IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001114, UI-2024-001117
First-tier Tribunal No: HU/55605/2023, HU/55442/2023

THE IMMIGRATION ACTS

Decision and Reasons Issued:
On 26th of June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

LOK KUMARI GURUNG
SAUJAL GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation

For the Appellant: Mr Matthew Moriarty, Counsel, instructed by Everest Law
For the Respondent: Mr David Clarke, Senior Presenting Officer

Heard at Field House on 15 May 2024

DECISION AND REASONS

Introduction

1. The Appellants bring these linked appeals from the decision of First-tier Tribunal Judge Suffield-Thompson promulgated on 29 January 2024. By that decision, the Judge dismissed their appeals from the decisions made by the Entry Clearance Officer to refuse their human right claims made in their applications for entry clearance to the United Kingdom.

Factual background

2. The Appellants are citizens of Nepal and were born on 9 July 1978 and 21 July 1986 respectively. They are siblings. They made applications for entry clearance on 27 January 2023 as adult children of their sponsor, Mrs Prem Kumari Gurang, who is the widow of a former Gurkha and settled in the United Kingdom. The Entry Clearance Officer refused the applications on 11 April 2023. The Entry Clearance Officer held that they were unable to meet the requirements for entry clearance as adult dependent relatives under Appendix FM to the Immigration Rules. The Entry Clearance Officer further held that the refusal of their applications was compatible with Article 8 of the European Convention on Human Rights. The Judge heard their appeals from those decisions on 24 January 2024. The Judge found that there was no protected family life between the Appellants and their mother and, therefore, Article 8 was not engaged. The Judge dismissed the appeals in a decision promulgated on 29 January 2024. The Appellants were granted permission to appeal from the Judge's decision on 14 March 2024.

Grounds of appeal

3. There are two connected grounds of appeal. First, the Judge made a material error of fact as to the provision of bank statements in evidence. Second, the Appellants were denied a fair hearing by the failure to put to their witnesses matters that were subsequently determined against them.

Submissions

4. I am grateful to Mr Matthew Moriarty, who appeared for the Appellants, and Mr David Clarke, who appeared for the Entry Clearance Officer, for their assistance and able submissions. Mr Moriarty developed the grounds of appeal in his oral submissions. He invited me to allow the appeals and set aside the Judge's decision. Mr Clarke accepted that there was a mistake of fact in the Judge's decision but submitted that the outcome was inevitable. He invited me to dismiss the appeals and uphold the Judge's decision.

Discussion

5. The relevant principles relating to family life in the case of adults have been explored in a line of well-known authorities starting from *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 [2003] INLR 170. A helpful distillation of those principles is set out in *Mobeen v Secretary of State for the Home Department* [2021] EWCA Civ 886, at [44]-[46]. Whether or not family life exists is a fact-sensitive enquiry which requires a careful assessment of all the relevant facts in the round. However, the case-law establishes clearly that love and affection between family members are not of

themselves sufficient. There has to be something more. Normal emotional ties will not usually be enough and further elements of emotional and/or financial dependency are necessary, albeit that there is no requirement to prove exceptional dependency. The formal relationship between the parties will be relevant, although ultimately it is the substance and not the form of the relationship that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions.

6. The Judge, at [39], considered the question of dependency and stated:

> "I had before me one money transfer from June to July 2023 (AB page 102-106) but there was nothing since. The Sponsor simply told the Tribunal that she supports them. I had the Sponsor's bank statement from 23 June 23 which showed very limited income and a transfer to Miss Tamang Ria, but this is not the name of either of the Appellants or their siblings. I had a bank statement of Appellant 1 (Lok) (AB page 95). I had statements from to of the other siblings but none from Appellant 2 (Sojal) which I noted as strange. The statements I did have showed many credits that do not correlate with the Sponsor's statement and are from many different banks or people, so this does not show that the only money going in from the Sponsor …"

7. The Judge, at [47], found:

> "… There was nothing said by the Sponsor to indicate that there is more than the normal ties between her and these two Appellants. From the bank statements it appears that the brothers are more than likely doing some form of work due to the credits from so many different people. He and his sister have lived together for most of their lives, although there was a period when he went abroad for three years to work."

8. There is a plain error of fact in the Judge's decision. Contrary to the Judge's view, the relevant bank statements were provided in evidence. Those bank statements were at pages 97-98 of the appeal bundle. The Judge failed to take into account those bank statements. The Judge described the perceived omission to provide those bank statements are "strange" and clearly held it against the Appellants in making the ultimate findings.

9. It is well settled, as the Court of Appeal observed in *ML (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 844, at [16], that a material error of fact in a determination will constitute an error of law. A material error of fact is an error as to a fact which is

material to the conclusion. The Court of Appeal added that if there is any doubt as to whether or not the incorrect fact in question was material to the conclusion, that doubt is to be resolved in favour of the individual who complains of the error. Mr Clarke took me to the evidence relating to money transfers and bank statements and sought to persuade me that it was deficient and this was not a case where Article 8 was engaged. His ultimate submission was that the error fact made by the Judge was not material to the outcome. There is considerable force in Mr Clarke's submissions. I must, however, bear in mind that I am not sitting as a first instance tribunal making findings of fact. My task is to decide whether the Judge erred on a point of law such that the decision should be set aside. Giving the benefit of doubt to the Appellant, I find that the error of fact made by the Judge was material to the outcome and constituted an error of law. I cannot rule out the possibility that a properly directed Judge may find that Article 8 is engaged in these appeals and that the decisions made by the Entry Clearance Officer are incompatible with it.

10. I entirely accept that I should not rush to find an error of law in the Judge's decision merely because I might have reached a different conclusion on the facts or expressed it differently. Where a relevant point or piece of evidence is not expressly mentioned, it does not necessarily mean that it has been disregarded altogether. It should not be assumed too readily that a judge erred in law just because not every step in the reasoning is fully set out. In this instance, I am satisfied that the Judge's decision is materially wrong in law.

Conclusion

11. For all these reasons, I find that the Judge erred on a point of law in dismissing these appeals and the error was material to the outcome. I set aside the Judge's decision. I apply the guidance in *AB (preserved FtT findings; Wisniewski principles) Iraq* [2020] UKUT 268 (IAC) and conclude that no findings of fact are to be preserved. Having regard to paragraph 7.2 of the Senior President's Practice Statement for the Immigration and Asylum Chambers, and the extent of the fact-finding which is required, I remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than First-tier Tribunal Judge Suffield-Thompson.

Decision

12. The First-tier Tribunal's decision is set aside and the appeal is remitted to the First-tier Tribunal for a fresh hearing.

Anonymity

13. I consider that an anonymity order is not justified in the circumstances of this case having regard to the Presidential Guidance

Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective. I make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Zane Malik KC
Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 18 June 2024