



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

Case No: UI-2023-001452

First-tier Tribunal Nos:  
HU/55144/2021  
IA/12799/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 10<sup>th</sup> of December 2024

**Before**

**UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**Nir Bahadur Thapa  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**Entry Clearance Officer**

Respondent

**Representation:**

For the Appellant: Mr M West of counsel instructed by Everest Law Solicitors  
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 20 November 2024**

**DECISION AND REASONS**

1. This is my oral decision which I delivered at the hearing today.

**Permission to Appeal**

2. The Appellant, a national of Nepal, appeals with permission against the decision of First-tier Tribunal Judge O’Keeffe (“the Judge”) dated 29 November 2022. Permission to appeal had been refused by the First-tier

Tribunal but was granted on renewed grounds by way of a decision of Upper Tribunal Judge Lodato, dated 6 September 2024.

3. The background to the matter is that the Appellant had sought entry clearance seeking to join his father in the United Kingdom as the adult dependent child of a former Ghurkha soldier.
4. For some presently unidentifiable reason, this matter has taken some time to make its way to the Upper Tribunal. I observe that the First-tier Tribunal hearing was in November 2022. It is fortuitous that Mr West of Counsel has continuously been involved in the case and was able to provide some background.

### **Grounds of Appeal and the Hearing Before Me**

5. In essence, the grounds of appeal contend that there was a mistake of fact which led the Judge to make a material error of law. Mr West contends that there was a critical mistake of fact because at paragraph 28, the incorrect travel locations and dates were later used by the Judge to support adverse credibility findings. In effect, argued Mr West, that that fundamental error infected the whole of the decision. That is because the 4 main paragraphs used the mistake of fact for the conclusions in respect of the Appellant's credibility and in respect of the reliability of the evidence presented to the Judge.
6. Mr West relies on the decision of the Court of Appeal in *E & R v the Secretary of State* [2004] Q.B. 1044 and in particular the judgment of Lord Justice Carnwath, as he then was, with whom the rest of the Court of Appeal agreed. Paragraph 66 states,  

“First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been ‘established’, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.”
7. In his grounds of appeal Mr West had originally relied on the judgment of the Court of Appeal in *ML (Nigeria)*, but during the discussion today it appears to be submitted that that that authority does not dilute the 2004 decision in *E & R*.

### **Consideration and Analysis**

8. I have to say that I was initially very attracted by the submissions made by Mr Terrell in respect of whether or not the test set out in *E & R* was actually met. Namely whether in this case the fact was ‘uncontentious and objectively verifiable’. During the submissions, I explored this with both advocates and tested it with examples.

9. I have reflected on two aspects of Mr West's submissions. First, he refers to the witness statement of the Sponsor at page 76 in the bundle at paragraph 13, which states,

"In 2013, Nir got another opportunity to work abroad. He was in some Gulf or Arab country. He was there as a cleaner. I was in Nepal at that time. He borrowed money and I became guarantee for him. I believe it was about 60000 Nrs that he took for his expenses to give to the agency."

10. Mr West, in his written grounds of appeal and today, has set out that there were three trips: Trip one was to Malaysia (2004 to 2006), trip two was to Oman (2013 to 2015) and trip three was to Saudi Arabia (2015 to 2017).

11. Mr West submits it was therefore important to see what was actually found by the Judge at paragraphs 28 to 31 of her decision.

12. Paragraph 28 says in the first sentence,

"In oral evidence before me, the sponsor said that he had arranged a loan for the Appellant."

In that same paragraph, the judge says:

"I assume therefore that this is the loan that the appellant took when he went abroad to work for the third time. This was in contradiction to the evidence given by the sponsor in his statement when he said that the appellant borrowed the money and he, the sponsor, was the guarantor."

13. At paragraph 29 the Judge said:

"When cross examined about the loan, the sponsor was unable to name the person from whom the loan had been taken. He then said the appellant had taken the loan. He said he sent the money from here and the loan was paid off. He was unable to point to any documentary evidence to show repayment of the loan; he simply said he sent the money from the UK and the loan was paid off."

14. Then at paragraph 30 the Judge said,

"... On the evidence before me I find that the loans the appellant took to enable him to travel to Malaysia and then Oman were repaid by him out of monies sent back to Nepal whilst he was working overseas."

15. Finally at paragraph 31 the Judge said,

"I do not accept that the sponsor took out that loan for the appellant or that he is responsible for its repayment. He gave inconsistent evidence as to who took out the loan and was vague about the lender."

16. In my judgment, the Judge's assumption, which she had referred to in paragraph 28, was wrong (being abroad for the third time). In my

judgment this is a matter which was uncontentious and objectively verifiable in that it was set out clearly within the witness statement at paragraph 13, (page 76) and was always the case and remained the case. It was material in that it was the Judge's foundation for dismissing the appeal. The Judge's decision was therefore based on an uncontentious and objectively verifiable error of fact.

17. Whilst initially I did consider that Mr Terrell was correct that the Appellant could have brought further evidence at this hearing, such as documentary evidence or bank statements and the like, to support his case, but I conclude that in the circumstances, the mistake of fact is manifest.
18. Whilst is it not possible to say the Judge would definitely have reached a different decision had the mistake of fact not been made, in my judgment it is likely that the Judge may have come to a different decision if she had not made this mistake of fact.
19. I therefore conclude that the decision of First-tier Tribunal Judge O'Keeffe contains a material error of law. I set aside her decision.
20. I had canvassed with the parties what their submissions were in respect of disposal of this case, if I was to find that the decision of the Judge contained a material error of law.
21. Mr Terrell quite properly invited me to consider the circumstances which are difficult and sad. The Sponsor has passed away since the Judge's decision was made. As I did during the hearing, I express my condolences to the two family members who are present in the hearing today.
22. I apply *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). I carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principles set out in paragraph 7 of the Senior President's Practice Statement. I take into account the history of the case, the nature and extent of the findings to be made and I consider paragraphs 7.1 and 7.2 of the Senior President's Practice Statement.
23. Given the scope of the issues and findings to be made, I consider that it is appropriate that the First-tier Tribunal remake the decision. I am persuaded by Mr West that in view of the stepmother's witness statement which (was before the First-tier Tribunal) which refers to her extensive involvement in this family then it is appropriate that despite the death of the Sponsor, that the First-tier Tribunal consider the matter on a de novo basis.
24. As I said at the start of this judgment it remains unclear as to why the matter has taken as long as it has to come before the Upper Tribunal. Any further directions are for the First-tier Tribunal to make, but it might be sensible for the Appellant's solicitors to check intermittently with the First-

tier Tribunal if no hearing is listed within the current time periods and with which time periods, they and Mr West will be familiar.

**Notice of Decision**

The decision of the First-tier Tribunal contains a material error of law.

The decision of the First-tier Tribunal is set aside.

There will be a complete rehearing at the First-tier Tribunal on all issues. None of the current findings shall stand.

**Abid Mahmood**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**20 November 2024**