



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

**Case No: UI-2023-001296
First-tier Tribunal No:
HU/53938/2022
LH/01146/2022**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 06 July 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR HUKUM BAHADUR TAMANG
(Anonymity order not made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, counsel

For the Respondent: Ms S Lecointe, Home Office Presenting Officer

**Heard at Field House on 14 June 2023
Prepared at Field House on 19 June 2023**

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The appellant is a citizen of Nepal born on 16 January 1975. He appealed against a decision of Judge of the First-tier Tribunal Tozzi sitting remotely at Taylor House on 8 March 2023. She dismissed the appellant's appeal against a decision of the respondent dated 31 May 2022 which had refused the appellant's application for leave to enter the United Kingdom based upon his family life.

The Decision at First Instance

2. The appellant's father ("the sponsor") is an ex-Gurkha who was discharged from the Brigade of Gurkhas in 1969 after more than five years of service. The sponsor gave evidence at the hearing before the FTT and although the sponsor's evidence was consistent in part, the judge found aspects of his evidence to be vague. There was said to be no information about the appellant's family life before the sponsor came to the United Kingdom. At [36] of her determination the judge noted that the sponsor's house was said to be in a small rural village and not the capital Kathmandu. Had the appellant been living with the sponsor in 2011 that would have been addressed in the statements. The judge found the appellant was living independently with his own family at the time the sponsor came to the United Kingdom and had likely been living independently for many years. The appellant told the judge that he had certain expenses which could only be met by monies sent by the sponsor. The judge noted however there was no detail about the support the sponsor was providing to the appellant, the evidence was generic. The appellant had only applied to come to the United Kingdom a month after his divorce was finalised indicating to the judge that the appellant had been living an independent life up until that time.

The Onward Appeal

3. In grounds drafted by counsel who had appeared at first instance but who did not appear before me, it was argued that article 8 was the only live issue in the appeal. Until the day of the hearing this was a conjoined appeal between the appellant and his sister but the respondent had subsequently withdrawn her objections to the sister's application for entry clearance (I was told that she had since arrived in the United Kingdom). The judge had found at [42] that there was no regular support provided to the appellant by the sponsor and the monies that were sent to the appellant's sister were not shared with the appellant, see [32]. The evidence on sharing funds was described by the judge as vague.
4. The grounds of appeal argued there had been no cross examination challenging the position as advanced by the appellant that monies were shared and it was the core plank of the appeal. It was impermissible for the judge to find against the appellant on the issue of sharing money with his sister when the point was made consistently in evidence that had been unchallenged. There was also a mistake of fact in the determination because both the appellant and his sister lived in the capital, Kathmandu. The judge made no reference to evidence in the sisters appeal which must have been accepted by the respondent because the sister had been granted leave to enter. The grounds also complained that the judge had made a mistake of fact as to where the appellant resided in Nepal. Permission was subsequently granted by a First-tier Judge on the basis that "lack of detail might not justify a positive conclusion which runs counter to the vague [lack of detail] evidence".

The Hearing Before Me

5. In submissions to me counsel relied on a witness statement prepared by the counsel who had appeared in the First-tier about the lack of questions put to the sponsor at the original hearing. There were a total of five questions. The failure to cross-examine it was argued amounted to a concession by the respondent as to matters not in dispute. The judge had nevertheless rejected uncontested evidence.
6. For the respondent the presenting officer stated that the appeal of the appellant's sister was withdrawn by the respondent in order to grant leave. However the reasons for that decision to grant were not clearly ascertainable from the Home Office file. The refusals for both the appellant and his sister were in very similar terms. The issue was whether the appellant could show family life with his sponsor and whether it continued, see Rai [2017] EWCA Civ 320.
7. The presenting officer having been taken to the relevant parts of the witness statement of counsel who appeared in the First-tier accepted that the judge's findings on the distance between where the sponsor had lived and where the appellant lived were inaccurate and the judge's findings were in error in relation to whether or not monies sent by the sponsor were shared between the appellant and his sister. To that extent it was conceded by the respondent there had been procedural unfairness in the hearing at first instance.
8. In the light of that concession I indicated to the parties that if the proceedings had been tainted by unfairness then the decision of the First-tier Tribunal judge could not stand and I would have no alternative but to set the determination aside and remit the matter back to the First-tier Tribunal to be reconsidered de novo with no findings preserved. I note here that for the next occasion it would be of assistance to the trial judge if the respondent were in a position to explain in more detail why the sisters application had been granted when the appellant's had not. If the reason for that was because it was said that the appellant had formed a separate household when he had married, what was the position once he divorced? These are factual matters which need to be explored in more detail at the renewed hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I allow the Appellant's appeal against that decision. The appeal will be remitted to the First-tier for rehearing de novo, no findings preserved.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 22nd day of June 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have set aside the decision in this case I also set aside the decision in relation to fee award which will therefore have to be reconsidered by the First-tier Tribunal judge on the next occasion.

Signed this 22nd day of June 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge