Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/47812/2014**

IA/47811/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 5 April 2016	**On 29 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SHANTI ACHARYA
GHANASHYAM PRASAD KAPHLE
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Razzar-Siddiq (Universal Solicitors)
For the Respondent: Mr E Tufan (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. These are the appeals of Shanti Acharya, a citizen of Nepal born 26 January 1984, and Ghanashyam Prasad Kaphle born 26 August 1978, against the decision of the First-tier Tribunal dismissing their appeals against the decision of the Secretary of State of 13 November 2014 to refuse their applications for further leave to remain.

2. The immigration history provided by the Respondent sets out that the Appellants entered the United Kingdom on 13 October 2009 with leave

until 23 October 2011; their leave was extended until 21 December, as a Tier 4 student and dependant, until its curtailment to expire on 22 August 2014 following the Sponsor college's licence being revoked.

3. Refusing the application, the Secretary of State found that, absent a Sponsor with settled status neither had a viable application under Appendix FM and, as to their private life within the Rules, they were not thought to have lost their ties to their home country such that they would be unable to integrate there on a return. Any relationships that they had established in this country could be maintained remotely in the future.

4. The application of 20 August 2014 was to remain based on Ms Acharya being from a family which had given everything towards her education. From October 2009 she had studied with Brit College London, studying Health and Social Care, with a view to studying Hospitality Management. Following the revocation of Brit College's licence on 21 May 2014 her visa had been curtailed, leading her to become depressed and unconfident. She had previously hoped to go into further education or to switch to Tier 2 as a sponsored employee. Her plans were ruined by the college's demise and she had been unable to obtain a further Certificate of Acceptance for Studies (CAS) despite her best endeavours to do so. She could not face starting out again in Nepal and her husband had already sold his matrimonial property to fund her education.

5. At the outset of the hearing below the Appellants' representative sought an adjournment on the grounds that she was unfit to attend the hearing: the Judge refused this application as her NHS fitness to work statement referred to her being unfit for work due to back pain but considered that insufficient to show she was unable to attend the hearing. Her witness statement set out that she was pregnant and was experiencing complications: she had been advised by her consultant to have a complete rest and to avoid anxiety and stress. Return to Nepal would be difficult in the light of the earthquake and the consequent infrastructure damage. It would be deeply embarrassing in her society for her to return to Nepal to make a fresh start, and the prospect of their lives being shattered had caused her to develop depression.

6. The First-tier Tribunal went on to determine and dismiss the appeals concluding that, whilst it accepted the factual basis on which the case was put forward, the Appellants were overstayers who had breached immigration and had always been aware of their short term stay here. It could be expected that return would involve some hardship given the earthquake, but they had always been aware of the need to return home and Ms Acharya had the advantage of her qualifications here to draw upon.

7. Grounds of appeal argued that the decision had been procedurally unfair because

(a) The decision to refuse an adjournment was unfair;

(b) The Defendant Secretary of State had acted unlawfully in failing to consider relevant considerations;
(c) Given the Appellant had invested a lot of money with a view to securing her degree, she could arguably benefit from the principle articulated in *CDS Brazil* that a person with strong connections to this country and to a particular institution could, if committed to a particular educational sequence which would be seriously damaged by the immigration decision, might have established private life here with which interference was disproportionate.

8. Mr Razzar-Siddiq submitted that the Upper Tribunal had acted contrary to the fundamental common law principle of fairness in its decision to refuse an adjournment application which had the consequence of excluding the Appellants from their own hearing. Furthermore the First-tier Tribunal had been wrong to suggest that they had breached the Immigration Rules: in reality their leave had been curtailed and they had made a timely further application prior to its new expiry date. Mr Tufan argued that the medical evidence had not clearly shown the Appellant would be unable to give evidence in her appeal.

Findings and reasons

9. It is uncontroversial to recognise that the pursuit of fairness lies at the heart of the Tribunal's overriding objectives. Where issues of fairness arise, on appeal the question is whether the procedure below was right or wrong, and is not to be approached via the prism of rationality: "Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The *Wednesbury* reserve has no place in relation to procedural propriety" (see Simon Brown LJ in *Kingdom of Belgium* (CO/236/2000 15 February 2000)).

10. The First-tier Tribunal refused the adjournment application because it was not satisfied that medical evidence stating that one Appellant was unable to work demonstrated that she could not attend a hearing. It seems to me that a person who is unable to work because of pregnancy-related issues may very well be physically compromised such that they cannot give evidence in important legal proceedings. I accept that the Judge below erred in law in failing to have regard to this relevant consideration.

11. As was stated in *MM (unfairness; E & R) Sudan* [2014] UKUT 105 (IAC) distilling the principles in *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 344 where there is unfairness "It is sufficient if an Applicant can establish that there is a real, as opposed to a purely minimal, possibility that the outcome would have been different". Pressed repeatedly from the Bench, the Appellant's advocate was unable to point to further evidence that would have been given that

might have led to a different outcome on the appeal. In these circumstances I cannot find that the error was a material one even to the relatively low standard envisaged by *MM Sudan.*

12. Beyond the challenge to the refusal of the adjournment it is rather difficult to extract points of law from the grounds of appeal, which are drafted as if the Secretary of State was the relevant Defendant, in judicial review proceedings, rather than focussing on demonstrating material flaws in the reasoning of the First-tier Tribunal.

13. As to the Appellants' claim that their rights protected by Article 8 ECHR might be infringed by the immigration decision, in *Niemietz v Germany* [1992] ECHR 80 at [29] the ECtHR recognised that private life goes beyond one's "inner circle" of relationships without regard to the "outside world" which one inhabits: one's "private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

14. In *CDS (PBS* "*available*" *Article 8) Brazil* [2010] UKUT 305 (IAC) a strongly constituted Panel of the UTIAC found at [19] that "people who have been admitted on a course of study at a recognised UK institution for higher education, are likely to build up a relevant connection with the course, the institution, an educational sequence for the ultimate professional qualification sought, as well as social ties during the period of study. Cumulatively this may amount to private life that deserves respect because the person has been admitted for this purpose, the purpose remains unfilled, and discretionary factors such as mis-representation or criminal conduct have not provided grounds for refusal of extension or curtailment of stay." Following the decision of the Supreme Court in *Patel*, in *Nasim and others (Article 8)* [2014] UKUT 25 (IAC) at [20] the UTIAC stated that:

> "*Patel and Others* is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)"

and at [41] went on

> "on the state of the present law, there is no justification for extending the obiter findings in *CDS*, so as to equate a person whose course of study has not yet ended with a person who, having finished their

course, is precluded by the Immigration Rules from staying on to do something else."

15. I cannot accept, based on the unparticularised assertions made in the application, that the Appellant has any private life connections of an intensity that would move this case from the general *Nasim* position into the compelling kind of case represented by *CDS Brazil*. Proportionality is to be measured via factors including the criteria identified in section 117B of the Nationality Immigration and Asylum Act 2002, and his presence is precarious given he has only ever been granted limited leave to remain as a student. Thus the private life they have established here is to be given only limited weight. The First-tier Tribunal was wrong to treat the couple's presence as established in breach of the Immigration Rules given that they made a timely application for further leave to remain, but the fact remains that had that mistake not been made, they would still have faced a similar disadvantage in the public policy balancing exercise.

16. The Appellants do not assert any family life links here, whereas abroad they would have the advantage of their own extended family to support them. One appreciates that the consequences of the earthquake will make life more difficult for them in the future, but it must be borne in mind that, firstly, the classes of person identified as at particular risk of disadvantage in its aftermath are essentially the vulnerable and do not include able-bodied young people, and secondly, that this complaint is of the vicissitudes of life to which flesh is heir, akin to naturally occurring illness, which (at least in a case where no strong Article 8 rights are established) could only raise an impediment to removal in the most exceptional humanitarian circumstances: see *N v United Kingdom* 2008 47 EHRR 885, *Sufi and Elmi* 8319/07 [2011] ECHR 1045 at [282], referencing circumstances "solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought …"

17. I accept that during their residence in this country they will have established friendships and something by way of connections here but I cannot accept that this amounts to such a fundamental aspect of either Appellants' identity as to make the interference with private life occasioned by removal disproportionate. It is to be presumed given Ms Acharya's length of studies in the United Kingdom that she speaks good English and that she has been financially independent, so those considerations do not count heavily against them. However she has always been present in an immigration capacity that was temporary and the couple's ensuing presence here has been precarious. There is no disproportionate interference with their private life occasioned by the immigration decision.

Decision:

The decision of the First-tier Tribunal is upheld as there is no material error of law within it. The appeal is dismissed.

Signed: Date: 27 April 2016

Deputy Upper Tribunal Judge Symes