



IAC-HX-MC/12-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/45376/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4 November 2014**

**Determination  
Promulgated  
On 25 November 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE E B GRANT**

**Between**

**KRISHNA G M  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Fripp, Counsel

For the Respondent: Ms J Isherwood, Counsel

**DECISION AND REASONS**

**The Background to this Appeal**

1. On 19 September 2014 following the grant of permission to appeal this appeal came before me and in an error of law decision promulgated on 2 October 2014 I set out the background and made findings as follows:

***"The Background to this Appeal***

2. *The appellant arrived in the United Kingdom on 15 September 2009 with leave to enter as a Tier 4 Student valid until 20 August 2010. He was subsequently granted an extension of stay for post-study work valid to 24 February 2013. On 7 February 2013 he applied for leave to remain on the basis of his private life in the United Kingdom. This application was refused on 18 October 2013 when the respondent made a decision to refuse to vary leave to remain in the United Kingdom and to remove by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.*
3. *The appellant appealed that decision which came before First-tier Tribunal Judge Oliver and in a determination promulgated on 26 April 2014 the judge found in a very brief determination, at paragraphs 5 to 9 the following:*
  5. *The appellant confirmed the truth and accuracy of his witness statements, dated 6 February 2014 and 20 March 2014. He gave details of his current employer. His father had passed away last year. He wanted to remain in the United Kingdom because he had been persecuted by political gangs whom he had refused to join. He had been wrongly blamed for the death of a member of one of the political gangs. When he left home for Kathmandu he had been stabbed in the chest and hip by a friend of the gang member.*
  6. *In cross-examination he was asked why there was no mention in his witness statement of February 2014 of the stabbing incident in 2009 in Kathmandu. He replied that he had mentioned it to the police and he referred to the medical report. Asked why documents had not been passed to the respondent, he explained that he had given all his documents to his solicitors. It had taken a long time to get the documents from his father's friend. Asked whether he really wished to make an asylum claim, he said that the process was taking too long and he wished to go with this application. He did not want to take another process to extend this. He had not claimed asylum in 2009 because he was living here legally.*
  7. *His documentary evidence included two character references and copies of the death certificate of his father and hospital documents in respect of his admission in 2009.*
  8. *The onus is on the appellant in immigration appeals to prove his or her case on the balance of probabilities.*
  9. *The appellant has chosen not to make an asylum claim and his application has been considered properly only within the terms expressed in the letter which accompanied the application. The appellant has been in the United Kingdom for only a short while and at no time has his leave been anything other than temporary. In that short space of time he cannot have lost cultural ties with his country and his claim in the application form that he has no contact with anyone there was undermined by his evidence at the hearing that he did still have contact with friends. He cannot meet the requirements of paragraph 276ADE by a very long way and I can find nothing which would qualify as a compelling reason to consider his article 8 private life in any wide context (**Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640**).*

**The Grant of Permission to Appeal**

4. *On 2 August 2014 Upper Tribunal Judge McGeachy granted permission to appeal for the following reasons:*
  1. *The grounds of appeal have been drafted by the appellant who states that his barrister had not attended the resumed hearing and that he should be granted a right of appeal. He appears to claim that both articles 3 and 8 of the ECHR were in issue.*
  2. *There are clear procedures for which must be complied with by those who wish to seek asylum here. However, Article 3 of the ECHR was raised by the appellant's solicitors in their letter of 6 February and the record of proceedings of Judge Khan dated 12 February indicates that the appeal was adjourned for the respondent to consider issuing a supplementary refusal letter.*
  3. *In these circumstances the grounds of appeal are arguable.*
  4. *If the appellant wishes to claim asylum he should do so now and if he does not he should be prepared to explain at the hearing of this appeal why he has not done so.'*

#### **Discussion and Decision**

5. *Mr Jarvis rightly conceded before me that the appellant had raised as an issue before the judge his claim under Article 3 both in the grounds of appeal and in evidence before the Tribunal (see paragraph 5 of the determination). The judge made no findings on that claim and it can be seen that at paragraph 9 he only dealt with Article 8.*
6. *In the light of the concession by the Presenting Officer I agreed that the judge had erred in law in failing to make findings on the evidence placed before him and his determination must be set aside.*
7. *The FTTJ did make findings in relation to the Article 8 appeal which are not challenged. The findings in respect of Article 8 are preserved.*

#### **Conclusions**

8. *The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.*
  9. *I set aside the decision to be remade at a fresh hearing of the appeal before me in the Upper Tribunal."*
2. Thus the matter came back before me. As a preliminary issue Ms Isherwood raised the point that Mr Fripp's skeleton argument contained submissions with regard to Article 8 but Article 8 was not before the Tribunal. I confirmed that Article 8 was not before the Tribunal and the issue before me was to decide the Article 3 appeal which had not been determined by the First-tier Tribunal Judge.

#### **The Evidence**

3. The appellant's claim is set out in his witness statement which is at pages 2A to 2F of the appellant's bundle of documents and I set out that witness statement insofar as it relates to Article 3 below.

*"I, Krishna G M of 5B Calderwood Street, Woolwich Arsenal, SE18 6QW, hereby state as follows in my Witness Statement in support of my appeal to the Immigration and Asylum Upper Tribunal:-*

1. *I am the Appellant above named. I am a national of Nepal born on 31/07/1985.*
2. *I first arrived in the United Kingdom on 15/09/2009 on Tier 4 (General) Student visa which was valid until 01/08/2010.*
3. *.....*

**My claim under Article 3 of ECHR:**

15. *I also currently fear for my life as I believe that there is still life threatening situations for me due to my family's past political associations. I believe that I will be physically assaulted or killed by my associated enemies or political gang members upon my return to Nepal.*
16. *My father, Jagat Bahadur Gharti Magar was a district political leader of Rastriya Prajatantra Party Nepal and then left his active party involvement in 2004.*
17. *My family then had to relocate twice from Seram Village Development Committee Rolpa to Tribhuvan Nagar Municipality (now, Ghorahi Municipality) dang in 2004 and from there to Kathmandu in 2008. The reason for the relocation was due to the confinement of family free movement and social-political approach and involvement by social-political affiliated gangs.*
18. *In 2008, when the political gangs (young communist league) forcefully wanted to recruit me in to their political mainstream imposing political agendas, we refused and refuted the physical assaults which turned into fights. After a few days, a guy in the fight died accidentally and the gangs blamed me for his death.*
19. *We had made several complains to the police and requested for the protection and justice from the political gangs but no actions were taken because of the political protection and movement as the police were a part of the local and central government.*
20. *Eventually even after moving to the capital city of Kathmandu, I was fatally injured by the gangs in 2009. The political state was in transitional phase with interim constitution on draft. There was a chaos in the country with no law and order. The country is still in transitional phase and constitution assembly is taking place.*
21. *For the reasons stated above, I left Nepal and came to the UK to complete my Studies as my father wanted a safe and secure future for me.*
22. *As stated above, I have no family members back in Nepal. I have not been to Nepal since I left the country in 2009 and I no longer have any social, cultural or family ties with Nepal. At this stage, I am very vulnerable as my life will be in danger, if I am returned to Nepal for the reasons stated above while I also no longer have any family members to return to in Nepal who will be able to protect me against these threats to my life. I fear for my life as I will be an easy target based on the current news I hear about Nepal from the Nepalese community in the UK. I am informed that the political gang members and their family are still looking for me in order to revenge the death of the gang member who died during a fight.*

**My explanation as to why I did not claim asylum:**

23. *I did not raise any specific claim under the Refugee Convention and for that reason and also because I was living in the UK legally all this time and did not have any reason or grounds under the Refugee Convention to claim asylum, I therefore did not claim asylum. I believe that my claim is under Article 3 of ECHR as opposed to an asylum claim.*
24. *Since my arrival in the United Kingdom, I feel very safe and secure and I am able to live a peaceful life without any fear which will not be possible, if I am returned to Nepal.*
25. *In light of above, I humbly request the Immigration and Asylum Upper Tribunal to allow my appeal."*

4. In a witness statement dated 10 March 2014 the appellant gave the following evidence in relation to Article 3:

***"I, Krishna G M of 5B Calderwood Street, Woolwich, London SE18 6QW make this statement in relation to my appeal hearing:***

1. *I confirm, endorse, adopt and accept the contents of my previous statement dated 06/02/2014.*
2. *I confirm that I have been residing continuously in the country since my arrival in 2009.*
3. *I confirm that I am sufficiently supporting myself in the country through my job and have been contributing to the economy.*
4. *I confirm that I have a well-founded fear of persecution on account of my perceived political opinion, namely that I am son of a former district political leader of the RPP.*
5. *I confirm that I have been persecuted for that reason in the past, by way of severe mistreatment.*
6. *I confirm that I still have scars on my body from the attack at our family home in 2007.*
7. *My past persecution is an indicator that I will be persecuted in the future as well by the same group.*
8. *I confirm I will be physically assaulted or killed by my associated enemies and political gang members upon my return.*
9. *I confirm that my father was a district political leader of Rasriya Prajantra Party (PPP) Nepal and then he left his party involvement in 2004.*
10. *I confirm that I along with my family had to relocate twice from Seram VDC, Ropla to Tribhuvan Nagar Palika 8, Dang in 2004 and from there to Kathmandu in 2008.*
11. *The reason of the relocation was due to confinement of family free movement and social-political approach.*
12. *I confirm that in 2008, when the political gangs (young communist league) forcefully wanted to recruit me in their political mainstream imposing political*

*agendas. I refused to join their group and disapproved the physical assaults which turned into fights. As a result of these fights, one person from the gang died accidentally and the deceased's companions blamed me for the sudden death.*

13. *I confirm that I have made several complaints to the police and public authorities. I demanded for the protection and justice from the political gang but no actions were taken. This is because the political protection and movement are part of the local and central government.*
14. *Even after I moved to the capital city Kathmandu, I was severely injured to death by gangs in 2009. The political state was in transitional phase with interim constitution on draft. There was a chaos in the country with no law and order. I confirm that the country is still in transitional phase and constitution assembly is taking place.*
15. *I confirm that for the incidents and reasons stated above I fled Nepal and came to the UK to complete my studies as my father wanted a safe and secure future for me.*
16. *I confirm that my father Mr. Jagat Bhadur Gharti Magar passed away on 13/05/2013. My mother is also deceased. I have only one elder brother who is currently present and settled in Belgium. He is an EEA national.*
17. *I confirm that I have no family remaining in Nepal. I confirm that I have not returned to Nepal since my arrival in the UK.*
18. *I confirm that if I am returned to Nepal my life will be more vulnerable and I will be an easy target for the political gangs as my father passed away and I will have no support or protection from anyone.*
19. *In the light of the above, there is insufficient protection available from those who have previously persecuted me and my family.*
20. *I confirm that the option of internal relocation is also not viable option as I along with my family previously relocated and continued to be persecuted.*
21. *.....*

*I therefore, request the honourable judge to allow and consider my appeal as I have exceptional and compassionate circumstances."*

5. In examination-in-chief the appellant gave evidence in the terms of his two witness statements and largely repeated what is contained therein. In cross-examination the appellant was questioned about the documents lodged with the additional witness statement which include evidence from Bir Hospital and evidence from the Deputy Superintendent of Police dated August 23 2013. The appellant was asked why the police report refers to an attack in May 2009 whereas the medical evidence refers to an admission in February, not May. The appellant's explanation was that the date on the hospital records is shown as a Nepalese date under the Nepalese calendar and that there is no discrepancy at all between the two items.
6. The appellant was unable to explain why the assault mentioned in his additional witness statement at paragraph 6 (an attack at the family home

in 2007) was not mentioned on the police report. The appellant was cross-examined about discrepancies between his account of reporting on several occasions to the police and the police report which seems to refer to no more than two matters. The appellant could not give any cogent explanation.

## **Submissions**

7. Submissions for the appellant with regard to Article 3 are set out in paragraphs 5 to 7 of Mr Fripp's skeleton argument which I set out below:

- "5. *In Soering v United Kingdom no 14038/88; [1989] ECHR 14; [1989] 11 EHRR 439, the ECtHR found an implied prohibition of refoulement in article 3 ECHR by reference to the 'death row phenomenon', involving prolonged detention prior to execution. It was held that there was an absolute prohibition against removing the applicant given the prospect of a breach of article 3 ECHR. Since Soering the Strasbourg Court has found that article 3 ECHR may be engaged by expulsion, including deportation on national security grounds: Cruz Varas & Ors v Sweden no 15576/89; [1991] ECHR 26; (1991) 14 EHRR 1; Vilvarajah v United Kingdom no 13163/87; 13164/87; 13165/87; [1991] ECHR 47; (1991) 14 EHRR 248; Chahal v United Kingdom no 22414/93; [1996] ECHR 54; (1996) 23 EHRR 413; Hilal v United Kingdom no 45276/99; [2001] ECHR 214; (2001) 33 EHRR 2. It has also been applied to risks attending removals of asylum seekers or refugees to other signatories under common framework agreements for the distribution of responsibility for asylum claims. See, in the domestic context, EM (Eritrea) v SSHD [2014] UKSC 12 per Lord Kerr, with whom the four other members of the Court agreed, at [3] and [58].*
6. *The Court has held that the burden of proof only initially rests on the applicant to adduce evidence 'capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3': N v Finland no 38885/02 (2006) 43 EHRR 12, [167]; NA. v United Kingdom no 25904/07 [2008] ECHR 616; (2009) 48 EHRR 15, [111].*
7. *In the present case the question which arises is whether there such grounds arise in relation to the Appellant in Nepal. He will argue that on the facts such a risk does arise."*

## **The Respondent's Submissions**

8. There is no refusal letter dealing with Article 3 because the appellant never made a claim for asylum and Article 3 protection. In oral submissions Ms Isherwood submitted that the appellant is not a credible witness and that there is no risk to him upon return to Nepal. She submitted that a genuine person in need of international human rights protection would have claimed it at the earliest possible opportunity yet this appellant failed to do so. His claim should be considered in the light of his immigration history and his failure to bring himself to the attention of the respondent by making a claim for asylum. She pointed out that there are significant discrepancies in the documents adduced by the appellant and no weight should be attached to them.

## **Decision**

9. I have no difficulty in finding that the appellant is not a credible witness and I adopt the words of Harrison LJ in **R (App. Sadia Abdi) v Secretary of State for the Home Department [2003] EWHC 2921** and find that the appellant has told “a pack of lies” in support of his Article 3 claim.
10. A genuine claimant in need of human rights protection would have made his claim at the earliest possible opportunity yet the appellant consistently failed to do so and declined to make a claim for asylum to enable the respondent to examine his case when specifically invited to do so after he intimated his Article 3 claim before FTTJ Oliver. His explanation for his failure to do so was that he was lawfully in the United Kingdom and did not need to do so is not credible. I find that the appellant did not make a claim for asylum because his claim is so flimsy and so vague that he faced the real prospect of his claim being allocated to the Detained Fast Track Procedure.
11. I find the appellant to be a vague and evasive witness who could not give any real particulars of his claim when questioned in cross-examination. His claim to have been the victim of an attack in reprisal for an accidental killing and to be at continual risk on return is completely undermined, not only by the delay in making the claim at all but also by the vagueness of his account and by the significant discrepancies as demonstrated by the supporting documents produced by him with his additional witness statement. His explanation of a date being written in the Nepali calendar to explain away the discrepancies in variously the hospital dates compared to the police report date and his account of an attack in May 2009 is simply not credible. The Nepali calendar is a lunisolar Hindu calendar used in Nepal for both civil and religious purposes. The year begins in the month Baishakh usually around 14 April. The official Nepali calendar follows Bikram Samwat (BS) and the BS year is 56.7 years ahead of the Western Gregorian calendar. Thus the Gregorian year 2000 is the Nepali year 2056.
12. The Nepali language is written in the devanagari script not roman numerals. The appellant’s claim that the Bir Hospital date is a Nepali date is patently and transparently false. The date is shown as 2011/2/09. The police report and the appellant’s claim refers to an event in May 2009 but makes no mention of another attack the appellant says left scars on his body in 2007. The May date is inconsistent with the date given in the hospital notes supposedly relating to the same attack. I find as a matter of fact that these documents have been fabricated to support the appellant’s claim and no reliance can be placed upon them.
13. In summary I find the appellant has not told the truth about events in Nepal, that his immigration history, the use of fabricated documents and his overall evidence demonstrates that he is a witness of no credibility upon whom no reliance can be placed. I find as a matter of fact that he is not at risk upon return to Nepal as alleged or at all.

### **Notice of Decision**



I set aside the decision of the First-tier Tribunal.  
I remake the decision of the FTTJ by dismissing the Article 3 appeal.  
The Article 8 appeal was dismissed by the First-tier Tribunal and those findings are maintained.

No anonymity order is made.

Signed

13 November 2014

Judge E B Grant  
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

13 November 2014

Judge E B Grant  
Deputy Upper Tribunal Judge