IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001925
FTT No: HU/58685/2023
LH/01785/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 August 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MITRA KUMAR LIMBU
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms J Fisher (Counsel)
For the Respondent: Mr N Wain (Senior Home Office Presenting Officer)

Heard at Field House on 21st June 2024

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge S.J. Clarke, promulgated on 21st March 2024, following a hearing at Manchester on 20th March 2024, by means of Cloud Video Platform. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nepal, and was born on 24th June 1973. He appealed against the refusal of entry clearance to join his father and Sponsor, Mr Jagat Bahadur Limbu, a Gurkha now discharged and retired, and settled in the UK together with the Appellant's mother, his two sisters, and one brother. The Appellant made his application on 4th May 2023 and the Respondent refused the application on 22nd June 2023 on the basis that the Appellant had not shown that he had a family life with his UK family members and that Article 8 was of no assistance to him.

The Judge's Findings

3. The judge noted the Appellant's statement was that he was living with his sister-in-law and her children. However, the Appellant's mother, who gave evidence before the judge, did not know if the Appellant was living alone in the property, which the judge found hard to believe. He referred to the witnesses' "repeated inability to answer probing questions" (paragraph 5). The judge also observed that the Appellant's brother's evidence before the Tribunal was that, although the Appellant used to live in his house with his wife and children, he now rented that house. On the other hand, there was no evidence of the Appellant renting that house. There was also no evidence of the Appellant moving into the family home owned by the Sponsor, as was also being maintained (paragraph 5).

4. The judge went on to note how the Appellant's two sisters, Ms Ganga, and Ms Jamuna Limbu, had their appeals allowed by Judge Abebrese. This was referred to by Judge Blake on 19th April 2021 when the appeal of the other siblings was allowed. The judge noted that, *"I accept that the starting point would be the decisions of family members where there was a common factual matrix"* (paragraph 6), but that in the Appellant's case, he "*was not residing in the family home in Dhankuta in Nepal when these siblings had their appeals allowed ..."* (paragraph 6).

5. In fact, the judge noted how, "the Appellant was working in Malaysia until 2016 when he returned to live with his wife and two children in his house and not that of his father's but his marriage ended in divorce after his UK siblings had their appeals allowed and entered the UK to settle" (at paragraph 7). This meant, according to the judge, that, "at the relevant times there was no common factual matrix" (at paragraph 7). It was concluded by the judge that, "the Appellant clearly established his own independent life by marrying, having two children, living and working abroad in Malaysia for 7 years" (at paragraph 8). Although, "there are the money remittances by MoneyGram" the fact was that, "the Appellant has not shown that the purposes of the money is for his maintenance and upkeep given he has formed his own independent unit, worked abroad ..." (at paragraph 12). The appeal was dismissed.

Grounds of Application

6. The grounds of application state that when the Appellant stated that his sole source of financial support was his sponsoring father in the UK, the judge stated (at paragraph 14) that the Appellant "has property which has not been identified for these proceedings" so that he "is a man with assets". This, however, was to do with a "Compromise Order" from the Appellant's divorce, which referred to his ex-wife not "claiming my partition of property with" him (see Respondent's

bundle at page 61). However, although the judge formed this very clear view against the Appellant, the issue was not put to the witnesses appearing before the judge. Nor was it raised in submissions. Nor indeed, was the Appellant's Counsel invited to comment on this matter by the judge. Indeed, neither party had referred to this document before the Tribunal. It could not have been reasonably anticipated by the Appellant or his representatives that the judge was going to raise it. This was all the more reason why the witnesses before the Tribunal and the representative of the Appellant be given the opportunity to comment on it.

7. Second, the reference to "property" did not necessarily refer to real property in the form of land and buildings in this "Compromise Order" between the Appellant and his former wife. It was likely a reference to the 'possessions' of the parties to the marriage. This "Compromise Order" had been translated from the Nepali into English and there was clearly ambiguity in the matter which is why it ought to have been put to the witnesses and the Appellant's representative.

8. On 1st May 2024, permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge materially erred in not putting a matter of concern on a key issue to the Appellant for comment.

Submissions

9. At the hearing before me on 21st June 2024, Ms Fisher, appearing on behalf of the Appellant, referred to the decision in **Maheshwaran [2002] EWCA Civ 173** which made it clear that it was unfair to a party to litigation to have a point decided against them which had not been properly put to them. Reference was also made to the decision of Schiemann LJ in **Abdi v ECO [2023] EWCA Civ 1455** which made it clear that unless the matter was "obvious" that the Appellant would have known about it in advance, it should have been put to the parties to enable comment to be made. Ms Fisher argued that it was at least arguable that the reference to "property" was simply a reference to possessions. Nor, she submitted, was the Appellant's brother's evidence, that the Appellant had previously rented, and not owned property, raised by the judge before the witnesses to enable comment to be made. The failure to raise these matters in the hearing meant that the judge moved quickly to the conclusion (at paragraph 16) that the Appellant had "accumulated his own property/assets which he retained on divorce". Finally, and in any event, whether or not the Appellant had any assets of his own, the crucial question was whether there was real and committed support being provided by the sponsoring father to the Appellant, and this question was not specifically addressed by the judge at all. The decision in **Kugathas [2003] EWCA Civ 31** required this to be addressed.

10. Moreover, although the judge stated that he accepted the evidence of Mr Dambar Limbu, the Appellant's brother, as being more reliable (at paragraph 5) the brother had made it clear that the Appellant was renting his house and did not own it and all of this was in any event before he moved into the Sponsor's house. The Appellant would not have had to do this had it been the case that he actually owned his own property. These matters were not properly explored by the judge and it was simply assumed that there was no real and committed support that the Appellant relied upon from his sponsoring father.

11. For his part, Mr Wain submitted that the judge was entitled to conclude that Article 8(1) was not even engaged in these circumstances (see his paragraph 8) and these findings have not been challenged before this Tribunal. Furthermore,

the judge was entitled to conclude (at paragraph 9) that there was in no sense a dependency on the money being sent by the sponsoring father from the UK.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. My reasons are as follows. First, the issue regarding the Appellant's "property" is one that arises from the Nepali document of the divorce agreement between the Appellant and his former wife. This forms no part of the evidence before the Appellant and if it was going to be raised then the witnesses should have been asked to comment on this. This is not least because of the ambiguity regarding whether, in circumstances where it is clear that the Appellant does not own any freehold property himself, the reference to "property" actually referred to "possessions".

13. Second, the judge errs in failing to consider the **Kugathas [2003] EWCA Civ 31** principle properly. Whilst it is true that the Appellant was working in Malaysia, this was only until 2016, when he returned to live with his wife and two children. Whereas there may have been an independent life at that point, this does not mean to say that a dependency cannot arise in the subsequent years after the Appellant divorced from his wife. For the judge to state that, "the Appellant clearly established his own independent life by marrying, having two children, living and working abroad in Malaysia for 7 years" (at paragraph 8) plainly overlooks this fact.

14. In the same way, it is a mistake to state that, "there are the money remittances by MoneyGram but the Appellant has not shown that the purposes of the money is for his maintenance and upkeep given he has formed his own independent unit, worked abroad …" (at paragraph 12) because this does not take account of what happened in the Appellant's life *after 2016*. If it is the case that the Appellant at first rented property, and then moved into his father's home, then it is arguable that in this appeal "there was a common factual matrix" (at paragraph 6).

15. To be fair to the judge, he was not assisted by the difficult way in which the witnesses presented their evidence, with the judge observing that, "I had to ask the sponsor to desist talking during the earlier part of the evidence of his wife …" (at paragraph 4).

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is remitted back to the First-tier Tribunal under Practice Statement 7.2(a) because the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal.

Satvinder S. Juss

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

1st August 2024