IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore decision

Case Nos: UI-2023-000767
UI-2023-000769
First-tier Tribunal Nos: HU/52804/2022
HU/52802/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16 June 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THAGENDRA BAHADUR GURUNG
TEJ KUMARI GURUNG
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – KATHMANDU

Respondent

Representation:
For the Appellants: Ms K. McCarthy, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr C. Avery, Senior Home Office Presenting Officer

Heard at Field House on 25 May 2023

DECISION AND REASONS

1. By a decision dated 10 January 2022 (although the judge must have meant 2023) First-tier Tribunal Judge Nightingale ("the judge") dismissed an appeal brought against two linked decisions of the Entry Clearance Officer dated 3 March 2022. The decisions refused human rights claims made in the form of applications for entry clearance on 8 December 2021 by the appellants.

2. The judge heard the appeals under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellants now appeal against the decision of the judge with the permission of First-tier Tribunal Judge Pickering.

Factual background

3. The appellants are citizens of Nepal. They are siblings, born in 1987 and 1980 respectively. Their father was a member of the Ghurkha Brigade. He sadly died in 2009 leaving the appellants and a number of other siblings, and their mother, in Nepal. Their mother is Shreemaya Gurung, the sponsor in these proceedings. She resides in the United Kingdom, having been granted settlement shortly before the Covid pandemic.

4. Upon the sponsor's arrival in this country, she sponsored the appellants' applications for entry clearance. The applications were submitted on the basis that, as the children of a former Ghurkha who was denied the opportunity to settle in the United Kingdom at the conclusion of his military service, they had been affected by the historical injustice which characterised the Secretary of State's overall treatment of former Ghurkha soldiers. They contended that they had never lived apart from their mother. They relied on her for financial support and were dependent on her to the extent that their relationships went beyond the ordinary emotional ties which usually characterise relationships between adult family members. That being so, Article 8(1) of the European Convention on Human Rights ("the ECHR") was engaged in relation to the relationships between the appellants and the sponsor and for the purposes of Article 8(2) it would be disproportionate for them not to be admitted to the United Kingdom.

5. The Entry Clearance Officer refused the applications. She rejected the appellants' case that they were dependent on the sponsor and did not consider that the requirements of the ECHR were such that the United Kingdom owed them a positive duty to facilitate their residence.

6. The appellants appealed. The hearing took place on 22 December 2022. In her decision, from paragraphs 7 to 14, the judge marshalled the evidence she heard. From paragraphs 15 to 19, she recorded the submissions advanced on behalf of both parties. She went on to set out the law, including the relevant provisions of Part 5A of the 2002 Act, and at paragraph 25 directed herself concerning the applicable principles relating to adult family members and the engagement of Article 8(1).

7. The judge's operative findings commence at paragraph 26. She found that Article 8(1) was not engaged for reasons she gave at paragraphs 27 to 30. She concluded that the evidence provided by the sponsor before her did not demonstrate that there was dependency. The sponsor had not been able to say how much money the appellants earned in Nepal and was unable to say whether they were able to meet their own outgoings from their own earnings. There was no evidence of the rent that was paid on the property in which the appellants lived, and, although there was a bank statement from the sponsor which demonstrated that the first appellant had been able to withdraw relatively large sums in Nepal, that did not demonstrate that there was dependence to the extent claimed. The judge said at paragraph 27:

> "There is confirmation that the first appellant has authority to take money from his mother's Nepali bank account, but there is no evidence to confirm the manner in which this money is spent or, indeed, the outgoings of the family. A bank account maintained in Nepal may well, I accept, not be accessible from the United Kingdom and it would be a prudent arrangement to ensure that another person resident in the country has authority to deal with that account. That is not, at all,

> evidence establishing that the authorised individual is using the money to support themselves".

8. The judge noted that there was a degree of evidence concerning video calls having been placed between the appellants and the sponsor. A number of phone cards had also been provided by the sponsor as evidence. As to the phone cards, judge said that the sponsor was a Nepali national with many relatives living in Nepal. Those relatives included, but were not limited to, these appellants. She was satisfied, on balance, that the sponsor does make regular calls to Nepal, and that the telephone cards were likely to have been used to speak to relatives including the appellants in these proceedings. However, she concluded at paragraph 30 that:

> "It is not established on balance that the sponsor provides the appellants with the real, effective or committed support in issue. I would therefore find that family life is not established and would not, in the usual run of cases, have continued to consider proportionality. However, in these particular appeals I have done so in the alternative in view of the arguments raised".

9. In the paragraphs that followed, the judge addressed an alternative hypothesis whereby Article 8(1) *was* engaged. She concluded that the evidence did not demonstrate that, but for the historical injustice experienced by Ghurkhas, the appellants' father would necessarily have sought to relocate to the United Kingdom. He was discharged from the Ghurkhas in 1963 and, had he desired to come to the United Kingdom at that point, the judge found "he may well not have married the sponsor or even met her". The judge observed that at the time the father was discharged he was married to his other wife with whom he also has children and he had not taken the sponsor as a second wife at that time. On that basis, concluded the judge, there is no "but for" causal link between the historic injustice and the presence of those appellants in Nepal.

10. The above analysis was not an argument that had been relied on by the Secretary of State in the refusal letter. At the hearing below, the judge identified that matter of her own motion and raised it with the parties on the basis that it was "*Robinson* obvious". The judge therefore appeared to conclude that she was obliged to consider it in any event and went on to address the alternative hypothesis in the terms outlined above. The judge concluded that if Article 8(1) were engaged, the decision would be proportionate for the purposes of Article 8(2) in any event. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

11. There are two issues for resolution in this Tribunal.

12. The first relates to the judge's analysis of Article 8(1) of the ECHR. Ms McCarthy submits that the judge failed to consider evidence before her. The bank statements that had been submitted demonstrated that withdrawals were made regularly by the first appellant. The oral evidence that the judge had heard demonstrated that there were strong emotional links between the sponsor and the appellants. That included evidence of Mr Em Bahadur, who is a friend of the sponsor and assists her with a number of daily matters in the United Kingdom. Mr Bahadur was said to have given evidence demonstrating that the claimed levels of support were, in fact, present on the part of the appellants on the

sponsor, and that the sponsor herself was emotionally dependent on the appellants. The judge addressed his evidence only briefly in the decision, submitted Ms McCarthy. For example, the judge summarised what Mr Bahadur said at paragraph 13, in the section of the decision marshalling the evidence, but she omitted to refer to his evidence in any form as part of her substantive analysis. It was an error, Ms McCarthy submitted, to omit expressly to consider the evidence of Mr Bahadur. It was also an error for the judge to have failed expressly to address the issue of whether there was dependency on the part of the sponsor on the appellants.

13. In this respect, Ms McCarthy highlighted the medical evidence that had been before the judge, and submitted that it demonstrated that the sponsor was dependent as claimed on the appellants. That being so, there was a degree of mutual interdependency which met the test for "real, committed or effective" support as enunciated in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 per Sedley LJ at paragraph 17.

14. The second issue is whether the judge erred in relation to Article 8(2). Ms McCarthy submitted that the judge misunderstood the concept of historical injustice.

(a) First, contrary to the judge's analysis, which focused on the position as it obtained in 1963, historical injustice experienced by the Ghurkhas was not something that occurred on a single occasion at a particular point in history. Rather, it was an ongoing phenomenon that characterised the experience of Ghurkhas and their inability to relocate to the United Kingdom over many years. As a result of the historical injustice, many Ghurkhas took life decisions which resulted in further and deeper roots being placed in Nepal, whereas, had the historical injustice not affected those decisions, they would have settled in the United Kingdom at a much earlier stage.

(b) Secondly, the Secretary of State by her grant of entry clearance and subsequent grant of settlement to the sponsor, had accepted in any event that the historical injustice was such that this sponsor was entitled to relocate to this country.

(c) Thirdly, Ms McCarthy submitted that the judge erred in relation to categorising this issue which she had identified herself as being *Robinson* obvious. Putting to one side the fact that it was far from clear that the doctrine of *Robinson* obvious applied in non-refugee cases, it would not apply in a situation where the Secretary of State has arguably been *too generous* to an individual. The purpose of the doctrine is to prevent the United Kingdom being in inadvertent breach of its obligations under international law. It is not, contrary to what the judge concluded, a basis to find additional reasons why the Secretary of State could have refused an application but chose not to.

The law

15. The judge directed herself concerning *Kugathas* and the related principles at paragraph 25 of her decision. There has been no challenge to her summary of those principles, and I need not set them out in further depth here.

16. Properly understood the appeal to this Tribunal challenges findings of fact reached by the judge. Findings of fact are capable of amounting to an error of law in certain circumstances. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 the Court of Appeal summarised some of the bases most frequently encountered in this jurisdiction when a finding of fact may amount to an error of law. At subparagraph (iii) the court said that "Failing to take into account and/or resolve conflicts of fact or opinion on material matters" may amount to an error of law.

17. There is extensive guidance to judges in appellate courts and tribunals concerning the approach that should be taken when a challenge is brought to a finding of fact reached by a first instance trial judge. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 the Court of Appeal summarised those constraints and the reasons for them in the following terms. They include the following:

> "(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> (iv) In making his decisions the trial judge will have regard to the whole sea of evidence presented to him, whereas an appellate court will only be island hopping".

18. In due course in this decision, I shall return to the judgment of the Court of Appeal in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 at paragraph 46. There the Court of Appeal gave guidance on what amounts to an adequacy of reasons.

Ground 1 – the judge took all relevant evidence into account

19. In relation to her analysis of the bank statements, contrary to what Ms McCarthy submitted, the judge gave full consideration to this issue. At paragraph 27, as I have already quoted, the judge concluded that the evidence of the withdrawals did not demonstrate that the claimed levels of financial dependence on the parts of the appellants were present. I have already quoted that extract and it is not necessary to do so here. It will simply be sufficient to observe at this stage that the sponsor had also said in her oral evidence, recorded by the judge at paragraph 11, that the money was taken by the first appellant from her account for her other daughter also, as she needed some financial help.

20. The judge also underlined the evidence of the sponsor, whereby the sponsor was unable to say whether she knew how the essential needs of the appellants were met, and how much they earned. Drawing the analysis set out by the judge together, she gave sufficient reasons concerning the relevance of the bank statements of the sponsor. As observed in *Fage v Chobani*, an exercise in challenging findings of fact reached by a first instance judge may amount to what has been called "island hopping". That entails the isolation of certain facets of

evidence at the appellate level, and the submission that they should have attracted greater weight than afforded by the first instance judge, or that different reasons should have been given. In my judgment the judge gave adequate reasons demonstrating that she had fully considered that aspect of the evidence, and that she ascribed weight to it in a manner rationally open to her. Island hopping rarely identifies errors of law.

21. Next, Ms McCarthy submitted that the judge failed to reflect the oral evidence that she had heard. The evidence of Mr Bahadur and of the sponsor demonstrated the sponsor's own reliance on the appellants and vice versa. Those features of the evidence, submits Ms McCarthy, were insufficiently considered, or otherwise addressed by the judge.

22. There is no merit to this submission. As I put to Ms McCarthy at the hearing, there is no transcript of the evidence that the judge heard below. The only written material concerning what took place at the hearing before the judge is that marshalled by her at paragraphs 7 to 14 of her decision and, of course, the written evidence itself. It is hardly surprising that this appellate tribunal will struggle to analyse the oral evidence given below in these circumstances. That is because, as observed in *Fage v Chobani*, a trial is not a dress rehearsal, it is the first and last night of the show. The judge had regard to all relevant evidence that was presented to her. The submission that the judge failed properly to have regard to it is not substantiated by any evidence concerning what was actually said at the hearing below. It would not be appropriate simply for this tribunal to engage in what would ultimately amount to a disagreement with it.

23. In relation to Em Bahadur's evidence, while it is true that the judge did not expressly refer to it in the course of reaching her operative findings, there is no error arising from that. As held in *Simetra Global Assets Ltd* at paragraph 46:

> "It is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment".

The judge conducted precisely that evaluative exercise in relation to the evidence of Em Bahadur. Her brief summary of his evidence at paragraph 13 has not been challenged, and the only material before the Tribunal concerning what he said in any greater depth is the short five paragraph statement that he made on 23 November 2022. Nothing in that statement demonstrates that the findings of fact reached by the judge were irrational in the face of that evidence or otherwise unfounded or disconnected from the evidence in the case.

24. Drawing this analysis together, the judge took all relevant considerations into account. She found that the evidence concerning the circumstances of the appellants in Nepal was limited, and the sponsor had been unable adequately to explain to the judge why the claimed levels of support were needed, by reference to what their actual circumstances were. While Ms McCarthy submitted that the judge failed to ascribe sufficient significance to the fact that the sponsor had returned to Nepal and had been prevented from leaving due to the Covid pandemic for some time, that in my judgment amounts to a disagreement of weight and emphasis and does not demonstrate that the judge reached a finding of fact that was not rationally open to her. For those reasons the judge was

entitled to conclude on the basis of the evidence before her that Article 8(1) of the Convention was not engaged.

Any error concerning Article 8(2) of the ECHR was immaterial

25. The above analysis is sufficient to dispose of this appeal. It is necessary, however, briefly to address the judge's findings concerning Article 8(2) of the ECHR. Nothing in the decision of the judge below, or in this decision, will prevent the appellants from submitting a further application to the Entry Clearance Officer, with additional evidence, if they so wish, addressing the concerns raised by the Entry Clearance Officer and the judge.

26. It follows that it may be helpful for me to address the judge's findings concerning historical injustice, lest there be a risk of any future assessment of the appellants' case being conducted on a legally erroneous basis based on the judge's Article 8(2) analysis.

27. In light of the fact I have dismissed the appeal on the basis of the first ground, my analysis under this heading may necessarily be briefer. I accept Ms McCarthy's submissions that the judge was in error by seeking to address the question of historical injustice by reference to a single point in time. As Ms McCarthy submitted, historical injustice is an ongoing phenomenon, and it is not possible simply to look back and imagine what would have happened on a single occasion in 1963 had the sponsor been granted leave to remain. Further, as Ms McCarthy submitted, the fact that the sponsor had been granted entry clearance, and ultimately settlement, on the basis of the historic injustice experienced by Ghurkhas strongly demonstrates that the judge's attempt to confine historical injustice to 1963 was wrong.

28. I also accept some of Ms McCarthy's submissions concerning the judge's characterisation of her concerns as relating to a *Robinson* obvious error. A *Robinson* obvious error is one which, if it were not identified by a judge of his or her own motion, could inadvertently place the United Kingdom in breach of its obligations under the European Convention on Human Rights or the Refugee Convention, as the case may be. There is no suggestion that making more generous provision than is required by either of those international instruments would place the United Kingdom in breach of the obligations it has assumed pursuant to them. It was therefore wrong of the judge to characterise her concerns as being *Robinson* obvious.

29. However, that is nothing to the point. A judge is entitled to raise concerns with the parties that have not been identified by those parties of their own motion. While the judge's concerns ultimately were wrong for the reasons that I have given, in principle it is not an error of law for a judge to identify a point of law that has not been identified by the parties. Of course, fairness may require that a judge canvasses with the parties a point of law that concerns the judge in circumstances where it has not previously been ventilated in the issues in litigation, which is precisely what the judge did in the circumstances of this case. There is no procedural or jurisdictional barrier to judges raising such concerns on a point of law of their own motion as a matter of general practice and procedure. Judges will naturally be careful before adopting factual theories not ventilated between the parties as doing so may entail descending into the arena, but there is no hard and fast rule. However, that is not what happened here, since the judge's concerns went to the legal question of proportionality under Article 8(2)

ECHR. Her analysis of that issue was wrong, for the reasons set out above. But it was not, in principle, an error to raise such concerns.

30. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it needs to be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

(Transcript approved) 9 June 2023