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

**Case No: UI-2023-004752**
On appeal from HU/50526/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 17 January 2024**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**
**DEPUTY UPPER TRIBUNAL JUDGE O'RYAN**

**Between**

**MR KRISHNA RAJ RAI**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms Keelin McCarthy of Counsel, instructed by Everest Law Solicitors Limited
For the Respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

**Heard at Field House on 11 December 2023**

## DECISION AND REASONS

### Introduction

1 The appellant challenges the decision of the First-tier Tribunal dated 25 September 2023, dismissing his appeal against the respondent's decision dated 6 December 2022 refusing entry clearance and refusing a human rights claim.

2 For the reasons set out in this decision, we have come to the conclusion that the appellant's appeal against the judge's decision must fail.

## Background

3 The appellant is a national of Nepal and is currently residing in that country. On or around July 2022, the appellant applied for entry clearance to enter the United Kingdom as the child of a former Gurkha soldier who was discharged before 1 July 1997. A letter of representations accompanying the application dated 26 July 2022 makes reference to the respondent's Immigration Directorate Instruction, Chapter 15, Section 2A, Annex K. In the judge's subsequent decision dated 25 September 2023, the relevant policy was identified, without dispute, as being 'Gurkhas discharged before 1 July 1997 and their family members', dated 22 October 2018.

4 The appellant's father was granted entry clearance to settle in the United Kingdom on 18 May 2009, but died on 1 December 2009 before entering the United Kingdom. The appellant's widowed mother, (the sponsor) was granted entry clearance on 6 January 2010 for settlement in the United Kingdom. She entered the United Kingdom on 31 July 2010.

5 In his July 2022 application for entry clearance, the appellant was therefore seeking to enter United Kingdom to enjoy family life with his sponsor mother. The sponsor lived in the United Kingdom for most of the time from 2010 onwards, and the appellant himself resided outside Nepal between 2015 in 2022, initially studying in Denmark for two months, and then working in Portugal in the computing industry. The appellant had returned to Nepal in April 2022, and the sponsor had travelled there in October 2022, and they had resided there together in the sponsor's house from October 2022 onwards. the sponsor had re-entered the United Kingdom in July 2023 solely for the purpose of the giving evidence before the Tribunal in September 2023. The appellant maintained that he remained financially dependent on his mother and that they enjoyed family life together, as defined under Article 8(1) ECHR.

6 The respondent in his refusal letter of 6 December 2022 refused, in summary, because:

(i) the application did not come within the Immigration Rules HC 395; in particular, the conditions for entry under EC–DR .1 .1 (dependent relatives) were not met;

(ii) the appellant did not meet the criteria for entry clearance under the respondent's published policy in relation to entry of an adult child of a Gurkha discharged before 1 July 1907; and

(iii) the appellant and his mother did not enjoy a family life under Article 8(1) ECHR, and refusal of entrance clearance would not amount to a disproportionate interference with the appellant's private or family life under Article 8 ECHR.

7 The appellant appealed against that decision to the First-tier Tribunal, the matter coming before Judge of the First-tier Tribunal Hatton on 20 September 2023. the sponsor gave oral evidence.

8 In a decision dated 25 September 2023, the judge dismissed the appellant's appeal for reasons which, in summary, mirrored those of the respondent in the respondent's decision of 6 December 2022. The judge's reasons are considered in more detail, below.

9 In an application for permission to appeal dated 6 October 2023, the appellant argued that the Tribunal had erred in law, in summary, in:

(1) finding that Article 8(1) family life did not exist between the appellant and his family members in the United Kingdom, on the grounds that the judge had:

(a) failed to take into account all relevant considerations, including by failing to take into account the following matters:
(i) the appellant had been living rent free in the sponsor's house in Nepal since April 2022;
(ii) the appellant and the sponsor had lived together in her house from October 2022 to July 2023;
(iii) evidence of ATM withdrawals by the sponsor during their recent cohabitation in Nepal, said to show that she had paid for their expenses in that period, as itemised paragraph 15 of the appellant's witness statement;
(iv) money transfers sent by the sponsor to the appellant prior to their recent cohabitation;
(v) that the appellant had remained unmarried, had no partner, and had no children;

(b) taken into account 'incorrect or irrelevant' considerations, including:
(i) by proceeding under an alleged mistake of fact regarding the duration of a joint visit by the appellant and the sponsor to Nepal in 2019/2020 (the grounds asserting that the appellant and the sponsor resided together in Nepal *throughout* a 4 to 5 month period);
(ii) failing to assess family life at the date of hearing, and being unduly influenced by the appellant having spent a 7-year period living and working outside of Nepal, and by being influenced by his finding (which was simply 'denied') that the appellant had demonstrated independence from the sponsor during that period;

(c) failed to apply the correct legal test as to the existence or otherwise of family life between adult family members, in particular by:
(i) appearing to conclude that family life between adults, once lost, cannot be recovered;

(ii) failing to identify whether the appellant's family unit included some or all of his siblings in the United Kingdom;

(iii) failing to direct himself in law correctly in particular by applying guidance in Ghising (family life -adults - Gurkha policy) [2012] UKUT 160; and by applying too restrictive an assessment for the existence of family life;

(2) finding that the respondent's decision did not result in a 'flagrant denial' of the appellant's Article 8 rights; in particular by misapplying the proportionality test under Article 8(2) ECHR; and by failing to apply guidance in Ghising [2013] UKUT 00567, to the effect that historical injustice will 'ordinarily determine the outcome of Article 8 proportionality assessment in an appellant's favour'.

10 Permission to appeal was granted by Judge of the First-tier Tribunal Nightingale in a decision dated 23 October 2023 in the following terms:

> "3. It is arguable that the judge fell into error in failing to consider the appellant's rent free accommodation provided in his mother's house. It is also arguable that the judge fell into error in not considering money transfers to the appellant when he was residing in Portugal as well as in Nepal. It is arguable that the judge failed to consider the period between 2019 and 2020 when the appellant and sponsor lived together in the family home in Nepal.
>
> 4. The remaining grounds are largely a repetition of the earlier arguable failure to consider relevant evidence. However, it is also arguable the judge fell into error failing to take into account the historical injustice set out in Ghising in assessing proportionality. The grounds are generally arguable and permission is granted on all grounds pleaded."

11 No rule 24 reply was provided by the respondent.

12 That is the basis on which this appeal came before the Upper Tribunal.

**Upper Tribunal hearing**

13 The appellant's representatives had failed to provide a composite electronic bundle which included a copy of all documentary evidence relied upon by the respondent before the First-tier Tribunal, in accordance with now standard directions. We directed that a senior partner of Everest Law Solicitors explain this non-compliance. We accept the explanation and apology later provided to us in writing by Mr Raju Thapa, Director of Everest Law solicitors. We were able to access the respondent's First-tier bundle through the First-tier Tribunal Judicial Case Manager application.

14 The oral and written submissions at the hearing are a matter of record and need not be set out in full here.

15 For the appellant, Ms McCarthy sought to rely upon the grounds of appeal and expanded on them in oral submissions. We set out further below specific points which we raised with Ms McCarthy.

16 For the respondent, Mr Tufan resisted the appellant's appeal.

**Discussion**

17 The appellant' grounds of appeal 1(a)(i)-(v) as we have summarised them at [9] above assert, in summary, that the judge erred in law in failing to take into account certain allegedly established facts regarding the appellant's dependency on his sponsor mother.

18 We find that the appellant's grounds of appeal wholly fail to appreciate the findings of fact actually made by the First-tier Tribunal, on which no substantive challenge has been made. During the course of the hearing before us, we drew to Ms McCarthy's attention the findings which the judge made in this appeal, none of which have been challenged:

(i) There were reasons (set out in the judge's decision at [24– 29]) to be circumspect about the appellant's claim to have earned only €600 a month in Portugal [30].

(ii) The judge was satisfied that the appellant was well placed to find and obtain employment in the computing industry in Portugal, on account of his qualifications [33].

(iii) The appellant would have been well remunerated for his employment in this sector (for reasons, including the conspicuous absence of any supporting documentation that he was paid poorly) [34].

(iv) Given the conspicuous absence of corroborative evidence regarding the Appellant's living expenses, salary, savings, and accommodation costs in Portugal, the judge was unable to make any meaningful assessment as to the extent, if any, to which the appellant required the sums sent by the sponsor to maintain him in Portugal [39].

(v) The judge was not satisfied that the appellant was no longer working since he returned to Nepal from Portugal in 2022 [40)] (ie the judge held that the appellant was working in Nepal).

(vi) The appellant's return from Portugal to Nepal must have been to obtain better remunerated employment [42]; such work could have been continued remotely online in Nepal [43]; and the judge accepted 'this' [44].

(vii) The appellant has had, and continues to have a significant degree of financial and emotional independence and autonomy (from the

sponsor) in Portugal and since returning to Nepal [46] (not challenged except to assert in the grounds of Appeal para 7 that this is 'denied', ie there is no properly articulated challenge to that finding). That finding is also repeated at [63] and [81].

(viii) The appellant was not dependent on hi mother in any 'meaningful sense' [47].

(ix) For reasons set out at [48–61], the judge found that the sponsor had worked occasionally in the UK, and had provided the appellant with 'sporadic financial assistance'. The judge found that there been significant times during which the sponsor had provided no such assistance [62]; and the appellant had received 'some' financial and emotional support from the sponsor [76]. This finding is merely 'denied' by the Appellant.

19 Thus, the argument that the judge erred in law in failing to take into account the alleged relevant consideration that the appellant had lived in the sponsor's house in Nepal rent-free since October 2022 is not an assertion which can properly be advanced. Given the judge's findings, we find that it was not established that the appellant was living in the sponsor's house rent-free; the judge found that the appellant was working and earning in Nepal and continued to have a significant degree of financial and emotional independence and autonomy from the sponsor since returning to Nepal.

20 Further, it is apparent that the judge was aware that the appellant and the sponsor had been living together since October 2022. However, given the judge's findings as to the appellant's financial circumstances, the reasons for the sponsor returning to Nepal were at best unclear.

21 In relation to evidence said to be set out at paragraph 15 of the appellant's witness statement regarding ATM withdrawals made from the sponsor's bank account, said to establish their mutual expenses living together from October 2022 onwards; it is to be noted that paragraph 15 of the appellant's witness statement does not refer to matters of expenditure. The grounds may have intended to refer to paragraph 13 of that statement. However, paragraph 13 sets out the appellant's alleged expenditure during the period April 2022 (when he returned to Nepal), to October 2022 (when the sponsor is said to have joined him) i.e. not the period referred to in the grounds of appeal. In any event, this alleged expenditure is impliedly rejected by the judge's finding that the appellant was working and earning in Nepal.

22 The judge took into account evidence of the sponsor's financial support of the appellant during his residence in Portugal from 2015 to 2022, but decided that there was reason to be circumspect about the alleged low earnings of the appellant in Portugal during that period; he was well placed to earn money in the computing industry.

23 Further, it was readily apparent from all the evidence that the appellant was unmarried with no partner. There is no reason to believe that the judge did not take this into account.

24 We find no error of law established by ground 1(a)(i)-(v) of the appellant's grounds of appeal as we have summarised them.

25 In relation to ground 1(b)(i)-(ii), that the Judge erred in law by having regard to incorrect/irrelevant considerations (impliedly, that the judge proceeded under one or more mistakes of fact), we note as follows.

26 The grounds aver that the judge was mistaken that the sponsor did not visit the appellant between 2015 and 2022 – it is alleged that their witness statements and the stamps in their passports indicate that they spent 4 to 5 months in Nepal together between 2019 and 2020.

27 Firstly, we note that it is perfectly correct for the judge to observe that the sponsor did not visit the appellant in Denmark or Portugal during the period 2015 - 2022. Hence, the judge made no mistake of fact.

28 Further, insofar as the grounds assert that the judge proceeded under a mistake of fact that they did not visit each other at all during that period, it is simply incorrect for the appellant to assert that they spent 4-5 months together with one another in Nepal in 2019 – 2020.

29 We have not been properly assisted by the appellant's representatives in this regard. We have considered the documents before us quite carefully. the sponsor's passport establishes that she was present in Nepal from 17 August 2019 to 25 November 2019; the appellant's passport establishes that he was in Nepal from 17 October 2019 to 2 February 2020. Hence, they were both present in Nepal between 17 October 2019 to 25 November 2019; a period of some 5 ½ weeks, not 4-5 months. The grounds are incorrect and/or misleading, and it required close analysis of the evidence to establish that. Ms McCarthy did not advance any argument that we were incorrect in our analysis of the information in the appellant's and the sponsor's passports.

30 Further, the sponsor's passport establishes that she was present in Nepal between 18 November 2016 and 24 December 2016, when the appellant was not in Nepal at all. Therefore, there were periods when the sponsor returned to Nepal for reasons other than to be reunited with the appellant. Further, even in relation to the 2019 – 2020 visits of both of them, the sponsor was present for the 2 month period 17 August 2019 to 17 October 2019 (at which point in time the appellant arrived), and the appellant remained in Nepal for the 2 month period from the time that the sponsor departed on 25 November 2019, until he departed on 3 February 2020, establishing that during those periods both of them had reasons to be in Nepal other than to be reunited with one another.

31 Hence, the judge did not proceed under any mistake of fact and no error of law is established.

32 It was further argued that the judge erred in law in misdirecting himself, by failing to assess the existence of family life at the date of hearing. We cannot see any merit in this argument. The judge correctly directed himself in law in that respect at paragraph 5 of the decision (at page 4 - there is some duplication of paragraph numbering). The judge made findings of fact which are set out above which tend to suggest that the existence of ties with one another, in particular, the appellant's alleged financial dependency on the sponsor, were not as asserted by the appellant and the sponsor.

33 The appellant also avers in grounds of appeal 1(c)(i)-(iii) as summarised above that the judge erred in law finding that once family life had been lost, it could never be recovered. However, the judge made no such a finding.

34 The appellant also avers that the judge erred in law by failing to identify whether the appellant's family unit properly included some or all of his siblings in the UK. However, the judge did take into account potential family life with his adult siblings – at paragraph 84. In any event, the appellant's Appeal Skeleton Argument did not argue that this was a relevant consideration in the appeal.

35 The appellant further avers that the judge did not take into account 'up-to-date' case law. The judge directed himself in law appropriately at [74 – 87]. The judge had regard at [68] to the policy enunciated by the respondent in order to remedy any historic injustice experienced by Gurkha soldiers and their family members. It is recorded at [71] that the appellant's advocate before the judge accepted that the appellant did not meet the terms of that policy.

36 Finally, it is argued at ground 2 that the judge misdirected himself in law in finding at [84] that there was no 'flagrant denial' of the Appellant's rights under Art 8 ECHR. We note that this part of the judge's decision is an alternative finding to the judge's principal finding that there is no family life under Article 8(1) ECHR in any event. That is a finding which the appellant has failed to established was vitiated by any error of law.

## Notice of Decision

37 For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law
We do not set aside the decision but order that it shall stand.

Rory O'Ryan
Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

**Dated: 9 January 2024**