IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001499
First-tier Tribunal Nos: HU/51035/2022
IA/01614/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31 January 2024

Before

UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

RR (NEPAL)
(ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mavrantonis, counsel (instructed by MYM solicitors)
For the Respondents: Ms Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 23 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 8 February 2022, refusing the Appellant's application made on 6 April 2021.

2. The Appellant is a national of Nepal. Her claim is made on the basis of her private life in the UK. She says she cannot return to Nepal because she has received threats from her ex-husband who has returned there; her family have disowned her because she married a member of a different caste and religion; she would have no support network and she would face discrimination due to being a lone, divorced, Dalit woman who has experienced domestic violence and has mental health issues. She says she meets the requirements of paragraph 276 ADE (1)(vi) of the immigration rules (as was) and the refusal decision is a breach of her protected rights under article 8 ECHR.

3. The Respondent refused the Appellant's claim by letter dated 8 February 2022 ("the Refusal Letter"). This stated that the Appellant had not proved she would face very significant obstacles on return to Nepal for any reason and she could seek the protection of the authorities in terms of the claimed risk. Whilst it was noted that the Appellant had been diagnosed with anxiety and depression and took medication, she could obtain treatment on return and there were no exceptional circumstances. A claim under either article 3 or 8 had not been made out.

4. The Appellant appealed the refusal decision.

5. The Respondent undertook a review of the matter on 28 April 2022 and maintained the refusal decision. The review said it was accepted that, as a divorced woman, the Appellant is likely to experience societal stigma in Nepal but submitted she would be no more disadvantaged than her peers there. The Respondent also accepted as credible that the Appellant has suffered domestic abuse from her ex-husband, and that she has been diagnosed with a high level of depression, severe anxiety, and extreme hopelessness for which she has been receiving medications and talking therapies. However there had been no significant change in circumstances warranting a departure from the Refusal Letter. Her claimed fear of return had not been assessed as she had not made a claim for protection.

6. The Appellant's appeal was heard by First-tier Tribunal Judge Parkes ("the Judge") at Birmingham on 6 February 2023. The Judge subsequently dismissed the appeal in his decision promulgated on 17 February 2023.

7. The Appellant applied for permission to appeal to this Tribunal.

8. Permission was refused by First-tier Tribunal Judge Gibbs on 30 April 2023.

9. The Appellant applied to this Tribunal for permission, relying on the same renewed grounds which may be summarised as follows:

   (a) the Judge erred in his assessment of proportionality under article 8 ECHR because:

      (i) he did not consider the factors contained in s.117B of the Nationality, Immigration and Asylum Act 2002;

(ii) he did not carry out the five-stage test under Razgar [2004] UKHL 27;

(iii) he provided inadequate reasons for finding that the Appellant's private life did not engage article 8;

(iv) he assessed the Appellant's claim through the framework of article 14, which was not argued or pursued, rather than article 8.

(b) the Judge erred in his assessment of the issue of discrimination because:

(i) there was objective evidence supporting this aspect of the Appellant's claim;

(ii) the Appellant did not have to make a protection claim for this aspect to be considered;

(iii) he failed to make clear whether or not he made adverse findings pursuant to JA (human rights) Nigeria [2021] UKUT 97 (IAC) for the Appellant's failure to make a protection claim;

(iv) the finding in [17] that the Appellant was educated in Nepal went against the claim of likely discrimination is inadequately reasoned in light of the objective evidence as to the treatment of Dalits in Nepal;

(v) in assessing 276ADE, the Judge was obliged to consider future foreseeable obstacles and not merely past conduct.

10. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 11 December 2023, stating:

> "1. Ground 1 submits that the judge erred in the assessment of proportionality under article 8 ECHR. In the light of the judge's finding (in paragraph 28) that the appellant's private life in the UK is limited and does not engage article 8 there was no need to assess proportionality. However, if the appellant's private life did engage article 8, than a proportionality assessment would be required. It is arguable that the finding in paragraph 28 about article 8 not been engaged was irrational and/or not supported by adequate reasons given the length of time the appellant has lived in the UK and that the threshold to engage article 8 is not especially high: AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801. Arguably, there was a need to undertake a proportionality assessment having regard to Part 5A of the 2002 Act and the judge erred by not doing so.
>
> 2. All grounds can be pursued."

11. The Respondent did not file a response to the appeal.

The Hearing

12. The matter came before us for hearing on 23 January 2024 at Field House.

13. Ms Ahmed helpfully accepted that ground 1 disclosed a material error of law in light of the Judge's failure to undertake a proportionality exercise under article 8, however she opposed ground 2.

14. The main points made in submissions were as follows.

15. Mr Mavrantonis confirmed that the decision/directions of First-tier Tribunal Judge Hawden-Beale made on 25 October 2022 were not before the Judge, however it is not disputed that Judge Hawden-Beale recorded by consent that the question of discrimination could be argued within article 8 ECHR (Ms Ahmed took no issue with this).

16. Mr Mavrantonis took us through the grounds of appeal and submitted that:

(a) the Appellant argued that she would face discrimination as a Dalit which comprises a very significant obstacle under 276ADE(1)(iv) and the Judge has not dealt with this aspect adequately or at all. The Judge appears to find that the Appellant is a Dalit woman, and that Dalits in general face discrimination, such that it is unclear why the Judge finds there to be no very significant obstacles.

(b) the Judge was wrong to say that article 8 was not engaged. Whilst this has been conceded, it links in with ground 2 because discrimination was a factor for 276ADE; this was not properly considered and the Judge's finding that there were no very significant obstacles was flawed; whether or not the Appellant met the immigration rules was a factor to be considered in the overall proportionality exercise. It is therefore artificial to separate the discrimination aspect from the proportionality exercise, and all of the findings must be set aside and be considered.

(c) the Judge's decision should be set aside and the appropriate forum for remaking is the First-tier Tribunal. This is because it has now been 3 years since the refusal decision, the Appellant has produced medical reports which are likely to need updating, she would also like to produce a country expert report, and she should not be deprived of the opportunity to have her case properly considered by the First-tier Tribunal.

17. Ms Ahmed responded to say:

(a) the Judge considered the evidence holistically, including the Respondent's acceptance that the Appellant experienced domestic violence and has mental health problems, but nevertheless finds there are no very significant obstacles to integration. It may be that, the Respondent having accepted these things, the Judge considered it unnecessary to mention them specifically, although he refers in [11] to the abusive text messages from the husband.

(b) It is clear that the Judge does not accept parts of the Appellant's account to be credible, such as:

(i) [11] that the divorce position was made when both parties were in the UK and yet the husband had not pursued her.

(ii) [13] the divorce decree was issued in Nepal such that it is not accepted that the Appellant is without support in Nepal.

(iii) [14] [15] it was not accepted that the Appellant has no recollection of pursuing the divorce.

(iv) [17] that the Appellant's father-in-law gave her husband the money enabling them to come to the UK, and that for the Appellant was clearly educated in Nepal to have been able to study in the UK.

(v) [25] the Appellant's father owns and works in a shop and it is not clear how, if Dalits are discriminated against (which is accepted), the Appellant was able to form a relationship with her husband.

(vi) [26] it is not clear why the Appellant did not pursue a protection claim despite having the benefit of legal advice (this was a sufficient finding to address JA (human rights) Nigeria [2021] UKUT 97 (IAC)).

(vii) [27] the Appellant's ability to initiate and pursue divorce proceedings in Nepal and then to receive the petition demonstrates that she has more support and contacts in Nepal than she claims.

These findings were open to the Judge and fed into the reasoning as to why there were no very significant obstacles. These points have not been challenged in the grounds of appeal. Such findings can be preserved, as can the finding that the Appellant is a Dalit as this is not being challenged.

(c) The Judge finds that the Appellant did not meet the requirements of the immigration rules, as per paragraph 112 of Alam & Anor v SSHD [2023] EWCA Civ 30 this is a weighty factor and the starting point for the assessment outside the rules.

(d) The only error is the final part of [28] where the Judge states that the Appellant's circumstances "cannot be described as compelling such as would justify a grant of leave outside the Immigration Rules".

(e) Ground 2 is in the nature of disagreement, seeking to use general objective evidence about the treatment of Dalits to say the Appellant's individual claim should succeed. The Judge clearly did consider the evidence of discrimination and made findings open to him that the Appellant as an individual would not be discriminated against such as to be an obstacle for the rules.

(f) The decision should be set aside for remaking in the Upper Tribunal but with preserved findings on those matters which the Judge did not find the Appellant to be credible, that the Appellant is a Dalit woman, and that the Appellant does not meet 276ADE(1)(iv).

18. Mr Mavrantonis replied to repeat his assertion that the entirety of the decision needs revisiting as it is all interlinked. He submitted that it is not actually clear that the Judge makes adverse findings as claimed by Ms Ahmed. He sought to expand on the grounds in questioning how a holistic proportionality assessment could be undertaken in the absence of an assessment of the Appellant's mental health, which he said is missing from the decision. He thanked Ms Ahmed for accepting that the Appellant is a Dalit woman.

19. At the end of the hearing, we reserved our decision.

Discussion and Findings

20. We agree that ground 1 discloses an error of law, for reasons which we shall now discuss.

21. As to the Appellant's private life, the Judge notes the Appellant's immigration history in [3], referring to the fact that she arrived lawfully in September 2009 as a student and that her last leave expired in September 2015 following a number of extensions. In [7] the Judge notes that it was agreed that the Appellant is a vulnerable witness. The reasons for this agreement are not stated, but were presumably based on the Appellant's history of experiencing domestic violence, as was accepted by the Respondent in the review. The Judge finds at [10] – [11] that the Appellant has no family in the UK and has limited contact with friends here. At [17] the Judge refers to the Appellant being helped by her friends and doing small jobs. The medical evidence is referred to in [20]-[24] but we cannot see that any findings are made in relation to it.

22. These are the only references to the Appellant's private life prior to the Judge's conclusion in 28 that:

> "the Appellant's private life in the UK is limited and does not engage article 8".

23. Having made this finding, the Judge does not address the five well-known steps in Razgar [2004] UKHL 27 nor does he undertake a proportionality balancing exercise.

24. The finding that the Appellant's private life does not engage article 8 is simply not explained, which is an error. This error is material because, had the Judge found that it was engaged, he should have gone on to conduct a proportionality balancing exercise, the likely outcome of which is unknown. Whilst whether or not the Appellant met the immigration rules would have been a weighty factor, we do not know what other factors the Judge would have considered as weighing for or against the public interest. It is of particular note that the Judge does not explicitly say what he makes of the Appellant's mental health conditions nor what impact, if any, he considers it would have on the nature of her evidence.

25. As submitted by the grounds, any proportionality exercise would also have to have taken into account the factors in s.117B of the Nationality, Immigration and Asylum Act 2002, as s.117A of that Act obliges the Tribunal to have regards to these considerations when determining whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8. We do not see how the failure to take these factors into account could have been determinative in its own right as, even had the Appellant been found to speak English and be financially independent, these factors would only have been neutral rather than positive in her favour, and as little weight was also to be given to any private life developed whilst her status was precarious.

26. Whilst the Judge does comment in [28] that "The evidence she gave of her treatment growing up did not suggest that she had suffered discrimination at a level that would engage article 14 or place the UK in breach of its obligations", we do not consider this is sufficient to indicate the Judge assessed the Appellant's claim through the 'framework' of article 14 as alleged by the grounds of appeal. There is no other discussion of article 14 and it appears to simply be a reference back to the Appellant's skeleton argument that was before the Judge.

27. For the sake of completeness, we say that the reference to article 14 ECHR was misconceived from the outset. Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

28. It merely enshrines the right not to be discriminated against in "the enjoyment of the rights and freedoms set out in the Convention". In other words, it is obliging UK not to discriminate against the Appellant in protecting her other, substantive, rights under the Convention, rather than prohibiting discrimination as such. The article therefore has no relevance at all to whether the Appellant would suffer discrimination on return to Nepal. As the Appellant had not made a protection claim, such discrimination fell to be considered in terms of significant obstacles under 276 ADE(1)(iv) and the wider proportionality exercise and article 8; that is all.

29. To summarise, we find a material error of law disclosed by ground 1 arising from the Judge's failure to provide adequate reasons or finding that article 8 is not engaged, and his subsequent related failure to address the five-stage test in Razgar which required him to undertake a proportionality exercise. The remaining parts of ground 1 are not made out.

30. For the sake of completeness, we highlight that we cannot see it was ever argued by the Respondent that article 8 was not even engaged, however (surprisingly) this is not something that was raised in the grounds of appeal.

31. We now turn to ground 2.

32. It is worth setting out in full the head notes of JA (human rights) Nigeria [2021] UKUT 97 (IAC):

> "(1) Where a human rights claim is made, in circumstances where the Secretary of State considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for her to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required, in the light of the Secretary of State's international obligations regarding refugees and those in need of humanitarian protection.
>
> (2) There is no obligation on such a person to make a protection claim. The person concerned may decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the immigration rules. If so, the "serious harm" element of the claim falls to be considered in that context.
>
> (3) This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a

> "new matter" for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.
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> (4) On appeal against the refusal of a human rights claim, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1) of the 2002 Act, but only on the ground specified in section 84(2)".

33. We accept Ms Ahmed's submission that the Respondent did point out to the Appellant (in the review at paragraph 7(v) in particular) that it was appropriate for her to make a protection claim given the arguments she had raised concerning risk on return. Nevertheless, the Appellant decided to proceed to raise her fears within her existing human rights claim.

34. What is not in dispute, is that the Judge was able to take the question of risk into account when considering significant obstacles under 276 ADE and also under article 8. This appears to be what was decided by First-tier Tribunal Judge Hawden-Beale, mentioned in [9] of the decision, although we do not have that decision in front of us. We do not consider that JA adds much more than simply confirming this is permissible. If anything, JA arguably undermines the Appellant's case by saying in headnote (3) that if an applicant proceeds in this way, the Secretary of State and Tribunal are entitled to approach any protection element with some scepticism.

35. The grounds of appeal appear to argue that the Judge does not make any clear findings as to whether such scepticism was actually brought to bear. At [3] the Judge simply notes that JA provides guidance where a protection claim is raised in the context of a human rights claim. At [26] the Judge states that:

> "The Appellant has had the benefit of legal representation in the UK and initiated these proceedings with assistance. It is not clear why the Appellant did not pursue an appeal on the basis of the additional difficulties said to arise from her being low caste and the need for protection".

36. We consider this to be in the nature of a comment rather than a finding, and agree that there would appear to be no finding as to what the Judge makes (if anything) of the Appellant choosing to raise protection issues within her human rights claim. However, we cannot see that this is an error or if it is, how it would be material. The grounds do not shed any light on this. Mr Mavrantonis did not elucidate further other than to say the Appellant was entitled to know what was being held against her or not. All we can say is that there is no indication that the Judge made an adverse finding against the Appellant in this respect. This is not sufficient to disclose an error of law.

37. As to the Judge's consideration of discrimination, he appears to find in [25] that Dalits are discriminated against, stating that:

> "That Dalits, formerly also called untouchables, suffer from societal and religious discrimination is clear".

38. Whilst the Judge could have been more explicit, the remainder of [25] appears to be the Judge's reasoning as to why, despite there being discrimination in general against Dalits, he does not accept that this poses an obstacle to integration for the Appellant i.e. because her father owns and works in a shop, she is well educated and it is not clear how she was able to form a relationship with her husband who is from a higher caste. We do not see what is inadequately reasoned about this paragraph and consider these are matters which the Judge

was entitled to take into account. We note that paragraph 21 of the grounds of appeal specifically says the objective evidence "did not apply specifically to the A", such that it is hard to see what more the Judge could have made of that evidence in any event. The grounds of appeal assert that "in all societies discrimination can exist but some people affected can be 'luckier' than others" and this appears to be precisely what the Judge finds; that the Appellant is luckier than others because she has been well educated, has a father with a shop, and was able to marry someone from a higher caste.

39. It is unclear what the grounds mean in saying that "The Judge, in his assessment of very significant obstacles, would have to consider future foreseeable obstacles if any, not merely past conduct". Whilst the Judge does look at the Appellant's circumstances in Nepal prior to coming to the UK, he was entitled to do so and clearly also considers the position of future return, finding in [27] that the Appellant has more support and contacts in Nepal than she claims. It is unclear which 'future' obstacles have not been addressed insofar as they were not comprised of discrimination, which we have already discussed.

40. What is not clear is whether, and to what extent, the Judge took into account the Appellant's mental health when assessing the question of discrimination and overall position on return. However, (again somewhat surprisingly) this is not something that was raised in the grounds of appeal. Whilst Mr Mavrantonis sought to expand on the grounds in this respect at the hearing, he did not seek permission to do so. Whilst we asked questions in relation to Ms Ahmed's submission that the Judge had considered all of the evidence holistically, this did not amount to our accepting that the grounds of appeal could be expanded in this way.

41. We agree with Ms Ahmed that the Judge appears not to accept parts of the Appellant's account to be credible, and that this is his main reason for not accepting that there are any very significant obstacles, as can be seen by the first line in [28]:

> "In summary the inconsistencies in the evidence are such that I do not accept that the Appellant would be without support in Nepal and she has not shown that she would be unable to access relevant services or medical treatment or that suitable treatment is not available".

42. This finding is somewhat odd given the Respondent does not appear to have challenged the Appellant's credibility either prior to or at the hearing, and given the review accepted as credible that the Appellant had suffered domestic abuse and had been diagnosed with a high level of depression, severe anxiety etc. However, again, this is not something raised in the grounds of appeal nor was permission granted to expand the grounds to include this challenge.

43. Overall, we find that ground 2 is not made out. As above, we consider the Judge makes a finding that the Appellant herself will not face discrimination to an extent such as to pose a very significant obstacle to integration. We consider this finding is adequately reasoned, and that the reasons for that finding were open to the Judge.

44. That is not to say that we consider the Judge's assessment of 276ADE(1)(iv) to be sound but, as the grounds have not touched upon other obstacles, we do not have to make a finding in this respect. We do, however, accept Mr Mavrantonis' submission that the assessment of 276 ADE is inextricably linked to article 8

because whether or not the Appellant met the immigration rules was a factor to be considered in the overall proportionality exercise. We therefore agree that all of the findings must be set aside and reconsidered afresh.

45. To summarise, we find the Judge's decision is infected by material error of law as discussed above, and we set it aside to be remade.

46. We bear in mind the guidance in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC). We take into account Mr Mavrantonis' submission that some time has passed since the hearing (and three years since the refusal decision) such that an up-to-date assessment of the Appellant's mental health may be needed and that out of fairness, the issues under consideration (given they all feed into article 8 and proportionality) should be considered again holistically. Ms Ahmed accepted that the judge who considered the remaking would need to make new factual findings and undertake a holistic proportionality assessment which would include factoring in the Appellant's mental health and history of domestic violence.

47. We accept that there is some overlap of issues. Taking everything into account, and also considering that that the Appellant would otherwise be deprived of the two-tier appeal structure, we are of the view that it is appropriate to remit the appeal to the First-tier Tribunal for hearing afresh, by a judge other than First-tier Tribunal Judge Parkes.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remit the appeal to the First-tier Tribunal for a fresh decision on all issues, to be heard by a judge other than First-tier Tribunal Judge Parkes. No findings of fact are preserved.

3. For the primary reason that the Appellant is a vulnerable witness with a history of being subject to sexual violence, and for the secondary reason that her claim raises questions of risk of serious harm on return (albeit within the context of human rights claim), we consider it appropriate to make an anonymity order.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
29 January 2024