



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000843
First-tier Tribunal Nos:
HU/57834/2021
IA/17161/2021

Extempore decision

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

DHAN BAHADUR DURA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr E. Wilford, Counsel, instructed by Everest Law Solicitors Ltd
For the Respondent: Mrs A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 21 March 2024

DECISION AND REASONS

1. By a decision dated 14 December 2022, following a hearing that took place on 13 December 2022, First-tier Tribunal Judge Nightingale (“the judge”) dismissed an appeal brought by the appellant against a decision of the Entry Clearance Officer dated 11 November 2021. The judge heard the appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
2. The appellant now appeals against the decision of the judge with the permission to appeal of First-tier Tribunal Judge I. D. Boyes.

Factual background

3. The appellant is a citizen of Nepal born on 27 December 1981. His father was a member of the Brigade of Gurkhas. He sadly died in 1999. His mother, as the widow of a former Gurkha, was admitted to the United Kingdom in 2013 and remains here. She sponsored an application by the appellant for leave to remain on the basis that the “historical injustice” experienced by Gurkhas and their families was such that it would be disproportionate for him to be excluded from the United Kingdom. The Entry Clearance Officer refused the application.
4. The Entry Clearance Officer’s decision included concerns about whether the appellant and his mother enjoyed family life together for the purposes of Article 8 ECHR. Concerns were raised in the decision relating to the claimed extent of financial support which was said to be provided by the appellant’s mother for the benefit of the appellant. I shall return to that issue.
5. The appellant appealed.
6. Before the judge, the appellant maintained that he enjoyed family life for the purposes of Article 8(1) of the European Convention on Human Rights (“the ECHR”) with his mother. He was emotionally and financially dependent upon her, he claimed. She remitted finances to him to support him in Nepal and he was reliant on her. If he were admitted to the United Kingdom they would live together, such was the relationship of dependence between the two. The appellant’s mother experiences a number of physical health conditions. She lives in a care home to which she is required to contribute a degree of financial support. She attended the hearing before the judge in order to give evidence in support of the appellant’s case but, after a number of short adjournments on the day itself, it was apparent that she was experiencing a number of difficulties in comprehending why she was there and what she was required to speak about. In the event, Mr Wilford (who also appeared below) confirmed that it had been decided that the appellant’s mother would not be called to give evidence. Mr Wilford therefore called the appellant’s brother, Shree Prasad Dura, who is also a citizen of Nepal and had already been admitted to the United Kingdom in order to live with his mother, to give evidence.

Decision of the First-tier Tribunal

7. The judge reached a number of findings which commenced at para. 29. She was concerned that the extent of the financial support which the appellant claimed was provided by his mother was unable to be substantiated by the documentary evidence that had been provided on his behalf. It was not clear, the judge found, how the appellant’s mother was able to provide any financial support for him in light of the fact she was required to make contributions towards the cost of her care. Mr Shree Dura had been asked in evidence, as the judge recorded in her decision, how the mother was able to provide financial support to the appellant in light of the level of contributions that she was required to make to the costs of her own care and the judge recorded that the appellant’s brother was unable to answer that question.
8. At para. 31 the judge said:

“I also have concerns regarding the suggestion that the sponsor is providing financial support to the appellant. The bank statements are

dated only from June 2021 and the first payments are made in July 2021 around the time that this application was made. There is no indication of any earlier transfers and there are no statements from the persons whom, it is said, took money in cash to Nepal. The appellant is an able-bodied young man with several siblings also living in Nepal. That he should rely upon an elderly, vulnerable, widowed mother who, on the documentary evidence submitted, has no money to spare is, I find, not credible. The care home fees and the contribution to be made by the sponsor towards those fees is shown in the appellant's bundle and her Ghurkha widow pension and pension credits are all, save for a very small amount, considered and the contribution leaves her with little more than £20 per week. It is therefore unclear as to how she could remit monies in the sums claimed; she does not have that money. I am therefore left with concerns that the financial documents and the money remittances have been devised purely for the purposes of this application and to support this appeal and are not a genuine reflection of support."

At para. 33 that the judge went on to explain how the appellant's brother had been unable, when cross-examined, to address how his mother was able to make remittances to the appellant in view of her own obligations to contribute to the cost of her care home fees. It was against that background that the judge proceeded to conclude that the appellant and his mother did not experience family life for the purposes of Article 8(1) ECHR. That being so the judge found at para. 34 that it was not necessary to address whether there had been any "historical injustice" such that it would be disproportionate to maintain the applicant's effective exclusion from the United Kingdom. Family life did not exist as a matter of fact and therefore, found the judge, that the question of proportionality simply did not arise.

Issues on appeal to the Upper Tribunal

9. There are four grounds of appeal.
 - (a) First, the judge's findings exceeded the scope of the dispute between the parties.
 - (b) Secondly, the judge unfairly took matters into account against the appellant which had not been ventilated between the parties and in relation to which the appellant had not had the opportunity to give an account under cross-examination or the witness had not had the opportunity to give an account under cross-examination.
 - (c) Thirdly, the judge had failed properly to apply the test in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31.
 - (d) Fourthly, that the judge had artificially elevated the Article 8 threshold.
10. The Entry Clearance Officer submitted a rule 24 notice dated 3 April 2023.

The law

11. The relevant principles applicable to this appeal to the Upper Tribunal may be stated simply.

12. The interests of fairness do require a witness or a party to proceedings to be cross-examined about an issue which would be taken against the witness or the party in circumstances where that issue has not previously been ventilated between the parties.
13. The approach that this Appellate Tribunal should take to findings of fact reached by a first instance judge are such that I must reach a conclusion that either there is no evidence to support a challenged finding of fact or that the trial judge's finding of fact was one that no reasonable judge could have reached see, for example, *Perry v Raleys Solicitors* [2019] UKSC 5 at para. 52 per Lady Hale PSC.

Issue (1): no unfairness in the assessment of financial evidence

14. I turn therefore to ground 1.
15. In my judgment this ground is without merit. The refusal letter stated that there had only been "limited" evidence concerning the financial support which it was claimed that the sponsor provided for the appellant, provided with the application and there was no concession in that document that there was financial support of any sort provided. Mr Wilford submitted that findings reached in the alternative in that letter precluded the judge from reaching her own conclusion about the extent to which the claimed financial support had been provided.
16. At page 128 of the respondent's bundle before the First-tier Tribunal the decision letter stated:

"Even if I accept that you do receive financial assistance from your mother, I am satisfied that you are a fit and capable adult who is able to look after yourself."
17. In my judgment that extract cannot be taken as a concession that the Entry Clearance Officer accepted the level of claimed financial support to be genuinely provided. It must be viewed against the preceding paragraphs earlier in the letter particularly that which features at the bottom of page 127 in the following terms:

"You have submitted limited documentation and have not demonstrated that you are financially and emotionally dependent upon your mother beyond that normally expected between a parent and adult child."
18. The findings reached by the judge were also reached following submissions, which were recorded in the judge's decision at paragraphs 19 and following, concerning the position adopted by the Entry Clearance Officer at the hearing before the First-tier Tribunal. The presenting officer who appeared before the First-tier Tribunal, had expressly submitted that "there was little evidence of money remittance[s] to the appellant", and "it was unlikely that she [the appellant's mother] could afford the care home fees and support relatives back in Nepal". There is therefore no merit to the submission that either the refusal letter, or the scope of the dispute as ventilated between the parties at the hearing, precluded the judge from reaching findings on this issue. I therefore dismiss the appeal under ground 1.

Issue (2): no unfairness on account of the judge's reasoning

19. I turn to ground 2. The issue Mr Wilford focused on in his submissions pertaining to this issue is the apparent non cross-examination of the appellant's brother in relation to a single sentence at para. 9 of his witness statement. The sentence in question said, "Since June 2021, money is being transferred from mother's account in Nepal to Dhan's account in Nepal". In my judgment no unfairness arose from the judge's reasoning in relation to this issue. By way of a preliminary observation on this issue, there is no evidence concerning what took place below. There is no statement from anyone present at the proceedings explaining what happened, there has been no application for a transcript of the hearing, or for the audio recording of the hearing before the judge to be produced.
20. In any event, it is clear from the record of submissions and cross-examination in the decision of the judge that this was a live issue in the proceedings before the First-tier Tribunal, and that Mr Dura had been asked questions about this issue in general terms (whether or not there was cross-examination expressly concerning the single sentence in question from para. 9 of Mr Dura's statement). It was not necessary for the judge either to have heard cross-examination on that particular sentence in light of the contents of the refusal letter and the presenting officer's submissions.
21. Of course, it may have been the case that there was cross-examination on that sentence. It was not necessary for the judge to set out the entirety of the cross-examination and the evidence that she heard in the decision itself. Decisions of the First-tier Tribunal do not have to set out every question and answer under cross-examination. So much was recently confirmed by *Volpi v Volpi* at para. 2(iv):
- "The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him."
22. When one looks through the decision of the judge, it is plain that the extent to which the sponsor was able to provide the claimed level of financial support for the appellant was one which was squarely an issue in the proceedings. Mr Wilford submitted before the judge that the ability of the mother to provide financial support for her son should not be in issue (see para. 22, "*[Mr Wilford] submitted that the availability of the funds to the sponsor should not be in issue in this appeal.*"). The judge disagreed. I respectfully consider that she was entitled to do so. Moreover, the point was clearly a live issue at the hearing. As the judge stated at para. 33, the appellant's brother was unable to explain how his mother was able to make remittances to the appellant in view of her own financial obligations to contribute towards the cost of her care. He therefore must have been asked some questions about the issue. In view of the fact there is no other evidence as to what took place before the judge, in my judgment, it is clear from her decision that this was a live issue that was ventilated between the parties at the hearing.

23. Another facet of this challenge is criticism raised by Mr Wilford of the final sentence at para. 31 of the judge's decision. The judge said that she was "left with concerns" about the financial documents and the remittances and observed that they may have been devised purely for the purposes of the application and to support the appeal. Mr Wilford submitted that the judge had not put the appellant or Mr Dura on notice that she had concerns of that nature.
24. In light of the judge's record of the submissions and cross-examination that took place at the hearing, that was a finding of fact that the judge was entitled to reach. I also note that the judge merely stated that she had "concerns" and did not make an express finding of fact that there had been the level of dishonesty which Mr Wilford submitted that she did. It is important to note that the claimed financial support on the appellant's case purported to characterise a lengthy relationship of dependence and emotional commitment to his mother. Against that background, the judge observed that the bank statements that had been provided in support of the application and the appeal dated only from June 2021. That was the date which shortly followed the divorce the appellant had from his wife whom he married in Nepal in 2009. Mr Dura had been unable to explain how his mother had been able to afford the claimed level of support, in light of her contributions to her care costs. These are factors that the judge was rationally entitled to take into account, and it is not for this Tribunal to criticise them.

Remaining grounds of appeal without merit

25. The remaining grounds of appeal concern the judge's claimed failure properly to apply the test in *Kugathas* and an artificial elevation of the Article 8 threshold. Mr Wilford did not press these submissions with any vigour and simply relied on the written grounds of appeal.
26. In my judgment there is no merit to ground 3. The judge gave herself an extensive and an unchallenged self-direction in relation to the applicable legal principles pertaining to family life between adult relatives, see para. 28 of her decision. The judge was sitting as an expert judge in a specialist tribunal and can be trusted to have done her job properly. I find that that is what she did.
27. Similarly in relation to the final ground of appeal, the alleged artificial elevation of the Article 8 threshold, again I consider this to be a disagreement of fact and weight and that it does not demonstrate that the judge reached a decision that no reasonable judge could have reached. The judge was sitting, having heard live evidence and reached findings of fact pursuant to a multifactorial analysis of the legal principles and the findings of fact that she reached. This Tribunal will not interfere with that analysis unless it was conducted in terms that were not rationally open to the judge to conduct or that it was infected by some other error of law. I find that neither of those criteria are met. The gravamen of Mr Wilford's criticism of her Article 8 finding is that the appellant disagrees with them. He has not demonstrated that the judge reached a decision that no reasonable judge could have reached or that was in some other way vitiated by an error of law.
28. I therefore dismiss this appeal.

Notice of decision

The appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Transcript approved 27 March 2024