IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000296
First-tier Tribunal No: HU/55187/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 March 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MIN BAHADUR HAMAL THAKURI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Bustani, instructed by Paul John & Co Solicitors
For the Respondent: Mr Tufan, Senior Presenting Officer

Heard at Field House on 11 March 2024

DECISION AND REASONS

1. The appellant is a Nepalese national who was born on 16 April 1975. He appeals with the permission of First-tier Tribunal Judge Gumsley against the decision of First-tier Tribunal Judge Latta ("the judge"). By his decision of 17 November 2023, Judge Latta dismissed the appellant's appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant entered the United Kingdom lawfully in 2010. He entered as the spouse of a Tier 4 student. Their relationship broke down, however, and ended (I was told by Ms Bustani) with a divorce in 2014. In the meantime, the appellant's leave expired in 2013 his application for further leave was refused. His appeal against the latter decision was dismissed, and appeal rights exhausted in 2014.

3. In due course, the appellant formed another relationship with a Nepalese national who has lived in the United Kingdom since 2005. She has Indefinite Leave to Remain in the United Kingdom. His first application for leave to remain

as her partner was refused on 14 February 2019. The appellant then sought asylum. There has been no decision on that application to date, although the appellant has apparently applied for it to be withdrawn.

4. On 13 February 2023, the appellant applied for leave to remain as an unmarried partner for a second time. The covering letter which accompanied the application for leave to remain stated that the appellant and the sponsor had been in a relationship since 2016; that she was in full time employment earning over the Minimum Income Requirement; and that the appellant spoke good English. Evidence was appended to the letter. Leave to remain was sought accordingly.

5. The respondent refused the application on 30 March 2023. The respondent noted that the appellant was unable to meet the Eligibility Immigration Status because he had been in the UK without leave for some years. It was not accepted that he met the Eligibility Financial Requirement because the stipulated evidence had not been provided. It was not accepted that he met exception EX1 because the respondent did not accept that there were insurmountable obstacles to family life continuing in Nepal. Nor was it accepted that the appellant met the relevant requirement for leave to remain on grounds as private life, as there would not be very significant obstacles to his re-integration to Nepal. The respondent did not consider there to be any reason to grant leave outside the Immigration Rules.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. His appeal was heard by the judge, sitting in the 'Virtual Region' on 16 November 2023. The judge heard evidence from the appellant and the sponsor. She also heard submissions from Ms Bustani of counsel, who represented the appellant then as she did before me. There was no attendance or representation from the respondent.

7. In his reserved decision, the judge proceeded on the basis that the appellant and the sponsor were in a genuine and subsisting relationship: [33]. The 'key issue' for him to determine was whether there were insurmountable obstacles to family life continuing outside the UK: [33]. The judge directed himself at [34] to the meaning of that term, as given in EX2. He stated at [35] that he had considered all that was said in the documentary evidence, particularly the witness statements made by the appellant and the sponsor.

8. At [36], the judge noted that the sponsor is in employment and that she and the appellant were trying to conceive. He did not consider either factor to present an insurmountable obstacle. They had expressed concern about a lack of accommodation and support in Nepal but he accepted what was said by the respondent in that regard: [37]. He considered the circumstances of the sponsor at [38], noting that she had been in the UK for 18 years but balancing that against the formative years she had spent in Nepal and her familiarity with the culture and language of the country.

9. At [39], the judge concluded that the sponsor could return to the UK once the appellant had made an application for entry clearance. Nor was there anything preventing her from visiting him in Nepal whilst an application for entry clearance was processed.

10. At [40]-[41], the judge reminded himself again of the threshold in EX2 and concluded that it was not met on the facts. He therefore found that the appellant was unable to qualify for leave under Appendix FM of the Immigration Rules.

11. The judge turned to Article 8 ECHR at [42 *et seq* of his decision. He directed himself on the law at [42]-[44] and at [45] he accepted, with 'no hesitation' that there was a family life between the appellant and the sponsor. He also accepted that the appellant had developed a private life in the UK over 13 years of residence: [46].

12. At [47]-[53], the judge considered the public interest in the appellant's removal and found that s117B(1), (4) and (5) of the Nationality, Immigration and Asylum Act 2002 militated against the appellant in the assessment of proportionality. The remaining factors were neutral.

13. The judge weighed those matters against the appellant's family and private life at [57]-[61]. Having done so, he concluded that the public interest outweighed the appellant's Article 8 ECHR rights, and he dismissed the appeal.

The Appeal to the Upper Tribunal

14. Permission was sought on five grounds but granted on only three. The grounds upon which permission was granted were that (i) the judge had given insufficient reasons for finding that there were not insurmountable obstacles; (ii) the judge had failed to consider whether there were very significant obstacles; and (iii) the judge's consideration of proportionality was inadequate.

15. Ms Bustani submitted before me that the judge had failed to consider how the sponsor would be affected by leaving the United Kingdom. They were trying to conceive and she had been in the UK for many years. Her family were also here. The sponsor was the breadwinner but she had never worked in Nepal. For similar reasons, the consideration of proportionality was inadequate. Ms Bustani accepted that she was unable to take the Private Life argument any further when I pointed out that there had been no reliance on that point in the Appeal Skeleton Argument before the FtT.

16. For the respondent, Mr Tufan submitted that the judge had set out the correct tests and had clearly applied his mind to the limited evidence before him. Section 117B evidently militated against the appellant and the judge had done 'more than enough' to explain to the appellant the basis on which he had lost.

17. In reply, Ms Bustani submitted that the judge had incorrectly imported a consideration of whether the appellant could seek entry clearance into his assessment of paragraph EX1. The difficulty with the proportionality assessment was its sole focus on the appellant, rather than considering the difficulties of the sponsor as well.

Analysis

18. It was not in issue before the judge that the appellant and the sponsor were in a genuine and subsisting relationship. Nor could it have been in issue, given the chronology which I have set out above, that he was unable to meet the Immigration Status Requirement in Appendix FM. This was therefore a case in which the proper focus, under the Immigration Rules at least, was on the question of whether there were 'insurmountable obstacles' to the continuation of family

life in Nepal, such as to satisfy the exception in paragraph EX1 and admit the appellant to the 'Ten Year Route' within that Appendix.

19. The judge was plainly well aware of the architecture of the Rules and the primary focus of the case. He correctly directed himself to the definition of 'insurmountable obstacles' in paragraph EX2. That definition was noted with approval at [44] Agyarko & Ikuga v SSHD [2017] UKSC 11; [2017] 1 WLR 823.

20. The judge then set out to consider whether that threshold was met on the evidence before him. He took account of everything that was said by the appellant and the sponsor. That is not merely what he said at [35], it was he demonstrably went on to do at [36]-[38] and [40]-[41]. There is reference within those paragraphs to the sponsor's length of residence in the UK, the lack of any support network in Nepal, and the assertion that the couple were trying to conceive.

21. Ms Bustani submitted that the judge had failed to consider how the couple's attempts to conceive – or the sponsor's other medical treatment – would be affected by relocation to Nepal. With respect to her, however, that was a point which could not have taken the appellant's case any further on the evidence before the FtT. It was asserted that the couple were 'undergoing some medical procedures' in an attempt to conceive but there was no evidence of those procedures, or any other treatment. Nor was there any evidence of what corresponding treatment might or might not be available in Nepal. There was simply no basis upon which the judge might properly have concluded that the sponsor's treatment (whether for conception or otherwise) would be disrupted by their relocation to Nepal.

22. Ms Bustani expressed concern that the judge had not really engaged with the sponsor's circumstances in the UK in deciding that there would not be insurmountable obstacles to her relocation to Nepal. When she attempted to provide particulars of matters which might have been left out of account, however, Ms Bustani once again found herself in difficulty. She suggested that the sponsor would have to leave her family behind but she was unable to state which family members are in the UK. As with the medical treatment, it is difficult to see what more the judge could have said about the case, given the evidence before him. He clearly appreciated that the sponsor had been in the UK for many years and that she was nervous about relocating to Nepal but he considered that nothing showed that there were insurmountable obstacles to that.

23. The appellant and the sponsor both expressed concern about their ability to find employment and to find a place to live but the judge was entitled to prefer what was said by the respondent in that respect. There was no evidence before him to show that unemployment levels were so high in Nepal that one or both of them would be unable to find a job or that they would be able to support themselves in that country.

24. In my judgment, therefore, the judge gave adequate reasons for concluding that the high threshold in paragraph EX1 was not met. Ms Bustani submitted that the judge had impermissibly introduced into that assessment a consideration of whether the appellant could apply for entry clearance. I accept that the reference to that point at [39] of the judge's decision was unfortunate but it is immaterial; he had already by that stage expressed the conclusion that there were no insurmountable obstacles. That was a conclusion which was properly open to the judge on the evidence before him and this ground must fail.

25. Ms Bustani was not able to make any submission that the judge erred in failing to consider whether there were very significant obstacles to the appellant returning to Nepal. That was because the point was not raised in the Appeal Skeleton Argument. I struggle, in any event, to see how the judge could have answered the question posed by EX1 adversely to the appellant but found in his favour on that point.

26. The remaining submission concerns Article 8 ECHR. As Ms Bustani accepted before me, this ground of appeal traversed much the same terrain as the first. She submitted that the judge's focus was somewhat 'one-sided', in that he had considered only the circumstances of the appellant and had failed to consider the ramifications for the sponsor of either staying in the UK without him or returning to Nepal with him. As I have set out above, however, the judge was clearly cognisant of all that was said in the witness statements about either prospect. He was not required to set out in full what was said by the appellant and the sponsor to be problematic about his removal.

27. The judge took careful account of the public interest factors in section 117B. He weighed those factors carefully against the family and private life enjoyed by the appellant in the UK, and he concluded that the former outweighed the latter. The result was a textbook 'balance sheet' analysis, undertaken in sufficient detail to enable the appellant to understand quite clearly why he had lost. In sum, the fact is that he has remained in the UK unlawfully for many years and there is nothing to show that his family life with his partner cannot continue in Nepal. That having been found by the judge, there was nothing in this appeal which began to establish the very compelling case required to demonstrate a breach of Article 8 ECHR: Agyarko refers, at [57]..

28. In the circumstances, I conclude that the decision of the FtT contains no legal error.

Notice of Decision

The appellant's appeal is dismissed. The decision of the FtT will stand.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 March 2024