



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04285/2020

THE IMMIGRATION ACTS

Heard at Field House
On 7th December 2021

Determination Promulgated
On 16th December 2021

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

RB
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, of Counsel, instructed by Irvine Thanvi Natas
Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal born in 1987. He arrived in the UK as a student in January 2010 with leave to enter as a Tier 4 student migrant. His leave to remain as a student expired on 31st May 2013, and he then overstayed. He went to a police station to claim asylum in July 2017, and formally made a claim on 22nd

August 2017. His asylum and human rights claim was refused on 24th July 2020. His appeal against this decision was dismissed by First-tier Tribunal Judge Isaacs in a determination promulgated on the 6th April 2021.

2. Permission to appeal was granted by Upper Tribunal Judge Kamara on 27th September 2021 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider whether it would be unduly harsh for the appellant to relocate within Nepal to avoid persecution in the form of forced marriage on account of his sexuality given that he has mental health issues and is HIV positive. Further, it was found to be arguable that the First-tier Tribunal erred in law in failing to consider why the appellant would live discreetly in Nepal, and thus it was found to be arguable that there was a failure to properly apply HJ (Iran) v SSHD [2010] UKSC 31.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether the decision and any findings should be set aside.

Submissions – Error of Law

4. In the grounds of appeal and oral submissions of Mr Briddock it is argued, in summary, that firstly the First-tier Tribunal erred in law by not considering whether it would be unreasonable or unduly harsh for the appellant to have to internally relocate away from his home area where he was found to face forced marriage. The appellant would, it is argued, find it unduly harsh to relocate as he would face discrimination against gay people and due to HIV status in the context of his having mental health issues. Secondly, it is argued, that the First-tier Tribunal misapplied HJ (Iran). This is because at paragraph 65 of the decision the First-tier Tribunal considers how the appellant lives as a gay man in the UK and this is not part of the test, instead what must be considered is how he would live if returned to his home country, and whether he would act discreetly and conceal his sexuality due to a fear of persecution.
5. In the Rule 24 notice by Mr Avery and in oral submissions from Mr Duffy, for the respondent, it is argued that the second ground is not arguable because the conclusion was that there was no evidence of persecution, although there might be harassment and discrimination, of openly gay men in Nepal. As such there was no reason to go on to consider how the appellant would live in that country. With respect to the first ground it is argued that there would be no difference for the appellant resettling in an area outside the home area so there was no issue of internal relocation being unduly harsh. This was also clear from the consideration of the appeal by reference to paragraph 276ADE(1)(vi) of the Immigration Rules, and which found that the appellant would not have very significant issues with integration if he were to return to Nepal.
6. I informed the parties that I found that the First-tier Tribunal had erred in law as contended in the first ground of appeal for the reasons I now set out in writing below. It was agreed that whilst the decision dismissing the appeal needed to be set aside all of the factual findings of the First-tier Tribunal could be retained, and

so it was retained that there was a real risk of harm from forced marriage on return to Nepal for the appellant in his home area; that there was no real risk of serious harm on the basis of the appellant's sexuality; and the private life findings with respect to his not having very significant obstacles to integration in Nepal if returned as single man and the family life findings with respect to the genuine nature of his relationship with his partner JM in the UK. It was agreed by both parties that both the decision under the Refugee Convention/ Article 3 ECHR and Article 8 ECHR should be set aside.

7. Mr Briddock referred to the Rule 15(2A) application made by the appellant's solicitors to admit new evidence for the remaking hearing. This evidence showed that the appellant had married his partner JM on 4th August 2021, was cohabiting with him and provided evidence of JM's income. Mr Duffy confirmed that he consented to this new matter being argued and to the evidence of the marriage, cohabitation and the appellant's husband's earnings (in the form of payslips) being admitted. I therefore admitted this evidence. Mr Briddock did not wish to call further oral evidence (although the appellant and his husband were both present) and so the remaking hearing proceeded with both legal representatives making submissions. At the end of the hearing I formally reserved my determination but explained to the appellant that as Mr Duffy had conceded that he was entitled to succeed on Article 8 ECHR grounds he would succeed in his appeal on this basis.

Conclusions – Error of Law

8. It is accepted by the First-tier Tribunal, and the respondent, that the appellant is a gay man, as set out at paragraph 12 of the decision. It is not accepted by the First-tier Tribunal that the appellant has a well-founded fear of physical violence from his family in his home area. However, at paragraph 35 of the decision, it is found that he has a well-founded fear of forced heterosexual marriage; and at paragraph 66 of the decision it is clearly found, with unarguably sufficient reasoning, that this fear does not extend beyond his home area and that he would not be in danger of such persecution if he were to internally relocate to Kathmandu or another urban area.
9. At paragraph 36 the First-tier Tribunal states that the question arises as to whether "it is possible for the appellant to relocate elsewhere and live as a gay man in Nepal". This is the correct issue, but not the correct test: the question should have been whether it was reasonable to expect him to relocate internally or whether it would be unduly harsh to expect him to do so. I find therefore that the First-tier Tribunal erred in law in the statement of the relevant legal test for internal relocation.
10. The First-tier Tribunal then goes on to look at whether the situation for gay people in Nepal is as good as the "exemplar" constitution position, with consideration being given to an expert report from Mr Gurung and the other country or origin materials. At paragraph 65 of the decision it is concluded that there is low risk of

official discrimination and violence, and a moderate risk of societal discrimination but no real risk of persecution based on the appellant being a gay man.

11. I agree with the submission of the respondent in relation to the second ground of appeal brought by the appellant with respect to the test for persecution on grounds of sexuality as set out in HJ (Iran). As it is rationally concluded at paragraph 65 of the decision that the treatment of openly gay people in Nepal does not amount to persecution then there was no need to move on to the issue of what the appellant would do if he returned to Nepal, so any arguable errors with respect to this consideration are not material errors.
12. With respect to the first ground of appeal I find however that there is an error of law in failing to apply the correct legal test, as I have set out at paragraph 9 above. I also find that the First-tier Tribunal erred by failing to provide sufficient reasons why it would be reasonable to expect/ not unduly harsh for the appellant to relocate to Kathmandu or another urban centre at paragraph 67 of the decision. No reasons are given beyond the First-tier Tribunal saying that he would not suffer persecution as a gay man. There is no consideration or reasoning relating to material issues, on which there was evidence before the First-tier Tribunal, such as whether the found issue of societal discrimination, the appellant's physical and mental health, or economic and social issues made relocation unreasonable.
13. The First-tier Tribunal does then go on to consider the Article 8 ECHR appeal with reference to paragraph 276ADE(1)(vi) of the Immigration Rules at paragraphs 68 to 73 of the decision, and it is the contention of the respondent that any errors of reasoning or failure to consider material factors in relation to internal relocation are immaterial as this section of the decision makes the relevant findings. I find however that this is applying the material to a different legal test, namely whether there would be very significant obstacles to integration, and that this was therefore not sufficient to say that there was no material error of law in the decision.

Submissions - Remaking

14. Mr Briddock argued that the appellant was entitled to succeed in his refugee appeal on the basis that it would be unduly harsh for him to have to relocate to Kathmandu or another urban centre because the findings of the First-tier Tribunal were that there was an element of societal harassment, discrimination and a low risk of violence towards gay men in Nepal and because the appellant suffers from mental health problems that have been caused by exposure to this level of harassment and discrimination on grounds of his sexuality. In this context it would not be reasonable to expect him to relocate internally in Nepal. The medical letter of 12th February 2021 from Guy's and St Thomas' hospital outlines that the appellant has had self-harming behaviours which originated due to this experience, and that he had received eight hospital therapy sessions as a result.
15. Mr Briddock argued that the appellant was entitled to succeed in his Article 8 ECHR appeal because he could now meet the Immigration Rules at paragraph

EX.1 of Appendix FM. This was because, unlike when the hearing took place before the First-tier Tribunal, the appellant was now married to his partner. It was submitted that there would be insurmountable obstacles to family life taking place in Nepal because of the accepted societal harassment and discrimination in Nepal which would be amplified by the fact that the appellant would be clearly living with his husband as a couple. Mr Briddock also suggested that there might be an element of a Chikwamba argument as the documentary evidence shows that the appellant's husband can assist him meet the financial part of the Immigration Rules requiring earnings of more than £18,600 p.a., but Mr Briddock also accepted that the rest of the evidential requirements were not shown to be met by the evidence before me, so ultimately it could not be shown that all of the requirements for entry clearance as a partner under the Immigration Rules were clearly met.

16. Mr Duffy argued that the level of harshness the appellant would face if he relocated within Nepal away from his home area was not sufficient to meet the AH(Sudan) v Secretary of State [2007] UKHL 49 test: the elements of discrimination and harassment were simply not serious enough. The asylum appeal should therefore be dismissed. He accepted however that the level of harshness sufficed to meet the test of insurmountable obstacles to family life as the appellant's husband is a British citizen and it had been found by the First-tier Tribunal that living in Nepal would entail levels of discrimination and harassment which he accepted would amount to very serious hardship for the appellant's husband. As a result Mr Duffy accepted that the EX 1 family life Immigration Rules were met and the Article 8 ECHR appeal should be allowed by reference to the Immigration Rules at Appendix FM.

Conclusions - Remaking

17. I find that the appellant is entitled to succeed in his appeal under Article 8 ECHR by reference to EX.1 of Appendix FM of the Immigration Rules. It is conceded by Mr Duffy that there would be insurmountable obstacles to family life taking place in Nepal for the appellant and his British citizen husband as there would be very significant difficulties and very serious hardship for them living together as a married couple based on the findings of the First-tier Tribunal that they would experience a low risk of official discrimination and harassment and a moderate risk of societal discrimination as gay men. There are also no suitability issues raised under the Rules for the appellant and he is able to meet the required eligibility requirements stipulated under R-LTR1.1(d) of Appendix FM. Mr Duffy therefore properly conceded that the Article 8 ECHR appeal therefore succeeds with reference to Appendix FM of the Immigration Rules.
18. I find that the appellant and his husband have family life together as they are married and cohabiting, and that the appellant's removal would interfere with that family life. I find that there is no public interest in the removal of the appellant as he is able to meet the requirements of the Immigration Rules at Appendix FM as set out above. I find therefore that the appellant's removal is not

a proportionate interference with the appellant's family life, and he is entitled to succeed in his Article 8 ECHR appeal.

19. The test that must be applied with respect to whether the appellant can relocate internally within Nepal to escape the persecution that the First-tier Tribunal found he faced a real risk of in the form of forced marriage in his home area is: whether, as set out in [Januzi v. Secretary of State for the Home Department & Ors \[2006\] UKHL 5 \(15 February 2006\)](#), it would be unduly harsh for the appellant to have to internally relocate or put another way whether it would be reasonable to expect him to relocate to a place outside his home area. As cited in [AH \(Sudan\)](#) the question is whether the appellant could lead a relatively normal life without undue hardship with consideration given to all the circumstances pertaining to the appellant and judged by the standards that prevail in his country of origin. This is a holistic assessment which includes the appellant's physical and mental health.
20. As found by the First-tier Tribunal the appellant would have the benefit of financial support from his husband and has managed to support himself financially in the UK, and so would be able to do so if he were to relocate to Kathmandu. I find that the appellant has studied at an advanced level and has a degree in commerce from Nepal. He came to the UK to do a degree in hospitality and speaks good English. I find that he would not therefore face any hardship with respect to financially supporting himself or with respect to accommodation.
21. There are no submissions that the appellant would not be able to obtain the medication that he needs for his HIV. The appellant is reliant on Mirtazapine for his anxiety and depression, a drug which is available in Nepal. He does not currently rely upon any talking therapies. I accept the opinion of those who treated the appellant at Guy's and St Thomas' hospital between 2016 and 2018 that these conditions arose due to the homophobia he experienced in Nepal. I accept that the appellant is genuinely subjectively afraid that he would not be able to cope without his supportive UK social network and the generally more liberal public attitudes, and that therefore that he is genuinely subjectively afraid that return to Nepal would lead to a deterioration in his mental health. I accept that the appellant might possibly experience official discrimination and harassment and that he is at moderate risk of experiencing societal discrimination as a result of being gay in Nepal, as found by the First-tier Tribunal, and that he would therefore not feel as free in relation to the expression of his sexuality as he does in the UK.
22. Ultimately, I do not find however that the appellant has shown that there would be a real risk that his mental health would suffer any significant deterioration as a result of having to relocate within Nepal to Kathmandu or another urban centre. There is no evidence before me that he has suffered any sort of life-threatening mental ill-health at any point in his life. If he returned to live in Kathmandu, or another urban centre in Nepal, he would have the moral support of his husband and friends via social media from the UK; he would have medication to help reduce

his anxiety and depression; and he would not face other stressors such as homelessness or a lack of funds. I find that he could lead a relatively normal life in the context of the standards that prevail in his country of nationality. I therefore find that with respect to his protection claim he could reasonably be expected to relocate internally away from his home area to Kathmandu or another urban centre, and so he is not entitled to international protection under the Refugee Convention or Article 3 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal but preserve the factual findings as outlined above.
3. I re-make the appeal dismissing it under the Refugee Convention, and Article 3 ECHR.
4. I re-make the decision in the appeal by allowing it on Article 8 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 8th December 2021