**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-004583

First-tier Tribunal Nos: HU/54271/2023
LH/02583/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

13th December 2023

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD**

**Between**

**RAMRI RAI**
**(NO ANONYMITY ORDER MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Elliott-Kelly, counsel, (instructed by Everest Law Solicitors)
For the Respondents: Mr Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 28 November 2023**

## DECISION AND REASONS

### Background

1. This matter concerns an appeal against the Respondent's decision letter of 22 February 2023, refusing the Appellant's application made on 7 December 2022.

2. The Appellant applied for entry clearance as the child of a former Gurkha discharged before 1997. She is the adult child of her mother the Sponsor, Maya Sobha Rai, widow of her late father Kirta Bahadur Rai who was formerly a Gurkha soldier.

3. The Respondent refused the Appellant's claim by letter dated 22 February 2023 ("the Refusal Letter"). This stated that the application had been considered with reference to Article 8 of the European Convention on Human Rights (ECHR) and

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having also considered the applicant as a dependent relative under Paragraph ECDR.1.1 of Appendix FM of the UK Immigration Rules. The Refusal Letter accepted that the Sponsor had been granted a settlement visa on 15 October 2015 under the discretionary arrangements for spouses of Gurkhas discharged prior to 1 July 1997; the father had already settled in the UK on 10 May 2010 and had since passed away on 10 May 2019. However, it said that the discretionary arrangements in place for adult children of a Gurkha discharged prior to 1 July 1997 did not apply to the children of widows such that the Appellant needed to demonstrate she met the requirements of the relevant immigration rules, which she did not. It was considered that the Appellant had formed an independent family unit and had not demonstrated that she was financially and emotionally dependent upon her mother beyond the extent normally expected between a parent and adult child. Even if it were accepted that she did receive financial assistance from her mother, she was a fit and capable adult who is able to look after herself. There were no any exceptional circumstances and article 8 was not engaged. Even if article 8 was engaged, the decision was proportionate, having taken into account the historical injustice and cases of Gurung & Ors, R (on the application of) v SSHD [2013] ECWA Civ 8 and Ghising and others [2013] UKUT 00567 (IAC).

4. The Appellant appealed the refusal decision.

5. Her appeal was heard by First-tier Tribunal Judge Cas O'Garro ("the Judge") at Taylor House (virtually) on 22 August 2023. The Judge subsequently dismissed the appeal in her decision dated 1 September 2023.

6. The Appellant applied for permission to appeal to this Tribunal on four grounds headed as follows:

> Ground 1: incorrect test as to the existence of family life
>
> Ground 2: erroneous consideration of the reason for the resumption of family life
>
> Ground 3: flawed approach to the Sponsor's financial support
>
> Ground 4: flawed approach to 'hypothetical' future employment.

7. Permission to appeal was granted by First-tier Tribunal Judge Dainty on 17 October 2023, stating:

> "1. The application was made in time.
>
> 2. The grounds assert that the judge erred in law in the approach to the question of whether family life existed under article 8. It is said that the judge wrongly looked at whether there was real, committed and effective support. It is further said that at 33-34 the judge treated as relevant the reason behind the resumption of family life and/or failed to make material findings on the point. At [37] placing reliance on as assumption that the Appellant would be intending to find employment in Kathmandu was an error of law.
>
> 3. It is arguable that although setting out the correct test in the section on the law the judge went on to impose a too high threshold in particular in her conclusion at paragraph 38 when she refers to real, committed and effective support, which is not the test in the decided cases rather the support need only be real, committed or

> effective. This error arguably infects the whole decision on family life and as such there is an arguable material error of law".

## The Hearing

8. The matter came before me for hearing on 28 November 2023 at Field House.

9. Ms Elliot-Kelly attended for the Appellant and Mr Terrell attended for the Respondent.

10. Mr Terrell confirmed that a discussion had taken place prior to the hearing and he conceded that the Judge's decision contained a material error of law in the nature of that alleged in ground one of the grounds of appeal. He said it cannot be contended that the Judge does not refer to the wrong test in her decision, using the word 'and' instead of 'or' concerning real/committed/effective support and it then not being clear whether in substance the Judge had in fact applied the right test for establishing family life. He said he did not agree with all of the grounds but admitted there were also concerns about the Judge's findings in relation to the Appellant's brother sending money.

11. Ms Elliot-Kelly thanked Mr Terrell for the concession and went on to argue the remaining grounds of appeal. She said those grounds constituted individual errors and cumulatively affected the overall decision as well. She said the fundamental issue with the decision is that there are comments and summations of the evidence with no clear findings per se on which to base and reason out the conclusion at the end. She said in light of the number of errors, it was appropriate to remit the matter back to the First-tier Tribunal for a de novo hearing, particularly given that there was procedural unfairness in making some findings on matters on which the Appellant was not given the opportunity to respond.

12. Mr Terrell replied to question the relevance of ground two to family life even if there were an error found; he left the forum for remaking to the Tribunal.

13. I confirmed that, having noted the Respondent's concession concerning ground one, I was satisfied that the Judge's decision contained a material error of law and that I would provide written reasons setting aside the Judge's decision and remitting it, which I now do.

## Discussion and Findings

14. It is well established that the decisions of judges should contain sufficient explanation and reasoning, including as to the origin of a point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal – see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).

15. Ground one asserts that the Judge failed to apply the correct test for family life in her assessment of the Appellant's evidence which is evident in, and compounded by, other errors identified at Grounds 2 to 4.

16. I say at the outset that it is difficult to see how ground one can stand alone, as it relies on errors identified in grounds 2, 3 and 4. For reasons which I shall go on to discuss, I find all of the grounds to be interrelated.

17. The Judge correctly sets out, at [1] – [12] of her decision, the background to the appeal and the nature of each party's case. At [13] she says the evidence is that contained on CCD and at [14] notes the issues to be determined as being whether article 8 ECHR is engaged, and if so, whether it would be proportionate to allow the Appellant to settle in the UK with the Sponsor.

18. At [15]-[17] the Judge sets out very briefly what happened at the hearing without describing the content of the oral evidence or submissions.

19. In [18] she sets out the correct standard and burden of proof.

20. The Judge records at [21] that:

> "It is not disputed that the appellant's application was bound to fail under the Immigration Rules and the respondent's Discretionary Policy."

21. In [22] she recognises this means she needs to "proceed to undertake an assessment of the appellant's Article 8 rights outside the Immigration Rules", which she then purports to do, correctly citing the applicable cases of Razgar in [24] and Kugathas in [26] and discussing in [27]-[28] how the matter of family life between a parent and adult child has been dealt with in subsequent cases. In [28] she correctly recites the test in Kugathas concerning 'real' or 'committed' or 'effective' support, but in [38] she replaces the word 'or' with 'and' when referring to this test.

22. At [30] the Judge finds that the Appellant has lived an independent life for 36 years, having been married with three children produced from that marriage [29]. At [32] the Judge finds that the Appellant was living this independent family life when her mother left Nepal with her father to take up the Gurkha's right to settlement in the UK.

23. At [33] the Judge states:

> "Where Article 8 family life between an adult child and a parent has ended, it is not impossible for there to be Article 8 family life between them subsequently. However, it is significantly harder to establish there is Article 8 family life in that situation as compared with the situation where there has been no interruption. If a resumption of Article 8 family life is asserted on the basis that cohabitation and financial support has resumed, it is relevant to ask why has it resumed".

24. Ground 2 asserts that this passage elevates the test of whether family life exists and that there is no authority that a reason for the resumption of family life has to be shown; it is only necessary to consider whether family life exists as a matter of fact.

25. I agree that the question for the Judge was whether family life had been proven to exist on balance on the evidence before her.

26. I am unaware of any authority which says it is significantly harder to prove family life exists where it has previously been interrupted, or that there is a requirement to ask why it has been resumed. However, it is not clear to me that the Judge is doing anything more in [33] than setting out matters which she will go on to take into account overall. It could be said to be common sense that if someone has left the family home and formed their own independent life, it may naturally be more difficult for them to establish family life than it would be for someone who has remained in the home and continued to rely on their parents

as an adult in the same way they did as a child. As the Judge's meaning is unclear, I consider it is necessary to look to the Judge's later findings to discern whether she actually did apply an elevated test. As such, I do not consider ground 2 to be made out in its own right, but the matters discussed in it relate also to the question of financial support, the subject of grounds 3 and 4 (see below).

27. The Judge's overall conclusion, contained in [41] is that:

> "I do not accept that the appellant has established on the facts that she has family life with her sponsor".

28. She finds in [38] that the money sent to the Appellant by her mother is not cogent evidence of of "real, committed *and* effective" support (my emphasis), appearing to do so for the following reasons:

(a) although the Sponsor sends money to the Appellant, it is not unusual in a poor country such as Nepal that family members who travel abroad to work send money home to other family members [35]

(b) the Appellant's brother, Umesh, also sends money to her and there is a high probability that a second brother living in the UK also supports her financially [35]

(c) there is insufficient evidence of the Appellant's circumstances in Nepal; she says she receives money from her mother which is used for living needs but she did not say she received money from Umesh or what that money is used for [36]

(d) the Sponsor's financial support must be temporary because it must be assumed that the Appellant went to Kathmandu for work, her statement saying she moved because there were no jobs in the village and she is studying [37].

29. Having found there is no financial support, the Judge turns to the question of emotional support in [39], reminding herself that, given the Appellant's age and history of living apart from the Sponsor, it would be unusual for there to be emotional support between the two in the absence of some psychological reason, which was itself absent.

30. In [40] the Judge finds there is no such emotional support because, whilst the Sponsor and Appellant speak regularly:

> "The sponsor has her son Umesh to speak to, for emotional support and the appellant has her adult children, who although they do not live with her, must, in all probability, provide her with a source of comfort, when she needs emotional support".

31. The overall conclusion in [41] is that family life does not exist between Appellant and Sponsor such that article 8 is not engaged. Because of this, the Judge finds in [43] that any historic injustice does not assist the Appellant.

32. The grounds of appeal assert that the Judge cites the incorrect test for family life in [38], after making erroneous findings concerning the resumption of family life, financial support and hypothetical future employment.

33. I consider the use of the word "and" in [38] is not necessarily indicative of the Judge having used a conjunctive test rather than the disjunctive test set out in paragraph 14 of Kugathas v SSHD [2003] EWCA Civ 31 as this could simply be a typing slip. However, the Respondent has conceded this, and for reasons which I will now discuss, there is a lack of adequate reasoning and accurate reference to evidence such that it cannot be said with certainty that the Judge did in fact have in mind the true nature of the correct test in Kugathas and/or had taken on board the development and application of that test in the other cases cited – Gurung, Ghising etc.

34. I find several of the reasons given for finding there was no financial support to be problematic.

35. The finding in [35] concerning the actions of family members in poor countries such as Nepal sending money back does not refer to the evidence on which it is based. There does not appear to have been any objective evidence before the Judge concerning conditions in Nepal. As noted above, there is no description of the oral evidence or submissions. Without having seen any evidence on which the finding is based, it appears to have come from the Judge's own unreferenced knowledge or research. It appears the Appellant was not asked about it nor given the opportunity to respond to it being taken as an issue. This was procedurally unfair and is an error.

36. Also concerning [35], ground 3 points out that, rather than being someone who went abroad for work, the Sponsor is an elderly widow who settled in the UK by reason of her husband's former service to the Crown. It may be therefore, that money being sent back in such circumstances was *unusual* and not usual as the Judge finds. Either way, I agree there is no requirement for such financial support to be unique or unusual. In addition, simply because the brother sent financial support did not mean that the Sponsor's support was not also needed.

37. Further, it appears the Judge found there was a high probability that the second brother also sent money simply because the first did, as there is no indication of any other basis for this finding. It does not follow automatically that because the first brother sends support, the second also does. There is no analysis of the relative financial positions of the two brothers. The Judge's reasoning here is inadequate.

38. At [37] the Judge states that it must be assumed that the Appellant went to Kathmandu for work. I do not understand the basis for this assumption. Para 7 of the Appellant's witness statement says:

> "... In August 2022 I moved to my parent's house. I stayed there for about four months before moving to the current address. There are no jobs available in this remote village. I moved to the current address as it is much easier to be in contact with my mother and do some language courses".

39. Whilst the Appellant says there are no jobs available "in this remote village"; it does not automatically follow that there were jobs in the place she moved to or that she intended to take up employment. On the contrary, she says she moved in order to do some language courses and have better contact with her mother. Even if she was moving to take up work, it is a leap to assume that such work would provide sufficient income to enable the Appellant to cope without the Sponsor's financial support. In making the assumption she does, the Judge therefore goes beyond what could rationally be discerned from the evidence.

Again there is no indication that this point was put to the Appellant for comment. This is an error.

40. At [34] the Judge discusses the Appellant's evidence that she became divorced with no maintenance or property being awarded to her, such that she turned to her mother for financial support and moved back into the family home, later moving into private rented accommodation which her mother paid for. However no specific findings are made in relation to these stated facts and it is not clear how much weight, if any, was attributed to them. They could have provided the reason for the resumption of family life that the Judge said in [22] was needed but, if so, this is not made clear.

41. The Judge's findings in [36], that there was insufficient information about the Appellant's living circumstances in Nepal and that the Appellant had not described what any money she was sent was used for, are potentially valid. However this comprised only one of the four reasons given for finding a lack of financial support from Sponsor to Appellant when the other three are erroneous. I therefore do not consider the finding(s) in [36] sufficient to save the Judge's reasoning concerning financial support.

42. Had the Judge not erred as she did, it cannot be said she would have made the same overall finding that there was an absence of financial support. Had she found such support existed, it may be that she would have further found it to indicate real or committed or effective support as per the correct test.

43. As such, I find the errors alleged in grounds 3 and ground 4, and ground 1 as a result, to be made out.

44. Overall, I consider the errors I have found to be material as they infect the overall finding concerning financial support, and the Judge appears to have attributed equal weight to the lack of financial support as is given to the lack of emotional support; the absence of those two things being the only reasons given for the absence of family life.

45. I find the errors found infect the decision as a whole such that it cannot stand.

46. In these circumstances, given the amount of fact finding needed, I find the appropriate course of action is for the matter to be remitted to the First-tier Tribunal for hearing afresh.

## Conclusion

47. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.

48. Given that the material errors identified fatally undermine the findings of fact as a whole, I set aside the decision of the Judge and preserve no findings.

49. In the light of the need for extensive judicial fact-finding, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Cas O'Garro.

## Notice of Decision

50. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

51. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.

52. No anonymity order is made.

**L.Shepherd**
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
**6 December 2023**