



IAC-AH-DP-V1

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

Appeal Number: IA/42137/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6<sup>th</sup> April 2016**

**Decision &  
Promulgated  
On 28<sup>th</sup> April 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**H G  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Uppal, Glen Solicitors, London

For the Respondent: Ms Willocks-Briscoe, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Nepal born on [ ] 1988. He appealed against the decision of the Respondent dated 6<sup>th</sup> October 2014 refusing his application for leave to remain in the United Kingdom as the partner of a relevant points-based system migrant and deciding, pursuant to Section 47 of the Immigration, Asylum and Nationality Act 2006, that he would be removed when his existing leave to remain expired. His appeal was heard by Judge of the First-tier Tribunal Higgins on 5<sup>th</sup> August 2015. The appeal was dismissed in a decision promulgated on 8<sup>th</sup> September 2015.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Hollingworth on 4<sup>th</sup> February 2016. The permission states that it is arguable that the judge should have made findings of fact in the context of the Appellant's wife's ability or

inability to travel due to being in the last stage of pregnancy and the fact that she had no relatives in the United Kingdom save for her husband and that it is arguable that in the absence of these findings the reference by the judge at paragraph 16 of the decision, to the issue of whether the Appellant's wife chose to remain in the United Kingdom, was a reference to a state of affairs without a foundation of findings in fact. The permission goes on to state that the reference by the judge at paragraph 17 of the decision to his conclusion that the Appellant's wife might reasonably be expected to return to Nepal with the Appellant is equally arguable on the footing that the judge did not set out sufficient findings of fact in order to reach this conclusion.

### **The Hearing**

3. The Appellant's representative submitted that he is relying on the permission. He submitted that there is an error of law in the First-tier Judge's decision as normally short term leave would have been granted to the Appellant by the Judge in the circumstances of this case but the Judge did not even consider this. He submitted that the child has now been born so Section 55 applies. He submitted that at the hearing the Presenting Officer submitted that given the circumstances the Appellant could have been granted short term leave and he submitted that there is an error of law in the decision. The representative submitted that the case should be remitted back to the Respondent for reconsideration on compassionate grounds. He submitted that that was put to the judge at the First-tier hearing. He submitted that since 2015 there has been a blockade in Nepal so there is evidence of hardship for the Appellant's child if the family have to return to Nepal. I put to the Appellant's representative that this is an error of law hearing. At the date of the hearing the child had not been born and so could not be taken into account and it is clear from the decision that the judge was aware of the Appellant's wife's pregnancy. In these circumstances Section 55 does not apply.
4. The representative submitted that short term leave should have been granted to the Appellant and not to do so was an error of law.
5. I was asked to consider the terms of the grant of permission. I was told the appellant's bundle may not have been before the First-tier Tribunal Judge.
6. The only items in the appellant's bundle are his witness statement, a copy of his passport and visas, his wife's residence permit and a maternity certificate. Even if these papers were not before the judge I find that he had sufficient evidence before him to make a reasoned judgment. His decision makes it clear that he is aware of the pregnancy and the facts in this case.
7. The Presenting Officer made her submissions submitting that as the child was not born at the date of the hearing Section 55 should not be taken into account as it is not relevant. She submitted that the Judge was clearly

aware of the pregnancy as it is referred to at paragraphs 13 and 14 of the decision.

8. With regard to the concession which the representative of the Appellant states was made by the Presenting Officer relating to short term leave, she submitted that there is nothing to indicate that a concession was made. I asked if there is anything in the Record of Proceedings of the Presenting Officer and she said that there is not. She submitted that the representative's submission relating to hardship on return to Nepal has arisen only since the decision was made.
9. The Presenting Officer submitted that there is nothing to indicate that the Appellant's wife will be unable to look after the child if the Appellant is not in the United Kingdom. The burden of proof relating to this is on the Appellant. She submitted that the Appellant's partner, now that she has had the child, can return but she does have permission to remain in the United Kingdom and it is up to her whether she decides to return to Nepal with the Appellant or stay with her child in the United Kingdom. She submitted that the First-tier Judge considered both positions.
10. The Presenting Officer submitted that the decision made by the First-tier Judge was open to him. She submitted that adequate reasons were given in the decision for refusing the claim under Article 8.
11. She submitted that there is no error of law in the First-tier Judge's decision.
12. The Appellant's representative had no further submissions to make.

### **Decision and Reasons**

13. This Appellant has always had leave to remain in the United Kingdom with his wife who came as a student on 1<sup>st</sup> February 2010. On 12<sup>th</sup> August 2014 the Appellant's wife made an application as a Tier 4 Student including the Appellant in her application as her dependant but although she was granted leave the Appellant was not granted leave because Westminster Academy was not a body in receipt of funding as a higher education institution. His wife was a Tier 1 (Post-Study Work) Migrant when she applied. The relevant paragraph of the Rules is 319C. The Appellant's contention is that he satisfied paragraph 319C(iv). He also made a human rights claim because his wife was pregnant. She became pregnant after the application was made. The Appellant was seeking leave to remain on compassionate grounds.
14. At paragraph 11 of the decision the First-tier Judge rejects the submissions of the Appellant's representative that sub-paragraph 319C(iv) is satisfied, as the Appellant and his wife made their applications when she was a Tier 1 (Post-Study Migrant) and he was the partner of a Tier 1 (Post-Study Migrant) during the three months prior to making their applications. It is clear that the claim cannot succeed under the Rules.

15. The Respondent was under no obligation to grant a short period of discretionary leave on compassionate grounds. I have considered the Record of Proceedings on my file and can see no concession by the Presenting Officer on this basis. A child was conceived after the Respondent's decisions were made in October 2014 and at the date of the hearing the child had not been born. Section 55 therefore cannot be considered and it was open to the judge to find that the Appellant's removal would not interfere with the family life he enjoys with his wife as she might reasonably be expected to return to Nepal with him. The judge not only considered this but also considered the fact that as she still has leave to remain she might choose to remain in the United Kingdom without the Appellant. This is a matter of her choice.
16. The situation in Nepal has happened since the decisions were made and affect the return of the child who was not born when the decisions were made.
17. The judge has properly considered Section 19 of the Immigration Act 2014, Article 8 and Part 5A of the Nationality, Immigration and Asylum Act 2002 sections 117A-D. The First-tier Judge refers to the Appellant's private life in the United Kingdom being established during periods when his continued presence in the United Kingdom was precarious.
18. The decision makes it clear that the First-tier Judge was aware of the Appellant's wife's pregnancy and her due date for the birth and I find that based on what was before him the judge was entitled to come to the decision he did on the Immigration Rules and on discretionary leave.

### **Notice of Decision**

There is no material error of law in the decision of Judge of the First-tier Tribunal Higgins promulgated on 8<sup>th</sup> September 2015.

This decision must stand and the Appellant's appeal is dismissed.

Anonymity has been directed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray

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

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

Signed

Date

Deputy Upper Tribunal Judge I A M Murray