



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000860
UI-2024-000861
First-tier Tribunal No: HU/054556/2023
LH/06528/2023
HU/054557/2023
LH/06529/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 6 September 2024**

Before

**UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE MAHMOOD
UPPER TRIBUNAL JUDGE LOUGHRAN**

Between

**DIL PARSAD LIMBU
NARMAYA LIMBU
(NO ANONYMITY ORDER MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Moriarty, Counsel instructed by Everest Law Solicitors

For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 15 August 2024

DECISION AND REASONS

1. The Appellants appeal with the permission of First tier Tribunal Judge C.M.Monaghan against the decision of First tier Tribunal Judge Suffield Thompson ('the Judge') dated 3 January 2024.

Factual Background

2. The Appellants are nationals of Nepal. Their father was a former Gurkha soldier. He was discharged from the British army in 1970, after 13 years of service. He died in 23 September 2013. The Appellants' mother ('the Sponsor') was granted settlement in 2016. In 2017, the Appellants' sister, Amila entered the UK and was granted settlement after a successful appeal.
3. On 21 August 2020, the Appellants and their two sisters were refused leave to enter as dependent relatives of the widow of a former Gurka soldier. They appealed and in a determination dated 14 July 2021 Judge Rothwell dismissed their appeal. Judge Rothwell found that there was no family life between the Sponsor and the Appellants. She accepted that the Appellants relied on money from their father's pensions which was paid to the Sponsor who transferred it to the Appellants, but noted that it was common for relatives to be supported by close relatives who have moved overseas. She accepted that the Appellants obtain poorly paid work on farms and that for the most part they were supported financially by money sent by the Sponsor and their sister in the UK. Judge Rothwell found that there were 'major discrepancies' about the property where the Appellants lived and noted that if the level of dependence between the Sponsor and the Appellants was as claimed she would expect them to be consistent about where the Appellants lived. She concluded that they had given conflicting evidence about where the Appellants lived because they were not emotionally dependent on each other.

The Appeal to the First tier Tribunal

4. On 28 August 2022, the Appellants were refused leave to enter as dependent relatives of the widow of a former Gurka soldier. On 21 February 2023, the Respondent refused their human rights claim.
5. The Appellants appealed and the appeal came before the Judge on 2 January 2024. It was heard remotely and the Respondent was not represented. The Appellants were represented by Mr West of Counsel.
6. The Judge records in her determination at paragraphs 12 and 46 that although the Sponsor attended the hearing she did not give evidence.
7. The Judge found that family life between the Sponsor and the Appellants did not exist because there was nothing before her to suggest that '*something more exists than normal emotional ties*' as required to establish family life between a parent and adult children. [*Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31]
8. The Judge found that family life had ended when the Sponsor came to the UK. She noted that the Sponsor had only visited the Appellants twice in ten years, that although there was regular telephone contact between the Sponsor and the Appellants that was normal between adult siblings and their parents, there was nothing to suggest the Sponsor makes decisions for the Appellants or directs them as to how to live their lives, the Sponsor lives with her daughter in the UK and does not receive or need the support of the Appellants and neither the Appellants are in ill health or have other vulnerabilities. The Judge dismissed the Appellants appeal.

The Appeal to the Upper Tribunal

9. The Appellants sought permission to appeal to the Upper Tribunal on the following grounds:
- (i) Ground 1: The Judge failed to consider the Sponsor's evidence. The Appellants submit that contrary to the Judge's statements at paragraphs 12 and 46 the Sponsor had in fact given evidence at the hearing. She had adopted her witness statement. She was not asked any additional questions by her representative or the Judge. The Respondent was not represented so there was no cross examination. The Appellants claim that the Judge omitted the Sponsor's witness statement from her consideration.
 - (ii) Ground 2: The Judge misdirected herself as to the applicable legal test under Article 8 ECHR. The Appellants submit that the Judge's comment that *'there is nothing to suggest that she makes decisions for them, directs what they do or how they live their lives or that they rely on her for advice any way'* demonstrates that the Judge applied the test for establishing sole responsibility under paragraph 297(i)(e) as defined in *TD (Paragraph 297(i)(e) "sole responsibility" (Yemen) [2006] UKAIT 00049* when the test was whether there was something more than normal emotional ties as defined in *Kugathas*. The Appellants submit that notwithstanding the Judge's earlier references to the correct test in the determination it was clear that she had applied an incorrect and more stringent test.
10. The Respondent did not file a rule 24 response. We heard submissions from Mr Moriarty and Ms Ahmed at the hearing.
11. Mr Moriarty relied on and expanded the grounds. In respect of ground 1, he explained that the Judge's failure to have regard to the Sponsor's evidence was material because the Sponsor addressed Judge Rothwell's finding about the discrepancy about where the Appellants lived, the amount and quality of the contact between the Sponsor and the Appellants and why their relationship amounted to more than normal emotional ties. In respect of ground 2 Mr Moriarty accepted that the Judge had referred to the correct test in assessing whether the family life existed between the Sponsor and Appellants, but the suggestion that a special relationship was required and her comment that neither of the Appellants were in ill health or vulnerable was indicative that she had applied a higher threshold.
12. Ms Ahmed opposed the Appellants' appeal. In respect of ground 1, she accepted that the Sponsor had attended the hearing and adopted her witness statement. She submitted that the determination accurately reflected what happened at the hearing as it was technically correct that the Sponsor did not give oral evidence. Alternatively, she submitted that the error was not material because the Judge had considered all the evidence including the Sponsor's evidence. She submitted that the Judge had addressed Judge Rothwell's findings and that the Sponsor's evidence was just a disagreement Judge Rothwell's findings. In respect of ground 2, Ms Ahmed submitted that the Judge had borrowed terminology from the test for sole responsibility, but it was immaterial because she recorded and applied the correct test. Ms Ahmed submitted that the Judge had considered all the evidence and that the determination must be read as a whole.

13. In response, Mr Moriarty opposed Ms Ahmed's submission that the determination accurately affected the hearing. He said that a witness adopting their statement was different to them not giving evidence at all. He submitted that it was not plain that the Judge had considered the Sponsor's witness evidence. There was little or no reference to it at all. He accepted that the Judge had set out the correct test for family life, but submitted that was in generic paragraphs and not when she was applying the law to the facts. It was not possible to have confidence that the Judge's application of a higher threshold was not material to the outcome of the appeal.
14. Mr Moriarty submitted that if we found a material error of law the matter should be remitted to the First tier Tribunal. Ms Ahmed submitted that it should be remade in the Upper Tribunal.
15. We informed the parties that we reserved our decision.

Discussion

16. We have considered both decisions of the First-tier Tribunal, the evidence before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing before coming to a decision in this appeal.
17. We find that the Judge erred by failing to have regard to the Sponsor's evidence. We note that at paragraph 9 the Judge recorded that the Appellant had submitted a bundle of documents which included witness statements and that at paragraph 53 the Judge stated that she had considered all of the evidence before her in the round. We do not consider that this is sufficient to demonstrate that the Judge considered the contents of the Sponsor's witness statement.
18. We have considered the Sponsor's witness statement in detail. It is detailed and addresses key issues in the appeal. The Sponsor provides a detailed explanation as to why the discrepancy arose regarding where the Appellants lived in the appeal before Judge Rothwell. It includes evidence relevant to the assessment of whether her relationship with the Appellants amounted to more than normal emotional ties. She explains that they speak *'almost every day and all the time'* and that her day is not complete until she has spoken to them. She details that they discuss their troubles, worries and needs and that if the Appellants were permitted to come to the UK they would live with her. There is no reference to this evidence in the determination.
19. It is not clear whether the Judge accepted or rejected the Sponsor's evidence and if she rejected the evidence her reasons for doing so (especially in the circumstances where it was unchallenged by the Respondent).
20. The Judge records at paragraph 38 that she treats Judge Rothwell's decision as her starting point, but there is no consideration of whether or how the Sponsor's evidence impacted on Judge Rothwell's findings.
21. We find that the Sponsor's evidence was material to the Judge's consideration of whether to depart from Judge Rothwell's findings and whether there are more than emotional ties are therefore family life between the Sponsor and the Appellants.

22. We are reluctant to interfere with the Judge's findings of fact. However, we find that in this case the Judge failed to have regard to clearly relevant evidence that could have made an impact on her findings and/or failed to give any or any reasons for rejecting that evidence.
23. We are not persuaded that the Judge misdirected herself as to the applicable legal test under Article 8 ECHR. She cited the correct legal framework at paragraphs 15-26 of her decision and clearly applied it paragraph 56.
24. The Judge considered whether the Sponsor made decisions for the Appellants, directs or advises them and whether the Appellants were in ill health or were vulnerable in her assessment of whether there were more than normal emotional ties between the Sponsor and the Appellants. These are relevant considerations and the Judge was entitled to include them in her assessment. They do not indicate that she applied an elevated legal test.

Notice of Decision

25. The First-tier Tribunal decision involved the making of an error of law
26. We have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement and *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), and taking into account the representatives submissions. We consider that the nature of the error deprived the Appellants of a fair hearing and the opportunity for their case to be put. Accordingly, the nature of error made by the Judge justifies a departure from the general principle that cases should be retained in the Upper Tribunal for the remaking of the decision.
27. We set aside the decision of the First-tier Tribunal and remit the case to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

G. Loughran

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 August 2024