IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001251

First-tier Tribunal Nos: HU/57448/2021
IA/16760/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th of December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

RUDRA BAHADUR LIMBU
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel; instructed by Everest Law Ltd
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 20th November 2023

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Apted, promulgated on 19th December 2022, dismissing his appeal against a decision of the Respondent refusing him entry clearance to join his mother in the United Kingdom for settlement as her dependant pursuant to the concession made in respect of families of Gurkha soldiers.

2. The Appellant applied for permission to appeal on the following bases:

   (1) the judge erred in the application of *Devaseelan*;

   (2) the judge failed to properly consider whether there was a very good reason to depart from the previous determination if required;

   (3) the judge erred in failing to consider the reciprocity of emotional support between the Appellant and Sponsor.

3. Permission to appeal was granted by Upper Tribunal Judge Sheridan in the following terms:

> "1. In accordance with rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I can only admit the application if I consider it in the interests of justice to do so. I am satisfied that it is in the interests of justice to admit the application because the First-tier Tribunal was wrong to refuse to admit the application: the appellant had 28 days, not 14 days, from receipt of the decision notice to apply, and therefore the application was in time.
>
> 2. The appellant's *Devaseelan* argument has some arguable merit, as it may be that the judge failed to appreciate the distinction between a finding by a previous judge on a state of affairs and a finding on whether or not a past event occurred. It may be that the judge asked herself the wrong question when finding that she needed to decide if there were very good reasons to depart from the previous decision. That said, this may be immaterial in the light of the last two sentences of paragraph 29, which may indicate that the judge in any event (in the alternative) decided for herself, based on the evidence, that there was not family life. Despite my reservations about the materiality of this arguable error, I am just persuaded to grant permission on this ground.
>
> 3. I also consider that there is arguable merit to the submission in the grounds that the judge erred by not considering the emotional support that the appellant arguably provides to his mother, as arguably this could amount to family life for the purposes of article 8 (either on its own or in combination with the support provided to the appellant by his mother) even if the support provided to the appellant is insufficient, on its own, to establish that there is family life engaging Article 8.
>
> 4. All grounds can be pursued".

4. At the conclusion of the hearing I reserved my decision, which I now give. I find that the decision demonstrates material errors of law, such that it should be set aside in its entirety for the following reasons.

5. In respect of Ground 1, it is argued that although the judge rightly took the previous determination of Judge Khawar as the starting point, this approach should not have been followed given that the previous determination was only a starting point in relation to a "past event", as opposed to a "state of affairs". In short, Mr Jesurum submitted that the question is not whether the previous determination should be "departed from". Instead, the question for Judge Apted was not whether there is a family life at the date of the *previous* hearing, but whether family life and Article 8(1) is now engaged at the date of the *present* hearing, taking into account the new evidence as well as the previous findings reached by Judge Khawar. To reinforce this point of law, Mr Jesurum applied to rely upon an unreported determination of the Upper Tribunal and cited Practice Direction 11 of Part 4 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal which reads as follows:

> "11. ***Citation of unreported determinations***

11.1 A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless:

(a) the person who is or was the appellant before the First-tier Tribunal, or a member of that person's family, was a party to the proceedings in which the previous determination was issued; or

(b) the Tribunal gives permission.

11.2 An application for permission to cite a determination which has not been reported must:

(a) include a full transcript of the determination;

(b) identify the proposition for which the determination is to be cited; and

(c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by the decision of a higher authority.

11.3 Permission under paragraph 11.1 will be given only where the Tribunal considers that it will be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are likely to be rare; in particular, in the case of determinations which were unreportable (see Practice Statement 11 (reporting of determinations)). It should be emphasised that the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination".

6. Pursuant to 11.2(a), Mr Jesurum provided a full transcript of a determination of an Upper Tribunal Panel (hereafter "UT Panel") composed of His Honour Judge Bird and Upper Tribunal Judge Blundell in the matter of *Santosh Rai v. Entry Clearance Officer* (UI-2022-001237; HU/01443/2021) promulgated on 28 September 2022. The proposition in respect of which the determination was relied upon appears at [19] of the determination wherein the learned Panel make the following finding:

"19 ... there is a difference between a judicial finding that a past event did not occur, on the one hand, and a judicial finding that a state of affairs does not exist, on the other. Where a judge has made a finding of fact in a protection appeal, for example, that an asylum seeker was not previously detained, a second judge might be particularly circumspect about departing from such a finding. Where a judge has made a finding of fact that no family life existed at the time of the hearing before them, however, a second judge is not invited to depart from that finding as such; the invitation is, instead, to bear that finding clearly in mind as an assessment of the historical situation, and to decide the subsequent appeal conscientiously, on the basis of the evidence presented".

7. Mr Jesurum submitted that this proposition was not to be found in any reported determination of the Tribunal, the IAT, or the AIT and had not been superseded by the decision of a higher authority. I pause to note that in his response Mr Parvar agreed that this was correct. In the Rule 24 response, upon which Mr Parvar relied, the Respondent opposed reliance on the determination because in his view it was "unnecessary" to do so as the point was "not contentious" as the correct approach had already been followed by the judge. However, that argument is plainly incorrect and circular, as even though the judge followed *Devaseelan*, the point here is whether a nuanced version of *Devaseelan* should be applied as the subject matter was family life or a state of affairs as opposed to a previous event fixed at some historic point in time.

8. Bearing in mind paragraph 11.3 of the Practice Direction and the proviso that "(p)ermission under paragraph 11.1 will be given only where the Tribunal considers that it will be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination", I do not find that I need to rely upon the determination of the UT Panel *per se* as I am in any event able to consider the point in law (and the finding made by the UT Panel) on its own merit.

9. Considering the First-tier Tribunal's decision for myself against the point in law extracted from the UT Panel's judgment, at paragraph 18, the judge makes reference to taking the previous determination of First-tier Tribunal Judge Khawar (promulgated on 23rd August 2019) as his starting point whilst also needing to have regard to the principles of fairness confirmed in *BK (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 1358 and *Secretary of State for the Home Department v Patel* [2022] EWCA Civ 36. The judge explicitly states that he will assess all of the evidence that is available now and decide if there is a "very good reason" to depart from the earlier findings. At paragraph 29, the judge considered the new evidence in respect of whether family life was engaged, but did not think there was a very good reason "to depart" from the previous findings. The two difficulties with this approach are that first, the judge did not consider whether family life existed at the date of the hearing before him notwithstanding the previous findings of Judge Khawar, and second, the judge specifically required "very good reasons" to depart from the previous findings which I do not find were applicable in relation to the question of whether family life existed now. A further reason why that must follow is because otherwise, if the judge were to find that family life existed, but there were no "very good reasons" given why a departure should be caused, it would mean that the judge was not able to find that family life was engaged despite conscientiously believing that to be right (see *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804 at [30]).

10. I find that the judge erred in law in their consideration of the evidence presented and whether or not family life existed at the date of the last hearing in September 2022 by taking the previous findings in respect of family life by Judge Khawar from August 2019 as a starting point and then applying the test that there were no very good reasons to depart from that previous decision. I find that the judge has adopted the approach of whether a past event did or did not occur, as opposed to whether a state of affairs which did not exist at the previous date before Judge Khawar may have in fact existed before Judge Apted in September 2022 which did not require Judge Apted to depart from the findings of Judge Khawar but instead required him to bear those findings clearly in mind as an assessment of the historical situation and to then decide the appeal

conscientiously for himself on the basis of the new evidence presented of family life and Article 8(1) being engaged. In my view there was evidence that was arguably capable of establishing family life at the date of the hearing including *inter alia* updated evidence of financial support and contact between the Sponsor and Appellant, and the fact that the Appellant lives in a house owned by the Sponsor.

11. I find that the correct approach that the judge should have taken would have been to bear the previous findings in mind as an assessment of the historical state of affairs that family life was not engaged, but to then decide the subsequent appeal and the engagement (or not) of family life for himself, on the basis of the evidence presented for himself, reaching a conclusion he conscientiously believed to be correct, without requiring very good reasons to depart from that previous finding.

12. This appears to me to be the correct approach in law as the engagement of family life is not a question of whether an event has occurred in the past, but whether a state of affairs is said to exist at each point in time when the Tribunal examines the evidence before it to see if it does, whilst being mindful of any historic non-engagement pursuant to *Devaseelan*. I am thus unable to conclude that the judge decided the appeal conscientiously on the basis of the evidence before him and instead adopted an improperly restrictive approach to his application of the *Devaseelan* guidelines.

13. Turning to Ground 2 and the argument that the judge failed to properly consider whether there was a very good reason to depart from the previous decision, I note that Judge Apted indeed noticed a factual discrepancy in the evidence before him which had been incorrectly noted by Judge Khawar. In short, Judge Khawar had before him a bank statement which he believed to belong to the Sponsor alone, whereas, as noted by Judge Apted at paragraph 21 of the decision, the bank statements provided "reveal…that the…bank account is in fact a joint bank account in the joint names of the appellant and sponsor…These show that the appellant's late father's Gurkha pension is credited to the account and very shortly thereafter, almost identical sums of money are withdrawn from the account by the appellant". However, notwithstanding the judge noting this discrepancy and inaccurate consideration of the evidence by the previous judge, the status quo remained the same. In my view, this is a further example of the judge failing to consider whether or not to conscientiously depart from the previous findings especially as he himself had observed that the bank statement was not in fact one that belonged solely to the Sponsor but was actually a joint bank statement of the Sponsor and the Appellant, such that this indicated the resources were *shared* by the Sponsor and Appellant (which was relevant to the engagement of family life) and also, that the father's Gurkha pension was withdrawn by the Appellant for his personal benefit, thus arguably demonstrating real financial support (going to the engagement of family life). Consequently it was arguably open to Judge Apted to depart from the finding by Judge Khawar that the bank account was the Sponsor's alone which could have arguably impacted his assessment as to whether family life was engaged or not (even if I am wrong in respect of Ground 1).

14. Turning to Ground 3 the Sponsor's evidence was that the Appellant and Sponsor were in contact every other day as stated at paragraph 24 of the mother's witness statement. The argument in respect of this evidence is that the judge failed to ask himself whether the Appellant provided emotional support to his

mother in order to gauge whether that support was “real, effective or committed” pursuant to the decision in *Rai v. Entry Clearance Officer* [2017] EWCA Civ 320 at [36]. The sole mention of communication between the Sponsor and Appellant is at paragraph 28 and concerns the ‘regularity’ of calls as opposed to what the regularity of those calls might arguably demonstrate going to whether or not the mutual emotional support between the Appellant and Sponsor is real, effective or committed. In any event, Judge Apted concludes his consideration of these communications by simply stating that the evidence shows “regular communication but again, was evidence that was considered by Judge Khawar, but is again more up to date”. I therefore find that there is an error established in respect of Ground 3 in that the judge failed to consider the emotional support demonstrated by the calls, and the nature of the conversations that are said to take place during those calls; which could have arguably demonstrated emotional support and thus an engagement of family life between the Appellant and Sponsor.

15. I therefore find that the judge has materially erred in law for the reasons given.

Notice of Decision

16. The Appellant’s appeal is allowed.

17. The appeal is to be remitted to the First-tier Tribunal to be heard *de novo* by any judge other than First-tier Tribunal Judge Apted.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

06th Of December 2023