Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08787/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2017	**On 01 December 2017**

Before

THE HON. LORD MATTHEWS
DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

MS P S
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER NEW DELHI

Respondent

Representation:

For the Appellant: Mr J Khalid, Counsel instructed by Goulds Green Chambers
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Nepal, applied for entry clearance for the purposes of settlement in the UK along with her parents and her younger brother on 12 August 2015. Their applications were granted, but hers was refused by the Respondent on 11 September 2015. She duly appealed that decision to the First tier Tribunal, and her appeal came before First tier Tribunal Judge NMK Lawrence, sitting at Hatton Cross, on 28 April 2017. That appeal was dismissed by his decision promulgated on 18 May 2017.

2. The Appellant applied for permission to appeal to the Upper Tribunal which was initially refused to her by a decision of First tier Tribunal Judge Boyes on 26 July 2017 but undaunted her application was renewed to the Upper Tribunal. It was granted by decision of Upper Tribunal Judge Reeds of 26 September 2017. So the matter comes before us today. This is our joint decision.

3. Before us today Mr Jarvis on behalf of the Respondent has very fairly accepted that the Judge's decision fails to provide an adequate analysis of either the relevant jurisprudence, or, the evidence that was placed before him. It is accepted that his decision discloses material errors of law of such a nature that leave as the only course open to us a decision to remit this appeal for a fresh hearing with no findings of fact preserved. We can only express our profound regret that such a course is necessary, particularly given the delay in processing the appeal to date. In the circumstances we set out briefly why it is accepted that we are constrained to take this course.

4. Although the decision was promulgated on 18 May 2017 and the Judge on that date would have had available to him the guidance to be found within the Court of Appeal decision Rai v Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320, no reference to that guidance is to be found in the decision. Undoubtedly that is one of the reasons for the deficiencies with the approach that was taken by the Judge towards the appeal, but of no less concern is the failure of the Judge to engage with the wealth of relevant evidence that was before him upon issues with which he had to engage in order to deal fairly with the appeal.

5. A wealth of evidence was relied upon by the Appellant to establish both that she had an innocent explanation for the allegations of dishonesty that had been made against her by the ECO, namely, that she had in the past; submitted false documents in support of a Tier 4 Student entry clearance application; misrepresented her marital status in the current application when describing herself as single; and, untruthfully claimed not to have formed an independent family unit at the date of the application. Had the allegation(s) of the ECO been made out, then they would have had to be weighed in the proportionality balancing exercise as adding to the public interest in the refusal of entry clearance, whether or not the Appellant had established the existence of "family life" with the members of her immediate family at any relevant date.

6. Taking those allegations in turn the Appellant had accepted that she was married in September 2010, as she had disclosed in her 2010 Tier 4 entry clearance application, but had explained in the evidence placed before the Judge that the marriage had lasted only a few months before it had failed, and, that as a result she had returned to live since her separation from her husband in the same family home in which she had grown up with her parents and her sibling. She had continued to live with them thereafter (as indeed she had until the occasion of her marriage) until they had left Nepal for the UK. In support of her explanation she had produced documents issued by the relevant Nepalese authorities that recorded both

the separation, and, her subsequent divorce. No reference is made to these passages of evidence in the witness statements, or to the existence or content of these documents, in the course of the Judge's decision. Taken at face value this evidence was a complete answer to the second and third allegations of dishonesty that she faced.

7. The Appellant had also provided documentary evidence to corroborate her explanation that far from dishonestly providing false documents in support of an application for entry clearance, she and her family had given genuine documents to the agents in Nepal that she had engaged, with the help of her father, to help her prepare an entry clearance application as a Tier 4 Student. She and her father alleged that they had been the victims of a fraud by these agents. In support of that explanation, and counter-allegation, she had produced in evidence a decision of the Kathmandu District Court of 5 August 2012 which, whilst not on our reading a final decision in her favour of the allegations that she and her father had made against the individuals running the firm in question, certainly accepted that they had a case of fraud to answer. Mr Jarvis accepts before us that there was no suggestion made on behalf of the ECO before the Judge that the decision of the Kathmandu District Court was anything other than authentic. (It would after all be an easy matter to check.) Again, we note with regret, that the Judge quite simply failed to engage with this explanation, and the evidence relied upon to corroborate it.

8. The position that the Judge was faced with in relation to the family relationships, was the assertion that at the date she submitted her entry clearance application the Appellant was living as an adult divorced child in the same household, with her younger brother (a child) and her parents. They were granted entry clearance and she was not. On the basis of the evidence before the Judge she remained living in that same family home, supported by her parents, up to and including the date of the hearing of the appeal. On the face of the evidence therefore she had at least an arguable case that notwithstanding her marriage she had either never formed an independent family unit, or perhaps more realistically, that upon the breakdown of her marriage after such a short period of time, that she had returned to the family home, and to the emotional and financial embrace of her immediate family, and there resumed the relationships and life that she had enjoyed up to the point at which she had married, and which had been all too briefly interrupted. We are unable to identify anything in the jurisprudence that would mean that her argument that "family life" existed at the date her parents and younger sibling left Nepal for the UK was bound to fail. The guidance available within the jurisprudence is quite clear; Article 8 cases concerning adult children are not susceptible to "bright line" rules, and require a very careful analysis of the evidence. To employ the perhaps overused phrase, their outcome is entirely fact sensitive.

9. It is conceded before us today that the Judge failed to give the evidence before him the analysis that the parties were entitled to expect of him, and that the fact finding exercise that he was required to undertake did not occur. In consequence it is conceded that we have no other course

than to remit this appeal to the First-tier Tribunal for re-hearing, with no findings of fact preserved.

10. We note for completeness for those who may come after us to consider this appeal, that it is also conceded now that there is in fact no evidence to suggest that the Appellant did ever travel to the UK on the Tier 4 Student visa with which she was issued in 2011. Thus her evidence that she chose not to do so when she realised that the college to which she had been directed by the agents engaged in Nepal to assist her, had ceased to trade. She had ostensibly been granted a place through the application that had been submitted on her behalf by the agents in Nepal against whom she has made the fraud allegations. Her case was that when she realised the true position she chose not to travel to the UK. Mr Jarvis accepts that that was the case. It may of course be that those who may need to analyse this evidence in the future will need to bear in mind, and consider that explanation for what happened subsequent to the grant of her entry clearance as a Tier 4 Student as going to, rather than going against, her general credibility, and therefore as corroborating rather than as undermining the explanation she has offered for what has occurred in the past.

11. In the circumstances the decision discloses a material error of law that renders the dismissal of the appeal unsafe, and the decision must in the circumstances be set aside and remade. We have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, or whether to proceed to remake it in the Upper Tribunal. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for her case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012. Having reached that conclusion, with the agreement of the parties we make the following directions;

    i) The decision is set aside, and the appeal is remitted to the First Tier Tribunal for rehearing de novo at the Hatton Cross hearing centre. The appeal is not to be listed before Judge NMK Lawrence. No findings of fact are preserved.

    ii) No interpreter is required for the hearing of the appeal.

    iii) There is presently anticipated to be the sponsor as a witness, and the time estimate is as a result, 2 hours.

Decision

12. The decision promulgated on 18 May 2017 did involve the making of an error of law sufficient to require the decision to be set aside and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing de novo with the directions set out above.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 30 November 2017

Deputy Upper Tribunal Judge J M Holmes