IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004715

First-tier Tribunal No: HU/51001/2023
LH/03449/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

Ms TARADEVI RAI
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr P. Blackwood, Counsel, instructed by Gull Law Chambers
For the Respondent: Mr D. Clarke, senior presenting officer

Heard at Field House on 19 December 2023

DECISION AND REASONS

1. The Appellant is a Nepalese national who appealed the Respondent's decision dated 9 January 2023 to refuse her application for entry clearance made as the adult child of her mother who is the widow of a Gurkha soldier.

2. First-tier Tribunal Judge Suffield-Thompson ('the Judge') dismissed the appeal in a decision dated 17 September 2023.

3. Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant in a decision dated 25 October 2023 in which it was decided that the Judge had failed to recognise that she should start from the findings made by Upper Tribunal Judge Frances in a decision relating to the Appellant's siblings; and consequently arguable errors of law had arisen.

The FTT Decision

4. The Judge said that she did not need to take into account Upper Tribunal Judge Frances' decision (or the preceding one in those appeals of the Appellant's siblings of FtT Judge Plumptre) in any way, save to take into account that the Appellant's sponsor (her mother) had provided inconsistent evidence which was "crucial" to the Judge's decision.

5. The Judge proceeded to find the sponsor's evidence to be neither consistent nor reliable. In reaching that conclusion the Judge relied not only on the "crucial" inconsistencies, but also on other matters, including doubts about the reliability of her apparently comprehensive Witness Statement given that the sponsor could not address the matters in that statement at the hearing.

6. The Judge also concluded that the evidence of the Appellant was not credible. The Judge then proceeded to set out various inconsistencies in the evidence of the Appellant and the sponsor and ultimately concluded that the Appellant had not shown that there was family life between her and her mother to engage Article 8.

7. The Judge considered the alternative position where Article 8 was engaged, but decided that there was no evidence that the Appellant's father had made any plans to retire in the UK before he died and there was therefore nothing to show that the Appellant would have been born in the UK but for the historic injustice to the Gurkhas.

The Appellant's grounds of appeal

8. In summary the Appellant says:

   a. The Judge misdirected herself about the approach to take to the Appellant's brothers' decision and, having failed to recognise that those provided the starting point for her decision, then proceeded to make further errors;
   b. The Judge misdirected herself regarding the extent of a relationship between the Appellant and her mother in order to engage Article 8;
   c. The Judge erred in her approach to the burden of proof, failing to recognise the balancing exercise required;
   d. It was irrelevant which child was sponsored to come to the UK first;
   e. The Judge referred to crucially inconsistent evidence without identifying what that was;
   f. The Judge made a procedural error in not raising concerns about the sponsor's Witness Statement at the hearing;
   g. The Judge's approach to the sponsor's oral evidence was procedurally defective;
   h. The Judge sought to relitigate a matter settled by UT Judge Frances' decision; and
   i. Findings were made which were not supported by the evidence and/or the Judge failed to take into account material evidence.

The Respondent's response

9. There is no Rule 24 response. However, Mr Clarke submitted that while certain matters raised by the Appellant were accepted – notably the failure to approach the decision of Judge Frances correctly, the consequent failure to recognise the existence of the historic injustice and the failure to recognise that the order in

which the children were sponsored was irrelevant– these were not material as the Judge had correctly found that Article 8 was not engaged.

My decision

10. Many of the matters relied upon by the Appellant are no more than a challenge to factual findings made by the Judge. Such a challenge faces a high threshold to succeed which I am not satisfied is met by most of the matters relied upon the Appellant.

11. However, as Mr Clarke conceded the Judge's approach to the decision of UT Judge Frances was incorrect. That decision provided a starting point for the Judge's decision. It is worth setting out the relevant parts of that decision in full:

> "I find that the judge erred in law in failing to have regard to paragraphs 17 and 18 of Annex K. Had the judge properly applied these paragraphs to the unchallenged evidence of the Appellant' mother, that their father would have settled in the UK on retirement from the army, then she would have concluded that there was historic injustice in this case. Her conclusions at paragraph 35 demonstrated a misapplication of Annex K or a failure to consider paragraphs 17 and 18. The judge did not doubt the credibility of the Appellants' mother. There was no countervailing evidence in this case.
>
> 10. I find that the judge erred in law in failing to consider the historic injustice in
> assessing proportionality. I set aside the decision to dismiss the appeal and remake the decision as follows.
>
> 11. The evidence of the Appellants' mother was sufficient to satisfy paragraph 17 of Annex K and there was no countervailing evidence. I find that the Appellants' father would have applied for settlement on retirement from the army had that option been available to him. The Appellants would have been born in the UK. Applying Gurung and Ghising to the facts of the Appellants' case, the refusal of entry clearance was disproportionate. I allow the Appellants' appeals on Article 8 grounds."

12. It is that last paragraph which sets out the findings to be taken into account applying the Devaseelan v SSHD [2002] UKIAT 702 and AL Albania v SSHD [2019] EWCA Civ 950 principles. (Mr Blackwood sought to rely upon Judge Plumptre's decision as well, but that was set aside by Judge Frances and therefore to start with her decision would be incorrect.)

13. Mr Clarke conceded that the Judge's approach to Judge Frances' decision was incorrect, but submits that the error is immaterial given that the Judge correctly identified that Article 8 was not engaged. If the decision that family life did not exist for the Appellant between her and her mother did not contain errors of law that would be correct.

14. However, having incorrectly stated that the previous decisions (including that of Judge Frances) did not bind the Judge in any way and were not a starting point for the Decision, the Judge proceeded to say that the previous decisions were useful to demonstrate how the sponsor's evidence was not consistent and that was "a

crucial factor" in the Decision. Unfortunately, there is no explanation of what the inconsistencies identified by the Judge were. Comparing the evidence in the bundle for the Appellant's case with the findings made by Judge Frances (and even Judge Plumptre), such inconsistencies are not apparent.

15. Given that these unidentified inconsistencies are described as "crucial" and the Judge's assessment of credibility was a major feature of the Judge's conclusions as to the non-existence of family life to engage Article 8, I must find that the Decision lacked reasoning such that there was a material error of law in deciding that family life did not exist between the Appellant and her mother, despite the fact that the Judge clearly took much time in addressing evidence otherwise in detail. Indeed, reading the Decision as a whole, the Judge's credibility concerns (some, at least, generated by the crucial inconsistencies) permeate the findings of fact such that the appeal should be heard afresh.

16. However, the Appellant should be aware that this does not mean that another Judge will allow her appeal.

17. Given the nature of the error of law conclusion, I have not addressed the other grounds of appeal any further.

18. Therefore the decision of Judge Suffield-Thompson is set aside. The case will be remitted to the First-tier Tribunal to be heard afresh by a judge other than Judge Suffield-Thompson.

Notice of Decision

19. The decision of Judge Suffield-Thompson is set aside.

20. The appeal is remitted to be reheard in the First-tier Tribunal but Judge Suffield-Thompson is excluded.

Tracey Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12/01/2024