Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002915
[HU/08254/2020]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Thursday 3 November 2022	**On Friday 9 December 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR YUWARAJ GURUNG

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Moriarty, Counsel instructed by Everest Law Solicitors
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Cohen promulgated on 30 March 2022 ("the Decision"). By the Decision, Judge Cohen dismissed the Appellant's appeal against the Respondent's decision dated 17 March 2020 refusing his human rights claim. That claim, based on the Appellant's Article 8 ECHR rights, was made in the context of an application to join his mother who is settled in the UK. His mother is the widow of a former Gurkha veteran. The Appellant is aged

51 years and lives in Nepal but claims to be dependent on his mother ("the Sponsor").

2. The Respondent refused the claim on the basis that it would not be disproportionate for the relationship between mother and adult son to continue as it had done for many years. The Respondent did not accept that the Appellant was financially or emotionally dependent on the Sponsor.

3. The Decision was promulgated nearly four months after the hearing. The Judge referred to the Respondent being represented by Counsel whereas it is common ground that the Respondent was unrepresented. There are other factual errors said by the Appellant to have been made which I will come to when dealing with the grounds of appeal. The Judge found that the Appellant's circumstances were not exceptional and did not warrant a grant of leave to remain outside the Immigration Rules. He did not accept that family life existed between the Appellant and the Sponsor. He concluded that exclusion from the UK was "entirely appropriate particularly having regard to the public interest in maintaining effective immigration and border control". He therefore dismissed the appeal.

4. The Appellant appeals on three grounds as follows:

> Ground (i): The Judge made material factual errors.
>
> Ground (ii): The Judge erred in his assessment of the evidence.
>
> Ground (iii): The Judge took irrelevant matters into account.

5. Permission to appeal was granted by First-tier Tribunal Judge F E Robinson on 19 May 2022 in the following terms so far as relevant:

> "... 2. The grounds assert that the Judge has made a error of law in making material factual errors, erring in his assessment of the evidence and taking irrelevant matters into account, in particular, assessing the evidence as if the Respondent were represented at the hearing when this was not the case.
>
> 3. It is arguable that the Judge has materially erred in law as it appears from his determination that he has made material factual errors. It unclear [sic] from his determination whether the Respondent was represented and whether the Appellant was cross-examined on his evidence; in addition, he has referred to contradictory ages of the Appellant."

6. The Respondent filed a Rule 24 Reply on 30 June 2020. She confirms that the Respondent was unrepresented at the hearing and therefore accepts that the Judge was wrong to record that the Respondent was represented by Counsel. However, she submits that this is not a material error. She also concedes that other facts were mistakenly recorded but again says that these are not material. She refers to the lack of witness evidence from Counsel who attended the hearing that certain matters were not put

to the Sponsor. Absent such evidence she does not concede that the Judge failed to put issues to the Sponsor.

7. Mr Moriarty was also Counsel who attended before Judge Cohen. As such, he could not appear as both Counsel before me and witness as to what occurred at the First-tier Tribunal hearing. In order to overcome this problem, he filed his note of the hearing before Judge Cohen. As it was, Mrs Nolan did not indicate that she wished to cross-examine Mr Moriarty in relation to what was there said, and the note was taken as read albeit it is not and does not purport to be a verbatim record of the hearing.

8. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal.

9. I had before me a core bundle of documents relating to the appeal, the Respondent's bundle and the Appellant's bundle which were before the First-tier Tribunal. I need to refer only to limited documents as identified below.

DISCUSSION AND CONCLUSIONS

10. The way in which Mr Moriarty made his oral submissions blurred the distinction between the three grounds. It is therefore appropriate to take the three grounds together.

11. I begin by noting that, although the Decision was not promulgated until nearly four months after the hearing, the Appellant does not say that the delay renders the Decision unlawful. The point made is rather that the Judge may have forgotten the case and/or considered that he was dealing with a different case given the errors made.

12. The first error to which I have already alluded is the question of representation. As I have indicated, the Respondent accepts that the Judge was wrong to refer to her being represented by Counsel. That appears not simply in the heading of the Decision but is also implied by the reference to the Sponsor being cross-examined ([13] of the Decision) and to "parties" (plural) ([25]).

13. In and of themselves, those are not material errors (which is the Respondent's position). The point made at [13] of the Decision is not adverse to the Appellant. It merely confirms the Sponsor's evidence that the Appellant is living in the family home and has "little in the way of living expenses". That does not suggest any adverse credibility issue or finding adverse to the Appellant's case. Similarly, at [25] of the Decision, the point made by the Judge is that he indicated his "own knowledge" ([19] of the Decision) about the unemployment rate in Nepal. That might be objectionable for other reasons (such as the Judge relying on his own research if not put to the parties) but is not an error of law if the

Appellant had the opportunity to deal with the point or if it were not a central part of the reasoning.

14. The way in which Mr Moriarty put the Appellant's case however is that points taken by the Judge adverse to the Sponsor (and therefore the Appellant) (in particular at [21] and [25]) were never put to the Sponsor. They were not issues raised by the Respondent in her decision under appeal. If the Judge wished to rely on findings adverse to the Sponsor and Appellant, he needed to put those points to the Sponsor so that she could answer them. The first point is that the Sponsor is said to have stated that her husband frequently expressed a desire to settle in the UK on retirement. The Judge did not accept that. The second relates to evidence about how the Sponsor was able to afford the fee for the application given her modest means. Mr Moriarty pointed out that the Sponsor lives with one of her daughters in the UK and it may be that she provided the funds or the community in the UK might have done so. He did not need to speculate as the point was not put to the Sponsor.

15. It is in this context that the Judge's error in relation to the Respondent's representation might become material because, if as is accepted to be the case, the Judge misremembered whether the evidence had been challenged by the Respondent, that may be relevant to the Judge's entitlement to reach adverse credibility findings. Absent challenge, as to which Counsel's note suggests there was none, Mr Moriarty says that the evidence of the Sponsor should have been taken as read. At most, the Judge could only determine issues which were raised by the Respondent and to which the Appellant and Sponsor had the opportunity to answer.

16. Mr Moriarty also submitted that the Judge had made further factual errors. By way of example, he drew attention to the Judge's record that the Appellant's "two elder sisters were married and form their own independent units". He pointed out by reference to the witness statements that the Sponsor's daughters (Appellant's sisters) are not living in Nepal but in the UK and Hong Kong. However, I do not understand that to be at issue. The Judge says that the Appellant has "family members" in Nepal but does not say that those are the Appellant's siblings. In fact, by reference to the Sponsor's witness statement and as is recorded at [5] of the Decision by reference to the Respondent's decision under appeal, it is said only that the Appellant had "relatives" in Nepal and that he had "family ties in Nepal". It is not said that these are his siblings. The suggestion that the Judge was there referring to the Appellant's siblings comes only from the Respondent's Rule 24 Reply and is speculative. It appears to be asserted in the grounds of appeal that the Appellant does not have "family members" in Nepal. However, that is inconsistent with the Sponsor's witness statement at [9] of the Decision. The Appellant has a daughter in Nepal albeit her mother has custody of her. It is unclear from the Sponsor's statement whether there are other family members still living in Nepal. It is not said in either that statement or the statement of the Appellant or his sister that there are not. It is said that he is living alone in the family

home but that does not mean that he does not have family members in Nepal. The point is in any event largely irrelevant since, as I come to, the central issue is the relationship of support between the Appellant and the Sponsor and not whether the Appellant has support from elsewhere.

17. I accept that the Judge errs at [28] of the Decision when stating that the Appellant is aged 32 years. He records at [19] of the Decision that the Appellant is aged 49 years. In fact, both are wrong. The Appellant was aged 49 years when the decision under appeal was made but was at the time of the hearing aged 51 years. However, I do not consider that anything turns on this. The Appellant is on any view an adult male. The Judge therefore understood that he needed to consider the relationship as between an adult son and his mother.

18. That brings me on to the further submission made by Mr Moriarty that the Judge erred in his legal approach. He drew my attention to [19] of the Decision which he suggested indicated that the Judge had wrongly required dependency to be of necessity which was not the legal position. I note that this was not a point raised in the grounds of appeal. Mr Moriarty also referred me to [29] of the Decision where the Judge referred to the public interest in maintaining immigration and border control. He submitted that this was irrelevant in a historic injustice case.

19. Mrs Nolan relied on the Rule 24 Reply. She accepted that there were errors, in particular in relation to the Respondent's representation but she submitted that nothing turned on those. In relation to the point raised about [25] of the Decision, as she pointed out and I have already alluded to, this came from the Judge's own knowledge as recorded at [19] of the Decision. She also pointed out that, although the Respondent had not directly challenged the Sponsor's ability to fund the application, she had taken issue with the financial support said to be provided by the Sponsor to the Appellant.

20. Mrs Nolan also pointed out the factual background to this case which is slightly unusual. As well as having formed his own family unit by marrying and having a child, the Appellant had also gone to work in the USA on two occasions. He had spent seven years there. That was relevant to the issue of whether the Appellant could be said to be financially and emotionally dependent on the Sponsor. That was, Mrs Nolan said, the issue which the Judge had to determine and was the issue which he had determined. She submitted that although there might be some factual errors, those were not material.

21. I accept of course that the Judge has made factual errors in this case as is conceded by the Respondent. Those which I accept are as follows:

    (1). The Respondent was not represented. Of itself, that makes no material difference.

(2). The Respondent could not therefore have cross-examined the Sponsor. However, as I have indicated, the point said to have emerged from cross-examination is favourable to the Appellant and not adverse to him.

(3) The Judge could not have put the employment rate in Nepal to "the parties" as is said at [25] of the Decision as only one party was represented. Of itself, that is not material. I consider below the points which were said not to have been put to the Sponsor.

(4) The Judge wrongly refers at [19] and [29] of the Decision to the Appellant's age. However, as I have already pointed out, the crucial point was not his precise age but that he was a relatively old adult male.

22. I do not accept that the Judge made a factual error in relation to family members in Nepal for the reasons I have given. Taken as a whole, I do not consider that those errors indicate that the Judge did not remember the case or thought he was dealing with a different case. The core facts are consistent with the case.

23. I am prepared to accept notwithstanding the lack of a witness statement from Mr Moriarty that the Judge did not refer at the hearing to the unemployment rate in Nepal. Mr Moriarty's note of the hearing is not conclusive since it does not purport to record everything which happened at the hearing. However, even if the Judge did not put this to the Sponsor/Mr Moriarty and perhaps should not have provided evidence for himself, I do not consider this to be a material error. The point being made at [19] of the Decision is that the Judge was not persuaded on the evidence that the Appellant was unable to work. That was a point made by the Respondent and to that extent the Appellant and Sponsor were on notice of it.

24. In relation to the point made at [25] of the Decision, nothing turns on whether the Appellant's father had or had not wanted to settle in the UK in the past (other than perhaps in relation to the historic injustice argument). In any event, the Judge did not wrongly record that the Sponsor said that this was the position. He simply said that he did not accept that evidence. His non-acceptance is perhaps understandable since the evidence is that the Sponsor and her husband lived in Hong Kong with one of their daughters after his retirement rather than seeking to come to the UK.

25. Although I am prepared to accept that the Sponsor was not asked how she could afford the application fee (or whether the Appellant had paid for it), both the Appellant and the Sponsor were on notice that the Appellant's financial dependency on the Sponsor was not accepted. The finding in relation to the application fee is not central to the Judge's reasoning that the Appellant was not so dependent.

26. That brings me on to the legal approach adopted. Notwithstanding that [19] of the Decision was not challenged in this way in the grounds, I have considered whether it contains a legal error. I am not persuaded that it does. The issue which the Judge had to consider is whether family life exists between the Appellant and the Sponsor. That depends on the legal test set out in cases such as Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 to which the Respondent referred in her decision under appeal. The issue is whether there is real, effective and committed support or more than the normal emotional ties. That was the issue which the Judge was considering at [19] to [25] of the Decision.

27. The Judge did not accept that the Sponsor is providing financial or emotional support which goes beyond the norm. He expressly finds at [28] of the Decision that family life does not exist between the Appellant and the Sponsor. On the facts of this case as I have set them out above, that was a finding which was open to the Judge for the reasons he has given. The errors made are not material to the reasoning and even if one excludes the reasons relied upon which are said not to have been put to the Appellant/Sponsor, the Judge has provided adequate reasons for his conclusion.

28. If as is the case the Judge has found that family life does not exist, Article 8 ECHR is not engaged (at least in a case such as this where an appellant is outside the UK as his private life is not relevant) and the issue of proportionality does not arise. As such, even if the Judge did err in relation to the public interest at [29] of the Decision that would not be material.

29. For those reasons, I am not persuaded that there is a material error of law in the Decision. I therefore uphold it with the consequence that the Appellant's appeal remains dismissed.

CONCLUSION

30. The Decision does not contain a material error of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge Cohen promulgated on 30 March 2022 does not involve the making of a material error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed L K Smith Dated: 4 November 2022
Upper Tribunal Judge Smith