Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/09807/2017
PA/12258/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 November 2019	**On 22 January 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

P Y	First Appellant
K S	Second Appellant

(ANONYMITY DIRECTION IN FORCE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J Norman, Counsel, instructed by Sterling & Law Associates LLP

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellants or either of them. Breach of this order can be punished as a contempt of court. I make this order because the Appellants are asylum seekers and are entitled to anonymity.

2. There are two appellants here. The first Appellant, PY, is a citizen of Nepal. She was born in December 1982. The second Appellant, KS, is a citizen of India. He was born in May 1985. The parties married in a civil ceremony on 15 February 2013 and this gave legal effect to a religious ceremony that had taken place on 14 December 2012.

3. They appeal against the Decision and Reasons of the First-tier Tribunal promulgated on 3 June 2019 dismissing their appeal against the decision of the Secretary of State made, in each case, on 20 September 2017 refusing their application for asylum and/or humanitarian protection. They appealed the decision on the grounds that they were refugees and entitled to international protection and also that removing them would contravene their rights under the European Convention on Human Rights, particularly Article 8. In each case the appeals were dismissed on all grounds. Although the Appellants appeal a joint decision of the Secretary of State which, appropriately, led to joint hearings in the First-tier Tribunal and now the Upper Tribunal their cases are separate and have to be considered separately.

4. The thrust of the appeals was particularly well summarised by the First-tier Tribunal Judge where she said at paragraph 3:

> "Both appellants claim asylum on the basis that their respective families have rejected their marriage and that they will be at risk on return to their home countries. The first appellant claimed that she had been threatened by her family because she married an Indian national. She claimed that her family are powerful and wanted her to marry someone else. She stated that they are politically influential and will be able to find her even if she moves to India with her husband. The second appellant claimed that his family disapprove of his marriage to the first appellant because he is Brahmin and that he will be at risk because he married outside his caste. He also fears that he will be killed by the appellant's family who have influence in India because of their political connections."

5. I begin with the case of the second Appellant because this, in my judgment, is by far the most straightforward.

6. The First-tier Tribunal Judge noted that the second Appellant entered the United Kingdom with permission as a student in May 2010. His leave was extended in different capacities until 18 April 2016.

7. On 25 November 2014 he applied for leave to remain on "private and family life" grounds as a dependant of his wife, the first Appellant. That application was refused on 16 February 2015 and an appeal dismissed on 17 December 2015. On 7 April 2015, that is before the outstanding appeal was dismissed, he applied for leave to remain as a general migrant and the application was refused in July 2015.

8. On 12 March 2017 he was served with a form identifying him as an overstayer and liable to detention. Shortly afterwards on 16 March 2017 he was served with removal directions for India. He claimed asylum on 27 March 2017.

9. The Judge summarised the Secretary of State's reasons for refusal and the substance of the appeal before her. It appeared to be the Appellants' case that the decisions leading to their removal would interfere with their private and family lives disproportionately because they would be removed to different countries. The Judge was not satisfied that she had been told the truth. She gave reasons for her findings, which are criticised in the grounds, and dismissed both appeals.

10. The Judge also had regard for expert evidence and again is criticised for the way she considered it.

11. The Judge's findings on the "Article 8" claim are clear and are found mainly at paragraph 50 of the Decision and Reasons. I set them out below:

> "Ms Norman submitted that any interference with their Article 8 rights will be disproportionate and that they would be living either in Nepal or in India without family support. I find that the appellants would be able to live in Nepal where they could seek employment and carve out an independent life for themselves. Alternatively they could live in India; the first appellant would be able to obtain a spouse visa to live with her Indian husband in India. Both appellants are well educated. The second appellant gave evidence that he has a Masters Degree in marketing, innovation and engineering. I find that they can utilise their qualifications and experience and settle in India. If they do not want to live in Kerala they could live in another part of India".

12. At paragraph 52 the Judge said:

> "I find that both appellants were well aware that if they feared returning to their countries of origin, they needed to claim asylum. I take into account their level of education. I find that their credibility is damaged under Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 because they did not claim asylum until they were faced with removal. The first appellant claimed asylum on 22 March 2017 when her application for leave to remain was refused on 16 February 2016. The second appellant claimed asylum only when he was served with removal directions on 16 March 2017. His claim for asylum is dated 27 March 2017. In conclusion, I find that any interference with the appellants' Article 8 rights, will be proportionate. I do not find that the interference will result in unjustifiably harsh consequences."

13. There are six grounds of appeal drawn by Ms Norman. As far as I can ascertain only ground 4 relates to the second Appellant. This ground criticises the Judge for finding that the credibility of the "Appellants'" (*plural*) was damaged because they did not claim asylum until they were faced with removal. The ground asserts that the details of the claim were first set out in a human rights application in November 2014 and so the substance of the claim was known to the Secretary of State before any immigration decision was made.

14. The grounds then draw attention to the terms of Section 8(5) of the 2004 Act:

> "This Section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification."

15. The ground asserts that the claim could be framed either as an asylum or as a human rights claim and as the human rights claim was raised before the immigration decision was made Section 8 has no effect.

16. Ground 6 mentions the second Appellant but only in the context of criticising the Judge for not making a finding on the claim that he would be arrested and mistreated by the police in the event of his arrival in Nepal. That is not material. There is no question of the second Appellant being removed to Nepal but to India. The Judge found that the second Appellant could live safely in India and the first Appellant could live there with him without difficulty if that is what she wished to do.

17. The grounds do not criticise the First-tier Tribunal's finding that the second Appellant had nothing to fear in India. The evidence to support a conclusion that he would face substantial difficulties in India, with or without the first Appellant, was scant. India is a large and diverse country. There was nothing to give weight to the expressed fear that the first Appellant's family would be able to create trouble for the second Appellant in India if that is what they chose to do or that they could not find somewhere to live together without risking persecution or other really serious ill treatment.

18. I appreciate that the grounds do criticise the general adverse credibility finding but that criticism is, I find, misconceived. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 sets out circumstances in which Parliament says conduct is discreditable. It is a difficult section. Discreditable conduct is discreditable without the authority of Parliament and conduct which appears to be discreditable is not necessarily discreditable or a reason to dismiss a protection claim merely because an Act of Parliament identifies such conduct as discreditable. This is not to disrespect Parliament. The matters set out in Section 8 are convenient hooks on which to hang adverse credibility points and because they are recognised by Parliament there is rarely any need to give any expansion or consideration or explanation to justify an adverse credibility finding but the point is not that an Act Parliament *makes* something discreditable but that something *is* discreditable and Section 8 makes it easy to identify and explain. The Judge's point at paragraph 52 was that the Appellants (this applies to both of them) are well educated people who did not claim asylum until faced with removal. In the case of the second Appellant the asylum claim followed the service of removal directions on 16 March 2017 and deferred until 23 March 2017 and the asylum claim followed on 27 March 2017. The Judge's clear point is that the Appellants could have claimed asylum earlier if they were in need of protection and the delay is discreditable. The Judge was entitled to give weight to that point without any reference to Section 8.

19. Counsel's grounds argue that the Section has been misapplied. Ms Norman argued that it applies where there has been a failure "to make an asylum claim or human rights claim" and the human rights claim had been made. In the case of the second Appellant the timing of the asylum claim is something that the Judge was entitled to consider and, given the general weakness of the second Appellant's claim, the Judge

was entitled to give considerable weight to the claim being made when it was and not on an earlier occasion.

20. Further I do not accept Counsel's contention that Section 8(5) does not apply. It applies where a person makes an asylum claim *or* a human rights claim. Even if a human rights claim had been made the asylum claim had not and it could have been because it was not based on fresh facts. The Act applied and the Judge was entitled to use it as a convenient shorthand for explaining her finding that the second Appellant was not believable.

21. There is no error of law in the decision in the case of the second Appellant.

22. It does not follow that the decision in the case of the first Appellant is sound and I turn to that now.

23. I consider now the grounds as far as they relate to the first Appellant.

24. Ground 1 complains that the Judge has made findings without giving proper reasons. Criticism is targeted at paragraphs 27 to 29 of the Decision and Reasons. It is a feature of the first Appellant's case that she has been married, or at least in a relationship regarded as marriage (it does not seem to be officially recognised in Nepal) before she started her relationship with the second Appellant. That relationship was unhappy and her former partner since did. There is a child of that relationship who has now achieved, or is close to, his majority.

25. The First-tier Tribunal Judge found it significant that the first Appellant never mentioned in her screening interview or her substantive asylum interview that she had been married previously and had a son from that marriage.

26. Screening interviews must always be reviewed with considerable care because their function is to identify the gist case so that it can be categorised, rather than to distil all the information on which an applicant seeks to rely. However the record shows that the first Appellant was asked directly at question 1.19 to confirm details of any spouse or partner or children "not included on asylum application". That may have prompted the first Appellant to say that she had had a partner who had now died and had a child who lived in Nepal but she did not.

27. I have also considered the Asylum Interview Record. Perhaps surprisingly the standard rubric does not ask someone if they have been married more than once or about their children. At question 27 the first Appellant was asked: "Why weren't you married off before you came to the UK?". She replied: "I was not interested in getting married to people linked with politics at all. I told them I am not interested in marriage and I want to study first, get qualified and then think about it."

28. I note too that earlier questions deal with the interviewing officer's professed surprise that the first Appellant had not been married in Nepal but her answers did not indicate that she had been married.

29. The first Appellant was asked at question 35 why she did not claim asylum in 2012. Her answer was that she had leave at that point. The interviewing officer thought that that was wrong but the first Appellant persisted that she had leave and it expired in November 2014 and she made an in-time application (she thought) on private and family life grounds. She indicated that the human rights application was based on the husband and her not being accepted in Nepal.

30. She then explained that she later told her parents that she had a partner in the United Kingdom and how that news caused consternation. She said that her father threatened her because he had been shamed because a match he had planned for her could not happen.

31. The first Appellant then explained how she had an uncle who was in a prominent position in politics. The interviewing officer said that he had not been able to find that relative at all on an "internet search" and asked her to comment on the suggestion that the uncle was not sufficiently important to worry about if he could not be found on the world wide web. The first Appellant replied "five days isn't enough" meaning it was not enough to provide further information. The first Appellant then referred to evidence she wanted to get in the form of the police report that her uncle and father had submitted. She insisted that she and her husband would be killed in Nepal. Marriage in different castes was a shocking thing.

32. The Judge was clearly entitled to find that these questions would have prompted a forthright person to have mentioned the earlier marriage. Taken at face value the questioning and tone of the interview did encourage the first Appellant to say that she had had an earlier relationship and a child and the failure to do that, without more, clearly supports an adverse credibility finding. The grounds contend that the adverse finding is unlawful because there was expert evidence that a previous relationship and a child of the relationship would be a matter of shame for the first Appellant and the Judge did not deal with the evidence that the first Appellant would find it very difficult to admit to what she later said had happened.

33. The Judge clearly understood the first Appellant's claim that it was shameful to mention the earlier relationship in Nepal. The Judge records at paragraph 15 that the first Appellant "said it is culturally taboo to say that she was previously married and has a child from another husband. She said that she never mentioned that to anyone." Thus it is beyond argument that the Judge understood the first Appellant's point.

34. The Judge also noted at paragraph 37 of her Decision and Reasons Professor Aguilar's report where he said at paragraph 30:

> "It makes absolute sense culturally that the appellant feels enormous shame of having been married with a son who was not with her and having found a loving partner in Europe. One cannot speculate on sentiments but it is plausible to say that no other Hindu or Nepali would have married her after finding out that she is a Magalik who was already married and has a child."

35. At paragraph 38 the Judge suggests that the reason the first Appellant did not mention at an early opportunity her earlier family is that it would be understood that it disadvantaged her as a marriage partner to be widowed with a child. The Judge suggested that far from being angry the first Appellant's parents would be pleased that she had found a partner and thereby relieving them from the difficult task of finding one suitable for her. The Judge also suggested that the family were not strict in Nepalian traditional values. If they were they would not have allowed the first Appellant to have left her child in the care of the former husband's family while she went to study in the United Kingdom.

36. Professor Aguilar listed the matters that he was expected to consider as part of his instructions. He refers to the first Appellant's witness statement and her husband's witness statement and their respective supplementary statements. He does not refer to the interview record. His observations about the first Appellant's reluctance to disclose her former marital status is not informed by the interview record and the context which might be thought to have prompted a truthful person to have overcome embarrassment and cultural taboos for the sake of her personal safety and to have explained that she had been married previously.

37. There is theoretical merit in the ground complaining that the Judge did not give a proper reason for discounting the explanation suggested by Professor Aguilar and that criticism has to be set against the background and the facts. There was a full asylum interview where it is quite clear to me a person who was telling the truth (which is more than just not telling lies) would be expected to have stated that she had indeed been married before and had a child. Professor Aguilar's comments are not informed by the interview record. The criticism has no practical merit. It is quite apparent that the Judge considered the evidence as a whole and can be excused for not giving a better explanation because it is obvious that Professor Aguilar was not informed properly when he expressed the opinion that he did.

38. Ground 2 complains that the Judge had given weight to immaterial considerations. At paragraph 29 the Judge does indeed say of the first Appellant that:

> "I find that she attempted to hide the fact that she had been previously married with a son and as a widow was free to marry the second appellant."

39. However, as the grounds correctly state, it had never been the first Appellant's case that she was not free to marry. It was her case that her chosen partner would be wholly unacceptable to her family.

40. I can make no sense of the finding that the first Appellant hid the fact that she was free to marry the second Appellant but nothing turns on this finding. What the Judge found significant is that she had attempted to hide the fact that she had previously been married with a son. The Judge went on to say that the first Appellant had said that she feared her own family and her deceased husband's family and found it significant that she had never mentioned a fear of her deceased husband's family in the asylum interview. The Judge was entitled to find that a woman genuinely frightened for her life would have mentioned these things.

41. Nevertheless the grounds are right when they say that the issue of the previous marriage does not affect the core claim, namely that the first Appellant fears her parents' action if she is returned to Nepal and she is not free to marry the person that her father has chosen for her but with a husband from a different country and a different caste.

42. The grounds say that the difference between a "district secretary" and a "Home Secretary" for the Congress Party is trivial and does not go to the core of the claim. It certainly does not go to the core of the claim but it is for the Judge to decide if it is trivial. The Judge was entitled to give weight to an inconsistency in the description of an officer when it was the first Appellant's case that her uncle was politically active in an important way.

43. The third ground deals with the expert evidence. I have looked particularly carefully at Mr David Seddon's concern that the first Appellant's family might instruct thugs and would be expected to do that to intimidate or even kill her. The Judge is wrong to say that the expert took the claim at face value. Mr Seddon was careful to refer to background material showing that criminal gangs operate in eastern Nepal, including the Sirha District where the first Appellant originates and the plausibility of the claim was not a result of accepting at face value her assertions but reading them against the background material. The grounds contend correctly that the first Appellant's evidence is that her family supported her before she met and married the second Appellant and that was something that she expected to be so disturbing she was very reluctant to tell her family about it. The fact the first Appellant had previously had support from her family does not mean that they would continue to support her now that she is married.

44. I have already considered ground 4.

45. Ground 5 criticises the Judge for failing to resolve conflicts on material matters and failure to take account of the expert report. I see merit in this claim. As the grounds point out, it was consistently the first Appellant's case that she had been badly treated by her first husband who was an alcoholic. I do not understand why the Judge was able to conclude that there would be no threat from that family in the future except that analysis seemed to fit with her view that she had formed of the Appellant's family circumstances in Nepal. The Judge has not dealt with the expert evidence about this.

46. Ground 6 complains there is a failure to make a relevant finding. The point is that the Judge accepted (I think) that the first Appellant's father had served a notice with the police which could have the effect of creating difficulties for the first Appellant and/or the second Appellant in the event of their entry to Nepal. The Judge decided that this was done cynically to bolster the claim. I do not understand why the Judge preferred that explanation to the one advanced by the first Appellant, namely that it was done because of the parents wish to do her harm.

47. The Judge has not dealt adequately with the expert evidence that adds weight to the credibility of the claim.

48. I am far from saying that the first Appellant is entitled to international protection but I am satisfied that the Judge's decision does not deal adequately with the evidence before her and I set aside her decision insofar as it relates to the first Appellant.

49. Further I find no findings can be preserved as everything should be considered in the light of a proper examination of the expert evidence.

50. Findings regarding the second Appellant are sound and I dismiss the appeal against the decision to dismiss the appeal of the second.

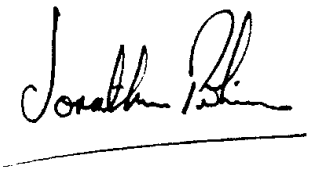
51. I allow the appeal in the case of the first Appellant and I have decided that it is appropriate for this to be dealt with in the Upper Tribunal probably before me. I give no further directions concerning the admission of evidence. If either party wishes to adduce evidence not already before the Tribunal then they must do that promptly because they may find that the case is listed quite soon. In any event an application in accordance with the Rules will have to be made.

Notice of Decision

52. In the case of the first Appellant, the First-tier Tribunal erred in law. I allow the appeal to the extent that I set aside the decision and direct that the appeal be heard again in the Upper Tribunal.

53. In the case of the second Appellant, I dismiss the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 21 January 2020