Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08464/2020**
UI-2021-001555

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 March 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MS POONAM SUBBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Mr Jafar, Counsel instructed by Kenton Solicitors
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

Heard at Field House on 13 January 2023

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Fern sent on 14 June 2021 dismissing the appellant's appeal against the decision of the Entry Clearance Officer dated 13 October 2020 to refuse her entry to the United Kingdom to join her sponsor. Permission to appeal was granted by Upper Tribunal Judge Grubb on 15 March 2022.

2. This hearing was by way of a face-to-face hearing with Mr Jafar attending remotely. There were no objections to this method of hearing. There were no issues with connectivity or communication during the hearing.

Background

3. The appellant is a national of Nepal. On 18 August 2020 she sought entry clearance to join her husband Mr Limbu in the UK pursuant to Appendix FM of the immigration rules. The application was refused on 13 October 2020.

The decision of the judge

4. The judge dismissed the appeal. The judge found that the appellant could not meet the requirements of EC-P1.1 of Appendix FM because the appellant did not meet the suitability or relationship requirements. On her application for entry clearance, she did not declare that she had previously been married nor did she declare that an application for entry clearance had previously been refused. The judge also found that the appellant had failed to demonstrate that her second marriage was valid because she was not divorced from her first husband at the date of the second marriage. The judge found that EX1 was not met because there were no insurmountable obstacles to family life taking place abroad and further that there would be no unjustifiably harsh consequences which would mean that the denial of entry would be a disproportionate breach of Article 8 ECHR. In this respect the judge noted that the sponsor's family lived in Nepal and that his evidence was that he would be able to return there.

Grounds of Appeal

5. The grounds of appeal are as follows:

   (1) In dismissing the appeal, the First-tier Tribunal Judge materially erred in law:

      (a) The judge's approach to the issue of the validity of the marriage was flawed. The judge's approach to the interpretation of the Nepalese statute (The National Civil Code Act 2017) was perverse and unfair. There was evidence from a Nepalese legal practitioner that the second marriage was valid. The judge failed to give adequate reasons for failing to attribute weight to this evidence and it was not put to the practitioner that he was lying. The footnote suggesting that the lawyers credibility "might be damaged" is not adequately reasoned. The judge also failed to make a finding on whether the appellant approached a lawyer for advice prior to her marriage.

      (b) The judge's errors in this respect were "pivotal" to the judge forming a view that the appellant had sought a "dangerous and evil " deception on the home office and her husband, and led the judge to find that the appellant had sought to deceive the Entry Clearance Officer for an immigration advantage. The judge failed

to take into account mitigating circumstances such as the reason behind the deception. This error infects the whole decision to dismiss the appeal.

Rule 24 Response

6. The Secretary of State did not produce a Rule 24 response.

Documents

7. On the day of the hearing, I was provided with an electronic copy of the appellant's original bundles, the respondent's bundle as well as further evidence from the appellant in relation to the validity of second marriages as well as a rule 15 Notice. The judge's decision, grounds of appeal and the grant of permission were all on the electronic file.

Grant of Permission

8. Permission was granted by Upper Tribunal Judge Grubb on 15 March 2022 on the basis that "the judge arguably erred in law in his interpretation and application of the applicable Nepalese law in finding that the appellant was not validly married to the sponsor. The materiality of any error, in particular in relation to the rules, may well be an issue".

Submissions

9. Mr Jafar made lengthy submissions which reiterated the grounds in respect of the judge's errors in relation to the validity of the marriage. He made the important point that an affidavit by the legal practitioner Mr Tula Gurung was in the respondent's bundle and a witness statement from him was in the appellant's bundle. Both documents were provided to the respondent prior to the appeal. He emphasised that in this appeal the respondent did not provide a "review" prior to the appeal, in response to directions. The respondent did not make any submissions on this evidence and it was not asserted by the respondent that the practitioner's opinion was unreliable.

10. In addition, he submitted that the judge erred in her approach to the suitability criteria, the application of which is discretionary by failing to take into account material factors including the reasons given by the appellant for putting incorrect information on her application form and other mitigating circumstances. There was no balancing exercise carried out and the judge did not take into account positive factors.

11. Mr Jafar confirmed that there is no challenge to the judge's wider Article 8 ECHR proportionality assessment.

12. Ms Cunha defended the decision. Her submission is firstly that there is no error in relation to the judge's treatment of the evidence in relation to the validity of the marriage and even if there were, any error would not be material because the judge's approach to the suitability criteria is

manifestly lawful and sustainable, and the appellant could not therefore succeed under the immigration rules which is relevant to the issue of proportionality.

Further evidence

13. The further evidence consisted of an article published on 22 September 2020 in relation to Nepal's divorce law by a student of law at National Law College. I refused the application to admit further evidence because it had no relevance to the lawfulness of the judge's decision because it was not before the judge at the date of the appeal hearing before the First-tier Tribunal. The further evidence related to a factual issue in the appeal and not to any alleged procedural impropriety during the hearing. Further it is not clear why a student of law would be considered an "expert" on matrimonial law in Nepal. The article appears to be an opinion piece and deals mainly with the rights of women to property following divorce. Even had the evidence been before the judge, it would have added little to demonstrate that women in Nepal can enter into a valid second marriage without first obtaining a divorce. Having taken into account the timing, relevance and content of the new evidence, I found it to be fair and in the interests of justice not to admit this evidence.

Discussion and Analysis

14. I start by observing that in order to satisfy the substantive requirements of the immigration rules, the appellant needed to demonstrate that she met all of the requirements of EC-P1.1. Although the Secretary of State accepted that the appellant met the English language and financial criteria, she was not satisfied that the appellant met the relationship or suitability criteria. There is no provision in EC-P1.1 to apply EX 1 if any of the criteria are not met. Ms Cunha conceded that the judge erred at [79] and [80] in considering EX1 to be relevant at all.

15. The effect of this is that if the judge's approach to the suitability criteria is not flawed, any error with respect to the issue of the validity of the marriage is immaterial because the appellant could not succeed under Appendix FM in any event.

Suitability

16. I turn first to Ground 2 in relation to suitability. The application was refused under S-EC2.2(a) because the appellant declared on her visa application that all the information she provided was "true and correct". The appellant stated that she had never been refused a visa for the UK. This was not true because she was previously refused a Tier 4 student visa on 24 May 2010. Secondly the appellant stated that she had not been previously married or in a civil partnership and this was also not correct because at the date of the visa application in 2010 she stated that she was married a Mr Binod Rai and she provided a marriage certificate as evidence of the marriage. The view of the Secretary of State was that the

omission of this information on the current application form could not reasonably be attributed to an “innocent mistake”.

17. The appellant admitted in her evidence to the judge that when she completed her visa application in August 2020, she failed to declare that she had made a previous application to enter the UK which was refused and that she failed to declare her previous marriage. In the affidavit she submitted in support of her grounds of appeal to the First-tier Tribunal she said her previous husband disappeared suddenly in 2011 and there had been no “whereabouts of him” for about 7/8 years. The appellant’s evidence was that she did not tell her husband about the previous marriage because she feared that he might not marry her or would abandon her because of pressure from his relatives or wider Nepalese society. She was forced to tell her husband about the previous marriage after her application for entry clearance was refused. Her legal representatives were not aware of the previous marriage and application because they were instructed by her husband. She stated that she did not intend to deceive the Home Office or provide false information. She did not want her husband to reject her and wrongly thought that the information submitted ten years ago would not be disclosed.

18. In the grounds of appeal, she asserted that the failure to disclose the previous marriage was an “innocent mistake”. Her motivation was to save her relationship.

19. In her appeal witness statement, the appellant repeats what she stated in her earlier affidavit.

20. In the skeleton argument prepared by Mr Bhandari who represented the appellant at the appeal it appears to be accepted as a fact that the appellant failed to disclose material information to the respondent in that she had made a previous application which had been refused and that she had previously been married. The submissions say that it is “not fair to apply the suitability requirements because of the appellant’s mental health problems”. It is “unreasonable” to expect the sponsor to leave NHS care because of a “trivial error” on the part of the appellant.

21. The judge heard oral evidence from the sponsor and the appellant. The sponsor’s evidence, set out at [28], was that he was not aware that the appellant had previously been married when he married her and that if he had known this, he would not have married her. It was only much later after the appellant was denied entry that she told him that she had a first husband who is in Korea.

22. The appellant’s evidence was that the marriage, which took place in 2009, lasted for a short period. The person who arranged the current marriage did not ask her if she had previously been married. She does not know where her first husband is – he could be in Kathmandu or Korea. After the application was denied in 2010 she had fewer and fewer contacts with him and then eventually lost all contact.

23. The appellant then gave oral evidence recorded at [31] that the previous visa application was not in fact rejected because she and her husband had decided to withdraw the application before it was rejected. She then modified her answer to say that she "thought" that the prior visa application had been withdrawn. The judge records:

> "When the appellant was asked why she had denied her first marriage in her current visa application, she said "What I believed was my old relationship was not useful to me and it was over". The appellant accepted that she had deliberately told the Home Office the falsehood that she no previous marriage stating; "I had to move on with my life. I never thought my previous husband would come back". The Appellant said that she had never tried to divorce her first husband, stating that she consulted a female lawyer friend in 2016 or 2017 who works with Mr Tula Ram Gurung and she had said that a woman doesn't have to get a divorce."

24. Mr Bhandari's submissions to the judge were recorded at [55]. He submitted that the appellant was not hiding anything from the Home Office. She did not disclose her previous marriage for two reasons; she didn't want to remember the past and she has taken advice from a female lawyer friend of the appellant who works with Mr Tula Ram Turung. He said the appellant had made what he categorised as a "small error".

25. The judge's finding on suitability are at [59] where she states:

> "With respect to eligibility under the immigration rules, the appellant accepts that she was intentionally untruthful in the application she submitted for entry clearance dated 18 August 2020".

26. And at [60]:

> "She says she was mistaken when she said in the application that she had not been refused an application previously, but accepted that she intentionally denied her first marriage in the application."

27. And at [61]:

> "I do not find the appellant's account regarding being mistaken to be credible. She says that she thought her 2010 application had been withdrawn because she anticipated it would be rejected. However, the appellant was sent a clear refusal letter in 2010 denying her visa application on financial eligibility grounds and she would have known that her application was denied. (RB 26). Further, the appellant's credibility is damaged because she entered into a marriage with the sponsor in a dishonest way, without having told the sponsor that she was married to Binod Rai. The appellant accepts intentionally denying the existence of this marriage on her application form. As she stated in evidence, "What I believed was my old relationship was not useful to me and it was over" "I had moved on with my life, I never thought my previous husband would come back". The sponsor said that he would not have married the appellant had he known about her first marriage. The appellant must have realised this as she carried on in this

> deception for more than two and one-half years, not telling the sponsor about the first marriage until after her application for entry clearance was denied on 13 October 2020. The appellant's behaviour is disingenuous at its highest".

28. At [62] the judge noted that to succeed under Appendix FM an applicant must not fall for refusal under any of the suitability grounds, which at [63] she noted included providing false information and a failure to disclose material facts.

29. At [64], the judge makes her findings concluding that the appellant provided false information (and did not disclose the true information) that she had not been refused a visa and had not been married before

30. At [65] the judge states:

> "I find that as the appellant herself admitted in evidence, her denial of her first marriage was false and intentionally so. I therefore find that the appellant has not complied with EC-P1.1 (c)".

28. Mr Jafar's primary argument is that this approach is flawed because the judge did not take into account the mitigating factors such as the fact that the appellant was reluctant to reveal the marriage to her husband because of a sense of shame and out of fear of cultural disapproval; that the previous marriage was short and a long time ago; and that she had not seen her first husband for a long time. He submits that the judge has failed to consider whether the respondent exercised the discretion correctly.

29. Firstly, I find this was point not argued in the skeleton argument. The only argument put forward was that the false declaration was a "trivial mistake". No arguments were made about discretion. The judge correctly points to the fact that the appellant deliberately did not mention her previous marriage and that this is her own evidence. The judge has taken into account her reasons for failing to do so including that that she did not want to jeopardise her new marriage and that the previous marriage was short-lived. The judge has properly taken into account material factors. Nevertheless, it was entirely open to the judge to find that the appellant deceived both her husband and made a dishonest false representation on the entry clearance application form.

30. The judge also manifestly gave adequate reasons for finding that the appellant did not make a mistake when she declared that she had not had a previous application refused. The judge properly pointed to the fact that the appellant was notified of the decision and that she modified her evidence under cross examination. These reasons are sufficient and rationally based in the evidence before the judge.

31. Mr Jafar submitted that the judge's view of the appellant entering into a second marriage without having first informed her husband informed her view of the suitability criteria and is erroneous.

32. I do not agree. I am satisfied that on the evidence before her in relation to the misrepresentation, notwithstanding any error in relation to the evidence of the validity, on the evidence before her, it was entirely open to the judge to find that the appellant had not established that she met the requirements of EC-P1.1 (c). The judge's finding that the suitability criteria apply to the appellant are in my view entirely lawful, rational and reasonable.

33. I am satisfied on this basis that the appellant was not able to satisfy the immigration rules at EC-P1.1 and the appeal could not succeed under the immigration rules notwithstanding any error in relation to the validity of the marriage.

Validity of the marriage

34. I agree with Mr Jafar that although the evidence of Mr Tula Gurung was not technically expert evidence in the sense that it did not comply with the relevant practice direction, the judge was bound to consider this evidence and decide what weight to give to it. Hussein v SSHD[2020] UKUT 250 is not authority for the proposition that only an expert report in the required format is acceptable evidence. What cannot be relied on is statute alone. The judge failed to engage with the evidence and did not really explain what weight, if any, she gave it. The judge appears to have failed to take into account factors that would point towards giving this evidence some weight. Mr Gurung explained under oath that he was a general practitioner in a High Court in Lalitpur Nepal and had been for 15 years. He was familiar with laws concerning family matters. He confirmed that the marriage certificate was lawfully issued, and the statute of limitations had passed. He confirmed in oral evidence that most lawyers in Nepal are general practitioners; the history of how s82 had come about and confirmed it was the current law. He confirmed that there may be inconsistencies in the statute and it may be amended in future. It is not clear to me what the judge made of this evidence because she did not deal with these points. She was of course entitled to take into account the fact that the report did not comply with the practice direction and that there was no other expert evidence in the form of legal journals etc, but she was obliged to deal with that evidence which was before her and if she rejected it to give adequate reasons for doing so.

35. I am also in agreement that the respondent failed to respond to clear directions by the Tribunal to provide a meaningful review taking into account the appellant's bundle of evidence. The appellant had put forward evidence that the marriage was valid both in her grounds of appeal and in the appeal bundle and the respondent had not made any comments on this evidence nor submissions notwithstanding directions to do so. The respondent did not assert prior to the appeal that the wording of s82 was ambiguous nor that the witness evidence was unreliable. It does not appear to have been put to the witness that he was lying and that he did not have the expertise to comment on the statute. Nor does it appear that it was put to him that his evidence was not credible because he was an

associate of the lawyer who had advised the appellant that as a woman she was able to lawfully remarry because of her gender without obtaining a divorce. I find the judge's footnote on page 13 to be unhelpful and unfair in this respect. If the judge is making a finding in the footnote that the witness lacks credibility for the above reasons, this should have been put to him and the judge should have given adequate reasons for this finding in the decision rather than addressing this issue obliquely in a footnote.

36. Further, I agree with Mr Jafar that the judge's reading of the statute is confused when she states at [72] that on the face of the statute it is "susceptible to two contrary" interpretations. This was not submitted by the respondent and s82 reads that a matrimonial relation between husband and wife shall be deemed to have been terminated if the wife concludes another marriage before effecting divorce according to law. I agree with Mr Jafar that "another" implies be a reference to a second or further marriage. I do not understand the judge's characterisation at [76] of the wording of the statute. I note and take into account that the record of proceedings appears to refer to a "June 2018 Nepal" document but this document was not on the electronic file and was not available on the Home Office website, thus it is not clear from the decision what this document was or how it impacted the judge's findings. Ms Cunha made the point that the statute was recent from 2017 and it was not clear when it came into force or if it applies to a woman who married on 18 February 2018. However, this point does not appear to have been taken at the hearing and this submission is not relevant.

37. I am satisfied that the judge's approach to Mr Tula Gurung's evidence was flawed because she did not give explain what weight she gave to the evidence, her reasoning was inadequate, she made confused comments in relation to the wording of the statute and came to a conclusion that the witness lacked credibility when this was not asserted by the respondent and was not put to the witness for the witness to address.

38. This is not an acceptance that the appellant provided sufficient evidence to demonstrate the validity of the second marriage, but to point to the errors in the judge's approach. It may be that had the judge analysed the evidence before her properly she may have come to the same conclusion, but this is not a certainty.

39. However, for the reasons I set out above, this error is not material to the assessment of whether the appellant could meet the immigration rules because the judge's findings on suitability are sustainable.

40. Mr Jafar did not challenge the judge's wider Article 8 ECHR balancing exercise and does not seek to challenge any of the judge's factual findings from [80] to [84] and her ultimate finding that there were no "insurmountable obstacles" to the appellant returning to Nepal to live with his wife. Although the judge was not required to ask herself this question in an entry clearance appeal because EX1 does not apply, her factual findings were firmly grounded in the evidence before her. These findings

include the fact that the appellant has always lived in Nepal: the sponsor's parents have returned to Nepal where the remainder of the family live including his grandparents so the reason for him coming to the UK to join his parents no longer features; the sponsor would not have any difficulties returning to Nepal; the reasons that the appellant and sponsor want to live in the UK are economic and the sponsor's assertion that he would not be able to get medical treatment was not supported by the evidence. Elsewhere the judge records that at the date of the appeal, the sponsor was not working and on benefits. These findings were all relevant to the Article 8 ECHR proportionality assessment.

41. In summary, for the reasons above, I am satisfied that the judge's suitability findings were sustainable. The judge's errors in relation to the validity of the marriage are immaterial. I can also find no error in the judge's approach to proportionality. The judge directed herself properly. She properly gave weight to the fact that the appellant could not meet the requirements of the immigration rules and took into account the public interest in maintaining effective immigration control. She took into account the appellant's ability to speak English, the sponsor's current reliance on benefits and that the fact that the appellant gave incorrect answers on her application form. The judge also took into account the sponsor's evidence that the couple could live in Nepal without difficulty and that there is healthcare available in Nepal. There is no error in the judge's approach here.

Decision

42. The appellant's appeal is dismissed.

43. The decision of the First-tier Tribunal dismissing the appeal is upheld.

No anonymity direction is made.

Signed R J Owens Date 27 January 2023

Upper Tribunal Judge Owens