



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41499/2013
IA/41500/2013

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2014

Determination Promulgated
On 9 December 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Ganga Bahadur Thapa
Anu Khapung Thapa
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr Z Malik, instructed by Malik Law Chambers
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, Ganga Bahadur Thapa, date of birth 2.12.81 and his wife, Anu Khapung Thapa, date of birth 25.8.87, are citizens of Nepal.
2. These are their appeals against the determination of First-tier Tribunal Judge Clapham promulgated 25.8.14, dismissing their linked appeals against the decisions

of the respondent, dated 26.9.13, to refuse their applications made on 28.8.13 for variation of leave to remain in the UK and to remove them from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 19.8.14.

3. First-tier Tribunal Judge Pooler granted permission to appeal on 25.8.14.
4. Thus the matter came before me on 27.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Clapham should be set aside.
6. The relevant background to the appeal can be briefly summarised as follows. The first appellant came to the UK in 2007 as a Tier 4 (General) Student. The second appellant came to the UK in 2008 as the dependant of the first appellant. Their leave was subsequently extended. On 7.3.11 the appellants were granted limited leave to remain in the UK until 30.8.13. The applications which are the subject of this appeal were made two days before the expiry of that leave. The appellants have no children.
7. The applications were made on the basis of private life in the UK, both under paragraph 276ADE and article 8 ECHR. In essence, the appellants claimed that after some 6-7 years in the UK they have both lost all ties to Nepal.
8. Having considered the evidence and the appellants' circumstances, Judge Clapham found that they failed to meet the requirements of the Immigration Rules (§22) and considering the proportionality of the decision outside the Rules under article 8, found that the decisions to remove were not disproportionate.
9. In summary, the application for permission to appeal submits that the judge of the First-tier Tribunal erred in law by:
 - (a) failing to make a rounded assessment of the appellants' ties to Nepal;
 - (b) failing to consider the respondent's policy on the assessment of such ties; and
 - (c) assuming that it was for the appellant to show that the decisions were disproportionate in terms of article 8.
10. In granting permission to appeal, Judge Pooler found that "The judge arguably erred in law, as alleged in the grounds, in his brief assessment at [21] of whether the appellants had no ties to Nepal. It is unlikely that his failure to consider the respondent's policy or his assessment of proportionality disclose a material error of law, but since permission is to be granted all grounds may be argued."
11. The Rule 24 response, dated 14.11.14, submitted that the judge directed himself appropriately and stated, "The IJ considers and finds at paragraph 21 that both

appellants given their involvement in Nepalese culture maintained ties in Nepal. This finding was open to the IJ to make.”

12. Mr Malik relied on Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC), to the effect that the meaning of ties in paragraph 399A, which has a similar requirement to 276ADE, imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. “Consideration of whether a person has ‘no ties’ to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to ‘social, cultural and family’ circumstances.” However, for the reasons set out below, I find not only that the judge did conduct a rounded assessment of the relevant circumstances, but that even if the decision were to be set aside and remade, no proper assessment of those circumstances would or could result in a finding that the appellants meet the requirements of paragraph 276ADE, so that the appellants have failed to demonstrate any material error of law in the decision of the First-tier Tribunal.
13. The reasoning for the finding at §22 that the appellants failed to establish that they had no ties to Nepal, including cultural, social or family, the then test under paragraph 276ADE, is set out in §21 of the decision. That the judge found that the appellants are citizens of Nepal is an inadequate reason, otherwise all applications under 276ADE would be bound to fail. It would have been relevant to point out the relatively short period of time in the UK and that they retain their native language. However, the judge relied on the appellants’ significant involvement in Nepalese cultural organisations to find that they retained a cultural tie to Nepal.
14. That evidence included many pages in the appellants’ bundle detailing the first appellant’s involvement in cultural events and organisations. These documents include a certificate of appreciation from the Kandara Performing Arts Centre and details of the London Himalaya film and cultural festival in 2011. A letter from the Pashupatinath Temple confirms that he is a prominent member of the Nepalese community in Charlton and an active volunteer at the temple, contributing immensely towards community events by singing and playing music to raise funds for the temple. He has also performed at a fund-raising event for the Help Nepal organisation. Most significantly, the appellant produced a letter from the Nepalese Embassy in London, dated 27.8.13, which states that he has been working in the Nepalese Community in the field of culture and music since 2007. The letter also states that he is a resident of Syangja, Nepal. Taken as a whole, this is cogent evidence that the appellants and in particular the first appellant have retained very strong ties to the culture of Nepal. Indeed, it would be hard to imagine better evidence of continuing cultural ties in the circumstances of an applicant under paragraph 276ADE.
15. Earlier in the decision the judge took into account the appellants’ witness statements and in particular that the second appellant has a mother and 5 siblings in Nepal. The witness statement of the first appellant reveals that his own father is living in Nepal. He claims that his father did not care for him or support him, but in his oral evidence he said that both parents attended his wedding in 2005. He claims to have no

siblings. At §27 the judge took into account the claim that the appellants had been ostracised by their respective families, but noted that families fall out for all kinds of reasons. That does not by itself demonstrate that there are not family ties. In my view, whether or not the family ties issue was adequately addressed by the First-tier Tribunal Judge, any objective assessment of the facts of this case would undoubtedly conclude that the appellants both retain family ties in Nepal.

16. In the circumstances, it is manifestly plain and obvious that the appellants cannot demonstrate, the burden being on them to do so, that they have lost all ties to Nepal, including cultural, social and family. It follows that I find no material error of law in this aspect of the determination.
17. In relation to policy, as referenced in §5 of the grounds, I see no basis for suggesting that application of such policy provisions as are there set out would or could have made any difference to the outcome of the appeals. I find that in effect the judge gave proper and careful consideration to those issues, even without there being any reference to policy. In the circumstances, I find no material error in this ground of appeal.
18. In relation to article 8, I agree that the judge was in error in suggesting that the burden was on the appellants to establish that the decisions were disproportionate. That burden is on the respondent, provided the appellants can first establish that the decisions constitute such a grave interference with their rights to private life as to engage article 8.
19. In any such an assessment, it has to be borne in mind that the appellants have not been in the UK very long, less than 7 years at the date of their application and the decision. Further, the fact that the appellants did not meet the Rules for leave to remain on the basis of private life is a factor that should be taken into account when assessing the public interest. Article 8 is not a shortcut to compliance with the Immigration Rules and the appellants could have had no legitimate expectation of being able to remain further in the UK except in strict compliance with Immigration Rules.
20. The judge took into account the claim that the appellants would not be able to obtain work in Nepal, but noted that the first appellant had worked as a musician in the UK and it had not been shown that he would not be able to work as a musician in Nepal. The judge accepted that the second appellant might not be able to work as a beautician in Nepal but noted that her good English would provide an advantage in the job market and that other work could be open to her. I find no error of law in this aspect of the decision of the First-tier Tribunal.
21. In relation to medical care, it is clear from the decision that the judge took some care to assess this issue and the first appellant's disabling condition, for which he had some sympathy. However, the judge found that the appellants had failed to demonstrate that medical care would not be available in Nepal. On the limited evidence available, that was a finding open to the judge.

22. Even though the judge applied the wrong burden of proof in relation to the issue of proportionality, I am satisfied that if the decision were to be set aside and remade applying the correct burden and standard of proof, it is inevitable that any judge properly directing himself on the available evidence would have to conclude that the decision was entirely proportionate and not disproportionate to the family and/or private life rights of the appellants under article 8 ECHR.
23. As students in the UK the appellants could have had no legitimate expectations of being able to remain, except in accordance with specific leave to do so.
24. In Nasim and others (article 8) [2014] UKUT 00025 (IAC), the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR in relation to private life as students. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity."
25. The panel considered at length article 8 in the context of work and studies. The respondent's case was that none of the appellants could demonstrate removal would have such grave consequences as to engage article 8. §57 of Patel stated, "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right... The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."
26. At §14 of Nasim [2014], the panel stated:

"Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control."

27. The panel pointed out that at this point on the continuum,

"the essential elements of the private life relied on will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country, (§15)" and (§20) recognised "its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation

arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

28. Applying the above guidance and case authority, there was no realistic basis for the appellants' appeals to succeed under article 8 ECHR in relation to either private or family life. In the circumstances, I find no error of law in this regard.

Conclusion & Decision:

29. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed on immigration and human rights grounds.



Signed:

Date: 5 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeals have been dismissed and thus there can be no fee award.

A handwritten signature in black ink, appearing to be 'J. Pickup', written in a cursive style.

Signed:

Date: 5 December 2014

Deputy Upper Tribunal Judge Pickup