IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005545

First-tier Tribunal No: HU/54202/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 May 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

KHADGA JUNG GURUNG
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETATY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Atas, instructed by Bond Adams LLP Solicitors
For the Respondent: Ms Ahmed, a Senior Home Office Presenting Officer.

Heard at Field House on 21 March 2023

DECISION AND REASONS

1. The Appellant relied upon the fact that he is the son of a retired member of the Brigade of Gurkhas (deceased on 19.3.97) to apply on 16 October 2022 for entry clearance to the UK, on the basis he intended to join his mother who had settled in the UK in 2012 as the widow of a retired member of the Brigade. That application was considered under the Immigration Rules relating to adult dependent relatives, and separately, under the discretionary arrangements in place for the adult children of members of the Brigade who had been discharged prior to 1 July 1997. It was refused on 11 December 2020, and the Appellant's human rights appeal against that decision was dismissed on Article 8 grounds by the First-tier Tribunal in a decision of Judge Seelhoff of 26 September 2022.
2. There were three key findings of fact that led to that decision. First the Judge concluded that he had not been told the truth by the Appellant, and his mother the sponsor, about the Appellant's circumstances. Second, he concluded that the Appellant had failed to establish that he enjoyed "family life" with his mother at the date in 2012 that she left Nepal to settle in the UK, and that there was therefore no "family life" that endured ten years later at the date of the hearing

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in 2022. Third, he concluded that he was not satisfied the Appellant, a 50 year old able bodied man, was financially dependent upon his widowed mother either at the date of the application, or at the date of the hearing.

3. The Appellant was granted permission to appeal on 18 November 2022 by decision of Judge Lodato on all of the grounds raised, although the principal one was said to be that there had arguably been procedural unfairness as a result of a failure to put issues of credibility arising from the documents relied upon by the Appellant to the sponsor in the course of her oral evidence that were later relied upon by the Judge in the course of reaching his decision.
4. Thus the matter comes before us.

Error of law?

5. The first ground asserts procedural unfairness, and Ms Atas argues that if this is made out the appeal should be remitted to the First-tier Tribunal for rehearing. It is said the Judge fell into error because he noted at paragraph 29 of his decision issues that he had identified from the documents in evidence, but only after the hearing, and which he considered went to the credibility of the claims made by the Appellant and the sponsor. They were said to have thereby been denied the opportunity to address those issues.
6. This appeal was advanced as a human rights appeal on Article 8 grounds, and as such the Appellant sought to establish that although he was aged 48 at the date of his application for entry clearance, and 50 at the date of the hearing, he had never formed an independent life. His claim was that he had always lived as a member of his parents' household, that he had always been financially supported by them, and that he had been separated from them only by the death of his father, and then the decision of his mother to settle in the UK in 2012 following her successful application for leave to enter made on 16 October 2020. His argument was, necessarily, that his relationship with his mother went sufficiently beyond the ordinary emotional ties between adult son and his mother to meet the requisite threshold for "family life" to exist, notwithstanding her decision to leave Nepal and to settle in the UK without him in 2012, and his own decision not to seek entry clearance to the UK for a further eight years.
7. The credibility of the Appellant's claims concerning the true nature of his relationship with his parents was always placed in dispute by the Respondent, and it was treated as such at the hearing of the appeal. Thus it is not open to the Appellant and the sponsor to claim that they were in any way taken by surprise by the need to establish that they were telling the truth about the Appellant's circumstances, and, that his circumstances were such as to meet the threshold of engagement for Article 8(1).
8. It is common ground before us, that as the Judge had stated in his decision, there were features of the evidence that led the Judge to conclude that he was not being told the truth by the Appellant and his mother. Part of his reasoning was based upon the content of some of the financial documents placed in evidence by the Appellant. As he made clear, the significance of some of the transactions (or lack of transactions) only became clear to him when reviewing the written evidence after the hearing, and whilst preparing his decision. This was because the documents in question had not been referred to during the course of the hearing either in the sponsor's oral evidence in chief, the witness statements, or the submissions made on behalf of the Appellant by Ms Atas.
9. It is plain to us, and indeed Ms Atas did not seek to persuade us otherwise, that the Judge was presented with an incoherent bundle of documents that were not properly ordered, and were neither adequately explained nor engaged with in the witness statements. Their existence and content were not rehearsed with the sponsor in the course of her examination in chief.

10. It is equally plain to us that the Judge quite properly sought to make sense of this bundle of documents before reaching his decision. He was in our judgement obliged to do so. Indeed had he not done so, then no doubt the Appellant's complaint would have been that he had failed to engage with the written evidence that had been placed before him. The issue raised by ground one is therefore a very simple one. In order for the Judge to conduct a hearing of the appeal that was fair to both parties, was the Judge in the circumstances of this appeal obliged to reconvene the hearing of the appeal in order to address with the sponsor in oral evidence the concerns he had identified as a result of the transactions that were recorded (or were not recorded) within the documents before him in the course of preparing his decision? We are satisfied that he was not.

11. Whilst we recognise that there will be occasions when the step of reconvening the hearing will be the only fair course, we are not satisfied that common law fairness required the Judge to do so in this appeal. Those acting for the Appellant must be taken to have been well aware of the content of the documents relied upon by their client in evidence. If there were transactions recorded within those documents which appeared to be inconsistent with their client's claim that he was, and had always been, entirely financially dependent upon one or both of his parents, then that was a matter in relation to which they faced a professional choice. They could be proactive and address those matters with written or oral evidence if their client or witness were able to provide an explanation. If they chose to do nothing then they and their client ran the risk of the inference being drawn, quite properly, that there was no explanation available that assisted their client's case. We note that even today there is no application before us to introduce further evidence from either the sponsor, or the Appellant, to explain the financial transactions (or lack of them) that the Judge had identified in the bundle of documents prepared for the appeal hearing and which he commented upon.

12. The second ground is a complaint that the Judge took into account an irrelevant matter, when he commented at paragraph 19 that offering poverty as an explanation as to why the Appellant was never sent away to seek work by his parents was somewhat illogical. We are unable to see that anything turns upon the Judge noting a lack of explanation as to why the Appellant did not seek to join the Brigade of Gurkhas himself. Army life is not for everyone, and admission to the Brigade only follows a highly competitive selection exercise. The essential point the Judge was making was however a valid one. Even if the Appellant did suffer a back injury of some sort 15-20 years ago that left him unable to work for a time (and this was not the Judge's finding), then even on his own case the Appellant plainly had an earning capacity both before that injury, and subsequently. The Appellant's case was that he had never taken employment, although he had worked upon the family farmland, and as a labourer for neighbours when his efforts for them were rewarded with meals. That evidence had to be placed in its proper context, which included the unexplained financial transactions, and the Appellant's apparent access to funds beyond those which could be identified as the remittances of his widowed mother from her pension in the UK.

13. The third ground is a complaint that the Judge failed to make any finding of fact in the course of paragraph 20 of his decision, and that this paragraph in the decision amounts to no more than a comment that it is significant that the Appellant had referred in his written evidence to working upon both farmland belonging to his family, and to others. There is no merit in this complaint. We are satisfied that it arises from a misreading of the decision (which the Judge is entitled to have read as a whole) and perhaps also from a misunderstanding of

the exercise in evaluating the evidence placed before him that the Judge was undertaking.

14. The paragraph in question is part of an assessment of the detail of the Appellant's evidence upon the issue of whether he had been truthful about how he has lived his adult life. This was central to his explanation for how and why in adulthood his circumstances had been such that he had always maintained "family life" that would engage Article 8(1) with both of his parents, and, following the death of his father in 1997, with his mother alone. That assessment was undertaken by the Judge between paragraphs 17-34 of the decision. Contrary to the suggestion made in the grounds, the Judge did draw that assessment of the evidence together, to make the finding that he had not been told the truth by the Appellant and the sponsor. That was an adverse credibility finding that he was entitled to reach upon the evidence before him, and it was one that was adequately reasoned. He went on, necessarily, to make the relevant adverse finding of fact that he was not satisfied that "family life" between the Appellant and his mother had continued into the Appellant's adult life, and that it had endured as he and she had claimed.

15. The fourth ground is a complaint the Judge fell into error in commenting upon the lack of corroborative evidence offered by the Appellant from his local authority in Nepal for his claims. There is no merit in this complaint. Necessarily, a specialist Tribunal will from time to time acquire knowledge about the existence of local officers within the regional administration of other countries, and the sort of records that they have access to. The Judge did not require corroborative evidence to be produced for any element of the Appellant's account, failing which that account was rejected. He simply noted, as he was entitled to do, that none had been provided. The absence of corroborative evidence upon an issue that had always been in dispute, when such evidence would ordinarily be available to a claimant, is a matter that the Tribunal is always entitled to consider when assessing what weight to place upon the evidence of a claimant.

16. We note that the consequence for the assessment of the weight that can be placed upon a claimant's evidence resulting from the existence, or absence, of corroborative evidence will be highly fact specific. As Ouseley J noted in CJ (on the application of R) v Cardiff County Council [2011] EWHC 23, it is important that the Tribunal follows the approach in Tanveer Ahmed v SSHD [2002] Imm AR 318. The documentary evidence relied upon by a claimant along with its provenance needs to be weighed in the light of all the evidence in the case. Documentary evidence does not carry with it any presumption of authenticity, which specific evidence must disprove, failing which its content must be accepted. Nor does oral evidence. What is required is an assessment of the claimant's evidence in the light of all the other evidence in the case. We are satisfied that this is the exercise that the Judge was quite properly conducting on this occasion.

Notice of Decision

The decision promulgated on 14 June 2022 did not involve the making of a material error of law. The decision to dismiss the appeal is confirmed.

JM Holmes
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 March 2023