IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005482

First-tier Tribunal No:
HU/54440/2023
LH/04585/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 July 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Bijun Gurung
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Moriaty instructed by Everest Law Solicitors
For the Respondent: Mr T Lindsay, Home Officer Presenting Officer

Heard at Field House on 29 January 2024

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of First-tier Tribunal Judge Moffat ("the judge") promulgated on 22nd October 2023 which dismissed the appellant's appeal. The appellant had appealed against a decision of the Entry Clearance Officer, dated 15th February 2023 refusing his application for entry clearance and his human rights claim.

2. The appellant, a citizen of Nepal born on 22nd February 1989, had made an application for entry clearance to join, as the adult dependant, the widow of his (now deceased) father, who was a former Gurkha soldier. The sponsor attended the hearing and gave oral evidence before the First-tier Tribunal.

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3. A former application had been refused and his appeal dismissed before the FtT in 2019.

4. The grounds for permission to appeal asserted the judge materially erred in law because there was

(i) a misapplication of Devaseelan v The Secretary of State for the Home Department [2002] UTIAC 00702 when finding that Article 8(1) was not engaged

(ii) a failure to consider relevant evidence as to disabilities. .

5. Permission to appeal was not granted on ground (ii). It was however considered arguable that the judge focussed excessively on the overseas period of work and failed to consider the facts in 2023. The issue was whether Article 8(1) was engaged at the date of the hearing not whether Article 8(1) had continued unbroken from childhood through to 2023. The test in **Kugathas v SSHD** [2003] EWCA Civ 311 is whether 'something more exists than normal family ties'. The judge had failed to consider the new evidence including the remittances and the fact that the appellant had no work. No findings were made on the new evidence. It was submitted that family life could ebb and flow.

6. Mr Moriaty before me submitted that albeit the date of the hearing before the FtT was relevant, the real focus should have been the family life at the date when the sponsor had made an application to settle. The applicant had, apparently sought work overseas from 2008-2011 and from 2012 to 2014 but advanced that at the time the sponsor left Nepal in 2012 there was family life and the appellant was living with his mother.

7. Mr Moriaty submitted the judge had not addressed the real issue holistically which was whether the appellant had established family life with the sponsor for the purposes of Article 8(1) when the sponsor left Nepal and whether that had endured. There was no reference to the leading authority which is Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320**.**

8. Mr Lindsay at the outset acknowledged that the judge had not engaged adequately with the appellant's evidence and submitted that the matter may be returned to the FtT but with preserved findings. Mr Moriaty submitted that the matter should be returned to the FtT.

9. *Analysis*

10. I note the concession of Mr Lindsay with which I agree. There was, contrary to Devaseelan, a focus on the previous decision to the extent that it obscured proper consideration of the further evidence which included remittances, payments from the sister and that the appellant is said to have no employment.

11. In **Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320** Lindblom LJ said At [39] – [40] it was held in Jitendra Rai:

> *'…the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.*

12. The judge was obliged to pay attention to the concept of "support" which needed to be ""real" or "committed" or "effective" but when focussing on the family debt and the appellant working abroad, failed to reach conclusions in the light of the new evidence, on family life at the relevant times or on current family life. That was a material error of law.

13. The findings were intertwined with previous findings, were overly targeted to the earlier decision and focussed on aspects of the appeal without referencing the new evidence. A holistic assessment should have been undertaken. I therefore preserve no findings and the matter should be remitted to the First-tier Tribunal.

14. Owing to the errors identified above I find that the judge erred in the approach to the assessment of family life.

Notice of Decision

15. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Directions

(i) The matter should be remitted to the First Tier Tribunal Hatton Cross and to be listed for 2 hours not before Judge Moffatt.

(ii) All further evidence including skeleton arguments should be provided at least 14 days prior to the listed hearing.

(iii) The solicitors should advise within 14 days of receiving this notice whether a Nepali interpreter is to be required.

Helen Rimington

Judge of the Upper Tribunal Rimington

Immigration and Asylum Chamber

17th June 2024