



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2024-000323
First-tier Case No: HU/53139/2023
LH/04418/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 21 June 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

BHASKAR THAPA

(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel

For the Respondent: Ms S Mackenzie, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 11 June 2024

The Appellant

1. The Appellant is a citizen of Nepal born on 24 July 1981. He appeals against a decision of the respondent dated 31 January 2023 to refuse his application, dated 14 October 2022, for entry clearance as the adult dependent child of his father, Bhakta Bahadur Thapa ("the sponsor"). The sponsor was a former member of the Brigade of Gurkhas. The First-tier Tribunal dismissed the appellant's appeal against the respondent's

decision but in a determination dated 20 March 2024 (now attached to this determination) I set the decision of the First-tier aside and directed that the appeal be reheard while remaining in the Upper Tribunal.

The Appellant's Case

2. The appellant's case is that he has a family life with his father the sponsor and his mother who are both in the United Kingdom. That family life would be disproportionately interfered with by refusing the application for entry clearance. The appellant is in receipt of remittances from his sponsor which he says demonstrates real effective and committed support since he could not survive without this money. He does not work in Nepal. The appellant has a wife and child there with whom he resides but he says that this is not relevant to the issue of whether he has a protected family life with the sponsor. He is in regular telephone contact with his parents who visit him once every year or 18 months.

The Error of Law Decision

3. What is in dispute in this case is whether there is family life between the appellant and the sponsor which goes beyond normal emotional ties. The appellant argues that his dependency on the sponsor means that the family life between himself and the sponsor does indeed satisfy this test. In setting aside the First-tier determination I indicated that certain facts found by the judge in the First-tier would nevertheless be preserved. I said:

“Those facts are that the sponsor is giving significant amounts of money to the appellant, that the sponsor and the appellant's mother are in regular telephone communication with the appellant and they make regular visits to the appellant. That the appellant has a family life with his wife and child in Nepal does not of itself preclude the appellant having a family life with his parents in the United Kingdom but can be part of a holistic evaluation of the appellant's relationship with his parents. The respondent should clarify his position on why the financial support given by the sponsor is not real or effective or committed and what weight if any should be given to the existence of the appellant's family in Nepal. I give permission to the appellant to file and serve further evidence at least 14 days before the resumed hearing if so advised.”

The Proceedings

4. When the case was called on for hearing on 11 June 2024 I was informed that it had not been possible to obtain the services of a Nepali speaking interpreter. With a view to avoiding an adjournment if possible, the parties discussed the situation and indicated to me that they were both content to proceed on the basis that there would be no oral evidence and the matter would proceed on submissions only. In agreeing to this request (which had the implication that there would be no testing of certain aspects of the evidence) I bore in mind the overriding objective

contained in Rule 2 (2) (e) of The Tribunal Procedure (Upper Tribunal) Rules 2008. This provides that: “Dealing with a case fairly and justly includes....(e) avoiding delay so far as compatible with proper consideration of the issues”

The Submissions

5. Following the direction I made in the error of law decision, the sponsor filed and served a further witness statement dated 20 May 2024. He said in the statement that:

“In the last year, I have sent about 4 Lakh Nrs [approximately £2,345] to Nepal for my son and his wife and children through Western Union Remittance alone. Moreover, I have a bank account in Nepal in the Standard Chartered Bank. I receive my Army pension in that account. I receive over 80,000 Nrs [approximately £470] a month in my army pension. I have sent signed cheques in the name of Bhaskar of about 7 Lakh Nrs [approximately £4,100] in the last year (various amounts). I sent cheques through friends and acquaintances going to Nepal. Bhaskar takes the money out and then pays for his household expenses.”

6. The sponsor was also paying for the appellant’s children’s school fees in Nepal. The appellant did not have an operational bank account. The appellant had had a shop but was obliged to close it after only a year. The appellant had not looked for work because he was shy and scared. He does not have the education or the skills to make a living in Nepal. The appellant’s wife and children were considered by the sponsor to be part of his, the sponsor’s household. He had provided receipts for the money sent from the UK and the bank statement in Nepal showed the withdrawal of cheques.
7. As there was no oral evidence I invited counsel for the appellant to make his opening submissions to me to be followed by the presenting officer with the final submission to be made by counsel. Counsel relied on the sponsor’s most recent statement (summarised above) and argued that the tribunal now had good evidence of real effective or committed support provided by the sponsor to the appellant. Article 8 was therefore engaged. There was family life between the appellant on the one hand and his wife and children on the other. There was also family life with the sponsor. It was significant that the sponsor was paying for the grandchildren’s school fees. The money was for the family unit as a whole. There was nothing in the law to say that one could only have one family life.
8. In reply the presenting officer relied on the refusal letter dated 31 January 2023. The remittance documents produced by the sponsor did not show real committed or effective support. The appellant was an adult living in Nepal in his own family unit. There was no evidence to show anything beyond normal emotional ties between the appellant and the

sponsor. The messages reproduced in the appellant's bundle did nothing more than show small limited conversations between the appellant and his sister. The calls lasted a matter of minutes each time.

9. There were also difficulties with the documents purporting to show money transfers. There were different spellings of the appellant's first name. In some documents the end of the name was spelt "er" and sometimes "a" The earliest date for the receipts for monies sent by the sponsor was 28 August 2022 which was shortly before the appellant made his application for entry clearance. The final date for receipts was 25 April 2023. The tribunal had been told that the remittances were sent to the appellant but had also been told the appellant did not have a bank account to receive these monies. In the case of **Tanveer Ahmed** it was said that documents may be genuine but the information contained therein is unreliable. The respondent accepted that no DVR had been obtained in relation to the remittance documentation but the fact that the appellant's name was spelt differently on the different documents undermined their reliability. At other times the documentation merely showed that a cheque had been issued not who was being paid or why. One could query why there were cheques if the appellant had no bank account to pay them into. If there had been real support from the sponsor that would have started long before October 2022 indeed it would have arisen from 2005 onwards.
10. The appellant's children in Nepal are now 15 and 13 years old. Although they might not be covered by the duty under section 55 of the Borders, Citizenship and Immigration Act 2009, they were still covered by the United Kingdom's obligations under the International Convention on the Rights of the Child. Under article 31 the best interests of the children were to be a primary consideration of decision makers. It was in the children's best interest that they should live with their father in Nepal. For the appellant to come to United Kingdom while the children remained in Nepal would put United Kingdom in breach of its obligations under the Convention. The appeal should be dismissed on that basis as well.
11. In conclusion counsel argued that the starting point was the error of law decision in which it was accepted that significant sums of money were being sent to the appellant by the sponsor. This was total support since the appellant had no other income. The respondent was seeking to impugn the remittance documents although their reliability had never been put to either the appellant or the sponsor indeed there was no challenge to the sponsor's evidence and there had been no cross-examination today. The various spellings of the appellant's name was to do with the name being written in a language other than English. In fact the differences were not relevant it was the same name each time. The sponsor had given his explanation for the remittances in his second witness statement. There was a time when the appellant did have a bank account although he did not have one now that was operational. The respondent had asked why there was no evidence before August 2022

but the Tribunal was only concerned with the existence of family life at the date of hearing.

12. There was little merit in the respondent's complaint that the record of the telephone calls showed the calls were short. The tribunal had accepted the frequency of contact between the appellant and sponsor. The respondent had raised at the hearing today the question of what was in the best interests of the children. The point had not been raised before and was not put in a question to anyone. The children were not appellants before this tribunal and their relevance to the case was therefore limited. This was a case of the family taking a decision for the greater good of all the family that the appellant should come to the United Kingdom. The appellant would be able to assist his elderly parents in the event he was here. Despite the direction at the error of law hearing the respondent had not filed a written statement setting out his position. At the conclusion of submissions I reserved my decision.

Discussion and Findings

13. It was not argued before me that the appellant could satisfy the immigration rules in relation to his application for leave to enter. The appellant failed under the eligibility criteria for the reasons set out in the refusal letter which the respondent continues to rely upon. The issue therefore was whether the appellant could demonstrate that there was a breach of article 8 in the respondent's decision.
14. Firstly the appellant had to establish that there was family life between himself and his sponsor which went beyond normal emotional ties. Next that that family life was interfered with by the decision. The respondent must show that the decision is pursuant to a legitimate aim and finally that the interference complained of is proportionate to that legitimate aim, see **Razgar [2004] UKHL 27.**
15. In **Kugathas [2003] EWCA Civ 31** (at paragraph 17) it was explained that for there to be a dependency which went beyond normal family ties there would have to be real or effective or committed financial assistance. The burden of proof of establishing this would rest on the appellant and the standard of proof would be the usual civil standard of balance of probabilities. The date for the assessment of an article 8 claim is the date of hearing not the date of application to the respondent. What the appellant produced as evidence on his behalf was documentation of the significant sums of money which the sponsor was sending to him in Nepal. That evidence has never been seriously challenged either in the First-tier proceedings or before me.
16. The respondent queries whether the remittance documents genuinely relate to the appellant citing concerns over the different spellings of the appellant's first name. I take the point that the documents have been transliterated. The appellant's name would originally have been written

in Nepali and in a different script to the Latin alphabet. In the process some rather minor discrepancies have arisen concerning the last two or three letters of the appellant's first name. I do not place great weight on these claimed discrepancies. In my view the evidence is clear that the sponsor is sending money to his son for the benefit of his son and his son's family including paying for the education of the appellant's children.

17. The second objection to the claim of dependency is that the appellant has formed a new household with his wife and children in Nepal and is not therefore in a family relationship with his parents that goes beyond normal emotional ties. As has been explained, under article 8 jurisprudence there is nothing to indicate that family life is restricted to one particularly family unit. It is correct that in certain applications made under the immigration rules by a child applicant (for example in the Relationship Requirements of section E-LTRPT.2.2 of Appendix FM) the child must show that they have not formed an independent family unit beside the parent they seek to join in the United Kingdom. That is not relevant in this case.
18. To what extent then is the existence of the appellant's family in Nepal relevant when assessing the nature of the family life between the appellant and the sponsor and mother? The appellant's argument in the onward grounds of appeal was that it is not a factor to be taken into account but that was not the view taken by Judge Lewis when granting permission to appeal, a position I indicated I agreed with. In his determination Judge Richardson cited the authority of **Ghising [2012] UKUT 160** in support of the contention that the existence of another family was relevant in assessing the existence of family life with other family members. On the facts of this particular case where the sponsor is paying for his grandchildren's education and is maintaining contact with the appellant, his wife and children one can analyse the family unit in this case as being one large unit of three generations, sponsor, appellant and children. Thus the existence of the appellant's family unit with his wife and children does not undermine the existence of the family relationship between the appellant and his parents.
19. The third argument put forward by the respondent is that if the appellant were to travel alone to the United Kingdom leaving his wife and two children behind in Nepal there would be a breach of the obligation on the United Kingdom to promote the best interests of the appellant's children as they would be deprived of their father. This argument emerged very late in the day in these proceedings, it was not made to me at the time of the error of law hearing and it does not appear to have been made to Judge Richardson at the original First-tier hearing. It is a somewhat speculative argument because it assumes that the family would put no arrangements in place to safeguard the interests of the children whilst the appellant was looking for work in the United Kingdom. The appellant said in his written statement that if he was permitted to enter the United

Kingdom he would be able to find work which would pay better than what he might find in Nepal.

- 20. Overall therefore I find that the appellant can demonstrate that he is receiving real and effective and committed support from the sponsor even though only one of those three factors has to be shown. This means that the appellant and sponsor’s family life which will be interfered with by refusing the application. The appellant’s family life with the sponsor and his, the appellant’s, mother goes beyond normal emotional ties and makes the interference unlawful. The courts have reminded the tribunal that where for example family life has existed before one party has moved away family life can still continue even after the physical separation and see **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320.**
- 21. Counsel for the appellant submitted that the sponsor’s evidence was largely unchallenged and was not subject to questioning. This was partly due to the fact that the respondent did not choose to be represented at the original First-tier proceedings but also because the respondent at the hearing before me was content to proceed on the basis of submissions only. It is also worth pointing out that the First-tier Tribunal judge had found against the appellant in relation to the receipt of remittances because no details of the appellant’s expenditure had been made available to show the extent to which the appellant was dependent on the remittances from the sponsor. The respondent’s subsequent submission at the error of law stage hearing to me (that the First-tier Tribunal decision fell to be set aside) meant that the respondent evidently did not consider that point to be so significant that it affected the outcome of the decision.
- 22. In these circumstances I find that the appellant has been able to show, due to his dependency on the sponsor, that he and the sponsor have a family life which goes beyond normal emotional ties and which will be disproportionately interfered with by the respondent’s decision to exclude the appellant from the United Kingdom. That being so I find the respondent’s decision breaches article 8 and I therefore allow the appellant’s appeal against the respondent’s decision.

Notice of Decision

The appellant’s appeal is allowed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 14^h day of June 2024

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Judge Woodcraft

Deputy Upper Tribunal Judge



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI/2024/00323
First-tier Case No: HU/53139/2023

THE IMMIGRATION ACTS

**Decision & Reasons
Promulgated**

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Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

BHASKAR THAPA

(Anonymity order not made)

and

ENTRY CLEARANCE OFFICER

Appellant

Respondent

Representation:

For the Appellant: Mr Sharma, Counsel

For the Respondent: Mr Parvar, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 20 March 2024

The Appellant

1. The Appellant is a citizen of Nepal born on 24 July 1981. He appeals against a decision of Judge of the First-tier Tribunal Richardson dated 12 November 2023. That decision dismissed the appellant's appeal against a decision of the respondent dated 31 January 2023. The respondent

refused the appellant's application made on 14 October 2022 for entry clearance as the adult dependent child of his father, Bhakta Bahadur Thapa ("the sponsor"), who was a former member of the Brigade of Gurkhas.

The Appellant's Case

2. The appellant's case is that he has a family life with his father and mother which would be disproportionately interfered with by refusing his application for entry clearance. The appellant is in receipt of remittances from his sponsor which he says demonstrates effective and committed support since he could not survive without this money. He does not work in Nepal. The appellant has a wife and child there with whom he resides but he says that this is not relevant to the issue of whether he has a protected family life with the sponsor. He is in regular telephone contact with his parents who visit him once every year or 18 months.

The Decision at First Instance

3. At paragraph 3 of his determination the judge noted that what was in dispute in this case was whether there was family life between the appellant and the sponsor. At [7] of the determination the judge commented: "There is considerable evidence of money transfers from the sponsor to the appellant, this is said to be his whole income however it is difficult on the evidence to assess this as I'm told the appellant does not have a bank account and although [he] has worked and owned the grocery business previously, does not claim to currently work". At [8] the judge added: "There is a list of remittance transfers from Western Union showing that the sponsor has sent the appellant £2700 in 2022 and between February and April 2023 a total of £2000 and therefore I am prepared to accept that the sponsor has provided that financial support to his son."

4. Of significance to the judge was the existence of the appellant's family in Nepal which he found impacted on the assessment of whether the appellant could have a family life with his parents living in the United Kingdom. At [13] the judge stated:

"I accept that the appellant and sponsor have regular contact by phone and that the sponsor travels to Nepal to see his son and his family every year to 18 months. I also consider that the appellant provides financial assistance to his son. However, those indicators of a family life between the appellant and the sponsor are I consider outweighed by the following facts. The appellant has formed his family life in Nepal with his wife and children. He has not lived with his parents since 2005, has been married for 18 years and has two children and they live together as a family unit. In my view it is clear that the appellant has established his family life with his wife and children in Nepal."

5. The judge's view appeared to be that the choice was a binary one, either the appellant had a family life in Nepal or he had family life with his parents in the United Kingdom. Since the judge found the appellant did not have a family life with his parents the appeal was dismissed.

The Onward Appeal

6. The appellant appealed against this decision making three main points. The first was that the judge, having found that there was financial and emotional support from the parents to the appellant, had misapplied the test of whether there was family life in those circumstances. The appellant relied upon the authority of **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**.
7. Secondly, the judge had not applied the relevant test to the core issue in the case. The grounds argued that: "the FtT] does not resolve the question of whether the factors identified [financial and emotional support] establish a relationship of real, effective or committed support."
8. Thirdly, the judge had wrongly taken into account the existence of the appellant's family life with his wife and child in Nepal. There was no legal principle establishing mutual exclusivity.
9. Permission to appeal was granted by DUTJ Lewis in the Upper Tribunal who considered that arguably it was unclear how the Judge reconciled the apparent acceptance of the facts relied upon with the guidance in **Rai**. It was also arguable that the Judge erred in elevating the observations that the founding of a family of his own by an adult child would be a factor in considering whether or not family life continued with a parent or parents, to a principle that the founding of a family of his own precluded the continuation of family life with parents.

The Hearing Before Me

10. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
11. At the commencement of the hearing the Presenting Officer indicated that he would not oppose the onward appeal. The determination should be set aside because of a material error of law and the case remitted to the First-tier to be re-heard. The material error of law was said by the respondent to be a failure by the judge to make a finding whether the accepted financial support given by the sponsor to the appellant was real or effective or committed support. However having found an error, it was not safe to dispose of the matter there and then. The respondent agreed with Judge Lewis's analysis in the Upper Tribunal when granting

permission to appeal that the assessment of the appellant's family life with his wife and child in Nepal had been wrongly elevated by the judge at first instance into something in itself decisive of the appellant's appeal. The judge had not drawn any conclusions about the nature of the support given by the sponsor to the appellant beyond indicating in the determination that there was financial support.

12. For the appellant, counsel stated that he did not have a strong view on whether the case should be remitted to the First-tier or remain in the Upper Tribunal to be reheard. Counsel noted that the respondent had conceded in the refusal letter that there was financial support. I pause to note here that what the refusal letter said on this issue was: "I accept that you may receive financial assistance from your father, but you have not demonstrated that you are genuinely dependent upon him." Following the submissions, I indicated to the parties that I reserved my decision in this case.

Discussion and Findings

13. This case had been on the floating list at first instance and the respondent was not represented at the hearing. As a result there was no challenge to the sponsor's evidence that he sent remittances to the appellant nor indeed to the appellant's written evidence (in his statement) that he was dependent upon those remittances. The difficulty in the case is that the judge did not draw any conclusion from the evidence of remittances whether that financial support represented real or effective or committed support.
14. As it was conceded by the respondent that there was a material error of law in the determination the next issue which arises is how the appeal presently in the Upper Tribunal should be disposed of. I note the respondent's submission that the matter should be remitted back to the First-tier and that the appellant has no objection to the matter remaining in the Upper Tribunal. What is clear is that the issue in the case is a very narrow one of whether financial support given by sponsor to the appellant taken together with the contact between the appellant and his parents represents family life.
15. The need for significant further evidence likely to be in dispute (and thus needing to be tested in cross-examination) is limited in this case. At [7] which I cite at paragraph 3 above, the judge indicated that it was difficult to assess the appellant's income. In this regard, some limited further evidence from the appellant and/or sponsor may assist at the rehearing. The principle requirement remains an assessment of whether the accepted financial and emotional support constitutes family life. The existence of a separate family life which the appellant has with his family in Nepal is not as the judge appeared to indicate of itself determinative of whether the appellant can nevertheless have family life with his parents in the United Kingdom. It is nevertheless a potential factor to be taken

into consideration in assessing whether it impacts on the appellant's claim to have a family life with his parents.

16. The appellant's argument in the onward grounds of appeal was that it is not a factor to be taken into account but that was not the view taken by Judge Lewis when granting permission to appeal with which I respectfully agree. In his determination Judge Richardson cited the authority of **Ghising [2012] UKUT 160** in support of the contention that the existence of another family was relevant in assessing the existence of family life with other family members. The issue needs to be explored further in argument.
17. These are essentially legal arguments. I do not consider that this case needs to be remitted back to the First-tier. I bear in mind Part 3 paragraph 7.2 (a) and (b) of the Upper Tribunal Practice Statement. The material error of law in this case did not deprive either party of a fair hearing and as I have indicated there is no fact-finding requirement to any significant degree. As a result I do not think this case falls within that class of case that needs to be remitted back to the First-tier to be reheard. I consider that the appeal can be correctly determined by rehearing in the Upper Tribunal where the facts found by the judge can be preserved.
18. Those facts are that the sponsor is giving significant amounts of money to the appellant that the sponsor and the appellant's mother are in regular telephone communication with the appellant and they make regular visits to the appellant. That the appellant has a family life with his wife and child in Nepal does not of itself preclude the appellant having a family life with his parents in the United Kingdom but can be part of a holistic evaluation of the appellant's relationship with his parents. The respondent should clarify his position on why the financial support given by the sponsor is not real or effective or committed and what weight if any should be given to the existence of the appellant's family in Nepal. I give permission to the appellant to file and serve further evidence at least 14 days before the resumed hearing if so advised.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set the determination of the First-tier aside. I direct that the appeal remain in the Upper Tribunal and be reheard on the first available date with a time estimate of two hours.

Appellant's onward appeal allowed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 20th day of March 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge