



Case Nos: UI-2023-004631

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

First-tier Tribunal No: HU/52037/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

28th February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Ratna Jyoti BISHWAKARMA
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D Balroop of Counsel, instructed by Everest Law

For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House on 1 December 2023

DECISION AND REASONS

Error of Law

1. This is an appeal against a decision of First-tier Tribunal Judge O'Garro signed on 2 September 2023 dismissing an appeal against a decision dated 4 January 2023 refusing an application for entry clearance as the adult dependent child of a former member of the Brigade of Gurkhas.
2. The Appellant is a citizen of Nepal born on 24 November 1970. The Sponsor - her father - is Mr Parsuram Bishwakarma (d.o.b. 11 October 1941).

3. It is convenient to note one other relative at this juncture: Samuel Bishwakarma (d.o.b. 11 January 2001). He is a grandson of the Sponsor, and a nephew of the Appellant.
4. The determinative issue before the First-tier Tribunal was whether or not Article 8 was engaged.
5. It was the Appellant's case, further to case law helpfully set out at paragraphs 26-30 of the Decision of the First-tier Tribunal, that there existed more than the normal emotional ties expected between a parent and their adult child because she received real and/or committed and/or effective support from the Sponsor.
6. The First-tier Tribunal Judge determined that Article 8 was not engaged on the basis of reasons advanced in submissions by the Respondent's Presenting Officer that had not seemingly featured in the initial decision.
7. Permission to appeal was granted by First-tier Tribunal Judge Chowdhury on 13 October 2023, in material part in these terms:

"2. The judge found the Sponsor credible at paragraph 35 and found the Sponsor had been sending money to cover the Appellant's living costs since he left Nepal. It is arguable the judge did not have regard to the low threshold in assessing when Article 8(1) is engaged. It is arguable this is a material error of law as outlined in Ground 1.

3. It is arguable that the judge's focus on the Appellant's nephew being the legal owner of the family home in Nepal is disproportionate. Having regard to the family circumstances in the UK it is arguable that the Appellant's father provides the real committed and/or effective financial support to the Appellant by providing accommodation and rental income. It is arguable the distinction made by the First-tier Tribunal Judge in finding the Appellant's accommodation is legally owned by her nephew is not material in an assessment of proportionality under Article 8 particularly under Article 8(1)."

8. Paragraph 2 of the grant of permission to appeal, as quoted above, contains a succinct summary of relevant findings. The Judge found the Sponsor to be credible and accepted *"that he has been sending money to cover the appellant's living costs since he left Nepal"* (paragraph 35).
9. However, the Judge did not make any finding on whether this amounted to 'real, committed or effective' support, or, if it did not, offer any reasons why it did not.
10. In this context it is to be noted that having referred at paragraph 41 to the Sponsor's evidence that when he visited Nepal annually he paid any debt the Appellant may have incurred the Judge commented *"although this may be the case, there is no evidence before the Tribunal to show these payments"*. The reader is left unclear as to why doubt is seemingly

expressed as to this aspect of the evidence in circumstances where the Sponsor was otherwise characterised as a credible witness, and no specific reason is advanced for any lack of credibility or reliability with regard to this particular part of his testimony. It may be noted that the Sponsor's testimony in this regard was consistent with the Appellant's witness statement at paragraph 3, wherein she indicated that if there were matters that she needed that were not within the budget of the room rental income she would buy items on credit, or borrow money, and her father would settle such debts from his Army pension when visiting Nepal. This running-up of debt to be covered later by her father was in addition to more regular remittances sent by the Sponsor (Appellant's witness statement at paragraph 4 – and see further in this context the Judge's finding that the Sponsor had sent money to cover living costs since leaving Nepal).

11. In such circumstances, and irrespective of the analysis in respect of the second issue identified in the grant of permission to appeal, it would appear that the Judge made primary findings of fact to the effect that, in accordance with the jurisprudence, Article 8 was engaged, but offered no reason for a contrary conclusion. In my judgement this amounts to material error of law.
12. In respect of the second basis for granting permission to appeal, paragraphs 36-40 are pertinent:

“36. An issue was raised by [the Respondent's Presenting Officer] about the family home because legally the property the appellant lives in belongs to the appellant's nephew Samuel. {The PO} in his submissions said that the appellant cannot claim to be having a benefit from her sponsor by living in the family home and using the rental income from the family home because the family home is legally not owned by the sponsor. Indeed the sponsor has written in his statement at paragraph 12 that he legally transferred the house he had owned to Samuel, his grandson, since he was 4 years old.

37. When questions was put to the sponsor about the legal arrangements, he was insistent that although the property is legally owned by Samuel, as he is Samuel's guardian, he has the authority to manage the property as he wishes.

38. I am prepared to accept that when Samuel was a minor the sponsor who was his legal guardian would have had the authority to manage the property and indeed according to the sponsor's evidence which I accept, he transferred the house to Samuel when Samuel was four years old and continued to live in the property, the family home, with the appellant, Samuel and his wife until he left Nepal in 2006.

39. Samuel became an adult in 2018 and would have had the right to change whatever arrangements that was put in place by his legal guardian, regarding the appellant living in the property and receiving

the rental income from the property. I find the fact Samuel has done nothing to change the arrangements his grandfather has put in place in relation to the property is because by implication, he consents to the arrangements.

40. However by law, if the sponsor legally transferred the family property to Samuel, the family home will belong to Samuel and so would the rental income , which means the appellant is not receiving financial support from her sponsor to meet her living needs but is being financially supported by Samuel and Samuel is not the Gurkha. Therefore, I agree with [the PO], that, the rental income the appellant receives and uses for her living needs, cannot be regarded as evidence of real committed and effective support by the sponsor."

13. It is to be noted that the Judge appears to have considered this conclusion at paragraph 40 to be determinative of the issue of family life. As already noted, this was to disregard – without offering any reasons – that the other financial support maintained throughout by the Sponsor was capable of demonstrating real, committed and effective support. As such, the Appellant does not have to succeed on this second basis of challenge in order to have the decision of the First-tier Tribunal set aside.
14. Be that as it may I am also persuaded that the Judge has fallen into error in her analysis of the relevance of Samuel’s ownership of the family home in which all of the Appellant, her mother, the Sponsor, and Samuel have resided together.
15. In this context, in my judgement it is of particular note and concern that beyond the matters rehearsed at paragraphs 36-40 there does not appear to be any further exploration in the Decision as to Samuel’s position within the family.
16. The uncontested evidence of the Sponsor – and it is to be recalled that the Judge found the Sponsor to be a credible witness – was that Samuel’s father had died when Samuel was about 10 months old, and his mother had left him in the care of the Sponsor’s household at two years old when she had remarried. As such the Appellant had been instrumental in raising Samuel as part of the household. This would have been the case even before the Sponsor left for the UK. Further to this it be noted that the Sponsor was able successfully to sponsor Samuel to join him and his wife in the UK: he joined them at the age of 14 and has lived in their household in the UK ever since.
17. Pursuant to such uncontested facts it would appear that Samuel was part of the Appellant’s household – and thereby family life existed between him and the Appellant prior to his entry in the UK. On the Judge’s own analysis family life continued between the Appellant and the Sponsor at least up until Samuel’s 18th birthday – (on the Judge’s analysis by virtue of the Sponsor’s continuing control over the rental income from spare rooms in the family home in his capacity as guardian for Samuel, the legal owner).

In such circumstances it is difficult to see that that family life between the Appellant and those members of her family in the UK did not include a family life with Samuel living as part of the same household as her parents: in other words, the family unit as it had existed for many years in Nepal continued albeit that different members of the family at different times relocated to the UK – the Appellant’s parents in about 2006 and Samuel in about 2015. Indeed implicit in the Judge’s finding that there was a change at the point that Samuel reached his majority is an acceptance of the notion that family life continued between the Appellant and the Sponsor at least until 11 January 2019 when Samuel became 18.

18. Moreover, the Judge appears to accept that when Samuel became legally entitled to the rental income which the Appellant continued to take advantage of, it was Samuel who was providing real, committed and effective support to her. As such, the Judge’s analysis is to the effect that family life stopped between the Appellant and the Sponsor that continued between the Appellant and Samuel: Samuel was now an adult relative from whom the Appellant derived support over and above normal ties between adult family members.
19. Notwithstanding the technical legal change, in practice – as seems to be acknowledged by the Judge – nothing actually changed. And even at the ‘legal level’, the Sponsor in effect became financially supported in part by a different member of the same family unit (Samuel rather than her father), and in any event continued to be financially supported in part by her father.
20. In such circumstances it is not sustainable, in my judgement, to conclude on the available evidence that the family life enjoyed between the Appellant and the Sponsor came to an end abruptly on 11 January 2019 for no other reason than that legal entitlement to certain monies passed from the Sponsor to Samuel – especially in circumstances where the Sponsor retained *de facto* control of such monies. The Sponsor was continuing to direct the application of the rental income, and to that extent was still instrumental in ensuring family monies upon which the Appellant was dependent continue to reach her. In my judgement that amounts to effective support.
21. For the avoidance of any doubt, even if I am wrong in concluding that my analysis in respect of the second basis of the grant of permission to appeal amounts to an error of law, the decision in the appeal is still to be set aside by reference to the error in respect of the first basis of the grant of permission to appeal.

Remaking the Decision in the appeal

22. It was common ground between the parties that the decision in the appeal could be remade by the Upper Tribunal without needing to hear further evidence. Indeed it was common ground that if I were to conclude in the Appellant’s favour in respect of the first basis of challenge it would

follow that the only other reasonable conclusion would be that Article 8 was engaged.

23. Yet further, in such a circumstance it was common ground that the Appellant would succeed in her appeal because the Respondent was not relying upon anything beyond the public interest in maintaining a firm immigration policy: see paragraph (4) of the headnote in **Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)**.
24. For the avoidance of any doubt, on the basis of the findings of the First-tier Judge in respect of the credibility of the Sponsor and his uncontested evidence of providing continuing financial support to the Appellant – irrespective of the issue with regard to any income derived from room rental – I find that he provides the Appellant with real, committed and effective support such that family life exists to an extent to engage Article 8. The proportionality balance favours the Appellant by reason of the historic injustice and the absence of any countervailing factor beyond the maintenance of effective immigration control – see **Ghising** as cited above.
25. Whilst it is unnecessary, I am also persuaded that even if I am wrong in my analysis of the second aspect of the challenge as amounting to an error of law, in re-making the decision I adopt much the same analysis and find on the facts that the circumstances also indicate the engagement of Article 8 as between the Appellant and the Sponsor, and also as between the Appellant and other members of her family unit that have already been able to relocate to the UK. Again, proportionality balance favours the.

Notice of Decision

26. The decision of the First-tier Tribunal contained a material error of law and is set aside.
27. I remake the decision in the appeal. The appeal is allowed on human rights grounds.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

22 February 2024

To the Respondent

Fee Award (*This is not part of the determination*)

I have allowed the appeal and in all the circumstances make a full fee award.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber),
qua a First-tier Tribunal Judge

22 February 2024