Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13637/2019
HU/13638/2019

THE IMMIGRATION ACTS

Heard at Field House
by Skype for Business
On 1 February 2021

Decision & Reasons Promulgated
On 15 February 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

USHA [G]
DINESH [K]
[NO ANONYMITY ORDER]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellants: Mr Reuben Solomon of Counsel, instructed by Aschfords Law
For the respondent: Ms Julie Isherwood, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission from the decision of the First-tier Tribunal dismissing their appeal against the respondent's decisions on 30 July 2019 to refuse

them leave to remain in the United Kingdom on human rights grounds, within or outwith the Immigration Rules HC 395 (as amended).

Background

2. The appellants are a husband and wife, who now have two children born in the United Kingdom, one aged 6 and the other, born in 2020, who is just over 6 months old. Both appellants and both children are citizens of Nepal, with no other citizenship.

3. The appellants married on 7 January 2009 in Nepal, both families attending the wedding. The are a mixed caste couple: the wife is Brahmin (the highest caste) and the husband is Cheddri or Kshatriya (the second highest caste).

4. They both entered the United Kingdom on 21 January 2010, the principal appellant (the wife) with a Tier 4 (student) visa, and the second appellant (the husband) with a Tier 4 dependant visa. Both visas were renewed twice, in the normal way.

5. On 14 June 2014, the appellants had a son. In March 2015, the College where the wife had been studying notified the respondent that she had ceased attending and on 5 June 2015, a decision was made to curtail her leave, effective 4 August 2015. The wife did not find another educational provider in that time. They have only 5 years and just over 7 months lawful residence in the United Kingdom.

6. The family homes in Nepal were damaged in the 25 April 2015 earthquake but the appellants' evidence is that they have been rebuilt.

7. On 1 August 2015, the wife submitted an in-time application for leave to remain outside the Rules, but it was rejected, as she had not paid the Immigration Health Surcharge (IHS). She made another application on 22 December 2015, having paid her IHS. That application was out of time. On 11 April 2019, it was refused, with an out of country right of appeal.

8. The appellants, who by this time had not had extant leave for 3 years and 8 months, did not embark for Nepal. On 9 May 2019, they submitted a second out of time application for leave to remain in the United Kingdom on human rights grounds, which the respondent refused on 30 July 2019, with an in-country right of appeal.

9. The respondent noted that the appellants had been in the United Kingdom for less than 10 years, and less than 6 years with leave. Their son was not a qualifying child and although he had just started school, was still of an age when the family was his main focus. There were no significant obstacles to their reintegration in Nepal, and no exceptional circumstances for which leave to remain ought to be given outside the Rules.

10. The appellants appealed to the First-tier Tribunal.

First-tier Tribunal decision

11. The First-tier Judge noted that the appellants could not meet the Immigration Rules. They had asserted that they could bring themselves within paragraph 276ADE(1)(vi) of the Rules, but he found that they had not demonstrated very significant obstacles to their reintegration in Nepal, and that their principal reason for wishing to stay in the United Kingdom related to the education they wanted for their young son.

12. The judge also found that there were no exceptional circumstances outside the Rules for which leave to remain ought to be given, and dismissed the appeal.

13. The appellants appealed to the Upper Tribunal.

Permission to appeal

14. On 11 August 2020, Upper Tribunal Judge Jackson granted permission as follows:

> "The First-tier Tribunal's decision arguably sets out the wrong test in [*Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11] and in paragraph GEN.3.2 of Appendix FM of the Immigration Rules as to unjustifiably harsh consequences of removal, and arguably fails to make any clear findings on the best interests of the child (albeit there are findings with only a minor inconsistency about age and about their circumstances). It is arguable that the way that the decision has been written has been to individually discount elements of the appellants' claims, rather than undertake a balancing exercise with factors in favour of the public interest and in favour of the appellants set out clearly.
>
> However, materiality is clearly in issue in this appeal, given the underlying claim by the appellants on the evidence that was before the First-tier Tribunal and will need to be addressed by them.
>
> *The First-tier Tribunal's decision does not contain any arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted*." [*Emphasis added*]

15. The final sentence quoted above does not seem consistent with the grant of permission, but it is clear that permission was granted and I approach the appeal on that basis.

Rule 24 Reply

16. There was no Rule 24 Reply on behalf of the respondent.

Further directions

17. On 13 November 2020, the Upper Tribunal sent out triage directions made by Upper Tribunal Judge Kebede in the light of the COVID-19 pandemic.

Submissions received

18. Further submissions were received from Mr Solomon on behalf of the appellants. He argued that Article 8 ECHR was engaged because the appellants had resided continuously in the United Kingdom for more than 10 years and had established a family life between themselves and their son (including his school life), a home, career, commitments, a network of friends and a safe secure and stable environment in which to live. They had physical and moral integrity and the wife was 16 weeks pregnant.

19. Mr Solomon argued that there would be very significant obstacles to the appellants reintegrating in Nepal: they had arrived in the United Kingdom at the ages of 24 and 26 and now were almost 35, and 36 years old respectively. Their son, who was 5 years old, was thriving at school and had never been to Nepal. He was not emotionally mature enough to cope with the change in circumstances in returning to Nepal. He did not speak the Nepali language well. Their families did not approve of the inter-caste marriage and the appellants and their son would suffer social ostracism and discrimination.

20. As to Article 8 ECHR outside the Rules, the respondent had delayed for over three years in making her decision on the December 2015 application, which reduced the weight to be given to the public interest in removing them. Article 8(1) was engaged, on the facts. There were a number of factual errors in the First-tier Judge's decision, in particular an error in one part of his decision as to the child's age, and a reference in another paragraph to the appellants as 'visitors' to the United Kingdom, which they had never been.

21. The error regarding the *Agyarko* test and GEN.3.2 of the Rules was material, given the elevated test applied in evaluating proportionality. The test was not one of exceptional circumstances, but whether it was reasonable for the appellants to leave. The appeal should be allowed, and remitted to the First-tier Tribunal for remaking.

22. The respondent did not reply.

23. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

24. At the beginning of the hearing, the appellants confirmed that the wife's pregnancy had come to a successful conclusion and they now have a daughter born in July 2020,

as well as their son born in June 2014. Both children are Nepalese citizens. Neither child is a qualifying child yet.

25. For the appellants, Mr Solomon relied on his grounds of appeal and the further submissions summarised above. The appellants had tried hard to regularise their status since the curtailment in 2015. They were overstayers, but there were as yet no removal directions.

26. Mr Solomon reminded me that the *Agyarko* test had been misunderstood and thus misapplied by the First-tier Judge. As regards paragraph 276ADE(1)(vi), the essence of his argument was that the appellants had been in the United Kingdom for over a decade, during which time their ties to Nepal had loosened. They had not returned there since 2012. Theirs was an inter-caste marriage: they were not relying on the Refugee Convention or Article 3 ECHR, but they would suffer societal discrimination, ostracism and stigma short of persecution.

27. Mr Solomon relied on the respondent's August 2018 CPIN on Nepal, which remained the most recent at 9.1.3. Although the judge had given himself a correct self-direction on the best interests of the appellant's child, Mr Solomon continued to contend that he had failed to make adequate factual findings on this important issue. The only evidence about the child's best interests before the First-tier Judge had been that of the appellants themselves. Mr Solomon reminded me that neither of the children had ever been to Nepal and that the older boy was 6 now, and would be a qualified child in July 2021.

28. The family had lived in the United Kingdom for 11 years now and the judge had not considered properly whether there were exceptional circumstances outside the Rules. His approach to delay was also flawed: see *Patel (historic injustice; NIAA Part 5A) India* [2020] UKUT 351 (IAC) and *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41.

29. For the respondent, Ms Isherwood reminded me that the appellants came to the United Kingdom in 2010 as a Tier 4 student and her dependant. They could have had no expectation that this would entitle them to remain when their studies were complete. They had not had valid leave since 2015 and could not meet the Immigration Rules on the 10-year route.

30. Although theirs was an inter-caste marriage, there had been family support. Both families had attended the wedding and there was no evidence of any family dispute: see the First-tier Judge's decision at [37.3]. Their absence from their mid-20s to mid-30s was not a significant obstacle to return. There was family support and no real evidence of difficulties.

31. As regards the best interests of the child, who had been 5 years old at the date of hearing, the evidence was that he was a normal happy child, with no difficulties at school, who spoke at least some Nepali. They would return as a family unit. Nepali

was likely to be the language spoken at home: the wife had needed a Nepalese interpreter at the First-tier Tribunal hearing, despite having studied here for 5 years and been in the United Kingdom for over 10 years.

32. The appellants' evidence was quite clear: they wanted to remain in the United Kingdom for a better life, and in particular, for better education for their son. *EV (Philippines)* & *Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874 had established that there was no right to United Kingdom medical treatment or education for non-citizens and that was not a proper reason for leave to remain either within or outwith the Rules. Although the form of the judge's decision was unusual, he had considered all relevant factors and reached an holistic conclusion.

33. I reserved my decision, which I now give.

Analysis

34. The question of delay is not a material error of law. There was no alteration in the appellants' circumstances between 2015 and 2019 when the decision was rendered. They had already had their son, and they remained unlawfully in the United Kingdom, supported by friends here. They did not engage further with British society: they spoke Nepali at home and lived within the Nepalese community.

35. There are a number of minor factual errors identified in the grounds of appeal. I do not consider that anything turns on them. In particular, the appellants complain that at 33.4, the judge referred to them as 'visitors' when they have never been in the United Kingdom on a visit visa.

36. What the judge said was that the appellants' being of good character was not an exceptional circumstance because 'It is expected that people visiting the United Kingdom be law abiding. To be so is not a reason why visitors should be allowed to stay permanently'. The judge did not say there that they were overstayers on a visit visa: this paragraph is inelegantly expressed but displays no fundamental error as to the appellants' status in the United Kingdom and certainly not an error of fact at the enhanced level required to amount to an error of law.

37. The appellants also observe that in one place, the judge referred to their son being 3½ years old, whereas elsewhere, he said the child was 5 years 7 months, which was correct. It is however clear from his findings at [37.1], [37.2], [39.3], [39.9] and [44] that he was well aware of the child's age and school status. Again, the enhanced level for an error of fact to amount to an error of law is not reached.

38. I next consider the appellants' contention that paragraph 276ADE(1)(vi) is applicable to them. It is not suggested that any other part of paragraph 276ADE is applicable. The judge recorded that the appellants did not rely on that paragraph, but Mr Solomon says that is an error. Whether or not it is erroneous, the materiality of that

error depends on whether the judge was right to conclude that there were not 'very significant obstacles' to the appellants' reintegration in Nepal, with their son.

39. The First-tier Judge gave proper and adequate reasons for finding that despite the parties being in an inter-caste marriage, they had family support in Nepal, both at their weddings and since, and that the houses in which their families live have been rebuilt since the 2015 earthquake. He did not err in considering that the appellants could not succeed within the Rules.

40. I turn therefore to Article 8 ECHR outside the Rules, and to whether exceptional circumstances exist for which leave to remain should be given. It is right to say that the First-tier Judge misunderstood *Agyarko* in the manner set out in the grounds of appeal. The meaning of 'exceptional' in the respondent's instructions to caseworkers is set out in at [19] in the opinion of Lord Reed JSC (with whom Lady Hale, Deputy President of the Supreme Court, and Lord Kerr JSC, Lord Wilson JSC, Lord Carnwath JSC, Lord Hughes JSC and Lord Hodge JSC agreed):

> "19. The [Respondent's] Instructions state that although refusal of an application will normally be appropriate where the applicant does not meet the requirements of the Rules, leave can be granted outside the Rules where exceptional circumstances apply. In that regard, the Instructions state:
>
> > "'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1. of Appendix FM have been missed by a small margin. Instead, 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely." (para 3.2.7d)"

41. The judge erroneously directed himself that decisions must be 'unduly' harsh in order to breach Article 8 rights. That is not the correct formulation of the test. However, whether unjustifiably harsh or unduly harsh is considered, that level of harshness is not made out. These appellants who have been in the United Kingdom since their mid-20s would return to their families in Nepal, bringing two grandchildren.

42. The circumstances advanced here were, again, the inter-caste marriage; the age of the appellants' son and his schooling; and effectively the family's preference for living in the United Kingdom rather than in Nepal. While that is entirely understandable, there is nothing exceptional there in the *Agyarko* sense, and despite the legal error at [15], and the First-tier Judge could have reached no other conclusion.

43. I note that in summarising Counsel's skeleton argument, the judge pointed out a number of inaccuracies: the correct position was that the child did speak Nepali, that Nepali was the language of the home and his mother had been unable to give evidence in English, needing an interpreter at the hearing, that the family homes had

been rebuilt as 2-storey dwellings, and that their families came from the Kathmandu valley, the only part of Nepal where healthcare was not poor. The appellants had lived within the Nepali community in the United Kingdom, being supported by kind friends to the tune of £1000 per month and had not really integrated into British society. They had good qualifications and there was 88.6% employment in Nepal. Any concerns about the wife travelling while pregnant have now resolved.

44. The judge identified at [37.3] that the appellants were both of high caste, the wife being Brahmin and the husband Cheddri. I have had regard to paragraph 9.1.3 of the August 2018 CPIN, on the question of caste in Nepal:

> "9.1.3 Despite prohibition of caste-based segregation, it persists in practice, preventing marginalized castes, including Dalits, from safely marrying members of other castes, and from accessing places of worship, public spaces, public sources of food and water, educational facilities and housing facilities occupied by members of other castes."

45. At 9.1.5 in the same CPIN, it refers to a Civil Society Report to the UN Committee on the Elimination of All Forms of Racial Discrimination, to be reviewed at the 95th session on 23 April-11 May 2018, entitled *Caste-based discrimination and untouchability against Dalit in Nepal.* Other source documents referred to in that paragraph also mention specifically the treatment of excluded subordinated ethnic and caste groups (Dalits).

46. When I asked for clarification as to which caste the appellants belonged, Mr Solomons asked the appellants and the wife said she was Brahmin (the highest caste) and the husband Kshatriya also known as Cheddri (the second highest caste). Neither of them is Dalit, the excluded group to which the CPIN refers.

47. Even had the judge applied his mind to this document, the outcome would have been the same: there is family support and approval, as evidenced by both parties attending the wedding, and neither of the appellants is an untouchable. The inter-caste argument cannot possibly succeed.

48. Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) emphasises at section 117B(1) that the maintenance of effective immigration controls is in the public interest. Section 117B(4) and (5) tell us how to treat the private life of adults which has been established when they were not settled in the United Kingdom or citizens.

49. These appellants' private life developed while they were in the United Kingdom either precariously, in the early years, when the wife was still studying, or unlawfully, from August 2015 onwards. Little weight can be given to that private life. The section 55 findings are accompanied by a proper self-direction and all relevant evidence (in context, only the parents' evidence) was considered and taken into account.

50. Section 117B(6)(b) says that the public interest does not require the parents' removal where it would not be reasonable to expect their child to leave the United Kingdom. Again, for the reasons given in the First-tier Judge's decision, it is entirely reasonable to expect a Nepalese child who has only just begun school in the United Kingdom to accompany his Nepalese parents to their country of nationality and complete his education there. There are no features about this child's circumstances which could possibly lead to a contrary conclusion.

51. For all of the above reasons, there is no material error of law in the First-tier Judge's fact-finding or his reasoning. These appeals were bound to fail and he did not err in dismissing them.

DECISION

52. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson* Date: 2 February 2021
Upper Tribunal Judge Gleeson