IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000574

First-tier Tribunal No:
HU/07658/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SHARMILLA MALLA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr E. Wilford, instructed by Everest Law Solicitor
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 23 March 2023

DECISION AND REASONS

1. The error of law hearing in this case was heard just over a year ago. There has been an unfortunate delay in listing the case for remaking caused in part by at least one avoidable adjournment.

2. It is not necessary to set out the case again in full. The factual circumstances were summarised in the error of law decision (annexed). The appellant produced further evidence in support of her case for this hearing, including an up to date witness statement addressing the concerns about the evidence outlined at [12] of the error of law decision. The appellant admitted that the letter submitted with the original entry clearance application that purported to be from her biological mother

was a false document. She had been advised by an agent who assisted her with the entry clearance application to produced such evidence. The telephone number on the letter was her own, which is consistent with the information contained in the entry clearance form itself.

3. The evidence of the appellant, her step-mother, and a cousin who lives in the UK has otherwise been consistent in stating that her biological mother left the family home when the children were quite young after she began another relationship. The appellant's father's senior wife, the UK sponsor, was the person who brought up the two children of the family from a young age. The bundle also contained evidence to show that the family has remained in contact with one another since the UK sponsor came to the UK. Since the last hearing, the appellant's father's second wife has died. The appellant and her brother are still living together in the family home in Nepal. They have not yet established independent family lives of their own. They continue to be reliant on their step-mother for financial and emotional support. She also relies on them for emotional support.

4. Having considered the evidence now before the Upper Tribunal Mr Tufan conceded that there was real, effective, and committed support between the appellant and her step-mother. He accepted that family life was established for the purpose of Article 8(1).

5. Whilst recognising that the historic injustice relating to Gurkha settlement would normally render a decision disproportionate where family life is engaged, Mr Tufan argued that the deception in producing a false letter purporting to be from her biological mother was a matter that tipped in favour of maintaining an effective system of immigration control.

6. Mr Wilford acknowledged that the appellant had made a mistake. He asked me to take into account the fact that she was only 19 years old at the date of the application and had foolishly followed advice from an agent. She had been candid in admitting her error, which in any event did not add anything that was of any material use to the application. He submitted that it was a deception at the lower end of the scale. When placed in the context of the historic injustice and the impact that the decision would have on an innocent party such as her step-mother, who had always intended for the appellant to travel with her to settle in the UK, the submission of a false letter purporting to be from her biological mother did not outweigh the historic injustice to Gurkha families: see *Ghising*.

7. Although this obvious discrepancy in the evidence should have been addressed at a much earlier stage in the witness statements prepared for the original hearing in the First-tier Tribunal, when the appellant has been asked to comment on the issue, she has been candid in admitting that she made a mistake in following the advice of the agent. The production of a false document is a matter that would normally be given weight in

favour of the public interest in maintaining an effective system of immigration control. However, for the reasons given by Mr Wilford, I accept that the misguided submission of this document was not central to the application. The real issue in this case is the strength of the appellant's family ties with her step-mother and the weight that must be given to the rights that have historically been denied to the family members of Gurkha soldiers to settle in the UK. For these reasons, I find that the decision to refuse entry clearance interfered with the appellant's right to family life in a disproportionate way.

8. I conclude that the decision is unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The appeal is ALLOWED on human rights grounds

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 March 2023

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000574
(HU/07658/2020)

THE IMMIGRATION ACTS

Heard at Field House
on 16 February 2022

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

SHARMILLA MALLA

Appellant

and

ENTRY CLEARANCE OFFICER (SHEFFIELD)

Respondent

Representation:
For the appellant: Mr D. Balroop, instructed by Everest Law Solicitors
For the respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 09 March 2020 to refuse a human rights claim in the context of an application for entry clearance as an adult child of the widow of a former Gurkha.

2. The appellant is a member of a polygamous family. Her father, who died in 2003, had three wives. The appellant and her younger brother are his only children. Their mother is their father's third wife. It is said that the appellant and her father's first wife (the sponsor) applied for entry clearance together. Her father's first wife was granted Indefinite Leave to Enter as the widow of a former Gurkha. The appellant was refused entry clearance on the ground that she did not meet the requirements of the immigration rules or the discretionary policy. She failed to produce sufficient evidence to show that she was financially and emotionally dependent upon her father's first wife. The respondent was not satisfied that there was sufficient evidence to show that her relationship with the sponsor engaged the right to family life under Article 8(1) of the European Convention.

3. First-tier Tribunal Judge J.G. Raymond ('the judge') dismissed the appeal in a decision promulgated on 15 June 2021. The judge noted that it was not argued on behalf of the appellant that she met the requirements of the immigration rules or the relevant policy. The case was put 'squarely under Article 8'. The judge found that it could not necessarily be inferred that the appellant would have been chosen to accompany her father to the UK had the right existed previously given that he had three wives [15].

4. The judge referred to the decision in *SG (child of polygamous marriage) Nepal* [2012] UKUT 00265 (IAC) and noted that paragraph (iii) of the headnote stated that the policies were not intended to give more favourable treatment to children born of polygamous marriage. Although the judge emphasised that element of the headnote, the decision included the full text, which in paragraph (iv) went on to state that the immigration rules did not prevent the admission of 'such children' and would 'probably be contrary to Articles 8 and 14 ECHR if it did'. The Upper Tribunal emphasised that the proportionality assessment must be fact sensitive in each case. Having considered *SG (Nepal)* the judge concluded that 'the historic injustice, so far as it could be considered to have affected the appellant within the article 8 balancing exercise, falls to be assessed in light of this guidance, and more particularly by reference to the third limb.' [16].

5. Thus far both points made by the judge in his decision came within the realm of issues that were relevant to the proportionality assessment carried out with reference to Article 8(2) rather than the assessment of family life ties for the purpose of Article 8(1).

6. The judge went on to say that the 'claimed degree [of] dependency which would be necessary for the family relationship between the appellant and sponsor to engage article 8(2) is hugely problematic.' It is not clear whether the reference to Article 8(2) was a typographical error or whether the judge was continuing to assess the case with reference to the princinple of proportionality. The judge went on:

> "15. It is premised upon the biological mother of the appellant, Pampha Devi, and of her younger brother having abandoned the two children when the appellant was about 3-5 years of age, from when the family has lost contact with her, because she had been ostracized by them because of her betrayal in effect, and since when the appellant and her brother have been brought up by the sponsor as her de facto mother. But the letter of support from the biological mother of the appellant, which gives the same address and mobile number as the appellant, cannot support this scenario.'

7. The First-tier Tribunal went on to conduct a detailed assessment of various bank statements in order to assess what weight could be placed on the sponsor's claim that she received her husband's army pension, but portioned it out to his other two wives. He noted that the amount paid into the sponsor's two accounts only appeared to account for half of the pension. He also noted that the accounts appeared to raise 'a question mark of the extent upon which the appellant could be reliant upon the sponsor' because the statement from Jyoti Bikash Bank Ltd 'suggests that a salary would be coming into the household.' [21]. The statement itself only appears to include two payments into the sponsor's account which are described as 'salary'. The statement covered the period from 22 May 2020 to 24 March 2021. The first payment was 19 February 2021 for 2,876.61 Rupees (OANDA = £17.55). The second was on 18 March 2021 for the amount of 18,311.30 Rupees (OANDA = £112.06). It is unclear whether the sponsor was asked about these payments during the course of the hearing if it was a matter of concern to the judge.

8. Having reviewed the evidence the judge made the following finding:

> "23. I therefore find that the appellant, sponsor, and their witness Mrs Thakura, are not reliable and credible witnesses on the claimed degree of family engagement between the appellant and sponsor, as could enable article 8(2) to be engaged. Albeit the photographs alone of the appellant and her brother, clearly in affectionate company with the sponsor, and going back it must seem to their earliest childhood, some with other members of the extended household that would include one or more of the other two wives, would show that there is a degree of family connection between them.'

9. We note the further reference to Article 8(2), which on repetition seems less likely to be a typographical error. The judge went on to consider further information about the family background and the appellant's current circumstances, noting that she is educated but was presently unemployed. He gave these circumstances 'little weight in assessing the potential for her future independent life given the context which her academic ability suggests she is launched upon.' [25]. The First-tier Tribunal concluded the decision in the following terms:

> '27. … I find, in the light of the profoundly contradictory and inconsistent evidence which seeks to assert that the sponsor alone has been the de facto mother, that Dambar Kumari, as well as the sponsor, and with Pampha Devi, who I do not accept has been off the scene,

> have played a parental role in the life of the appellant, so that it has not been established that between the sponsor and appellant there exists a family connection going beyond something more than normal emotional ties.
>
> 28. Looking at the totality of the evidence I find that the appellant has not established a dependency on her part upon one of her two de facto mothers, the sponsor, as was identified in **Jitendra RAI v ECO (New Delhi) [2017] EWCA Civ 320**, by Lindblom LJ at §36-37, with whom Henderson and Beatson LJJ agreed, as amounting to a threshold of "support" that is "real" or "committed" or "effective", and in that way compatible with the approach established in Kugathas for family life between adults as being "something more exists that normal emotional ties", and without the need for any extraordinary or exceptional feature to be present.
>
> 29. As a result, I find that Article 8 is not engaged on the basis that the personal circumstances of the appellant are rendered exceptional by the historical injustice, and sufficient to outweight the public interest in the maintenance of firm immigration controls. By reference to GEN 3.2.1 I find for the same reasons that it has not be (sic) established that the refusal of entry would result in unjustifiably harsh consequences for the appellant and sponsor, and the rest of their family.'

10. The appellant appealed the First-tier Tribunal decision on the following grounds:

    (i) The judge erred in failing to properly assess Article 8(1) and in relying on an immaterial aspect of *SG (Nepal)*, when the decision itself recognised that Article 8 might still be engaged in cases involving polygamous families. In any event, the decision in *SG (Nepal)* has been overtaken by subsequent decisions in *Gurung v SSHD* [2013] EWCA Civ 8, *Ghising (Gurkhas/BOCs: historic wrong: weight) Nepal* [2013] UKUT 567 (IAC), and *Rai v ECO* [2017] EWCA Civ 32).

    (ii) The judge erred by taking into account irrelevant considerations and failing to take into account relevant considerations. The judge failed to assess the appellant's family life within the proper context of a polygamous household in circumstances where the first wife received the army pension, the rental income for the property benefitted everyone in the family, the appellant was unmarried and unemployed, and that the appellant and the sponsor applied for entry clearance at the same time.

Decision and reasons

11. Despite having cited the correct case law at [28] of the decision, we conclude that there is some force in the argument that the judge failed to engage with relevant issues relating to Article 8(1) sufficiently, took into account irrelevant considerations, and failed to take into account relevant considerations.

12. It was open to the judge to find that it was unlikely that the appellant's biological mother was estranged as claimed. It is astounding that, having instructed legal representatives to assist her to prepare the appeal, the witness statements of the appellant and the sponsor did not deal with the piece of evidence that was produced in support of the original entry clearance application contained in the Home Office bundle. The 'To Whom It May Concern' letter from the appellant's mother, Pampha Devi, stated that she had no objection to her daughter going to live with her step mother, Dhan Kumari Rai, in the UK. The letter was undated but included a contact telephone number. Other evidence indicated that she was likely to live at the address given for the joint family household. This evidence directly contradicted the evidence given by the appellant and the sponsor in their witness statements and should have been addressed.

13. However, this piece of problematic evidence, and the discussion about whether there was evidence to show that the army pension was divided amongst the wives, appeared to distract the judge from other key elements of the assessment. Even if the appellant's biological mother was still living in the joint family household in Nepal, it did not necessarily mean that the appellant did not have a family life with the sponsor that might engage Article 8(1).

14. We agree that the judge failed to consider factors that might have been relevant to the assessment. The case needed to be considered in its proper context. The evidence indicated that the appellant grew up in a polygamous household. The appellant and her brother are said to be the only children of the family. Because their mother was the third wife, this means that they would have grown up in a household with, in effect, three mothers. In a cultural context, is likely that the sponsor would have taken the role of an elder or grandparent. The fact that the first wife was chosen to come to the UK for settlement is hardly surprising if she is the senior wife. Given that she does not have children of her own, it is also unsurprising that the appellant might have been chosen to accompany her to provide support in her advancing years. As an educated person, the appellant might also be afforded opportunities in the UK that could benefit the family as a whole.

15. The judge's speculation about whether the appellant would have been chosen to come to the UK when there were three wives was a matter that related to issues of historic injustice and was therefore within the realm of the proportionality assessment. Other references to Article 8(2) in the wrong context also call into question whether the assessment undertaken by the judge was properly focussed on the relevant issue of the strength of the family ties between the appellant and the sponsor.

16. Financial support might be one of several factors relevant to the assessment of whether there is 'real', 'committed' or 'effective' support for the purpose showing family life between adult relatives, but is not the only factor. The judge appeared to focus on the question of whether the appellant was financially dependent on the sponsor. He accepted that the

appellant was unemployed but seemed to place weight on the fact that she has the potential to find work. These findings also focussed the assessment in the wrong direction because family life might still be established without financial dependency: see *Patel v ECO* [2010] EWCA Civ 17. Even if there was evidence of financial dependency it need not be out of necessity.

17. In *Kugathas v SSHD* [2003] EWCA Civ 31; [2003] INLR 170 the Court of Appeal identified a range of factors that might be relevant including whether the person is a near relative, the nature of the relationship, the age of the appellant, where and with whom she has resided in the past, and the forms of contact she has maintained with other family members. Having found that the appellant's mother was likely to form part of the joint household, and that there was insufficient evidence of financial dependency on the sponsor, the judge's assessment appeared to end there. There were a range of other matters that needed to be considered that are absent from the decision. We conclude that the judge took into account irrelevant matters and failed to take into account relevant matters and that this amounts to an error of law.

18. For the reasons given above we conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside.

19. Mr Balroop urged us to remit to the First-tier so that the appellant did not 'lose the first step' but we do not consider that it is appropriate in this case. The judge made a sustainable finding that the appellant's biological mother was likely to still be living in the joint household. Subject to further evidence that might cast doubt on that finding, it is preserved. In the circumstances, the case is not suitable for remittal. The usual course is for the Upper Tribunal to remake the decision even if it requires further findings to be made. The decision will be remade at a resumed hearing in the Upper Tribunal.

DIRECTIONS

20. **The parties** may file and serve any up to date evidence relied upon at least 14 days before the resumed hearing.

21. **The appellant** shall notify the Upper Tribunal of (i) the details of any witnesses that will be called; (ii) whether they require the assistance of an interpreter; and (iii) if so, in what language within 14 days of the date this decision is sent.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision will be remade at a resumed hearing in the Upper Tribunal

Signed M. Canavan Date 14 March 2022
Upper Tribunal Judge Canavan