



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004828

First-tier Tribunal No: HU/62129/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 30th of January 2025

Before

UPPER TRIBUNAL JUDGE LANDES
DEPUTY UPPER TRIBUNAL JUDGE HOSHI

Between

DILLI LIMBU
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr West, Counsel instructed by Everest Law Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

Heard at Field House on 14 January 2025

DECISION AND REASONS

Background

1. The appellant is a citizen of Nepal born on 18 August 1985. He appeals, with permission granted by Upper Tribunal Judge Norton-Taylor, against the decision of Judge Cary promulgated on 29 July 2024 to dismiss his appeal against the respondent's refusal, on 31 July 2023, of his application of 22 June 2023 for entry clearance as the child of a deceased former member of the Brigade of Gurkhas.
2. The appellant's father was discharged from the Brigade of Gurkhas in 1978. He passed away in November 2009. His wife, the appellant's mother, Mrs Limbuni, arrived in the UK on 12 February 2016 having been granted settlement as the widow of a former member of the Brigade of Ghurkhas. The appellant's sister,

Kabita Limbu, joined her in September 2019 having been granted entry clearance after a successful appeal.

3. The appellant first applied for entry clearance to join his mother in the UK as his late father's son in November 2019, but that application was refused and his appeal was dismissed by a decision of Judge Thapar promulgated in January 2022.
4. The only issue before Judge Thapar was whether there was family life between the appellant and his mother. She accepted that Mrs Limbuni had sent funds to the appellant from April 2019; however she found there was no evidence of financial support before this, and no bank statements had been provided to evidence the assertion that the appellant accessed funds from his mother's account in Nepal. The appellant said he had been living at his mother's former home in Nepal, but Judge Thapar found that the letters from the Ward Chairperson contradicted the same. She considered that it had not been satisfactorily explained why the appellant had not sought to join his mother in the UK earlier and she found there to be little evidence of emotional dependency as the appellant's mother had only returned to Nepal once to visit him, in 2017. For those reasons taken together, she considered that the appellant had failed to establish family life with his mother.
5. In the present appeal proceedings, the appellant asked Judge Cary to depart from the findings of Judge Thapar. As far as Judge Thapar's finding about where the appellant had been living in Nepal was concerned, before Judge Cary:
 - (i) the appellant relied on a letter dated 13 February 2024 from the Phedap Rural Municipality, Ward no 4 Office, to say that Samdu Village Development Committee Ward no 07 had been merged into Phedap Rural Municipality Ward no 04 with effect from 10 March 2017 (and so his address had not changed). Earlier dated documents from Phedap Rural Municipality verifying the relationship between the appellant and his mother, his identity and his date of birth, also referred to the change in name of Samdu VDC Ward 07, but did not specify the date of change. The appellant asserted in his witness statement that he had always lived in the family home in the village (Phedap 04 formerly Samdu 07) except when he stayed in Dharan for his education;
 - (ii) the appellant asserted that in so far as remittance slips referred to the appellant with an address in Dharan, this was simply the place where he collected the money. The appellant's mother said in her witness statement that she did not know why there were different addresses on the money transfer receipts; she did not remember ever being asked the children's exact address although she might have told the remittance shop that she was sending money to them in Dharan/she remembered saying once or twice that the children were in Dharan.

The hearing before Judge Cary and his decision

6. Judge Cary heard evidence from Mrs Limbuni. She told him that the appellant collected the money in person from the bank in Dharan [8]. The judge does not record that Mrs Limbuni was asked any questions about where the appellant lived or had lived since she came to the UK, or was asked any questions about addresses on documents. There is no suggestion that the presenting officer in closing submissions made any points about the appellant's address or highlighted

any conflict within the documents in this respect [12]. By contrast, the judge recorded Mr West, who then as now appeared for the appellant, submitting that the appellant had explained the apparent change of address [13].

7. The judge noted in his decision at [28] that the explanation about the Samdu and Phedap addresses being the same place was not put forward at the previous hearing. He noted:
 - (i) The address given for the appellant's mother on the account with Standard Chartered Bank had always been shown as Samdu 7 from July 2016 to January 2021 [28];
 - (ii) The recent IME transfer slips variously gave the appellant's address as Dharan-Nepal, Dharan sub-metropolitan city 10 Sunsari Nepal, Bhokraha Rural municipality Nepal, Itahari Sub-metropolitan city - Nepal. Samdu or Phedap were not mentioned [28];
 - (iii) The appellant's bank statements with the Dharan branch of Global IME Bank for March 2023 to February 2024 gave his address as 10/106 10 Deurali Dharan Province no 1 [28];
 - (iv) A bank deposit from the appellant's mother of May 3 2023 referred to the appellant's address as Gadhi Rural Municipality, Sunsari, Nepal [31].
8. The judge concluded at [29] that the documents produced did not confirm that the appellant had always lived in the family home except when he was in Dharan for education, as was alleged. The judge's reasoning was the following:
 - (i) The letter of May 2023 from the Phedap Rural Municipality purported to confirm that the appellant was a permanent resident of Phedap no 4 previously known as Samdu no 7 but did not say when the change took place;
 - (ii) The late Mr Limbu's death certificate of November 1 2022 recorded his address as Ward no 4 Phedap;
 - (iii) Ward no 4 Phedap did not appear on the bank statements of either the appellant or his mother/brother or any of the IME transfer slips.
9. Judge Cary explained that it was said that the appellant's late father's pension was paid into an account managed by the appellant's brother who gave the appellant money, but there was no evidence from the brother and it was unclear how the account was used, as the credit balance had risen. There had been no mention before Judge Thapar of there being a bank account [30]. The judge referred to the relative lack of evidence of the appellant's mother paying money into his bank account in 2023 as was alleged [31], there being other deposits into the appellant's bank account without corresponding money transfer slips to identify the source of funds/the appellant's address [32] and to a potential discrepancy between Kabita's statement about when funds were transferred into the appellant's account and the other documentary evidence [32]. In addition, there was a lack of documentary evidence about the appellant and his mother living together before she came to the UK, no oral evidence from Kabita and no evidence of why her appeal succeeded [33]. Judge Cary did not find Mrs Limbuni's evidence reliable on the issue of the appellant's work or his ability to find work [34].
10. Judge Cary concluded at [35] that there was some evidence of telephone contact but that was to be expected between a mother and her adult children.

Mrs Limbuni had only visited Nepal twice since coming to the UK, though he accepted she may not have been in a financial position to visit more frequently. The next sentence reads *“However, when I look at all the evidence in the round I cannot see that family life is engaged within the meaning of Article 8”*.

11. Judge Cary then noted at [36] that the appellant was 38, educated, in good health and had worked in Nepal. He and his mother had not lived in the same country for about 8 years, and she had only visited him twice during those years, on each occasion for about one month. There was no evidence of family life between the appellant and Kabita. After discussing that the historic injustice had no bearing on whether family life existed, he concluded at [37] *“the Appellant cannot succeed on Article 8 grounds as he has failed to establish on the balance of probabilities that Article 8 is engaged.”* He therefore dismissed the appellant’s appeal.

The grounds and submissions at the hearing

12. It was averred in the grounds that there had been procedural unfairness. The issue of the appellant’s address was not challenged in cross-examination by the presenting officer, nor were any questions asked by the judge about it. It was a critical issue. There was no reason the judge had not accepted the document of 13 February 2024 from Phedap Rural Municipality ([29] grounds). Indeed, there was a mistake of fact resulting in unfairness because the judge said that the letter of May 2023 did not say when the change took place, but there was evidence from the February 2024 letter of when the change took place ([38] grounds). It was averred that it was procedurally unfair for the judge to conduct a forensic examination of the address issue without putting any of his observations to Mrs Limbuni, the only witness, to give her an opportunity to respond ([19] grounds). Mrs Limbuni never had the opportunity to give an explanation as to why her bank statements still showed her address as Samdu and there could have been any number of potential explanations ([27] grounds).
13. It was said that the difference in addresses on the money transfer slips had been explained in the sponsor’s witness statement referred to in the Appeal Skeleton Argument (“ASA”) so, bearing that in mind, the presenting officer or the judge should have put any other addresses they believed to be discrepant to Mrs Limbuni ([32] and [33] grounds). The grounds explain that the addresses are either in Dharan or the same district and the appellant was collecting money from the Dharan area ([35] grounds). It was averred that fairness demanded that if there were concerns about the addresses on documents those concerns should have been put to the sponsor. The address had been a significant issue in the previous appeal and the appellant had now explained that issue fully. No questions had been put to the sponsor at the hearing and the judge, after the event, had considered points which he believed to be inconsistent and held them adversely against the appellant without the opportunity to respond being given to the only witness ([40] grounds).
14. Mr West developed the grounds at the submissions before us. He acknowledged that there was a Dharan address on the appellant’s bank statements and that it was difficult to see that the sponsor was the appropriate person to ask about the appellant’s bank statements, but he said we did not even know that it was the appellant’s address on those statements. The point was that the appellant had been led to understand that the address point had been dealt with and there was no issue about it. The address on the appellant’s bank

statements was never raised at all. The judge had then opened it up as an issue in the decision without giving the appellant an opportunity to deal with it. The address issue was obviously material; the bar was low.

15. Ms Everett confirmed that there was no rule 24 response. She said that she understood the point being made if the judge had hung any credibility issues on the address issue, but he did not take any credibility issues against the sponsor. Rather, the judge seemed to have decided the appeal on the basis that he could not get a clear view of the appellant's situation and that taking everything in the round he was not satisfied that there was family life. She pointed out to us that Upper Tribunal Judge Norton-Taylor when granting permission had raised the question of materiality, but very fairly accepted that she appreciated that it was a low threshold and did not dissent from our suggestion to her that if we considered that there had been a procedural irregularity it would be material.

Discussion and conclusion

16. We told the representatives at the hearing that we were satisfied that the judge made a material error of law such that the decision fell to be set aside, and we would give our reasons in a reserved decision.
17. When standing back and looking at the decision, Ms Everett's suggestion that the judge was, in his conclusion, saying that he could not get a clear picture of the evidence and so was not satisfied as to the engagement of family life appears attractive, although the judge is not explicit in his reasoning as to why he is not satisfied. However that the judge spent a significant part of his analysis on the address issue (without any suggestion that he considered it not directly relevant) would indicate that he considered what he thought were discrepancies on that issue to be a material part of the reason why he could not obtain a clear picture of the evidence.
18. However one has to remember that this was an appeal involving Devaseelan issues, where the appellant's case was that one significant issue which had concerned Judge Thapar (the apparent change of address) could be and had been easily cleared up by the provision of documents from the relevant local authority in Nepal. The judge had therefore to resolve whether or not that was so.
19. No questions were asked on the address issue by the presenting officer or the judge, the presenting officer made no submissions on the issue and the judge records Mr West's submission as being that the appellant had explained the issue. The judge did not raise the apparent address discrepancies with Mr West in submissions.
20. If the issue of the address is seen as a discrete one for the judge to resolve, then clearly if the appellant and sponsor's explanation was not to be accepted, it needed in fairness to be challenged so that the sponsor had an opportunity to respond. Even if the judge were making his decision on the basis he could not get a clear picture of the relationship between the appellant and his mother, fairness demanded that he give the sponsor an opportunity to clarify matters on the specific apparent inconsistencies which troubled him. There was no respondent's review, and the address point was not referred to in the respondent's submissions, so Mr West was left in the position where he was unaware of the detail he needed to address in submissions. That was not fair.

21. We consider for those reasons that the grounds are made out. A made out ground of procedural fairness is always material as it concerns a party's right to a fair hearing; in any event in this particular case the apparent inconsistencies clearly concerned the judge and were a significant part of the reasoning why he was not satisfied that Article 8 (1) was engaged. We could not say that on the evidence before the First-Tier Tribunal any rational tribunal would be bound to reject the appellant's claim (see the test of materiality as expressed in ASO (Iraq) and Secretary of State for the Home Department [2023] EWCA Civ 1282).
22. As we discussed at the hearing with the parties if we found procedural irregularity, the appeal would have to be remitted, as the effect of the error was to deprive the appellant of a fair hearing/a proper opportunity for his case to be considered by the First-Tier Tribunal.
23. We draw to the attention of the appellant and his representatives:
- (i) The appellant produced a migration registration certificate at p 40 of the bundle produced for the hearing before us under the heading "Documents served under Rule 15(2A)". That document is dated 07-04-2023 and shows the appellant as migrating from his address in Phedap to Dharan Sub-Metropolitan City - Ward no 10, Sunsari District, Koshi Province. Given the date on the document appears to predate the entry clearance officer's decision and suggests that the appellant had migrated to Dharan at least by the date of the decision if not by the date of the application (depending on whether the date is to be read as 7 April or 4 July 2023) an explanation is called for;
 - (ii) The appeal decision in respect of the appellant's sister Kabita is a significant missing document which would be expected to be produced;
 - (iii) It is noted that the ASA is unclear about the location of some of the appellant's surviving siblings and suggests that one, Chandra, is about to come to the UK. The location of each sibling and immigration status of Chandra should be clarified.

Notice of Decision

The judge's decision contains a material error of law and is set aside with no findings preserved.

The appeal is remitted to the First-Tier Tribunal to be decided by a judge other than Judge Cary or Judge Thapar.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 January 2025