



IAC-AH-SAR-V1

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

Appeal Number: IA/50175/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 16<sup>th</sup> March 2016**

**Decision & Reasons  
Promulgated**

**On 12<sup>th</sup> April 2016**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

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

**and**

**SUNIL SUNDAS  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

**Representation:**

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: Mr J Babarinde, Hatten Wyatt Solicitors

**DECISION AND REASONS**

1. This is the Secretary of State's appeal. However, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Nepal born on 6<sup>th</sup> August 1982. His appeal against the Respondent's decision to refuse leave to remain under Appendix FM of the Immigration Rules was allowed by First-tier Tribunal Judge Loughridge in a decision dated 23<sup>rd</sup> June 2015.
2. The Respondent appealed on the grounds that the judge had misdirected himself in law in concluding at paragraph 26

“Applying the relevant law to the established facts, I find that the decision of the Respondent is not in accordance with the law and the applicable Immigration Rules. It is absolutely clear that there are insurmountable obstacles to the Applicant and Mr Vincentski continuing their family life together in Nepal. Doing so is not even remotely realistic. The principal obstacle is that Nepal is a society which does not accept openly gay relationships and they would face significant difficulties if they cohabited and generally conducted themselves in public as a gay couple. These difficulties could not in my view be overcome or would entail very serious hardship in that they would have to hide their sexual orientation and conduct their relationship in a wholly clandestine manner.”

3. The Respondent submits that these findings are predicated on the Appellant being forced into a heterosexual marriage against his wish and having to conceal or suppress his sexual orientation, being the fundamental characteristics of his personality. It is submitted that the Appellant appears to be running a protection based argument or extraterritorial Article 8 against the lower threshold in the form of EX.1(b).
4. Secondly, it is submitted that the judge failed to give reasons or adequate reasons for a material matter, namely there was no background evidence that has been recorded in the determination to support his finding on the position of homosexuality in Nepal. There was no oral or documentary evidence recorded that the Appellant would be forced into a marriage against his will, should he relocate to Kathmandu.
5. Permission to appeal was granted by First-tier Tribunal Judge Molloy on 24<sup>th</sup> November 2015 for the following reasons:

“The grounds have merit in that they firstly suggest that the judge has effectively determined a protection claim based upon sexual orientation rather than apply the Immigration Rules under scrutiny with reference to insurmountable obstacles being evidenced to continuing family life overseas, and secondly suggest a failure to provide reasons and/or adequate reasons on material matters bearing in mind that the oral and documentary evidence which has been produced is not set out in the determination.

When reading the witness statements of the Appellant and his civil partner the case appears to have been advanced that neither of them would be able to enjoy family life in Nepal because of the recent earthquake in that country yet this is not mentioned in the judge’s decision at all. Those witness statements do not make reference to the couple facing sexual discrimination in Nepal because of their orientation, nor do they make reference to it not being possible for the couple to conduct themselves in public as a gay couple yet these matters are recorded in the determination.”

## Submissions

6. Mr Duffy stated that he did not rely on ground 1, namely whether the circumstances which were before the judge could amount to insurmountable obstacles. However, he relied on ground 2, namely the lack of reasons, because there was no reference anywhere in the determination to background material to support his finding that the Appellant and his partner would not be able to continue their private and family life on return to Nepal. There was no documentary evidence to support such a finding and there was no evidence in the witness statements to enable the judge to come to that conclusion. Accordingly, the judge had erred in law in failing to give reasons for such a finding or to demonstrate the evidence upon which he relied.
7. Mr Babarinde, who was present at the hearing before the First-tier Tribunal, submitted that there was evidence before the judge on which he came to the conclusions he did at paragraphs 13 and 14, namely:
  - “13. Although the law in Nepal accepts homosexuality, it is very different in practice in terms of society itself. Gay men are almost always forced into being bisexual, in other words they are almost always married and have to conduct their gay relationships in secret. This is the position throughout the country including the capital Kathmandu.
  14. In reality therefore it would not be possible for the Appellant and Mr Vincentski to be openly gay in Nepal.”
8. Mr Babarinde submitted that this evidence was given by the Appellant and his partner at the hearing and was recorded in the Record of Proceedings. Therefore, whilst there was no background material to support such a finding the judge was entitled to rely on the oral evidence given at the appeal, particularly having found that the Appellant’s relationship was credible on the basis of the oral evidence and documentary evidence before him.
9. It is also worth noting that the Respondent did not appear at the appeal hearing before the First-tier Tribunal and there was no cross-examination of the witness and no suggestion that the Appellant could live an openly gay life. It was for the judge to decide the appeal on the evidence which was before him.
10. Whilst Mr Babarinde accepted that there was no documentary evidence to show that the Appellant would be forced into being bisexual and into marrying, the judge was entitled to accept the oral evidence of the Appellant and therefore to conclude that there were insurmountable obstacles to family life continuing outside the UK. The judge was also

entitled to rely on the evidence of Mr Vincentski that there were insurmountable obstacles to him relocating to Nepal.

### Discussion and conclusions

11. Given the oral evidence which before the judge, his finding that there were insurmountable obstacles to family life continuing outside the UK was open to him on the evidence. Indeed, Mr Duffy does not seek to challenge that finding and has not pursued ground 1.
12. The Respondent challenges the judge's lack of reasons for coming to that conclusion. It is clear that the judge heard oral evidence from the Appellant and his partner. Although the judge did not set out the oral evidence, it was apparent from his findings that he accepted it. Any lack of reasoning was not material to the decision because there was evidence before the judge to enable him to come to the conclusions he did. It could not be said that his conclusions were perverse.
13. Accordingly, there was no material error of law in the decision of the First-tier Tribunal allowing the appeal under the Immigration Rules. The judge properly considered insurmountable obstacles and took into account all relevant evidence before him including the oral evidence of the Appellant and his partner. The judge was entitled to rely on such evidence in order to come to his conclusion that family life could not continue outside the UK or that it would entail very serious hardship for the Appellant or his partner.
14. I find that the judge properly applied the Immigration Rules to the facts as he found them and his findings were open to him on the evidence before him. There was no material error of law in the decision of 23<sup>rd</sup> June 2015 and the Respondent's appeal to the Upper Tribunal is dismissed.

### **Notice of decision**

Appeal dismissed

No anonymity direction is made.

**J Frances**

Signed

Date: 30<sup>th</sup> March 2016

Upper Tribunal Judge Frances