IN THE UPPER TRIBUNAL **Case No: UI-2023-000027**
IMMIGRATION & ASYLUM CHAMBER **First-tier Tribunal No: HU/57569/2021**

IA/16874/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 May 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MR SUBASH TEJ BAHADUR RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Heard at Field House on 31 March 2023

Representation:
For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

1. No anonymity direction was made by the First-tier Tribunal. Considering the facts of this case and the circumstances of the appellant and his family, I can see no reason for making a direction.

Introduction

2. By a decision dated 25 October 2022, First-tier Tribunal Judge Eldridge ("the judge") dismissed the appeal brought by the appellant, a citizen of Nepal born on 29 October 1966, against a

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decision of the respondent dated 6 September 2021 refusing his application for Indefinite Leave to Enter.

Relevant background

3. The appellant's father was a former Gurkha soldier. He died on 13 February 1993 having served in the Army for 5 years and 53 days until his discharge on 28 December 1963. His widow, the appellant's mother and sponsor, Ms Tinsari Rai, left Nepal and entered the UK on 5 June 2012, having been granted entry clearance and Indefinite Leave to Enter as a widow of an ex-Gurkha. She is present and settled in the UK. Her son Mahesh – the appellant's brother – also a former service man of 17 years is present and settled in the UK with his wife.

4. By an application dated 1 July 2021, the appellant applied for leave to enter the United Kingdom as a dependant of his mother. The basis of the appellant's application to the respondent, and his case before the judge, was that he is dependent upon his mother for emotional and financial support. He earns a basic wage from time-to-time from casual labour, but it is insufficient to meet the costs of his daily needs.

5. In refusing the application the respondent did not accept that he met the criteria for entry as an Adult Dependent Relative as contained in Appendix FM of the Immigration Rules. She did not accept that there were emotional ties between the appellant and the sponsor that went beyond those that would be expected between a parent and adult child. Further, she did not accept that he met the requirements of the applicable policy, or that his exclusion from the United Kingdom would be in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The hearing before the judge took place on 13 October 2022 at Hatton Cross. The appellant was represented by Mr West of counsel. The respondent was unrepresented. The judge heard evidence from the sponsor and submissions from Mr West before reserving his decision. It was not submitted to the judge that the appellant met the requirements of the respondent's Annex K policy. The judge considered the submission which was made on behalf of the appellant – which was made in reliance on Article 8 ECHR. He found that there was no family life between the appellant and the sponsor and he dismissed the appeal accordingly.

The Appeal to the Upper Tribunal

7. The grounds of appeal to the Upper Tribunal are:

(i) The judge made material mistakes of fact; and

(ii) The judge reached an irrational conclusion in finding that Article 8 was not engaged; and

(iii) The judge erred in his approach to Article 8.

8. Upper Tribunal Judge Pickup granted permission to appeal on all grounds. Whilst observing that some grounds were stronger than others, it was considered arguable, nonetheless, that the judge made "careless" material errors of fact relevant to the issue of family life between the appellant and sponsor, which informed whether Article 8 was engaged and, the judge's finding to the contrary was insufficiently reasoned.

9. The respondent filed a Rule 24 response opposing the appeal dated 28 February 2023. Therein it was argued that the judge's findings were rational and based squarely on the evidence before him. The grounds were no more than a disagreement with the judge's decision.

Submissions

For the Appellant

10. Mr Jesurum adopted the grounds of appeal (not drafted by him). In elaborating on the grounds he fairly acknowledged in respect of ground (i), that it was not clear from the passport entries whether the judge was inaccurate in his recording of the number of visits made by the sponsor to see the appellant in Nepal. Mr Jesurum accepted the judge had considered the evidence of visits and this in itself was not an error of law. Nonetheless, he submitted the judge plainly failed to consider the evidence of historic financial support and other evidence capable of demonstrating dependency between the appellant and the sponsor. Mr Jesurum referred to the evidence that the judge had not factored into his assessment including evidence from the appellant, sponsor and her son in the UK as corroborative evidence of the facts and the supporting documentary evidence. In his submission no issue had been taken by the respondent with the evidence and the various documents in the appellant's bundle and it was not open to the judge to doubt the veracity of the evidence without at least raising the point with counsel.

11. Mr Jesurum emphasised that the judge, instead of asking whether the support provided to the appellant was "real, committed, or effective", had applied a different test, namely, whether the financial support and emotional support was of a greater level than might be expected in circumstances where people are separated as this family is and had conflated the issue of engagement with that of proportionality. This, he argued, amounted to a failure to apply the established law and was a material error given the evidence demonstrated that in addition to the normal ties of love and affection, there was "real, committed and effective support", both financial and emotional.

12. Grounds (ii) and (iii) Mr Jesurum submitted overlapped. The judge failed to direct himself in accordance with any of the authorities on the existence of family life between adult relatives and failed to pay attention to the evidence of support. The judge had attached great significance to his assessment the sponsor could look after herself and to her wish for the appellant to join her in the UK, however these were matters that went to proportionality and not engagement.

13. Mr Jesurum tentatively suggested that if an error was established then this Tribunal could remake the decision on the evidence that went unchallenged or, alternatively, there would need to be a rehearing, the venue for that rehearing would depend on the extent of the fact finding exercise.

For the Respondent

14. Ms Lecointe relied on the respondent's rule 24 response. She added, briefly, that whilst the judge did not refer to the evidence of historic financial remittances, the error was not material; the appellant was working and the grounds were no more than a disagreement with the judge's decision.

Discussion

15. The sole issue in this appeal was whether there is family life between the appellant and sponsor within the meaning of Article 8 (1) ECHR. In other words, was Article 8 (1) *simpliciter* engaged.

16. For the purposes of determining that issue, the judge was required to make an evaluative assessment of the evidence that speaks to that issue and reach a reasoned conclusion.

17. In his submissions Mr Jesurum properly acknowledged that the judge considered the evidence of visits made by the sponsor to see the appellant in Nepal, and that it was unclear from the evidence that the judge had in fact failed to take account of two additional visits she claimed to have made. Whilst I consider Mr Jesurum was right to adopt that position on the evidence, it is the judge's consideration of other aspects of the evidence (or lack of it) which is as Mr Jesurum put it "troubling".

18. There is no dispute that the issue of financial support is relevant to the question of whether family life exists between the appellant and sponsor. There is also no dispute that such support is not a conclusive factor of whether or not family life exists and the judge was clearly cognisant of that at [22]. However, in cases such as this, the question of dependency is vital and the evidence of financial support that goes towards establishing dependency cannot be understated: *Ganesh Pun (Nepal) & anr v The Secretary of State for the Home Department* [2017] EWCA Civ 2106.

19. In this case, the appellant relied, *inter alia*, on the sponsor's financial support as one facet of the evidence that supported his claim of dependency. The judge's assessment of the financial evidence is at [20] and provides:

> "On the other hand, I am not satisfied as to the extent to which Mrs Rai has been regularly supporting her son in Nepal<u>. There are several receipts for maintenance but all of those postdate the date of the application, the earliest being the 15 July 2021. This does not demonstrate a history of such support.</u> I understand that she says that she did not recognise the importance of keeping receipts but, as she is unable to read or write Nepali, I infer that she is probably not confident in doing either in English (and she confirms her lack of ability in the language in her witness statement) and that she is probably dependent on her relatives in this country who do have a good command of English. There is no reason why receipts could not be provided or sought again. <u>I do not accept that she has been providing regular, significant financial maintenance to her son in Nepal</u>"

(emphasis added).

20. In my judgement, a reasonable inference can be drawn from the judge's reasoning above, that he was concerned about the absence of significant and historic evidence of financial support prior to the date of application on 1 July 2021. The judge's conclusions at [20] are an unfortunate and inaccurate reflection of the evidence that was before him. There was in fact evidence of financial support that predated the application, in the form of the sponsor's Nepalese pension account statements issued by Gurkhas Finance Limited, which showed debits being made to the appellant for significant sums on 6 November 2020 and 8 and 31 December 2020 respectively. This evidence was, I note, explicitly referred to in the appellant's skeleton argument before the judge. Whilst, the evidence is confined to a limited period, it is nonetheless historical evidence of financial support predating the application by approximately six months. Whilst it is not incumbent on a judge to refer to every piece of evidence, he is required to consider material evidence and give reasons why that evidence is accepted or rejected. It seems appreciably clear to me that he did not do the latter because he failed to recognise the existence of the former in respect of financial support.

21. Ms Lecointe fairly recognised that the judge did not make any reference to this evidence but submitted it was immaterial, in view of the judge's findings that the appellant was working, but that does not satisfactorily address ground (i), and nor does it recognise that even partial financial support can be evidence of dependency. In fact at [22] the judge found that the appellant "has some income from his own work, is supported by his brother and it has not been shown that he has been reliant upon money from his mother." The judge's reasoning thus demonstrates that his conclusion that the appellant was not dependent on his mother was not only based on his finding the appellant was working, but was also premised by his erroneous conclusion at [20], that all the evidence of financial support post-dated the application.

22. As I stated earlier, I recognise, that the question of financial support in a case such as this is relevant to, albeit, not conclusive of the issue of dependency, but it is a material consideration. The judge in my view considered the facts at the exclusion of relevant evidence material to the issue in the appeal. Given the emphasis upon which the judge attached to the financial evidence being post the date of application, the failure to take into account evidence of financial support that predated it, must be material to his reasoning. On any reasonable view, I do not see how it can be said that the judge's mistaken approach to the evidence has not had an impact on his view of the evidence overall.

23. In the case of *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at paragraph 66 Carnwath LJ (as he then was) recognised that a mistake of fact was capable of giving rise to a separate head of challenge in an appeal on a point of law, and that a factual error, if significant to the conclusion, can constitute an error of law. I am satisfied that the judge's mistaken view of the facts falls into this category. It follows that ground (i) is made out.

24. I agree with Mr Jesurum that grounds (ii) and (iii) can be considered cumulatively. These grounds challenge the judge's finding that Article 8(1) was not engaged, both in relation to the law and his application of it to the facts. I take the view however that the grounds are all inextricably linked. This is because ground (i) impacts on grounds (ii) and (iii) as they all essentially relate to the judge's consideration of whether there was an established family life between the appellant and sponsor. It seems to me therefore, that ground (i) is sufficient to vitiate the judge's decision, but I will nonetheless consider the substance of grounds (ii) and (iii).

25. Whilst I would not go so far as to conclude that the judge's findings are irrational, and Mr Jesurum in his submissions did not go that far either, there is justified criticism that the judge's approach to the question of family life failed to take into account material considerations within the framework of the relevant legal principles.

26. In *Gurung & Ors, R (on the application of) v Secretary of State for the Home Department [2013] ECWA Civ 8 (21 January 2013)*, the Court expressly endorsed (at paragraph 46), as '*useful*' and as indicating '*the correct approach to be adopted*', the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)* [2012] UKUT 00377. In *Jitendra Rai v ECO, Delhi* [2017] EWCA Civ 320 (at paragraphs 16-20) the Court again reviewed the authorities. It is unnecessary to review them in full here and it suffices that they include the following key principles:

    (i) Dependency should be read as 'real' or 'committed' or 'effective' support (*Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 at paragraph 17).

(ii) Family life is not established between an adult child and his surviving parent unless something more exists than normal emotional ties of love and affection (*Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 at paragraph 24).

(iii) Such ties might exist if the appellant is dependent on his parent or family or *vice versa* (per Arden LJ at paragraph 24 of *Kugathas*).

(iv) Care must be taken not to interpret the judgments in *Kuthagas* too restrictively. There is no requirement for evidence of exceptional dependency (*Ghising (family life – adults – Gurkha policy)* at paragraph 56).

(v) The question of whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of a particular case. The issue is highly fact sensitive and can result in different outcomes in cases which have superficially similar features (*Gurung*, at paragraphs 45-46).

27. In dismissing the appeal, the judge approached the evidence in the following way:

(i) Prior to the sponsor's arrival in the UK in 2012, she was living with the appellant in Nepal.

(ii) The appellant was working on a casual basis as a labourer for up to 15 days in a month.

(iii) The sponsor visited the appellant in 2013, 2016, 2017 and last returned to Nepal in 2018 and remained there until 2021. She lived with the appellant, underwent cataract surgery and was supported by the appellant on a practical basis.

(iv) A finding was made that the sponsor now lives alone in the UK having moved out of her son's home which demonstrates that she can look after herself.

(v) The appellant's brother Mahesh has been supporting the appellant for some time from his own resources and wishes to continue to do so.

(vi) A finding was made that the sponsor has not been providing regular, significant financial maintenance to the appellant.

(vii) The sponsor who is 78 years old wishes the appellant to come and help her in the UK.

(viii) There is a genuine continuing relationship between the appellant and sponsor, but this is not family life for the purposes of Article 8; the appellant is working, is supported by his brother, is living an

independent life and, it has not been shown that he is reliant on money from the sponsor.

(ix) The nature of ties between the appellant and sponsor are not significantly beyond the norm for two loving adults within the same family.

28. First, I am satisfied that at no stage does the judge purport to direct himself to the correct test of “real, or committed or effective support”, and in considering whether the support provided was significantly more than might be expected between two adults from the same family, the judge applied the wrong test. This is a clear error of law. Second, I am satisfied that the judge took into account irrelevant considerations, and not relevant considerations, in his assessment of whether Article 8 was engaged. I agree with Mr Jesurum that findings relating to the sponsor being able to look after herself and her wish for the appellant to come and help her in the UK are matters that go to proportionality rather than engagement of Article 8(1). Third, whilst the judge was entitled to factor into his assessment the evidence from the appellant’s brother, he did not adequately or at all, factor into his assessment the evidence that the appellant was single and had lived with his mother until she left Nepal in 2012, the fact that he had looked after her from 2018 to 2021 when she visited Nepal, the sponsor’s pension statement withdrawals to the appellant (evidence subject of ground (i)), a failure which in my view led the judge to treat the appellant’s relationship with his brother as a separate entity of family life rather than considering the family unit as a whole.

29. I agree with Mr Jesurum that on various occasions in the judge’s decision it is difficult to see how these factors have been taken into account, and if he did so, the judge has not identified reasons which led him to reduce the weight of that evidence. In the circumstances, the conclusion I reach is that the judge failed to take into account relevant and highly material factors. That is a further material error of law.

30. To conclude, the errors of law, and which can be characterised both as a failure to take account of the material considerations as well as a mistake of fact leading to unfairness are made out. The decision of the First-tier Tribunal is set aside. Having regard to the fact that the errors of law relate to the judge’s approach to the evidence that affects all of the fact finding relating to the existence of family life at the time of the hearing, I have concluded that there should be a hearing de novo.

31. I have taken into account the latest guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) as to whether the case should be remitted or retained at the Upper Tribunal. The approach of the judge raises fairness issues, but as *Begum* makes clear this form of unfairness does not automatically cause the appeal to be one which should be remitted. However, having regard to the fact that the failure to have regard to material evidence has an impact on the judge’s decision

which is far wider than the impact on the discreet issue in *Begum*, such that the appellant would effectively lose the benefits of a two stage appeal if his case was retained in this Tribunal, I have decided that it should be remitted to be held de novo in the First-Tier Tribunal.

Notice of Decision

32. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

33. The appeal is remitted to the First-tier Tribunal to be heard before any judge aside from Judge Eldridge.

No anonymity direction is made.

Signed Date 18 May 2023

R.Bagral
Deputy Upper Tribunal Judge Bagral