IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004075
UI-2023-003546
First-tier Tribunal No: HU/59082/2023
LH/00754/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th June 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR MILAN NEPALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr West, Counsel instructed by Bond Adams LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 17 May 2024

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Aldridge) dated 13 June 2023.

2. The appellant is a citizen of Nepal born in January 1989. On 26 April 2022 he applied for entry clearance in order to join his mother in the UK. The appellant's mother is a widow of a Gurkha soldier who died in 2001. She has lived in the UK since 2011 and has been granted indefinite leave to remain. On 5 October 2022 the application was refused on the basis that:

   (a) the arrangements for adult children of Gurkhas discharged prior to 1 July 1997 did not apply because the appellant's father is deceased;

   (b) the appellant does not meet the requirements of Appendix FM for dependent relatives;

(c) refusing entry would not breach Article 8 because Article 8 is not engaged and, in any event, would be proportionate.

The Decision of the First-tier Tribunal

3. The appeal before the First-tier Tribunal was heard without a representative of the respondent in attendance.

4. The decision is structured in the following way:

(a) First, the judge considered the respondent's case as set out in the refusal decision.

(b) Second, the judge set out the appellant's case, as set out in the appellant's skeleton argument.

(c) Third, the relevant law on Article 8 ECHR was briefly summarised.

(d) Fourth, the judge summarised the hearing. In this part of the decision, the judge noted the absence of a Presenting Officer but that he was satisfied that it was in the interests of justice and fairness to proceed. The judge also noted that the sponsor gave oral evidence and that some supplemental questions were asked concerning her children and the circumstances of each of them.

(e) Fifth, the submissions of the appellant's representative, Mr Balroop, were summarised.

(f) Sixth, the judge set out, in paragraphs 17–31, his "findings and determination".

5. In the "findings and determination" section, the judge found that there were significant inconsistencies in the evidence about who lives with the appellant in the family home. The judge stated in paragraph 24:

> "I draw significant adverse inference from this inconsistency as it appears to go to the core of the family circumstances which are being relied on".

6. The judge also found that inconsistent evidence was given about the employment and financial circumstances of the appellant and his siblings, stating in paragraph 25:

> "I do not find that the tribunal is being furnished with an accurate and genuine reflection of the true income of the household, the appellant and his siblings appear to have their own independent source of income. I do not accept that they are unemployed in the sense that they have the land to work on to provide an income and also an ability to find casual work in farming elsewhere. These findings damage the credibility of the appellant's evidence and that of the sponsor".

7. The judge stated in paragraph 26:

> "I have carefully considered the appellant's and sponsor's statement and considered the oral evidence, and I conclude that I do not find the evidence to be credible and reliable".

8. Having made these adverse credibility findings, the judge proceeded to find, in paragraph 28:

> "I do not accept there is a continuing real, committed and effective support. I am not satisfied that the appellant has demonstrated that he is dependent upon the sponsor both financially and emotionally from the evidence provided which is in contradiction to written evidence of the appellant and the sponsor. I do not find the evidence of the statements to be reliable. I do not accept the family ties go beyond the normal ties of love and affection between adult children and their parents. It follows that Article 8 is not engaged in its family life aspect. I find that the historic injustice point does not apply and nor do I find any compelling circumstances".

Grounds of Appeal

9. There are four grounds of appeal. The First-tier Tribunal granted permission only on the first, but the Upper Tribunal granted permission on the other three. All four grounds were pursued before me.

10. Ground 1 submits that adverse credibility findings were made without giving the appellant fair notice and without there being an evidential foundation. These are two distinct points. I will refer to the procedural fairness submission as ground 1(a) and the evidential foundation submission as ground 1(b).

11. Ground 2 submits that the parameters of the dispute between the parties was exceeded. There are two elements to this ground. The first, which I will refer to as ground 2(a), is a contention that negative findings on the provision of financial support were made when this was not disputed by the respondent. The second submission in ground 2, which I will refer to as ground 2(b), is that the judge found that there had not been a historical injustice despite the respondent not disputing that the appellant's father had suffered a historic injustice by being denied the opportunity to settle in the UK when discharged in 1997.

12. Ground 3 submits that the judge misdirected himself by stating in paragraph 28 that he did not accept that there is continuing real, committed and effective support. The grounds submit that the test is disjunctive, i.e. whether there is real, effective or committed support, as set out in *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320. It is contended that the consequence of this error is that an elevated test was applied when addressing whether article 8 ECHR was engaged.

13. Ground 4 submits that material factors which demonstrate that there is family life between the appellant and sponsor were not considered.

Analysis

14. Before me, Mr West and Mr Melvin made helpful submissions. I have not set these out separately but the points they raised are reflected in the analysis below.

15. I will now address each of the grounds in turn.

Ground 1(a): rejection of credibility without fair notice / procedural unfairness

16. Where a judge reaches the view that an appellant (or sponsor) is not credible in circumstances where the respondent has not raised credibility before the hearing

and is not represented at the hearing, considerable care is required. Guidance is provided in the "Surendran Guidelines", which are set out in *MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 00005. Paragraph 5 of the Guideline states:

> Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.

17. Ground 1 argues that the judge did not point out to the appellant's representative any credibility issues or even identify that credibility was in dispute. It is submitted that fairness required the judge to put any concerns to the appellant and his representative so that they could be addressed.

18. This case came before me on 5 February 2024. The case was adjourned, at the request of Mr West, because the appellant had not adduced any evidence (for example, a transcript or note from Counsel) of what occurred at the hearing. Mr West stated that he did not feel he could pursue ground 1 in the absence of such evidence, and requested an adjournment to enable the evidence to be obtained. I adjourned the hearing and directed the appellant to file and serve documentation showing in detail what occurred in the First-tier Tribunal. My directions made clear that if Mr Balroop was unable to provide a witness statement with sufficient detail a transcript was required.

19. The appellant submitted a transcript. However, the transcript that was submitted is incomplete as it ends at the conclusion of evidence being taken but before Mr Balroop made submissions on behalf of the appellant. As I observed - and Mr West accepted - it is impossible to discern from the partial transcript that was provided whether later in the hearing the judge put to Mr Balroop his concerns about credibility. Mr West did not seek an adjournment in order to obtain a complete transcript; instead stating that his focus would be on ground 3, which he maintained was the strongest ground.

20. Given that credibility issues were not raised by the respondent before the hearing, I have no hesitation in finding that it would have been procedurally unfair for the judge to make adverse credibility findings without first putting the adverse points to the appellant (and his representative). However, I am unable to accept, based on the evidence provided, that the judge did not raise adverse points during the hearing. The appellant (and his representatives) have had ample opportunity to provide evidence of what occurred at the First-tier Tribunal hearing. Indeed, the previous hearing before me was adjourned solely in order to enable them to do this. The consequence of the failure by the appellant (and his representatives) to provide the necessary evidence, despite the adjournment to enable them to do so, is that I am not prepared to accept that the judge did not raise the adverse credibility points at the hearing.

Ground 1(b): lack of evidential foundation to support credibility findings

21. The judge had the benefit of hearing oral evidence from the sponsor and of considering all of the evidence as a whole. Having heard and considered the evidence, the judge identified inconsistencies in respect of issues he considered significant (who lives with the appellant and whether the appellant works), and was not satisfied that he had been given accurate information about the income

of the appellant's household. The judge also found that evidence was lacking in several areas: specifically, what funds are needed for the appellant's living expenses and the extent of communication between him and sponsor. In the light of these findings, it was open to the judge to conclude that the accounts given by the appellant and sponsor were not credible. I therefore reject the argument that there was not an evidential foundation for the conclusion reached on credibility.

Ground 2(a): finding on provision of financial assistance exceeding parameters of the dispute

22. The position of the respondent, as set out in the refusal decision, was that even if the appellant receives financial assistance from the sponsor he is a fit and capable individual who is able to look after himself. The respondent also stated in the refusal decision that the appellant had not provided details of his financial commitments in Nepal.

23. The judge found, in paragraph 26 of the decision, that there was evidence of financial remittances from the sponsor to the appellant, but that it had not been demonstrated that the appellant is reliant on the sponsor for his living expenses.

24. In my view, the findings of the judge are in line with – and do not go beyond – the position taken by the respondent in the refusal letter. I therefore do not accept that the judge's findings in respect of financial assistance exceed the parameters of the dispute.

Ground 2(b): finding on historic injustice exceeding parameters of the dispute

25. The appellant's late father was a Gurkha who was denied the opportunity to settle in the UK following his discharge from military service. It is well established that this is a historic injustice that must be factored into (and is often determinative of) a proportionality assessment under article 8 ECHR. See, for example, *R (Gurung v Secretary of State for the Home Department* [2013] EWCA Civ 8.

26. However, in a case where there is not a family life engaging article 8(1), there will not be a need to conduct a proportionality assessment under article 8(2) and the historic injustice will consequently not need to be considered. In this case, the judge found that article 8 was not engaged. There was therefore no need to consider how much weight to attach to the historic injustice.

27. In my view, the judge's statement in paragraph 28 that "the historic injustice point does not apply" means no more than that it was not necessary to consider historic injustice because article 8(1) was not engaged. However, even if the judge meant something other than this, and was saying that there had not been a historic injustice (which appears to be the appellant's reading of paragraph 28 of the decision) the error would be immaterial because the case turned on whether article 8(1) was engaged, not whether refusing entry was proportionate under article 8(2).

Ground 3: applying an elevated threshold

28. Whether family life that engages article 8 exists is a fact sensitive question that depends on a consideration of all of the relevant facts. A formulation that has received approval in the Court of Appeal (see *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320) is that, for family life to exist between a parent and adult child, there must be support that is real, committed **or** effective.

29. In paragraph 28 the judge stated that he was not satisfied that there was continuing real, committed **and** effective support.

30. There is, clearly, a difference between a conjunctive test (represented by "and") and a disjunctive test (represented by "or"), and there will be cases where using a conjunctive rather than disjunctive test will lead to a different outcome. However, this is not – and is not close to being – such a case. The judge found that the sponsor and appellant did not give credible accounts, that there is no financial or emotional dependency, and that the family life they enjoy does not go beyond the normal ties between a parent and adult child. The findings of fact could lead to only one conclusion, which is that Article 8(1) was not engaged. Therefore, nothing turned on whether the judge mistakenly applied the test set out in *Rai* conjunctively rather than disjunctively.

Ground 4: failure to address several factors indicative of family life engaging article 8(1)

31. In this ground, the appellant contends that there are several factors indicative of there being a family life engaging article 8(1) that the judge failed to engage with. These are that (i) the sponsor provides the appellant's accommodation and the land from which he draws sustenance; (ii) the sponsor provides the appellant with funds from her pension; (iii) the sponsor visits him and discusses important issues with him; (iv) the sponsor is distressed about being alone without her family and highly values the contact she has with the appellant; (v) the appellant has not established a family of his own; and (vi) the appellant and his mother lived together prior to her migration to the UK.

32. This submission is premised on the judge having accepted that the appellant and sponsor gave credible accounts. However, for the reasons given above in respect of ground 1, the judge was entitled to find that the appellant and sponsor had not given accounts that are credible. For this reason alone ground 4 cannot succeed.

33. However, there is a further reason ground 4 lacks merit. This is that it does not follow from not every point being referred to in a decision that a judge did not consider every relevant point. The Court of Appeal, in numerous cases, has emphasised that the Upper Tribunal should be slow to infer that a point not expressly mentioned has not been taken into account and that it should not assume that the First-tier Tribunal has misdirected itself just because not every step in its reasoning is fully set out. See paragraph 26 of *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201 for a recent discussion of this by the Court of Appeal. Although the appellant is able to identify specific points that could have been, but were not, specifically mentioned in the decision, it is tolerably clear, from reading the decision as a whole, that the judge reached a conclusion based on consideration of the entirety of the evidence.

Costs

34. At the previous hearing (on 5 February 2024) I raised the issue of whether a wasted costs order should be made as, had the appellant's representatives obtained a transcript (or witness statement from Mr Balroop, there would have been no need to have adjourned the hearing. In the light of the witness statement provided by the appellant's solicitor, which explains difficulties arising as a result of a change of solicitors, I am satisfied that a costs order would not be appropriate in this case.

Notice of Decision

35. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 June 2024