



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

Appeal Numbers:

UI-2021-001707 / HU/16860/2019

UI-2021-001708 / HU/16862/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 19<sup>th</sup> August 2022**

**Decision & Reasons Promulgated  
On 27<sup>th</sup> November 2022**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**SABINA SHRESTHA  
MIJJAL SHRESTHA  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M West, Counsel instructed by Gurkha Solicitors Limited

For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are nationals of Nepal born on 16<sup>th</sup> May 1987 and 7<sup>th</sup> November 1987 and married. They appeal against the decision of the First-tier Tribunal, Judge I Ross (“the judge”) promulgated on 22<sup>nd</sup> December 2020 dismissing their human rights claim.

2. The appeal came before the First-tier Tribunal for the rehearing of an earlier decision of First-tier Tribunal Judge Shiner promulgated on 22<sup>nd</sup> December 2020 which had been set aside by the Upper Tribunal. Prior to that First-tier Tribunal Judge Miller had dismissed the appellants' appeal in 2017. That decision remained unchallenged.
3. The primary substantive issues before the First tier Tribunal were first, whether the appellants' removal (most particularly that of the second appellant, who is said to be "severely affected by mental illness"), would contravene Article 3, specifically in relation to **AM (Zimbabwe)** [2020] UKSC 17), and secondly, whether there were very significant obstacles engaging paragraph 276ADE of the Immigration Rules HC 395 (as amended) to the appellants' re-integration into Nepal, given the second appellant's mental health. The judge accepted that the second appellant was a vulnerable witness who should be excused from any expectation of giving evidence.

### **The grounds for permission to appeal**

4. Ground (i) flawed approach to the previous decision. The judge erred in his treatment of findings in an earlier determination promulgated on 1<sup>st</sup> December 2017 and exhibited a failure of adequate self-direction in the light of **Devaseelan v SSHD** [2002] UKIAT 00702.
5. On 1<sup>st</sup> December 2017 First-tier Tribunal Judge Miller dismissed the appellants' appeal noting there was no medical evidence before him. The second appellant had worked part-time, and Judge Miller found there was no evidence he suffered from any significant illness. That determination was upheld.
6. In this instance there was evidence that the second appellant had in 2020 been diagnosed with paranoid schizophrenia, after incidents including threats of self-harm. There was a report from Dr Cutting, consultant psychiatrist, dated 29<sup>th</sup> April 2021 showing the appellant had more recently tried to hang himself.
7. It was argued in the grounds that the judge erroneously treated substantial issues as excluded because the judge considered they had been previously addressed by Judge Miller.
8. The judge's implicit attempt to apply **Devaseelan** missed the wider principles identified in that determination, which warned that an earlier adjudication could not be treated as closing off issues and at [38] stated:

*"The second Adjudicator must, however, be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that*

*were not - or could not be - raised before the first Adjudicator; or evidence that was not - or could not have been - presented to the first Adjudicator.”*

9. The specific guidance identified the previous relevant adjudication as the starting point only and that: “Facts happening since the first Adjudicator’s determination can always be taken into account by the second Adjudicator.”

10. The court in **Djebbar v Secretary of State** [2004] EWCA Civ 804 upheld **Devaseelan** but identified that:

*“The second Adjudicator must, however, be careful to recognise that the issue before him is not the issue before the first Adjudicator.”*

11. **Djebbar** however, identified that: “This is not the language of *res judicata* nor estoppel. And it is not open to be construed as such.”

12. The Court of Appeal returned to the point in **The Secretary of State for the Home Department v BK (Afghanistan)** [2019] EWCA Civ 1358 when confirming:

*“The basis for the guidance is not estoppel or res judicata but fairness. A Tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal.”*

13. The grounds submitted that in the instant case the judge treated the 2017 determination as closing off the issues of potential employment and housing. The judge erred in considering that the appellants could advance only a very narrow case based on the evidence of the more recent diagnosis of mental illness in the second appellant.

14. That was erroneous, for the following reasons:

(i) The judge treated the earlier determination as excluding whole issues from consideration by him as by *res judicata* and at no point adequately considered or properly self-directed himself as to the effect of **Devaseelan**.

(ii) The premise of the earlier determination in 2017 was that the appellants were fit and well and therefore a complete revisitation of all issues in the light of the now established facts including serious mental illness was required. By the time of the second adjudication the second appellant had been diagnosed with mental illness (paranoid schizophrenia) and the judge had not rejected the evidence of the first appellant that the second appellant required constant supervision and the judge’s approach and decision was thus illogical and irrational. The second appellant’s disabling condition and the

need for the first appellant to supervise him constantly were plainly important factors.

- (iii) Additionally, the determination of 2017 was not created against the background of the pandemic.
- (iv) The judge had at no point coherently explained how significant issues with the second appellant's mental health and the first appellant's preoccupation with her husband's safety could be excluded, when properly applying **Devaseelan**.
- (v) No issue of real relevance was identified which could be treated as continuous from the 2017 determination and what was required was consideration "in the round" of all relevant matters.

15. Ground (ii): failure to apply **Secretary of State v Kamara** [2016] EWCA Civ 813 and Article 8 generally.

16. The judge held, in resolution of paragraph 276ADE at [26] the following:

*"Applying this test to the appellants' circumstances, I find that there is no reason to consider that the appellants, who resided in Nepal until the ages of 25 and who both have close family members still living there, would be anything other than 'insiders' who are able to operate on a day-to-day basis in that society. I find that the second appellant's health condition would not prevent their integration into Nepal given that his condition is managed by medication which is available there. Accordingly, I find that there are no very significant obstacles to the appellants' integration in Nepal."*

17. That finding was substantially unreasoned and did not address significant parts of the factual evidence which the judge had before him. **Kamara** plainly denoted more than just knowing Nepalese culture and included the "personal capability to realise integration". The illness and the need to supervise were obviously very significant obstacles to reintegration. The finding that the appellants could return to Nepal was undermined by the judge's continuing reliance on the findings in 2017.

18. The judge appeared to have sought to address the obvious objections by the supporting finding that the second appellant's health condition "would not prevent their integration into Nepal" because "his condition is managed by medication which is available there".

19. The term "managed" in this context was a coy evasion of the actual situation, namely that the appellant was suffering from paranoid schizophrenia and that his condition may be to some degree stabilised but he was in essence incapacitated from productive activity such as work or self-care and, secondly, and I cite from the grounds of appeal themselves: "Even assuming continuation of the medication to be possible, the status quo in the United Kingdom translated to Bangladesh (sic) was plainly still a

*situation in which the applicants would face very significant obstacles to re-integration.”*

20. In effect, it was submitted in the grounds that the judge had paid lip service to the terms of paragraph 276ADE, and the principles outlined by the Court of Appeal in the **Kamara** decision. This part of the decision was “bad” for absence of adequate self-direction and a lack of appreciation of the correct test. So too was the slender dealing with the issue of suitability for return under Article 8.
21. Permission to appeal was granted by Judge Adio on two grounds, in relation to the failure of adequate self-direction in the light of **Devaseelan** and the treatment of the evidence with reference to **Kamara**. Judge Adio found that it was arguable that in view of the nature of the medical evidence before the judge, which was not present before Judge Miller when the decision of 1<sup>st</sup> December 2017 was promulgated, the judge had excluded substantial issues which were significant in assessing the appellants’ Article 3 and Article 8 claims. Judge Adio found it was arguable that the judge had failed to follow the guidance of the Court of Appeal in **Djebbar** and **BK (Afghanistan)**.

### **The hearing**

22. At the hearing before me Mr West relied on the written grounds and expanded that the judge had closed off matters and had carried over previous findings from decisions without considering how the subsequent medical issues would have a bearing. Judge Ross did not take issue with the credibility of the first appellant’s (the wife’s) evidence and the evidence of the domestic situation was not discredited. Further findings on employment, employability and access to accommodation were crucial.
23. In relation to the second ground, the decision of Judge Ross did not address the factual evidence and was substantially unreasoned. He paid mere lip service to **Kamara** when there should have been a broad evaluation; [26] was not broad but brief. There was no consideration of the fitness to fly. Paragraph 26 did not consider crucial matters on appeal and the grounds had pointed out that the judge’s decision at [10] recorded the preoccupation of the second appellant with looking after the first appellant. At [20] and [21] when the judge referred to the latest medical report, he cited the report that was not the latest. In the supplementary bundle there was a report from pages 11 to 22 dated 19<sup>th</sup> March 2021 from the consultant psychiatrist Dr Cutting and this was not considered in the determination at all and was important.
24. Mr West accepted the grounds for permission to appeal did not refer to Article 3 and did not challenge those findings.
25. The decision at [14], which recorded the appellant’s condition being ‘managed’ by medication, was a complete contradistinction from [10], which stated that medication had not controlled his behaviour. The

primary reason given at [26] that there were no very significant obstacles was because his condition was “managed” but at [10] recorded that his condition was not so managed.

26. Overall, there was no evaluative assessment. The finding that the second appellant could be managed by medication was unsustainable in the light of the Cutting report and the judge had to say why he disagreed with that report and there was no mention of it in the determination.
27. Mr Walker submitted that Judge Ross had made no reference to the supplementary bundle and the medical evidence therein but that was not pleaded. He relied in essence on the Rule 24 response. The judge was aware of the change of circumstances compared with the previous determination and had regard to the medical expert who was his main crisis physician. Judge Ross did note the lack of medical evidence regarding the care of the appellant, and it should be noted that there was family in Nepal. He submitted there was no material error with regard to the evidence.
28. Mr West submitted that the grounds challenged [26] of the decision and that the condition was managed by medication and as this was a reasons challenge, that included the fact that the judge did not address significant parts of the factual evidence. Dr Chakma referred to previous attempts of suicide which had not been contested. If the judge wished to criticise Dr Cutting it was incumbent upon him to do so and to give reasons.

## **Analysis**

29. In relation to ground (i), the judge clearly applied the principles of **Devaseelan** by stating his starting point at the outset at [15]:

*“My starting point is that the appellants’ evidence about any difficulties which they would face in Nepal regarding lack of employment and suitable housing has been dealt with already in the previous appeal.”*

30. He referred to a decision of the Upper Tribunal dated 15<sup>th</sup> May 2018, upholding Judge Miller’s decision and in which the issues of lack of accommodation and difficulties in obtaining employment and the second appellant’s ill health were addressed.
31. The judge noted at [17] that at that time there was no evidence that the second appellant had ‘anything wrong with him’ and that he was working part time at Tesco. Specifically, in relation to the first appellant, the judge noted that the previous decision found

*“... there was no evidence supporting the first appellant’s contentions that, despite being in part-time work in the UK and having worked in a bank in Nepal and given her MBS qualification, due to high unemployment she would not be able to obtain any or any full time employment on her return.”*

32. That paints the picture as it was in 2017. The judge in this instance proceeded at [20]:

*“The only circumstances I find which have changed since the Upper Tribunal’s decision is the medical evidence regarding the second appellant and his diagnosis of schizophrenia.”*

33. This does not indicate that the judge constrained his consideration of later evidence but merely that the situation as in the previous decision was recorded. Indeed, at [17] the judge recorded that previously, by contrast, the second appellant had no significant health issues. It was concluded previously that the first appellant would be able to find employment and it was not accepted by the Tribunal in 2017 (upheld by the Upper Tribunal in 2018) that the first appellant

*“...would not be able to obtain any or any full-time employment on her return, sufficient to provide for herself and the second appellant, particularly given that despite his claimed medical issues he was also capable of taking general part-time employment in the UK”.*

34. It is clear that the judge from [15] to [19] was merely recording the findings of the First-tier and Upper Tribunal in 2017 and 2018.

35. From [10] to [12], the judge set out the oral evidence in detail noting already that the second appellant was a vulnerable witness owing to the medical evidence.

36. The judge then recorded clearly that the second appellant had a diagnosis of schizophrenia. It is correct that the diagnosis was the circumstance which had changed and there is nothing to indicate that the judge failed to understand the implications for employment and living conditions for the appellants in Nepal.

37. Albeit Mr West attempted to introduce a new ground such that the judge had omitted consideration of relevant evidence, that being the updated report from private consultant psychiatrist Dr J Cutting, Mr West accepted this was not specifically challenged in the grounds. Dr J Cutting had produced two reports one dated 18<sup>th</sup> February 2021 and an update on 19<sup>th</sup> March 2021 (in the latter Dr Cutting relied on letters from Dr Chakma and a one hour interview).

38. Immediately before that first Dr Cutting report, was a report dated 4<sup>th</sup> February 2021 from Dr Sylvia Chakma, the second appellant’s treating doctor from the NHS Hounslow Crisis Team who specifically stated that the appellant had a diagnosis of paranoid schizophrenia and more recently “possible conversion/dissociative disorder”. The judge clearly considered this report, cited extensively from it and recorded at [21] that the second appellant had denied “any thoughts/plans or intent to commit suicide/harm to others or self”. The judge also specifically noted: “He is currently under continuous supervision of his wife. But can be vulnerable

in the community due to his illness.” The February 2021 Chakma report identified that the second appellant was prescribed with Olanzapine, Venlafaxine and Propranolol.

39. Dr Cutting in his latest report remarked: “At interview he was much the same as I had found him before [February].” Indeed, Dr Cutting too diagnosed schizophrenia although disputing conversion/dissociative disorder and suggested he ‘might’ ring the changes of different antipsychotics but did not detail precisely what those changes might be. He added that the second appellant needed “constant care from his wife and needs care from his local psychiatric services.”
40. The supplementary bundle discloses that there was a further report on 29<sup>th</sup> April 2021 from Dr Chakma, his treating physician consultant, who recorded that it was reported that “*wife reported that Mijjal **remains same** with no significant improvement*”[my emphasis]. This report also concluded that he had been seen twice by a private psychiatrist [Dr Cutting], but they could not afford private care, so Dr Chakma would continue with the care. The report from Dr Chakma in April 2021 also included the reference “no changes to his medications now”.
41. Dr Chakma in the report dated April 2021 identified that the medication remained similar, his wife stated that he remained the ‘same’ and he was notably discharged from the team although indicated for longer term support. This April report from his treating physician *post-dated* the report of Dr Cutting, the private consultant, and included references to it. It is clear from the reports of Dr Cutting and Dr Chakma that the condition of the second appellant had not varied significantly since that report considered in detail by Judge Ross.
42. Not only did the grounds of appeal fail to challenge the decision on the grounds that the judge had omitted evidence but, in the circumstances, I am not persuaded that the lack of reference to Dr Cutting’s report is material or that the judge failed to take into account the detail of the second appellant’s condition and its effects on living conditions when applying the principles of **Devaseelan**.
43. The judge specifically reasoned at [22] that although the previous Tribunal had stated there was nothing medically wrong with the second appellant “that position has now changed in that he was diagnosed in 2020 with paranoid schizophrenia”.
44. Turning to the impact of the new medical evidence on the previous findings, the judge initially addressed the medical evidence in terms of Article 3 and found this at [24]:

*“I find that the medical evidence in respect of the second appellant falls far short of the criteria set out in **AM (Zimbabwe)**. In particular, I find that there is no medical evidence that the second appellant faces a real risk of being exposed to a serious, rapid and irreversible*



*decline, resulting in intense suffering or a substantial reduction in his life expectancy. Nor has it been shown that there is an absence of appropriate treatment for schizophrenia in Nepal or that the second appellant would lack access to such treatment. For these reasons I do not find that Article 3 is engaged in this appeal in respect of the second appellant's mental health."*

45. As the judge stated at [24], albeit in relation to Article 3, it had not been shown "that there is an absence of appropriate treatment for schizophrenia in Nepal or that the second appellant would lack access to such treatment". Those findings were open to the judge on the evidence. There was no clear evidence from the appellants that there would be a lack of appropriate health care in Nepal.
46. In terms of managing the second appellant's condition, the judge had recorded at [10] that the first appellant had stated that she had to "watch him constantly for fear of him harming himself". Additionally, the judge also noted that the first appellant accepted that they have relatives who are currently supporting them financially. It was accepted under cross-examination that the first appellant had parents in Nepal and that the second appellant was in contact with his mother and younger sister.
47. The evidence itself given by the wife to Dr Chakma in February 2021 was "*wife said they are being supported financially by family and denied any financial worry*". Her oral evidence as recorded at [10] was that she has to watch her husband 'constantly' and the first appellant 'accepted that they have relatives who are currently supporting them financially sometimes'. The judge recorded at [29] that there are no children and that since February 2019 the appellants have had no leave. They would thus have no permission to work and there was thus no indication that the wife was even working in the UK or had been since 2019, that is over 3 years ago.
48. The first appellant's position and that of her husband, therefore in Nepal, where she could afford him, supervision as recommended, would not be materially different from that in the UK of the past 3 years. I do not accept on reading the decision carefully that the judge failed to consider the 2017 decision as the starting point or having clearly reviewed the relevant medical evidence, that he had failed to take into account that evidence in assessing the position in the light of the second appellant's ill health and therefore the appellants' developing circumstances. Having reviewed the evidence in the light of Article 3 it is inconceivable that this was ignored for the purposes of the appeal overall. The second appellant's fitness to fly at the relevant time is not a matter that Dr Chakma raised and that would be an administrative matter at the time of removal and for the Secretary of State to consider at the particular time. There was confirmation in the reports that the appellant had not been violent to others.
49. The evidence given to Dr Cutting was that both the first and second appellant wished to return to Nepal 'eventually' but at the moment this

would be disastrous. There was, however, no further explanation, merely assertions, that the position would be different in Nepal from the UK. The wife would be returning with the second appellant, and it is open to her to supervise him there. Dr Cutting merely stated that they could not return because he would not have the 'ongoing care' of the mental health team. As noted, Dr Cutting's care was no longer pursued, the second appellant was discharged from the team by Dr Chakma and the judge found that health care in Nepal was available. The judge properly reasoned at [26]

*'Applying this test [Kamara] to the appellant's circumstances, I find that there is no reason to consider that the appellants, who resided in Nepal until the ages of 25 and who both have close family members still living there, would be anything other than 'insiders', who are able to operate on a day-to day basis in that society. I find that the second appellant's health condition would not prevent their integration into Nepal given that his condition is managed by medication which is available there. According I find that there are no very significant obstacles to the appellants' integration in Nepal'*

50. The criticisms of the judge's decision through the lens of **Devaseelan** do not, on careful analysis, withstand scrutiny. I do not accept that there was overreliance on the 2017 decision to the exclusion of the further medical evidence, or the application of res judicata, and on a proper analysis, there was no material legal error.
51. Ground (ii). On the evidence before the judge having been properly explored, he then turned to a consideration of paragraph 276ADE and whether there were very significant obstacles to the appellants' integration into Nepal. He specifically cited the case of **Kamara** and set out the direction of the Court of Appeal at [14].
52. On the basis of the evidence before the judge that there were no financial worries (as contained in the report identified above, which chimed with the previous Tribunal findings), and the fact that there was medical treatment in Nepal together with family in Nepal, it was entirely open to the judge to find that "the second appellant's health condition would not prevent their integration into Nepal given that his condition is managed by medication which is available there". The first appellant in her witness statement indicated that she thought living with her parents would be 'undignifying' but this was, in effect, an acceptance there was accommodation available. As recorded, the appellants had arrived in the UK at the age of 25 years, were self-evidently conversant with the language and had retained family there.
53. On the evidence before the judge, it was open to him to reason (as he did cogently) that the appellants could re-establish and re-integrate themselves in Nepal. He undertook a broad evaluative assessment. That the second appellant is entirely incapacitated from productive activity does not negate the findings of the judge that there was family in Nepal and the evidence on mental health, did not, in the circumstances,

materially controvert the issue of finance and accommodation in Nepal or that he could seek health treatment there. Whether his condition is managed in the UK or managed in Nepal, (Dr Chakma, post the private consultation discharged from the "HCAT Tier 2 Team), his wife would be with him and support him as she does here; neither is working at present in the UK.

54. As set out in **UT (Sri Lanka)** [2019] EWCA Civ 1095 by Floyd LJ at paragraph 26:

*'... In R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19, Lord Hope said (at paragraph 25):*

*"It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.'*

55. The decision when read as a whole has not merely paid lip service to the terms of **Devaseelan** or **Kamara** in relation to paragraph 276ADE(1)(vi); the conclusions are sustainable, and I find no material error of law. The decision of the First-tier Tribunal will stand, and the appellants' appeals remain dismissed.

### **Notice of Decision**

The appeals are dismissed.

No anonymity direction is made.

Signed Helen Rimington

Date 17<sup>th</sup> October 2022

Upper Tribunal Judge Rimington