treatment, which the Appellant's partner was receiving.

11. Permission to appeal was initially refused by the First-tier Tribunal on 26th May 2023 on the basis that it was clear that the judge had dealt with "a complex case in a sensitive and compassionate way" and had applied the law to it. The judge had plainly found that there was family life between the Appellant and his partner as the relationship had subsisted since 2015. Article 8 was engaged. The findings were plainly open to the judge on the evidence. When considering proportionality the judge had made the decision open to her on the evidence and it was adequately reasoned. The judge made specific reference to how she had to consider whether the decision was disproportionate and the legitimate aims of

the Secretary of State under Section 117B even though the public interest had not been specifically referred to.

12. On 27th June 2023, however, the Upper Tribunal granted permission to the Respondent. This was on the basis that the Appellant had no leave to remain in the UK since December 2015 and his partner also had no leave to remain in the UK as a national of Nepal. As such, she could not be a qualifying partner under the Immigration Rules. It was true that the Appellant's partner had a serious medical condition, but the judge did not accept that the Appellant's partner could not return to Nepal, and appeared to accept that the Appellant and his partner could continue their family life in Nepal, so that it was arguable that the judge failed properly to take into account the public interest when conducting her assessment outside the Rules and failing properly to consider the implications of the lack of status of the Appellant's partner.

Submissions

13. At the hearing before me on 1st August 2023, Mr Iqbal of Counsel submitted that the judge had given a complete consideration to both the public interest when considering the position outside the Rules and to the lack of status of the parties before him. This is clear when the judge observes (at paragraph 34) that:

> "I recognise that it is possible that Ms Dhanagana will have to leave the United Kingdom but at present she is here. If the appellant were required to leave the United Kingdom today there would be a disproportionate interference with her article 8 rights and as such I find that the appellant's appeal succeeds to the limited extent that his departure from the United Kingdom whilst Ms Dhungana remains here is an interference with her article 8 rights." (Paragraph 34).

14. The judge then goes on to consider the implications of Section 117B of the 2002 Act when observing (at paragraph 33):

> "I have considered section 117B of the 2002 Act and I find that the appellant is financially independent and he is able to speak English which are neutral factors. However, he has formed his relationship with Ms Dhungana when he had no leave to remain in the United Kingdom or at best at the start of the relationship his leave was precarious. Therefore, little weight can be given to his private life or his relationship with her.".

15. The judge thereafter is not oblivious to the various serious ill-health condition of the Appellant's partner when observing (at paragraph 31):

> "She suffers from very serious ill-health. I accept the evidence before me that with dialysis she has a life expectancy of 5 to 10 years and with a transplant 10 to 15 years. She is a young woman and this is obviously a very distressing and difficult situation for her to find herself in".

16. Such was the Appellant's partner's condition that the nature of her medical condition in this country was one that could not be ignored, submitted Mr Iqbal, in that (at paragraph 32):

> "The dialysis which she undergoes every day, when combined with the other effects of ill-health which includes the effects of having stage 5 kidney disease, heart problems, abnormally high blood pressure which needs

> controlling and the emotional difficulties with dealing with all of these problems at a relatively young age means that it would be very difficult for her to manage without the appellant. In these circumstances I find that there would be an interference with her article 8 rights to both a private and family life if the appellant was removed from the United Kingdom".

17. Mr Iqbal submitted that on the difficult facts of this case, to which the judge had given a proper consideration, he was entitled under paragraph 276ADE(vi) to allow the appeal as that provision was not designed to make one's case hopeless but to facilitate it in appropriate circumstances. There was, therefore, no material error of law.

18. For his part, Mr Terrell submitted that the matter in relation to the Appellant's TOEIC background was an unchallenged finding and so that was not a matter in issue in this appeal. However, the judge in this appeal could not explain why the parties could not live abroad. When he states that, "I recognise that it is possible that Ms Dhanagana will have to leave the United Kingdom but at present she is here" (paragraph 34), it has not been explained why both parties could not live abroad. The question was whether there were insurmountable obstacles under paragraph 276ADE(vi) and these had not been explained by the judge. If the evidence was that, "The appellant and Ms Dhungana are entirely financially supported in the United Kingdom by friends who pay their rent and all of their living costs", (at paragraph 15), there was no reason why these friends could not continue to support the Appellant and Ms Dhungana in Nepal.

No Error of Law

19. I am satisfied that the making of the decision below did not lead the judge into an error on a point of law. My reasons are as follows. Permission to appeal was granted by the Upper Tribunal on the basis that the appeal had been allowed because of the Appellant's relationship with his partner, but the Appellant's partner was also a national of Nepal "no right to remain in the UK (albeit she has an application to remain pending with the Respondent)". This is after the First-tier Tribunal had refused permission on the basis that the "Judge dealt with what was a complex case in a sensitive and compassionate way", finding that there was a family life between the Appellant and his partner since 2015 whereby Article 8 was engaged. This had led to the conclusion as a matter of proportionality that the appeal stood to be allowed, with the public interest requirement being plainly in the mind of the judge. Against this background the following is noteworthy.

20. First, the judge is not oblivious to the fact that the Appellant's partner was also a citizen of Nepal. He ends his determination with the observation that, "I recognise that it is possible that Ms Dhungana will have to leave the United Kingdom but at present she is here", so that "If the appellant were required to leave the United Kingdom today there would be a disproportionate interference with her article 8 rights …" (Paragraph 34). The judge gives "little weight" to the fact that the relationship between the two of them was formed at a time when there was no leave to remain (paragraph 33).

21. Second, the Appellant's very serious ill-health condition is such that "she has a life expectancy of 5 to 10 years and with a transplant 10 to 15 years" and as a young woman this is "a very distressing and difficult situation for her to find herself in" (paragraph 31).

22. Third, the treatment that she actually undergoes in this country is one that takes place “every day, when combined with the other effects of ill-health which includes the effects of having stage 5 kidney dialysis, heart problems, abnormally high blood pressure which needs controlling …”, such that the judge is clear that all of these “would be very difficult for her to manage without the appellant” (paragraph 32).

23. In the circumstances, although the decision could have gone either way, the judge was entitled, having reviewed the evidence in the manner that was done, to have come to the conclusion that he did.

24. It is worth noting that recently it was emphasised by Lewison LJ (see **Volpi & Anor v Volpi [2022] EWCA Civ 464** at para 2) that:

> The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
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> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
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> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
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> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
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> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
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> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

Notice of Decision

25. There is no material error of law in the judge’s decision. The determination shall stand.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12th September 2023