Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10132/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th April 2018	**On 19th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR SHREE PRASAD DURA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Layne, Counsel
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 13th July 1985. The Appellant applied for entry clearance to settle in the United Kingdom as the adult dependent relative of his late father, Mr Ganga Parsad Gurung. The Appellant's application was considered as a dependent relative under paragraph EC-DR.1.1 of Appendix FM. The Appellant's application was refused by Notice of Refusal dated 30th March 2016. I am aware that there have been previous applications. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Rahman sitting at Taylor House on 29th June 2017. In a decision and reasons promulgated on 17th July

2017 the Appellant's appeal was allowed under Article 8 of the European Convention of Human Rights.

2. The Secretary of State lodged Grounds of Appeal to the Upper Tribunal on 17th July 2017. Those grounds contended that the findings at paragraphs 51 and 52 of the determination were unsustainable and that such findings did not relate to the case and that the findings related to two other cases which were heard on the same day and it is submitted that the judge had made reference to those authorities in his decision. It was submitted that those cases based on different facts, different evidence and different claims reached almost exactly the same conclusion and that an extract of the final paragraphs of findings reflected that. The Secretary of State submits the Tribunal had somehow managed to apply the findings of those linked cases to the facts of this individual case and that the findings were unsustainable and the findings have to be re-made.

3. Further, it was contended that the findings in the case were speculative and that the findings showed that the Tribunal had failed to show evidence of emotional dependency as per *Kugathas* and therefore the Tribunal had erred in law.

4. On 12th January 2018 First-tier Tribunal Judge Saffer granted permission to appeal.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the appeal process Mr Dura is referred to herein as the Appellant, albeit that this is an appeal by the Secretary of State. The Appellant appears by his instructed Counsel, Mr Layne. The Secretary of State appears by her Home Office Presenting Officer, Mr Clarke.

Submissions/Discussions

6. Mr Clarke takes me to paragraphs 45 onwards in the current decision and refers me to paragraph 65 onwards in the linked decision referred to above. He submits that the similarity in the wording therein shows that the judge has not turned his mind to the issues that were before him in this case. Further, he submits that there has been a lack of findings on emotional dependence and that the approach adopted shows a speculative approach to historic injustice. He submits that there is a paucity of reasoning and that there has been no reference to the evidence provided purportedly by the Appellant and the Sponsor and consequently it has not been reasoned that family life exists. Mr Layne in brief submission submits that emotional dependency is addressed at paragraph 35 but I challenged him with regard to the findings made at paragraphs 18 and 21 by the judge and he did not wish to push this particular issue any further.

The Law

7. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

8. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

9. It is appropriate to address this matter in two ways. The initial thrust of the Secretary of State is that the First-tier Tribunal Judge has misplaced within this decision paragraphs from another decision. I have had the benefit of looking at both those decisions. There are slight differences therein which show that they are effectively standard paragraphs used by the judge in cases of this nature. There is nothing wrong in a judge setting out the law and making appropriate reflections as to whether or not family life has or has not arisen. What however the judge needs to do is to ensure that findings are made on the facts. Consequently, I do not find there to be any error of law that is material on the approach adopted by the judge in using similar paragraphs in both decisions.

10. Where, however, the judge has erred in law is to be found in his approach to this matter. At paragraph 18 of his decision the judge has noted that the Appellant's mother appeared before him with a view to giving evidence through an interpreter in Nepalese but that she had stated that she did not understand the interpreter and consequently the Appellant's representative at that hearing (and it was not Mr Layne) confirmed that the hearing should proceed by way of submissions only.

11. Thereafter, the judge has noted the evidence at paragraph 21 that it consisted of undated and unsigned statements. The judge has then gone on to make conclusions at paragraph 35 and paragraph 35 is of importance. It states:

> "I note the detailed and consistent evidence from the appellant and his mother … I have no reason to disbelieve the factual account put forward by the appellant".

12. It is difficult to see how the judge has made these findings. He had heard no evidence from the Appellant's Sponsor. The witness statements to which he has given read-through consideration are unsigned and undated. It is hard to see that they are worth consequently the paper upon which they are written. To make findings based on that evidence, where it is then admitted and accepted that all that is done by the Appellant's representatives is to make submissions, confounds the reality that the judge could possibly in such circumstances have concluded that the evidence was "detailed and consistent" and confounds the fact that the judge made a finding that he believes the factual account put forward by the Appellant. That evidence has never been tested. In such circumstances the findings of the judge which are extremely limited are not ones which are sustainable and the approach of the judge shows clearly a material error of law. In such circumstances the correct approach is to set aside the decision of the First-tier Tribunal with none of the findings of fact to stand and to remit the matter back to the First-tier Tribunal for rehearing.

Notice of Decision

The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. Directions are given hereinafter for the rehearing of this matter.

(1) On finding that the decision of the First-tier Tribunal Judge discloses a material error of law the decision is set aside with none of the findings of fact to stand.

(2) The appeal is remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an ELH of two hours. The restored hearing is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Rahman.

(3) That there be leave to either party to file and/or serve thereafter an up-to-date bundle of subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing.

(4) That a Nepali interpreter do attend the restored hearing.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris