Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31394/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 April 2014	**On 18 June 2014**
Oral determination given following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MS ALISHA SHARMA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Subbarayan, Legal Representative of Sivaramen
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case is a citizen of Nepal who was born on 22 November 1986. On 16 November 2009 she was granted leave to enter the UK as a student until 31 July 2011 which leave was extended subsequently until 24 November 2013.

2. The background to this appeal is set out in a decision which I made following a hearing which was before the Honourable Mr Justice Jay and myself on 27 February 2014 and I will set out within this determination the relevant facts as set out in that decision.

3. The appellant was married at the time she entered the UK but this marriage broke down and while still married she met Mr Roshan who is a British citizen and she formed a relationship with him. On 21 June 2013 at a time when she was still married she applied for leave to remain in the UK as Mr Roshan's partner. The respondent refused this application for a number of reasons which it was not necessary for me to set out within my earlier decision and is not necessary for me to set out in the course of this determination either. Amongst the reasons why the application was refused was that the financial requirements under Appendix FM of the Rules were not met and the respondent also considered that there would not be a breach of the appellant's Article 8 rights were she required now to return to Nepal.

4. The appellant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Sangha sitting at Birmingham on 5 November 2013 but in a determination promulgated on 3 December 2013 Judge Sangha dismissed the appellant's appeal both under the Immigration Rules and under Article 8. In between the dates when the application was made and the hearing before Judge Sangha the appellant had finalised a divorce from her first husband and on 1 November 2013 which was four days before the hearing before the First-tier Tribunal the appellant and Mr Roshan had got married. Although Judge Sangha noted that there had been some discrepancies between the evidence given by the appellant and her husband and one or two inconsistencies between what the appellant had claimed with regard to her parents' disapproval of her relationship with Mr Roshan and the evidence that they had nonetheless assisted her with the divorce proceedings from her previous husband nonetheless the Judge found at paragraph 21 of his determination that despite any such discrepancies "I have come to the conclusion that [the appellant and her husband] are in a genuine and subsisting relationship". He also accepted that Mr Roshan was a British citizen who lived and worked in the UK and he had taken up employment recently and was earning above the income threshold (£18,600 per year) necessary under the Rules. It had earlier been explained during the course of the hearing that because Mr Roshan had not been able to find employment until relatively recently he could not provide six months' payslips showing the required earnings which was necessary in order to succeed under the Rules because at the time of that hearing he had only been working in his present job for two months. While finding that the appellant in fact now earned about the threshold (albeit that he could not satisfy the requirements of the Rules at that point in time) and that the marriage was genuine nonetheless Judge Sangha dismissed the appeal for the reasons which he set out within paragraph 21. Essentially he found that:

> "There does not appear to be any valid reason why the appellant cannot return to Nepal as she originally intended in order to apply for entry clearance in order to join her husband here."

He continued as follows:

> "Whilst there may be a degree of hardship for both of them, there does not appear to be any valid reason why the appellant cannot return to Nepal in order to apply for entry clearance and why she would not be able to gain entry clearance from Nepal within a reasonable period of time. In my assessment, the evidence before me does not suggest that there are any insurmountable obstacles to the appellant returning to Nepal in order to apply for entry clearance and there was no evidence to suggest it will have any adverse effect on their continuing relationship. … There is no valid reason why the appellant cannot return to Nepal and apply for entry clearance which is likely to be granted within a reasonable period of time. It is clear that the appellant's husband is in secure full-time employment and his income is above the financial threshold. While there may be a degree of hardship in the appellant having to return to Nepal to apply for entry clearance I do not consider that it is in any way disproportionate in the circumstances of this particular case."

5. As I noted in my earlier decision the appellant was granted leave to appeal against this decision by Upper Tribunal Judge Grant on 17 January 2014 and when setting out his reasons for granting permission to appeal Judge Grant stated as follows:

> "2. … The grounds argue that the judge erred in law in dismissing the appeal under Article 8(2) because, in line with *R (NM)* … [2013] EWHC 1900 (Admin), the decision was disproportionate even though the appellant's partner could not meet the financial requirements.
>
> …
>
> 4. As regards (2), the judge accepted that the parties' relationship is a genuine one and that they had married a few days before the hearing. The judge also accepted that the sponsor's income exceeded that required by the Rules. Nevertheless, the judge concluded that it was proportionate to expect the appellant to return to Nepal to seek entry clearance. That finding is arguably perverse and contrary to the approach of the House of Lords in *Chikwamba* … [2008] UKHL 40 – it would appear to amount to an interference with the parties' family life in order to enforce a procedural requirement for no good or sensible reasons (see … *Hayat* [2013] Imm AR 15 at 30(b)) …"

6. The Tribunal (that is Mr Justice Jay and myself) having heard submissions on behalf of both parties considered Judge Sangha's determination had contained material errors of law such that the decision must be remade and our reasons are set out within the decision. We noted that although Judge Sangha had stated at paragraph 21 that "there may be a degree of hardship for both of them" he does not explore in his determination how much hardship there would be, nor, more importantly does he attempt to weigh this hardship against the need to enforce the Immigration Rules for the purpose of maintaining a fair and effective system of immigration control,

which is a legitimate purpose, necessary for the maintenance of the economic wellbeing of the country. Far more importantly, we considered that in finding that "there does not appear to be any valid reason why the appellant cannot return to Nepal", especially in circumstances where she was likely to be granted entry clearance within a reasonable period of time thereafter, the judge seemed to be approaching his consideration of proportionality on the basis that it was the appellant to show that there were not, as he put it, insurmountable obstacles to the appellant returning to Nepal in order to apply for entry clearance whereas the Court of Appeal in *Hayat*, following the decision of the House of Lords in *Chikwamba*, had made it clear that rather than considering whether there was any reason why this appellant should not return to Nepal, the judge should rather have considered whether there was a sensible reason why she should. The judgment at paragraph 30b) of *Hayat* sets out one of the effects of the various decisions which were summarised in that judgment as follows:

> "Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ [in *MA (Pakistan)* [2009] EWCA Civ 953], there is a sensible reason for doing so."

7. We considered that Judge Sangha should have had consideration to the decisions in *Chikwamba* and *Hayat* and that because there is no reference in his determination to either decision when considering whether removal would be proportionate in this case there was no basis upon which it could be properly argued that he did have in mind the relevant guidance given in those decisions. We considered that it could not be said with any certainty that had he done so his decision would have been bound to be the same. The Tribunal at the earlier hearing directed that the hearing would be adjourned until today's date and that the hearing, which was to be before me sitting alone, would proceed on the basis that the finding of the First-tier Tribunal that the appellant and her husband are in a genuine and subsisting marriage would be preserved, as would the finding (which was confirmed in further evidence placed before us) that the appellant's husband was currently employed and earned over £19,000 a year, unless by the date of the resumed hearing further evidence was put before us to establish that this was no longer the case. We also directed that the Tribunal would at the resumed hearing today consider whether in all the circumstances of this case including whether or not at the date of this hearing the requirements under the Rules would be satisfied it would be proportionate to require the appellant to return to Nepal in order to make an application for entry clearance from that country in light of the guidance given by the House of Lords in *Chikwamba* and subsequently by the Court of Appeal in *Hayat*.

The Hearing

8. This appeal has now come back before me as directed and I heard submissions on behalf of both parties. I was also referred to evidence of the appellant and her

husband which had been put before the Tribunal at the last hearing in readiness for any rehearing which might be ordered. Both the appellant and her husband attended for cross-examination although in the event Ms Everett, representing the respondent, only cross-examined the appellant. She had no questions for the appellant's husband.

9. I have recorded all the submissions which were made to me and such evidence as there was in the Record of Proceedings and so I shall not refer below to everything which was said during the course of the hearing, but only to such material and submissions as is necessary for the purposes of this determination. Essentially the evidence of both the appellant and her husband is that they were married on 1 November 2013 and are living together and intend to live the rest of their lives together. The appellant's family in Nepal are not happy with the appellant's decision to marry Mr Roshan because they are from different cultures and countries of origin and although in time the attitude of her parents might change at present she might not be able to stay with them. Although the appellant's husband has now secured full-time employment their finances are tight and if she were to be required to return to Nepal in order to make her application this would be a substantial strain on their financial resources and it would also have a detrimental effect on the relationship as they are relatively newly wed and it is important to them to be together at this stage of their marriage. As she also notes in her statement, she and her husband had been going through a very difficult time because as a result of the difficulties her husband had in securing employment he had built up a large overdraft with the bank which they are still struggling to repay. If she had to return now to Nepal which would involve having to find money which she does not have for plane fares, application fees, accommodation and other expenses this would be very harsh for her. In addition of course as with any application of this sort the period of time it would take is open-ended and there is no guarantee that the application would be granted immediately without the need for her to appeal. It was submitted on her behalf that in these circumstances, given especially that it is not suggested that there is any reason why permission should not ultimately be granted it would be unduly harsh to require her to return for the purpose of making her application from outside the UK.

10. On behalf of the respondent Ms Everett's submissions were also commendably brief. She submitted simply that the interference would be proportionate; the couple could not at the time of application meet the requirements of the Immigration Rules and also it had been the appellant's original intention to return and apply for entry clearance from abroad. There was no reason why she could not be supported by her husband and the hardship would be justified in this case by the need to enforce the Immigration Rules. The couple knew at the time they decided to get married that the appellant's immigration status was precarious and they had married in the knowledge of that status.

Discussion

11. There has been a considerable academic discussion as to the effects of the recent changes in the Immigration Rules with regard to consideration of whether or not to

require the removal of an applicant such as the appellant in this case would be in breach of his or her Article 8 rights. I can summarise the provisions very briefly by stating that the effect of the new rules in a case such as the present is that it will be in breach of an applicant's Article 8 rights if as a result of a requirement to return to his or her home country to make an application from abroad this requirement could be said to be "unduly harsh". The requirement for this appellant to return is "harsh" because it will greatly inconvenience her. Whether it is "unjustifiably" or "unduly" harsh can only be assessed by balancing the adverse consequences to her against the need to maintain a fair and effective system of immigration control. In my judgment the changes to the Rules do not substantively alter the guidance given by the Court of Appeal in *Hayat* which is as already noted above to the effect that in a case such as this where the only reason for requiring an applicant to leave the country to make an application from abroad is to ensure compliance with the rules for their own sake this will be disproportionate unless "there is a sensible reason for doing so".

12. Of course the Immigration Rules must be enforced fairly and consistently but this should be done by having regard in every case to whether a rigid adherence to the letter of the rules would be proportionate. In my judgement, on the facts of this particular case, it would not. The requirement for this appellant to return to her home country in order to apply from there for entry clearance can only be for the purpose of ensuring technical compliance with the rules, it being accepted that the financial and other requirements under the Rules are now satisfied (even though they were not at the time of the original application). However (and I find) the consequences to this couple of being forced to disrupt their lives to such a significant extent, with such large financial and emotional consequences, significantly outweigh the benefit to the public of the strict enforcement of the Rules such that such a requirement is disproportionate in this case. In light of this finding it follows that this appeal must be allowed and I so find.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law and substitute the following decision:

The appellant's appeal is allowed on human rights grounds Article 8.

Signed: Date: 16 June 2014

Upper Tribunal Judge Craig