Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13513/2017
and HU/13519/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2018	**On 10 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

PRAKASH POKHREL and
SUNITA SUBEDI
(ANONYMITY DIRECTON NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms S Iengar of Counsel instructed by Paul John & Co, solicitors
For the Respondent: Ms J Isherwood of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are Nepalese and are husband and wife, born respectively in 1986 and 1989. They arrived on 24 September 2009, the husband with leave as a Tier 4 (General) student migrant and the wife as his dependent. The husband's student leave was extended on a number of occasions until

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30 May 2012 and the wife's leave as his dependent until the same date. In time, the husband had applied for leave as a Tier 1 (Post-Study) migrant which was granted to expire on 21 August 2015 and the wife was given leave in line as his dependent.

2. On 20 August 2015 the husband applied for further leave to remain on medical grounds and on the basis of his private and family life with his wife. She applied for further leave as his wife.

The Respondent's Original Decision

3. On 16 October 2017 the Respondent refused the applications. The Appellants were not present and settled in the United Kingdom and did not have any children. Their son was born on 8 May 2017 some five months before the date of the Respondent's decision but there was no evidence in the Tribunal file that the Respondent had been informed of the birth before the date of the decision under appeal. They did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and there were no very significant obstacles to their integration on return to Nepal.

4. The Respondent did not accept the Appellants' claim that they could not live together in Nepal because their respective families were opposed to their marriage. It was noted they had lived together in the Nepal before coming to the United Kingdom.

Proceedings in the First-tier Tribunal

5. By a decision promulgated on 07 September 2018 Judge of the First-tier Tribunal AA Wilson dismissed the appeal on human rights grounds.

6. On 11 October 2018 Judge of the First-tier Tribunal PJM Hollingworth granted the Appellants permission to appeal because it was arguable the Judge had not made an adequate analysis of the difficulties the Appellants claimed they would face on return, in particular because of the husband's medical condition. It was arguable the Appellants had established compelling circumstances making their removal disproportionate and that the Judge should have conducted a full proportionality exercise.

Proceedings in the Upper Tribunal

7. The Appellants attended the hearing with their son. I explained the purpose and procedure of an error of law hearing and other than the husband's confirmation of the Appellant's' address, they took no active part in the proceedings.

Submissions for the Appellants

8. Ms Iengar pointed out that the Judge had incorrectly stated the husband's nationality. Further, the husband fortunately did not have bone cancer referred to in paragraph 1 of the Judge's decision but the transplant

referred to in the middle of page 3 of the Judge's decision as successful had in fact not been successful which he had made clear at paragraph 6 of his statement of 16 July 2018 at page 3 of the Appellant's' Bundle (AB). This error of fact will have infected the rest of the Judge's assessment of the difficulties the Appellants would face on return to Nepal. The Judge had made neither an assessment whether the husband would be able to work nor a finding whether he accepted their claims on this particular issue.

9. The Judge had made no assessment of the difficulties the Appellants claimed they would face in accessing appropriate care in Nepal or of their claim they would be destitute on return referred to in paragraphs 6 and 8 of the husband's statement: AB p.3. There had been no proper assessment by way of reference to the evidence whether the Appellants would face significant obstacles on return in relation to each of the Appellants. The decision should be set aside.

Submissions for the Respondent

10. Ms Isherwood submitted that the Respondent had addressed the availability of medical facilities in Nepal in the Reasons for Refusal Letter. The husband at paragraph 6 of his statement had accepted that treatment was available in Nepal but noted it was very expensive and that the treatment he had received in the United Kingdom had been very good. The wife had expressed similar views at the end of paragraph 5 of her statement at AB p.7. The Appellants were not entitled to succeed on the grounds of the price and quality of medical treatment in the United Kingdom.

11. Further, even if the Judge had erred in his finding that the transplant in the husband's arm had been successful, that finding was immaterial in the light of the Judge accepting that treatment was in any event continuing.

12. The Judge had adequately dealt with the claim based on the Appellants' private and family life in the United Kingdom in the last paragraph of his decision. It was notable there was no other evidence of private life. The decision may be brief but it contained no material error of law and should be upheld.

Response for the Appellants

13. Ms Iengar submitted that the problems which the Appellants might encounter on return to Nepal had been referred to or canvassed in the Reasons for Refusal Letter and in the Appellants' evidence but there was nothing to indicate they had been factored into the Judge's decision. He had made material errors in identifying the husband's nationality and his medical complaint. He had not made any proper assessment of the proportionality of the decision under appeal by way of reference to Article 8 of the European Convention outside the Immigration Rules. He had not addressed the wife's position and had inadequately considered the issue

whether the Appellants would face very significant obstacles to re-integration on return to Nepal. The Appellants had prior to the date of the Respondent's decision supplied medical evidence for the husband at Sections D, E and F of the Respondent's bundle which had not been addressed in the Reasons for Refusal Letter.

14. The wife was an appellant in her own right and the Judge had needed to consider her circumstances even if it did not include the evidence relating to her Post-Traumatic Stress Disorder which he had considered to be a "new matter". Nevertheless, her mental state was a factor to be considered in assessing the proportionality of the Appellants' return to Nepal.

Further comments for the Respondent

15. Ms Isherwood commented that the grounds for appeal had not been amended., What was a "new matter" under s.85 Nationality, Immigration and Asylum Act 2002 as amended had been explained in *Quaidoo (new matter: procedure/process) [2018] UKUT 00087 (IAC)*. The Appellants had not challenged the Judge's treatment of this in his decision and the appeal was an attempt to re-argue the case.

16. The only medical evidence on the wife was at AB pp.18-19 and was dated 8 November 2017 together with an open letter of 3 July 2018 confirming her continuing symptoms for which she is in the course of receiving therapy.

17. Ms Iengar countered that the wife's mental health was not a "new matter" and had needed to be taken into account in assessing the obstacles to re-integration.

Consideration and Conclusion

18. Even if the mis-statements of the husband's nationality and his medical complaint in paragraph 1 of the Judge's decision are attributable to a combination of the use of a Voice Recognition Program and inadequate proof-reading, the difficulty remains that the Appellants will have been given adequate reason to form the perception that their appeals have not been fully and fairly adjudicated.

19. The grounds for appeal and the grant of permission to appeal did not include any challenge to the Judge's findings that the birth of the Appellants' child and the issue of the wife's mental health were new matters within the scope of s.85 of the 2002 Act.

20. For the reasons given in paragraph 18 of this decision I find the errors in paragraph 1 of the Judge's decision are material errors, if only because justice will not have been seen to be done. There is sufficient merit in the submission that these errors will have infected the rest of the Judge's consideration of the appeals which together with the paucity of the assessment whether there are substantial obstacles to the Appellants' re-

integration on return to conclude the decision is unsafe and should be set aside.

21. Having regard to the extent of the fact-finding exercise which will have to be conducted and the provisions of s.12(2) Tribunals, Court and Enforcement Act 2007 I conclude that the appeals should be remitted to the First-tier Tribunal for hearing afresh with no findings preserved.

22. I would mention that the Appellants may wish to take advice first, on what constitutes a “new matter” within the scope of s.85 of the 2002 Act and whether the Respondent consents to any “new matter” being dealt with at the hearing afresh and second, on the jurisprudence on medical cases and whether either of the Appellants falls within the scope of Articles 3 or 8 of the European Convention: see for instance *GS (India) v SSHD [2015] EWCA Civ.40* and *AM (Zimbabwe) v SSHD [2018] EWCA Civ.64*.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained an error of law and is set aside.
The appeals are remitted to the First-tier Tribunal for hearing afresh.

No anonymity direction is made.

Signed/Official Crest Date 19. xii. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal