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

**Case Nos: UI-2024-000200**
**UI-2024-000201**
**First-tier Tribunal Nos:**
**HU/52431/2023**
**HU/52432/2023**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 12 March 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**(1) ROMA RANA MAGAR**
**(2) ROJA SHAKYA**
**(ANONYMITY ORDER NOT MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellants: Ms Amy Childs, Counsel instructed by Everest Law Solicitors
For the Respondent: Ms Sandra McKenzie, Senior Home Office Presenting Officer

**Heard at Field House on 28 February 2024**

**DECISION AND REASONS**

1. The appellants have been granted permission to appeal against the decision of First-tier Tribunal Judge Chana promulgated on 19 November 2023 ("the Decision"). By the Decision, Judge Chana dismissed the appellants' appeals against the decision of an Entry Clearance Officer to refuse them entry clearance as adult dependants of a Gurkha veteran.

**Relevant Background**

2. The appellants are citizens of Nepal, whose dates of birth are 5 October 1976 and 17 February 2004 respectively. They are the daughter and

granddaughter respectively of their sponsor who served in the Gurkha regiment and who was discharged from service before 1997.

3. As the first appellant is the main appellant, I shall hereafter refer to her as "the appellant", save where the context requires otherwise.

4. The appellants and their sponsor applied at the same time for entry clearance for the purposes of settlement. An Entry Clearance Officer granted the sponsor's application but refused the applications of the appellants. In the case of the first appellant, she was refused admission on the ground that she did not meet the criteria for admission under the rules; and, in the alternative, it was not shown that she had subsisting family life with the sponsor. In the case of the second appellant, she was refused admission because, among other things, her father was still alive and residing in Nepal.

5. The sponsor decided to come to the UK on his own, while the appellants pursued an appeal from Nepal.

6. About 6 months after his departure from Nepal, the appellants' appeals came before Judge Chana sitting at Hatton Cross on 17 October 2023. Both parties were legally represented, and the Judge received oral evidence from the sponsor.

7. In the Decision, the Judge gave extensive reasons for finding that the appellants did not qualify for admission under the rules; and, in the alternative, she found that family life between the sponsor and the appellants was not subsisting at the date of the sponsor's departure from Nepal 6 months previously, and was also not subsisting at the date of the hearing.

## The Grounds of Appeal to the First-tier Tribunal

8. The grounds of appeal were settled by Counsel who acted for the appellants at the hearing in the First-tier Tribunal which took place at Hatton Cross on 17 October 2023.

9. Ground 1 was that the Judge had erred in her approach to the test for the engagement of Article 8(1) ECHR. Ms Childs submitted that the Judge's finding that the appellant had founded an independent married life away from the sponsor and had become a parent herself had been an improper reason for finding that family life was not made out. The existence of family life with a partner and child was not mutually exclusive of the existence of family life with a parent. Both could exist in tandem. The Judge identified no precedent for finding otherwise.

10. Ground 2 was that the Judge had made two adverse credibility findings "without notice". The first adverse finding was that the first appellant had been inconsistent as to her addresses in Nepal. The second adverse finding was that her divorce certificate was unreliable and therefore it was unknown what role the second appellant's father played in the second appellant's life. As these issues were not raised at the hearing, Ms Childs

submitted that these adverse findings were not open to the Judge, following *Abdi & Others -v- ECO[2023] EWCA Civ 1455.* Such an approach was procedurally unfair.

## The Reasons for the Eventual Grant of Permission to Appeal

11. On 16 January 2024, Judge Mills granted permission to appeal for the following reasons:

> "While, in principle, it may have been open to the Judge to find that the first appellant's establishment of a separate household undermined her claim to dependency upon her father, such a conclusion is arguable unsafe when reached in reliance on matters that she has not had the opportunity to comment upon. Permission to appeal is granted, and both grounds may be argued."

## The Hearing in the Upper Tribunal

12. At the hearing before me to determine whether an error of law was made out, Ms Childs developed the grounds of appeal. In reply, Ms McKenzie submitted that the Judge had directed herself appropriately and no error of law was made out. After briefly hearing from Ms Childs in reply, I reserved my decision.

13. In her signed witness statement, dated 12 April 2023, the appellant acknowledged that in her *"previous application"* it had been erroneously stated that she had lived at her current address for 42 years. She placed the blame for this on "*the agency*". She said that the correct chain of events was that, after her marriage, she had gone to live with her husband in his family house in the same ward in Dharan. Her parents were also living in Ward No.12 at that time. After about 18 months into her marriage, her mother died and her elder sister took up the responsibility of caring for her ill father. After nearly 3 years into her marriage, her elder sister got married too, and went to live in the US. So, the burden of responsibility to care for her father came upon her. Her father, her husband and she moved to Ward No.10 in a rented place. She had lived at the current address for over 17 years.

14. She had married her ex-husband in February 2023, and they had officially divorced in February 2020. She attributed the breakdown of the marriage to the fact that her husband did not like the round-the-clock attention that she had to give to her father and to her daughter, the second appellant, who was disabled.

15. She said that she was currently with her father, giving him round-the-clock care 24/7. She said that her father would greatly benefit from her company in the UK. She knew his health issues more than anyone else. She could cook, wash and shop for him. She could take him to the hospital and to GPs. Since her mother's death, she had been the only emotional and physical support for her father.

16. It is difficult to form a complete picture, as the consolidated bundle prepared for the hearing before me only contains the refusal decisions and

the evidence provided by the appellants by way of appeal. It does not contain the application forms, or any other documents that might reasonably be expected to have featured in the respondent's bundle for the hearing in the First-tier Tribunal.

17. Nonetheless, it is apparent that the sponsor and the appellants applied together from Nepal on 20 September 2022, and that, whereas the appellants' application were refused on 11 January 2023, the sponsor's application was granted. Moreover, although the witness statements were all prepared on the basis that the sponsor was still in Nepal at the time that they were signed, in fact the sponsor had come to the UK on 8 April 2023 on his own. Accordingly, at the time of the hearing on 17 October 2023, the sponsor had been living in the UK apart from the appellants for some 6 months.

18. Ground 1 relates to the Judge's finding at para [30] that the appellant's account in her witness statement demonstrates that she founded an independent life away from the sponsor and became a parent herself; and that the appellant became independent when she married and left her parents' home.

19. As is submitted by Mr McKenzie, the Judge immediately went on to observe that Annex K makes it clear that normally children who have lived more than 2 years apart from their sponsor - as of the date of application - would not qualify to be granted entry clearance.

20. Thus, the Judge was not suggesting that the finding she made at para [30] was determinative of the question of whether family life subsisted between the appellant and her father at the date when he left Nepal in order to settle in the UK.

21. The first limb of Ground 2 relates to para [33], where the Judge observed that the appellant had claimed in her statement that she lived at different addresses in Dharan. However, in her application form when she was asked how long she had lived at College Road 10 in Sunsari in Nepal, she said that she had lived at the same address for 42 years. The Judge held: "*This goes to the credibility of her claim that she, her husband and her daughter were living with her father before he came to the United Kingdom.*"

22. The grounds of appeal raise the fact that the appellant had addressed this misrepresentation in her witness statement. However, the Judge did not ignore this. On the contrary, it is apparent that the Judge has extracted the information about the misrepresentation from the witness statement, as she begins with the observation that, in her witness statement, the appellant said she had resided at different addresses in Dharan. Moreover, although the appellant attributed the mistake to agents who handled her previous application, there was not, and is not, any evidence of there being a previous application. The only application that was in evidence was the application of 2022, which was refused in January 2023. As the appellant had herself drawn attention to the discrepancy between what she said in her application form and what she was now saying in her witness

statement, there was no procedural unfairness in the Judge making an adverse credibility finding in consequence of the misrepresentation.

23. The second limb of Ground 2 relates to the Judge's finding at para [39], where she says that she does not find the appellant credible, and nor does she find the divorce document that she has provided is credible.

24. After a detailed discussion of the contents of what is in fact a judgment issued by a court on a divorce petition made by the appellant, the Judge states at the beginning of para [41] that she does not find this document credible and that it does not demonstrate that the second appellant's father's role in the second appellant's life has been extinguished. The Judge adds that there is no evidence before her that the second appellant can leave the jurisdiction of Nepal in order to settle in the UK.

25. I consider that it was open to the Judge to find that the "divorce document" did not demonstrate that the role of the second appellant's father had been extinguished. Indeed, consistent with the implication of the judgment, the bundle contains a letter from the father giving his consent to the second appellant going with her mother to the UK. Accordingly, the Judge made a mistake of fact in stating that there was no evidence that the second appellant could leave the jurisdiction of Nepal and settle in the UK away from her father.

26. I have also considered whether there is procedural unfairness in the Judge making an adverse credibility finding against the appellant on the basis of the contents of the divorce judgment.

27. In her witness statement, the appellant did not say anything about the divorce beyond the fact that it meant that her husband was no longer part of the household which she shared with her father and daughter, and that, following the divorce, she and her daughter were wholly reliant financially upon the sponsor.

28. While the contents of the divorce judgment arguably suggest that the second appellant's father has a continuing financial responsibility her, and also do not clearly support the appellant's claim that her father was part of the matrimonial household prior to the divorce, there is nothing in the judgment itself which reasonably calls into question the claim made by all the witnesses, including the sponsor, that they had been living under the same roof for a substantial period of time prior to his departure in April 2023.

29. The appellant was not present in the jurisdiction to be cross-examined on her witness statement, and it is reasonable to question whether the sponsor would have been able to answer any questions that the Judge had about the interpretation or implications of the divorce judgment. But the sponsor could have been cross-examined on the veracity of his claim that he had been living with the appellants prior to his departure, and for how long. As the Judge does not discuss or make any adverse findings about the sponsor's oral evidence (if any) on this topic – whereas she does discuss and make adverse findings on his oral evidence about his

knowledge of the appellants' current situation – it is reasonable to infer that the sponsor was not challenged on his evidence of prior cohabitation with the appellants.

30. Ms McKenzie submits that the appellants have failed to make out a procedural unfairness claim as they have not produced a transcript or a note of the proceedings. However, on the particular facts of this case – and in the absence of a Rule 24 response challenging the factual basis of Ground 2 - I do not consider that this is necessary.

31. In conclusion, I am persuaded that an error of law is made out, because the Judge's conclusion that the appellant is not credible in her claim that family life with her father subsisted at the date of his departure is in part based on a procedurally unfair adverse credibility finding in relation to the divorce document. Moreover, as it is wholly unclear why the Judge regards the divorce document as being not credible in itself and also highly damaging to the appellant's credibility, the upshot is that the Judge has not given adequate reasons as to why she finds that family life was not subsisting at the date of departure, given the apparently unchallenged evidence of the sponsor that, before he left, they were all living in the same household with the appellant looking after him.

32. It is arguable that the Judge's error is not material, in that elsewhere in the Decision she makes a sustainable finding that the appellants have not discharged the burden of proving that family life is <u>still</u> subsisting between them and the sponsor.

33. However, as was held in *Abdi* at para [37], tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same. This is a very high hurdle to surmount, and Ms McKenzie rightly did not suggest that the test was satisfied in the instant case.

## Future Disposal

34. In light of the nature of the error of law, the appellants have been deprived of a fair hearing in the First-tier Tribunal, and accordingly the appropriate course is for these appeals to be remitted to the First-tier Tribunal at Hatton Cross for a completely fresh hearing, with none of the Judge's findings of fact being preserved.

## Notice of Decision

**The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside in its entirety.**

## Directions

This appeal shall be remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Chana, with none of the Judge's previous findings of fact being preserved.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
11 March 2024