



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07781/2015
HU/07783/2015
HU/07780/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
on 29th July 2019 and
at Field House
on 20th September 2019

Decision & Reasons Promulgated

On 3rd October 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

KAMALA GAUTAM KANDEL
BHOJRAJ KANDEL
KABITA KANDEL

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Chohotu, Direct Access Counsel

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. I reached a decision on whether there was an error of law in the First-tier Tribunal's decision following a hearing at the Royal Courts of Justice on 29th July 2019 as follows:

ERROR OF LAW DECISION AND DIRECTIONS

“1. Kamala Kandel and Bhojraj Kandel are the mother and father respectively of Kiran Kandel¹ and Kabita Kandel. Kiran’s date of birth is 27 November 1996 and he was thus an adult when he made his human rights claim; Kabita’s date of birth is 2nd May 1999 and she was a minor when she made her human rights claim and a minor when it was refused and a minor on the date of the First-tier Tribunal hearing.

2. The appellants’ human rights claims were refused in separate decisions by the respondent for reasons set out in decisions dated 25th September 2015. All four appellants submitted separate appeals, but they were linked for hearing because they are a family.

3. Their appeals were dismissed by First-tier Tribunal Judge Malcolm for reasons set out in a decision promulgated on 5th July 2017 (incorrectly endorsed as promulgated on 5th June 2019). Permission to appeal was sought by each appellant and refused first by the First-tier Tribunal and then by the Upper Tribunal. An application for permission to judicially review the decision of the Upper Tribunal was sought and granted by Sir Stephen Silber and the Upper Tribunal then granted permission to appeal the First-tier Tribunal decision in all four appeals on 22nd May 2019. The appeals thus came before me.

...

Error of law

7. There are 3 appeals before me: HU/07781/2015 (Kamala Kandel), HU/07783/2015 (Bhojraj Kandel) and HU/07780/2015 (Kabita Kandel).

8. The grounds of appeal upon which permission to appeal has been granted are, in summary, as follows:

(i) It is arguable that the refusal by the First-tier Tribunal to grant an adjournment of the hearing to permit Kabita to give oral evidence was procedurally unfair;

(ii) It is arguable that the First-tier Tribunal judge incorrectly equated Kabita and her brother’s exceptional educational qualifications and academic talent with the ability to overcome the practical, social, financial and cultural challenges such that there would be no or no very significant obstacles to their reintegration to their country of origin;

(iii) It is arguable the First-tier Tribunal judge failed to undertake a ‘best interests’ assessment in connection with Kabita compounded by the fact that the First-tier Tribunal judge did not hear oral evidence from her;

(iv) It is arguable there were fundamental errors of fact by the First-tier Tribunal judge who referred to the appellants as coming from Sri Lanka whereas they are Nepalese; the incorrect understanding of their country of origin has, it is argued led to an incorrect assessment of the obstacles they would face on return to Nepal.

9. Mr Chhotu expanded on the grounds in particular by referring to the unfairness of the appeal proceeding without Kabita being given the opportunity to give oral evidence. It was unfair, he submitted, that she had

¹ Kiran Kandel has, I was informed on 20th September 2019, an application for leave to remain outstanding with the respondent. I was not provided with a copy of that application.

been forced to choose between taking an A-level exam that day and attending to give oral evidence in her appeal. It was offensive, he submitted, that her other family members should be presumed to be able to speak on her behalf and give the totality of the evidence that she would seek to give.

10. The references by the First-tier Tribunal Judge to Sri Lanka as oppose to Nepal confirmed, he submitted, that the judge had failed to give anxious scrutiny to the evidence before him and the context in which those references occurred illustrated that the judge had considered the evidence of reintegration in the context of the wrong country thus resulting in a flawed assessment.

11. Mr Melvin submitted that the First-tier Tribunal judge had correctly refused to grant an adjournment. The judge had accepted the content of her witness statement and there was no indication what else she would have wanted to say that was not in the papers before him or not available from the evidence of her other family members. She had arrived in the UK as a dependent of her parents; they had no sustainable argument why they could not return to Nepal and it followed, despite her exceptional educational achievements that having lived in Nepal previously as a family, having lived in the UK as a family, that all the appellants would and could return to Nepal as a family. There were no insurmountable obstacles, or obstacles, evident from the evidence before the First-tier Tribunal; if she wished to remain in the UK to study or work, then it was open to her to make the relevant application.

12. Mr Melvin submitted that the reference by the Judge to Sri Lanka rather than Nepal was not material. The references to Sri Lanka were in only 4 paragraphs; it was plain when the decision was read as a whole that the judge was considering Nepal and the return of the family to Nepal. The underlying issue was whether there were insurmountable obstacles to the family returning to Nepal; in these appeals on the evidence before the First-tier Tribunal it could not be concluded that such obstacles existed.

Discussion

13. There is considerable force in Mr Melvin's submissions that there was no indication what Kabita could or would have said if she had given oral evidence and thus it cannot be concluded that the First-tier Tribunal judge was procedurally unfair in refusing to grant an adjournment. The difficulty with that submission is that it is not for Kabita now, to say what she would have said then. The fact is that she was prevented from giving oral evidence in her appeal despite having reasonably asked for an adjournment because she had an A-level exam that day. I do not go so far as Mr Chhotu is saying that it was oppressive and unfair to 'force' her to choose. Nevertheless, the explanation provided why she could not attend the hearing was reasonable and at the very least arrangements could have been made for her to give her evidence later that day or on another day separate from her parents and brother. That such an arrangement was not even considered, and a decision taken by the First-tier Tribunal judge that other family members could speak for her was to negate the importance to her of her appeal.

14. Each of the family members has their own appeal; it is not one appeal with the other family members dependant on the outcome of that appeal. It is not inconceivable that one or more may have been successful and others

unsuccessful, given that each of their circumstances are different in some respects as well as similar in other respects. It is perhaps instructive that Kiran was in fact successful in his human rights claim because he was granted leave to remain for a period of time. Given that Kabita was in the middle of her A-levels such an outcome may have been the case for her as well had an adjournment been granted.

15. I am satisfied that the First-tier Tribunal judge erred in law in refusing to grant an adjournment, at least of Kabita's appeal hearing.

16. It seems that the appeals were presented as dependent upon each other, although whether this would have been the case if Kabita had given oral evidence is not clear. At the time of the appeal Kabita was a minor. If her appeal had been successful it is reasonable to conclude that her parents, because of her age, would also have been successful. I am therefore satisfied that the refusal by the First-tier Tribunal judge to grant an adjournment had, at that time, a material adverse impact on the outcome of the appeals of her parents.

17. In so far as the references by the First-tier Tribunal Judge to Sri Lanka are concerned I do not accept the submission of Mr Chhotu that they are material. As submitted by Mr Melvin, when the decision is read as a whole it is clear that the judge had Nepal in mind for all material purposes. That the judge failed to read through the decision once written is to be deprecated, but the conclusions overall are plainly reached in the context of Nepal.

18. In so far as it is submitted that the judge failed to have adequate regard to s55 and the best interest of Kabita, the judge considered s55 and reached a conclusion that was available to him on the evidence that was before him. But because that evidence did not include the oral evidence of Kabita, the conclusion reached was legally flawed.

19. I set aside the decisions reached by the First-tier Tribunal in the appeals of HU/07781/2015 (Kamala Kandel), HU/07783/2015 (Bhojraj Kandel) and HU/07780/2015 (Kabita Kandel). The decision of the First-tier Tribunal in the appeal HU/07773/2015 (Kiran Kandel) stands, the appeal having been abandoned.

Remaking the decision

20. Mr Chhotu submitted that if the decisions of the First-tier Tribunal are set aside, the appeals should be remitted to the First-tier Tribunal for hearing before a different First-tier Tribunal judge. I decline to remit to the First-tier Tribunal. The evidence of the parents and the brother is not contested and they each gave oral evidence before the First-tier Tribunal. The legal error has arisen because of the inability of the daughter to give oral evidence. The circumstances such as would lead to a remittal, as set out in the practice direction, do not arise.

Conclusions:

The making of the decisions of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decisions in the appeals of HU/07781/2015, HU/07783/2015 and HU/07780/2015. ...

Consequential Directions

- (i) ...
- (ii) Oral evidence of the appellant Kabita only;
...”

2. On 20th September 2019 I heard oral evidence from Kabita Kandel. I had before me the documents that were relied upon before the First-tier Tribunal judge and I heard oral submissions from both representatives.

Uncontested and undisputed evidence

3. Mrs Kandel entered the UK as a Tier 4 student on 4th February 2010. She has remained in the UK since that date with extended leave to remain until 2nd August 2015 and thereafter on 3C leave. Her husband, Mr Kandel, arrived in the UK as her dependant on 17th August 2010. He also remained in the UK with extended leave to remain until 2nd August 2015 and thereafter on 3C leave. Their eldest child, Kiran arrived with Kabita on 8th July 2011 as dependants of their mother; they also remained in the UK with leave to remain until 2nd August 2015. On 8th May 2019, during the currency of his 3C leave, Kiran was granted further leave to remain until 30th June 2019. He has a pending application for further leave to remain and is currently on 3C leave. Kabita has, like her parents, been on 3C leave since 2nd August 2015.
4. The applications for further leave to remain in the UK on human rights grounds were made on 30th July 2015 on Form FLR(O). Kiran completed his own separate application form; the three appellants completed a joint form. The covering letter was common to all four applications. Written by Kiran, the letter refers, *inter alia*, to the following

“... Kabita was only 12 when she arrived in the UK. She is now 16 and spent the last 4 years and 1 month in the UK since arriving...

...

Now through no fault of our own making we are now facing the prospect of having to leave the UK where we have built our lives as a family over the last few years ...As you will see from the supporting documents that we have submitted with the application forms, we have worked very hard to establish ourselves with a family life in the UK for the last 4/5 years.

...

[Kabita] has been educated in the UK and has just completed her ‘GCSE’ examinations...Depending upon her results she would be able to attend sixth form for the next two years to progress her level of studies to attend university when she becomes 18.

...

To be able to fund ourselves in the UK my father sold our house in Nepal for £9000. ... this has helped pay for mine and my sisters schooling and continued to help to pay for me [sic] mothers tuition fees and repeat visa applications.

...

...we are unable to go back to our native country as we have nowhere to live as entire villages were flattened by the earthquake [April 2015]. The basic essentials for life such as food, water, clothing, health care, education, are just not available as all assistance has been given to the affected people inside the country at the time of the earthquake and is still ongoing to this current day.

...

I therefore request that consideration be given to our situation that we are unable to go back to Nepal as we have nowhere to live as we sold our original home in Nepal and it would be impossible to start over as a family in Nepal taking into consideration the events of 25th April 2015."

5. The social worker report, dated July 2015, submitted in support of their application refers to both Kiran and Kabita openly talking about not wanting to return to Nepal and that they feel settled and integrated into the British lifestyle.
6. In her recent witness statement, Kabita states that she was not aware, until July 2015, that her stay in the UK was limited. She states that she had always wanted to do chemical engineering (the social workers report says she wanted to be a doctor specialising in neurology). She is due to commence the third year of her undergraduate degree at Queen Mary University (a Russell group University) in chemical engineering in October 2019 and has exams in January and May 2020. She is expecting to do well having done extremely well in her first and second years. She was awarded the Science and Engineering Excellence award of £5000 per year for each of her first two years. She states that after completing her undergraduate degree, she has ambitions to undertake a Masters and/ or PhD. She was not asked, and did not say, whether she had considered studying for those qualifications elsewhere than the UK.
7. In her oral evidence, Kabita confirmed that she did not intend to settle permanently in the UK but wanted to do a PhD in water purification; she wanted to help people in 3rd world countries. Her intentions were to complete her studies. In response to a question about whether she had made enquiries about taking a gap year, returning to Nepal and then returning to the UK with a student visa, she said she had not made enquiries but, in any event, thought that a gap year in her academic discipline would be problematical because of the break in studying.
8. Kabita is engaged to be married to a Nepalese national who has indefinite leave to remain in the UK. He did not give oral evidence: he was visiting his parents in Nepal. He is currently undertaking a fully funded PhD at Imperial College, London, in fluid mechanics in aspects of aeronautical engineering having previously received a Masters in aeronautical engineering. They intend to marry next summer when she has graduated.
9. Kiran was granted further leave to remain and at present is on 3C leave.

10. Mr and Mrs Kandel did not give oral evidence before me, but their previous evidence was not disputed.

Submissions

11. Mr Chhotu submitted that the context within which the decision should be made for all appellants included that Kabita had been a minor throughout the application and decision making process until the matter came before the Upper Tribunal; this impacted positively upon the weight to be given to her length of stay and that account should be taken of the fact that had her application been granted (or her appeal allowed), as he submitted it should have been, then she would not be in the same position today as she now is. He did not go so far, rightly so, as to assert some form of historic injustice or that I should reach my decision now on the basis of the factual matrix as it was before the First-tier Tribunal but made strong submissions that greater weight should be placed upon those matters because she was a minor at that time. He drew an analogy with the Windrush issue and the voucher system for East African Asians which, eventually, led to the righting of a wrong. There was, he submitted, no intention by the appellants to settle in the UK, the intention was to enable the family to remain together as a dependent family unit for the duration of the children's education. The proper procedure is, he submitted for Kabita's appeal to be considered first as a child and then as an adult, then her parents including the effect on Kabita as a child and as an adult. He acknowledged that none of the family met the Immigration Rules save that there were, he submitted, insurmountable obstacles to their return to Nepal. Nevertheless, he submitted that in considering s117B Nationality Immigration and Asylum Act 2002 and the test outlined in Razgar, the public interest in the refusal and subsequent removal of the appellants both as a family and as individuals was outweighed by their cumulative circumstances; the decision to refuse leave to remain was, he submitted, disproportionate.
12. Mr Melvin did not dispute Kabita's evidence save as referred to herein. He submitted that the basis of the current claim was founded upon continuing education which, as set out in *Patel and others* [2013] UKSC 72, was not a sustainable basis for a successful human rights claim. The family have been pursuing appeals since 2013 and it is this that has enabled Kabita to engage in higher level education. There was no evidence, he submitted, that Kabita could not take a gap year and return to the UK with entry clearance; there was no credible evidence of insurmountable obstacles or of detrimental impact should the family return to Nepal; there are no outstanding medical issues and no credible evidence that the relationship between Kabita and her parents is anything other than the usual level of emotional dependency that exists between a daughter and her family, albeit it is a close family. He submitted that they had never had leave to enter on a route to settlement, the education being sought by Kabita was not for a short period but for a lengthy period and her private life, based as it was almost solely upon her education albeit she was engaged to be married next year to a Nepalese citizen with indefinite leave to remain in the UK, was not such as could render refusal of leave to remain disproportionate.

Discussion

13. I have placed no weight upon the social workers report. She has not stated how long she interviewed the family members for or whether she interviewed them as a group or individually. She expressed her conclusions in terms of the availability of educational, housing and health facilities in Nepal but makes no reference to how she has reached her conclusion as to the claimed difficulties in reintegration. There is no indication in the report that she has any expertise with regard to country conditions in Nepal either with regard to the area this family comes from or Nepal generally. There are family members in Nepal, and she makes no reference to the possibility of support from those family members or why adequate education could not be available. At best the only thing to be taken from this report is that the family feel they have integrated into Britain, do not wish to leave, Kiran and Kabita are doing well academically and that they fear the disruption to their education if they were to leave. None of these conclusions is in any way surprising or out of the ordinary where secondary education has been pursued in the UK by academically bright youngsters. I am unable to draw from her report a conclusion that each and every member of the family expressed a desire to remain permanently in the UK.
14. The country information available, relied upon by the respondent and not subject to challenge by the appellants save through the expression of opinion and the social worker report, is that there is a functioning education system in Nepal. I was not provided with evidence to the contrary and Mr Chhotu did not submit that education facilities would not be available, merely that the standard and quality of education available would not be at the level currently being experienced by Kabita.
15. The family members remaining in Nepal have relocated. Mr Kandel visited his family in 2013 and remained there for about three months. Although evidence was led that various family members live in a rural area with limited links to cities or towns where Mr and Mrs Kandel would be able to and could expect to find employment, no evidence was given why initial short term assistance could not be provided or why the financial assistance currently being provide by family members in the UK could not continue whilst the family re-established themselves.
16. The family entered the UK as students/student dependants. This is not a route to settlement and although I accept that Kiran and Kabita were personally unaware of the limited leave granted, the fact remains that the family house was sold by the parents in the full knowledge that they could not expect to remain permanently in the UK and that they would have to make arrangements for self-financing their return on conclusion of the leave that they had been granted. I accept and acknowledge the devastation undergone in Nepal because of the earthquakes in 2015 together with the ongoing significant problems with the infra-structure in Nepal but the family have relatives in Nepal; they have financial support from family members in the UK; the parents have qualifications and expertise obtained in the UK and there is scant evidence they would not be able to find employment – particularly given that Mrs Kandel is a qualified teacher. I accept that return would be difficult given the length of time away from

Nepal, but it cannot realistically be submitted that these difficulties come anywhere close to amounting to insurmountable obstacles.

17. The two children are now adults. They live together as a family unit but there was no significant evidence that there was a dependency in physical or emotional terms other than that they were a close-knit family and, if separated, would be upset and such separation would take time to adjust. I acknowledge and accept the evidence from Kabita that when she and her brother were in Nepal and separated from their parents, they found it difficult and that Kabita was bullied. But they were young then, facing separation from their parents possibly for the first time and such distress would have been inevitable.
18. I note Mr Chhotu's submissions regarding the change in circumstances with Kabita reaching adulthood over the period of time that the appeal process has taken place. Conversely, had the family left the UK when they were refused further leave, Kabita would not have continued her education in the form she has. It cannot be concluded with any certainty that Kabita would have succeeded in her appeal and, even if she had, that her parents would have succeeded in theirs. It is not a question of 'righting a wrong'. The appeals have to be determined on the basis of the evidence as it was before me on the date of the hearing before me, which includes her current personal circumstances.
19. Kabita is now an adult. Her brother has an application pending at the Home Office. There is no evidence before me such that I can conclude that it would be disproportionate for her parents to return to Nepal – that they sold their assets to fund Mrs Kandel's education was a matter for them and would have been taken in the full knowledge that they could not expect to remain permanently in the UK – or indeed for an extended period of time after her education had concluded. Whilst the earthquake has caused devastation in Nepal there was a lack of evidence that it impacted or will impact upon them such as to amount to an insurmountable obstacle for her and her husband's return to Nepal. This is particularly so given they both have qualifications which will be of use to them and there are relatives who can assist at least in the short term. I accept they will have short term difficulties. I also accept that they speak English, would be unlikely to be a burden to the UK State, that they have developed friendships and ties to others in the UK and that although some limited medical treatment may be required, treatment is available in Nepal. Nevertheless there are no significant or insurmountable obstacles to their return to Nepal. There is nothing out of the ordinary in their case. The decision to refuse their Article 8 claim is not disproportionate.
20. It follows that I dismiss the appeals of Mr and Mrs Kandel (HU/07781/2015, HU/07783/2015).
21. Kabita's position is different from that of her parents and her brother. She has just started her third and final year of her degree at Queen Mary University. She has been awarded large sums of money for excellence and there is no doubt but that her fees and living costs are being met. Her evidence, which I accept, was that it was not her intention to settle in the UK. She wants to complete her education. She has yet to finish her undergraduate degree and although she

aspires to undertake a Masters and/or a PhD, I have disregarded this as being relevant. It is speculative to assume that she would be offered a place/funding or that such education would take place in the UK.

22. Completion of her undergraduate degree is not speculative. Her academic ability is not in doubt; she has less than a calendar year of her course left.
23. Mr Melvin relied upon [57] of Patel which reads as follows:

“57. 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 merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in Pankina for “common sense” in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. 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.”

24. Mr Chhotu submitted that there were insurmountable obstacles to Kabita returning to Nepal. This cannot be the case, not only for the reasons I have set out above in relation to her parents, but also she would be returning home with her parents and would be able to obtain employment with qualifications she has obtained so far. The fact that the courses she wishes to pursue are not available in Nepal does not amount to an obstacle to her return. There may not be the equivalent university education in Nepal; but that does not render her return to Nepal insurmountable.
25. Kabita cannot meet the requirements of the Immigration Rules and it follows that consideration of her appeal has to be in broad Article 8 terms, taking full account of and placing weight upon the fact that she does not meet the requirements of the Immigration Rules. That she speaks English, is financially able to support herself, would not have family ties here in the UK (her parents having lost their appeal and therefore returning to Nepal) and that her immigration status is precarious is self-evident. It can be said that this appeal falls fully and squarely within the question whether it would be disproportionate for her to return to Nepal in the final year of her undergraduate degree with the possibility of her returning to complete the final year, a year later. In a sense one only has to pose the question to reach the answer that in the particular circumstances of this appellant it would not be proportionate. She is an excellent student whose excellence has been recognised and financially rewarded by the University she is attending. Until very recently she was a minor whose presence in the UK has been dictated to by her parents. It would have been unreasonable for her to fail or refuse to attend university during that period of time, given not only her academic ability but also that there was no legal restriction on her doing so. Of course, article 8 is not a general dispensing power; nor is article 8 concerned with education as such. Nor is the desire of Kabita to complete her course in the UK a right protected under Article 8. But in

her case, it is not that straightforward. She undertook education as a dependant of her mother whilst she was a minor. She started her university course as a minor. Whilst there can be no expectation now on her part that she would be able to commence a Masters course or PhD, it is reasonable for her to be able to complete her current undergraduate degree – a matter of some 8 months. The investment by the University as well as her personal investment and circumstances are matters that do weigh in the assessment of the proportionality of the decision to refuse leave to remain to complete her current undergraduate course; a young person who has been in the UK since the age of 12 and who has culturally and socially integrated into the UK. That she is engaged to be married is of no relevance to the proportionality of the decision. Nor is the fact that she would be in the UK without her parents – she is now an adult.

26. In these circumstances I allow her appeal (HU/07780/2015).
27. In allowing the appeal I make clear that this is not on the basis that I take the view that it would be disproportionate to enable her to continue her education after completion of her undergraduate degree – any such further leave would be a matter for the respondent at that time. It is not inconceivable that she would seek to continue her studies elsewhere than the UK.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in all three appeals.

I set aside the decision of the First-tier Tribunal.

I re-make the decision in the appeal by:

Dismissing the appeal in HU/07781/2015 – Kamala Gautam Kandel

Dismissing the appeal in HU/07783/2015 – Bhojraj Kandel

Allowing the appeal in HU/07780/2015 – Kabita Kandel

Date 2nd October 2019



Upper Tribunal Judge Coker