IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005318
First-tier Tribunal No: HU/57814/2021
IA/17153/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 March 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SAYLENDRA LIMBU
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Shrestha, instructed by Gurkha Solicitors
For the Respondent: Mr Melvin, Senior Presenting Officer

Heard at Field House on 7 March 2023

DECISION AND REASONS

1. The appellant is a Nepalese national who was born on 9 August 1980. He appeals, with permission granted by First-tier Tribunal Judge Easterman, against the decision of First-tier Tribunal Judge Row, who dismissed his appeal against the respondent's refusal of his application for entry clearance.

Relevant Background

2. The appellant sought entry clearance to join his father in the United Kingdom. His father is a former serviceman who left the Brigade of Gurkhas in 1971. He and his wife came to the United Kingdom in 2012, having been granted entry

clearance and Indefinite Leave to Enter on account of his service. Their daughter – the appellant's sister – was also subsequently admitted to the UK.

3. The appellant applied for entry clearance in November 2019. His application was refused on 30 December 2019. The respondent did not accept that he met the requirements of the applicable policy, or that his exclusion from the United Kingdom would be in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

4. The appellant appealed, and his appeal came before the judge, sitting in Birmingham on 17 August 2022. The appellant was represented by Mr Shrestha of counsel, as he was before me. The respondent was unrepresented. The judge heard evidence from the sponsor and submissions from Mr Shrestha before reserving his decision.

5. It was not submitted to the judge that the appellant met the requirements of the respondent's Annex K policy. The judge considered the submission which was made on behalf of the appellant – which was made in reliance on Article 8 ECHR. He found that there was no family life between the appellant and the sponsor and he dismissed the appeal accordingly.

The Appeal to the Upper Tribunal

6. The grounds of appeal to the Upper Tribunal were not settled by Mr Shrestha. They are diffuse and rather unhelpful, in that they fail to identify with concision and precision the grounds of appeal which the appellant seeks to advance. In substance, however, the following points emerge:

   (i) The judge failed to follow the Surendran guidelines and departed impermissibly from the terms of the respondent's decision; and

   (ii) The judge failed to apply any of the dicta from the Court of Appeal or the Upper Tribunal in considering whether there was a family life between the appellant and the sponsor.

7. Judge Easterman considered the grounds to be arguable. Amongst other things, he noted that the respondent was 'not entitled to special consideration when they choose not to attend'.

Submissions

8. In his submissions, Mr Shrestha noted that he had been counsel before the judge and that he had reminded the judge of the Surendran guidelines, given the absence of the respondent. No issue had been taken by the respondent with the various documents in the appellant's bundle and it was not open to the judge to doubt the veracity of those documents without at least raising the point with counsel. The points taken by the judge were in any event obscure. In various respects, he had ignored evidence altogether. Into that camp fell the evidence of contact between appellant and sponsor. The judge had not been entitled to reject the evidence that money had passed between appellant and sponsor via the Hundi system.

9. Mr Shrestha submitted that the judge had failed to direct himself in accordance with any of the authorities on the existence of a family life between adult

relatives. There had clearly been a family life in 2012, when the sponsor came to the United Kingdom and the judge should have considered whether that family life had been extinguished subsequently. The judge had seemingly attached great significance to the appellant's age, without considering the remaining evidence.

10. Mr Shrestha invited me to set aside the decision and to remit the appeal to the FtT.

11. Mr Melvin relied on his skeleton argument. He began his submissions by acknowledging, at my request, that there was no reference to any of the decided cases on the existence of family life, and no indication in the judge's decision that he was aware of the applicable principles. He had clearly focused on the proper issue, however, and had decided whether or not there was a family life between the appellant and the sponsor. The judge had not gone behind the ECO's acceptance of various points and although his [13]-[14] could have been clearer, there was no material error of law disclosed. The judge had evaluated the evidence holistically and had reached a conclusion which was open to him on the evidence. Mr Melvin did not feel able to take matters much further.

12. In reply, Mr Shrestha noted that the ECO had not complied with rule 23 of the FtT Procedure Rules by providing within her bundle a copy of the unpublished material provided to her. What was clear was that the judge had gone beyond his remit in doubting the documents when the respondent had not expressed any such doubt in her decision.

13. I reserved my decision.

Analysis

14. The FtT(IAC) is a specialist tribunal, tasked with administering a complex area of the law in challenging circumstances. It should be taken to know and to apply the law correctly in its specialist field. A judge is not required to set out, as part of his reasons, an anxious parade of learning which demonstrates to the parties, and any appellate body, that he is aware of the law.

15. The law in this particular field is well known to judges of the First-tier Tribunal. Cases of this nature have been part of the ordinary work of the Immigration and Asylum Chamber for appreciably more than a decade and there is an established body of authority which has settled the proper approach to Article 8(1) and Article 8(2) in such cases. The most often cited are now Rai v ECO (New Delhi) [2017] EWCA Civ 320 and Gurung v SSHD [2013] EWCA Civ 8; [2013] 1 WLR 2546.

16. As I have said, it is not necessary for cases such as these to be cited by the FtT. To impose such a requirement would, as Sedley LJ once said, be to substitute formulaic for substantive justice: SR (Iran) v SSHD [2007] EWCA Civ 460, at [5]. What matters, instead, is whether the judge asked himself the correct question. He might have shown that he did so by directing himself, for example, that the search for a family life in this context was for a relationship which disclosed more than normal emotional ties or one that was characterised by real, committed or effective support.

17. There is no indication in the judge's decision that he was aware of the correct test, or that he applied it. There is neither any citation of relevant authority nor

any mention of the principles which emerge from the case-law. None of his findings are expressed in terms which demonstrate an appreciation of the relevant test. The closest there is to any self-direction is to be found in [11], in which the judge stated that there 'is no presumption of family life'; that it was for the appellant to establish its existence; and that the appellant's age and separation from his father 'does not mean that he does not have a family life with the sponsor'.

18. I regard this as inadequate and consider that the judge's failure to apply the correct approach to the engagement of Article 8 ECHR in its family life aspect is an error of law.

19. The judge also fell into error in his consideration of the evidence in this case. As Mr Shrestha noted, the respondent was unrepresented before the FtT and the judge was obliged to apply the Surendran guidelines from MNM (Kenya) [2000] UKIAT 5; [2000] INLR 576. Those guidelines have been refined and revised in some subsequent decisions, including WN (DRC) [2004] UKIAT 213; [2005] INLR 340 but certain principles have stood the test of time. One such principle is that it is not the function of the judge to raise matters which a Presenting Officer might have raised, had one been present. Another is that matters of credibility which are not obvious, and which arise from the judge's reading of the papers, should be pointed out to the representative so that they might be dealt with in evidence.

20. The judge did not adhere to these principles. The Entry Clearance Officer's decision accepted that the sponsor sent the appellant some financial support but it noted that there was otherwise limited evidence of the appellant's personal circumstances. The ECO did not accept that there was real, committed or effective support between appellant and sponsor. It is not clear to me which documents were presented to the ECO but whatever documents there were, there was no attempt on the part of the ECO to descend into the detail of those documents. The respondent's review took matters no further, seemingly on account of the fact that the appellant had not provided a bundle by the time that review took place.

21. At [13] *et seq*, the judge engaged with the documentary evidence produced by the appellant. He noted at [13]-[14] that documents from local officials in Nepal (which spoke to the appellant's lack of employment or marriage) had not been the subject of any indication from the respondent as to whether 'those documents are what they purport to be'. The judge then expressed a concern that the appellant's representatives had not written 'to the officials concerned to ask for confirmation that the documents were genuine'. There is no indication that this concern was put to Mr Shrestha so that it could be addressed in evidence. It certainly does not fall into the category of the obvious point which need not be put, as considered in WN (DRC). I cannot readily understand why a representative, faced with evidence which was unchallenged by the other party, would seek to expend time and client money by contacting the author of that evidence to establish that it was reliable.

22. Equally, at [15], the judge went on to consider the documentary evidence of money transfers. In common with the ECO, he seemingly accepted that these transfers (which had been made from March 2019 onwards) had been made. He expressed a concern, however, that they 'may have been made in order to support an application such as this'. There is no indication that this concern was raised with Mr Shrestha. That is a point of particular concern, given that there is

no indication in the ECO's decision that the sponsor may have been complicit (or instrumental) in a conscious decision to construct a false reality in order to secure entry clearance for his son. If that was to be the judge's finding, the sponsor was entitled to be confronted with the suspicion.

23. The judge expressed concern at [16] that there were no records of transfers prior to 2019 and, at [17], that there was no evidence to show that the appellant lived in the sponsor's house. Again, there is no indication that either of these points were raised in the hearing. An explanation had been given to the judge about the first of these points (the explanation being that the transfers had been effected by an informal system known as Hundi) and the judge gave Mr Shrestha no indication that he had concerns about the truthfulness of that account. The same is true of the points taken against the appellant at [18]-[22], one of which was a point of inconsistency which was not taken in the letter of refusal and clearly raised concerns in the mind of the judge about the truthfulness of the appellant's account. At [22], he observed that this concern led him to think that the appellant had established a separate family life of his own.

24. At the risk of stating the obvious, the Surendran guidelines were formulated partly to ensure that an appellant (or sponsor) who attends a hearing which the respondent does not attend is properly able to address concerns which are in the mind of the judge. Obvious points need not necessarily be put, as Ouseley J explained with reference to Court of Appeal authority in WN (DRC). Here, however, the judge took a range of points against the appellant, none of which were obvious, yet none of those points were pointed out to counsel so that the sponsor could deal with them in evidence.

25. I do not accept the submission made in the grounds of appeal that the judge was bound to accept matters on which there had been no cross-examination. MS (Sri Lanka) v SSHD [2012] EWCA Civ 1548 on which that submission was based, concerns the very different situation in which the respondent is represented and chooses not to cross-examine on a particular point. JK (DRC) v SSHD [2007] EWCA Civ 831 is to similar effect. Here, the judge's obligation was to ensure that the appellant had a fair hearing by adhering to the amended Surendran guidelines. I am satisfied that those guidelines were brought to his attention by Mr Shrestha at the start of the hearing and I am satisfied for the reasons above that he failed to adhere to them.

26. In the circumstances, and despite Mr Melvin's rather tentative submission that I should uphold the decision of the First-tier Tribunal, I find that the judge erred in law and that his decision falls to be set aside.

27. Given the nature of the second error of law into which the judge fell, and considering the recent guidance in Begum [2023] UKUT 46 (IAC), I am satisfied that the proper course is as contended for by Mr Shrestha and I will remit the appeal to the FtT to be heard afresh by a judge other than Judge Row.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed. The appeal is remitted to be heard de novo.

Case No: UI-2022-005318
First-tier Tribunal No: HU/57814/2021

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 March 2023