IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003066
On appeal from: **HU/60379/2022**

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 3rd of October 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE KHAN

Between

TEJ BAHADUR TAMANG
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shashi Jaisri of Counsel, instructed by Sam Solicitors
For the Respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

Heard at Field House on 25 September 2024

DECISION AND REASONS

Introduction

1. The appellant challenges a decision of Judge of the First-tier Tribunal Moxon ("the Judge") dated 16 May 2024 dismissing his appeal against the respondent's decision on 01 December 2022 to refuse him entry clearance as the dependent relative of a person present and settled in the UK, by reference to paragraph EC-DR 1.1(d) and E-ECDR 2.4 of Appendix FM of the Immigration Rules HC 395 (as amended), or pursuant to Article 8 ECHR outside the Rules on exceptional compassionate grounds.

2. The appellant is a citizen of Nepal. He is the son of a former Gurkha soldier now resident in the UK who has been settled here since September 2011. At the date of application, the appellant was 49 years old and had not lived with his parents for two decades.

3. The hearing took place face to face. We are satisfied that the hearing was completed fairly, with the cooperation of both representatives, and we take the opportunity to thank them both for their helpful submissions.

4. For the reasons set out in this decision, we have concluded that the decision of the First-tier Tribunal is not subject to an error of law. In the alternative, if there is an error of law it was not material to the outcome. The decision of the First-tier Tribunal is upheld.

Background

5. The main basis of the appellant's case on Article 8 ECHR human rights grounds as now advanced, is that he is a dependent relative of the sponsor who is a person present and settled in the UK.

6. The appellant was born on 23 November 1972. He is the son of the sponsor, a retired British Gurka, who was granted indefinite leave to enter on 8 August 2011 and entered the UK in September 2011 with his wife, the appellant's mother, following his discharge from the British Army on 27 August 1971 after exemplary service.

7. The sponsor successfully sponsored the entry clearance of his daughter, in 2015 and his younger son in 2017, who are the appellant's siblings.

8. The appellant applied for entry clearance on 14 July 2022 as an adult dependent relative to settle in the UK. The application was refused on 1 December 2022 as the respondent was not satisfied on the balance of probabilities that the appellant met all the eligibility requirements for settlement as an adult child. The respondent also found there were no exceptional compassionate circumstances present to exercise discretion outside of the Immigration rules. The applicant appealed to the First-tier Tribunal.

First-tier Tribunal

9. The First-tier Tribunal Judge dismissed the appeal principally because he found it more likely than not, that the Appellant lived an independent life, was married, and supported himself from income derived by growing and selling vegetables. He was not satisfied, upon the balance of probabilities, that the appellant and sponsor had a qualifying family life or that the appellant otherwise had a qualifying life in the United Kingdom.

10. The evidence was contained within a 319-bundle prepared by the appellant's representatives. The bundle included two witness statements

of the appellant dated 15 June 2023 and 1 July 2022, respectively. The appellant remains in Sri Lanka and did not give oral evidence. The sponsor's wife also provided a witness statement. The Judge gave limited weight to her statement, because her evidence was not tested in cross-examination as she did not attend the hearing.

11. The only witness who gave oral evidence was the appellant's father, the sponsor. The Judge considered that the sponsor's evidence was lacking in credibility: see [8] and [20]-[30] in her decision. The Judge's findings concentrated on issues concerning the appellant's residence or home address, his income and finally his marital status.

12. In relation to his residence, the appellant gave his home address as being "Bayarban" and said he had lived there for 20 years which would have been since he was approximately 30 years old. In contrast, his younger brother when applying for entry clearance in 2017, had given his address as being in "Dharan", and stated that he has lived there for 37 years which would have been his whole life. The Appellant sought to explain the discrepancy in the addresses by stating that it was the same property but that the Village Development Committee changed the address.

13. The sponsor stated in his witness statement of 16 June 2023 that the family home was in "Dharan", but it was previously called "Bayarban". However, no documentation corroborating a change of address was produced.

14. The sponsor was asked where the appellant lived and he replied "Bayarban". He was asked when the name had changed and he replied, "about four years ago". He was next asked why he had said the appellant lived in "Bayarban", to which he replied his son lived in "Dahran". He was asked why he had said his son lived in "Bayarban" rather than "Dahran" but did not answer [21]. When asked to address the inconsistency he remined silent.

15. The Judge found the inconsistency in the address was material given that both brothers had stated they were living in the same family home with the Sponsor. He found the Sponsor's evidence was evasive in initially refusing to answer some questions and was significantly internally inconsistent.

16. Turning to the appellant's income the witness statements stated that the appellant did not and had never been employed and was financially dependent [24]. That was also the Sponsor's initial evidence. However, the Sponsor disclosed that the appellant made a small income from growing vegetables and so was working "a little bit but not much". He further stated the income was "…enough to sustain him but not enough".

17. The Judge found that even though the delay in seeking the entry clearance of the appellant was said to be due to funds, the Sponsor had in fact been able to fund the arrival of his daughter in 2015, his son in 2017 and had been able to afford to visit Nepal on four occasions. The delay was

therefore more likely than not because the appellant had been living an independent life.

18. Finally, in respect of the appellant's marital status, the Sponsor had stated in his witness statement that the appellant was married which he later said was an error made by the legal representatives. The appellant in his witness statements said that he was unmarried and produced a married status certificate. The Judge rejected the Sponsor's explanation as it was not something as simple, such as a date, that could readily be explained as a slip of a pen, but was an account about someone's circumstances. It was either the reality or the invention the legal representatives which he did not accept [29].

19. Overall, the Judge concluded the name change of the home address was "confusing, inconsistent and not supported by any documentation" [23]. Although he accepted there was evidence of money transfers, these were dated from only a few months prior to the application which he considered were included to give a false impression of financial support [29]. The Judge was not satisfied that the Sponsor sent money to the appellant to meet his essential needs but rather to supplement the income earned by the appellant which indicated nothing above that normally between adult children and parent [31].

20. Finally, the Judge found that it was more likely than not that the appellant lived an independent life in his own home at "Bayarban", was married and supported himself and financed his essential needs by growing and selling vegetables [33]. That is a finding of fact based on the discrepancies in the evidence and lack of credibility in the sponsor's oral evidence.

21. The Judge dismissed the appeal, and the appellant sought permission to appeal to the Upper Tribunal.

Grounds of Appeal

22. There were three grounds of appeal. Permission was not granted on ground 1, which asserted that the First-tier Judge had failed properly to apply relevant jurisprudence relating to the engagement of Article 8 ECHR in Gurkha dependant appeals.

23. Grounds 2 and 3 were that the First-tier Tribunal:

> (ii) failed to have regard to the Appellant's evidence and appeal statement; and
> (iii) failed to consider that the Appellant continues to reside in the family
> home.

Permission to Appeal

24. Permission to appeal to the Upper Tribunal was granted on grounds 2 and 3 as follows:

> "3. Ground 2 is arguable. There is reference in the decision to the sponsor's oral evidence and statement, and the statement of the Sponsor's wife. There is a brief reference at [24] to "Within the witness statements", but no express reference to the Appellant's witness statements or their specific contents. It is arguable that the Judge erred in law by not considering (i) the statement of the Appellant dated 15 June 2023, (at page 88-92 of the 319 page Appellant's consolidated bundle), and (ii) his earlier statement of 11 July 2022 (at pages 300-302). If that is right, it is arguable that infected the overall assessment of the other evidence, and consequently renders the key finding about Article 8 not being engaged unsafe.
>
> 4. Ground 3 is arguable only to the extent that, if Ground 2 is made out, the findings that the Appellant had moved out of the family home are unsafe."

25. There was no Rule 24 Reply on behalf of the respondent, and no challenge to the refusal of permission on ground 1.

26. That is the basis on which this appeal came before the Upper Tribunal.

Legal Framework

27. We remind ourselves of the provisions of Paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules regarding applications by a dependent relative.

28. Further, we remind ourselves that making perverse or irrational findings on a matter or matters that were material to the outcome and/or failing to take into account evidence that is capable of making a material difference are errors of law: R v (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9].

29. We have reminded ourselves of the guidance given by Lord Justice Lewison (with whom Lord Justices Males and Snowden agreed) at [2] of Volpi, who summarised the existing case law on interference with findings of fact. The guidance at 2(iii) to 2(vi) is particularly helpful in this appeal:

> "2. … The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled: …
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> 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.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract. ”

Upper Tribunal hearing

30. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal.

31. The appellant challenges the First-tier Tribunal decision regarding the ECHR Article 8 findings on the basis that they are unsafe because the Judge appeared not to have considered the appellant’s witness statements in relation to family life and the strength of the family ties. Our primary conclusion, reading the First-tier Tribunal decision as a whole, is that the Judge did take account of the witness statements from the appellant and from the sponsor’s wife, but that the conclusion on fact turned on the unsatisfactory oral evidence of his sponsor father.

32. For the appellant, Mr Jaisri acknowledged that the appellant’s witness statements were unsurprising and simply set out what the appellant did from day to day. He reminded us that if the appellant was residing in the family home, then the vegetables would be grown from the sponsor’s property which demonstrated the appellant’s lack of independence.

33. Mr Tufan for the Secretary of State relied on the case law set out above and argued that there was nothing to suggest that the Judge had not read the appellant’s witness statements. The sponsor’s evidence had been undermined in several places. It was open to the Judge to reach the conclusions that he did at [33]. If there were any errors, they were not material. The demanding standard of ‘rationally insupportable’ was not met here.

Conclusions

34. The appellant’s challenge is to the First-tier Judge’s findings of fact regarding his life in Sri Lanka. He contends that his witness statements were overlooked, alternatively that an examination of his witness statements would have made a difference to the Judge’s conclusions. There is no challenge to the First-tier Judge’s characterisation of his mother’s statements as a repetition of the sponsor father’s evidence.

35. The appellant relies on the fact there is only one reference in the First-tier Tribunal decision to “within the witness statements” and no express reference is made to his witness statements or to their specific contents. We remind ourselves that in *Volpi* at [2(iii)] the Court of Appeal said that:

> "iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it."

36. At [24] in the First-tier Tribunal decision, reference is made to the witness statements

> "24. Within witness statements it is detailed that the Appellant does not and has never been employed and that he is financially dependent. That was also the Sponsor's initial account in his oral evidence. However, he then said that the Appellant makes a small income from growing vegetable and so is working "a little bit but not much". He said that this was "enough to sustain him but not enough". He had said in his witness statement that the Appellant has no skills. However, I note that the fact he grows vegetables for an income indicates some agricultural and commercial skills."

37. That paragraph may be infelicitously worded but the reference to 'within witness statements' is sufficient indication that the Judge did read the appellant's witness statements: see, in particular, [11] of his statement of 15 June 2023:

> "11. I am also unemployed the reason being is the reason being is it is difficult to find employment in Nepal as it is not a developed country like the United Kingdom there are limited job opportunities available. In Nepal employers will only offer employment if one has adequate qualification, skills, and experience. Additionally, we also need to know influential people. I do not have adequate qualifications, Skills or experience and I along with my parents do not know anyone influential. Due to this reason, I am unemployed. I am dependent upon my parents both emotionally and financially till date. They have always supported me till date and will continue to do so."

38. The weight to be given to the evidence before the fact-finding Judge is a matter for her, unless it is 'rationally insupportable', which these findings are not.

39. Even if the First-tier Judge had overlooked the appellant's witness statements, we are not satisfied that the error would be material to the outcome of the appeal. The assertions made in the appellant's statements were contradicted by his father's oral evidence and the Judge was entitled to have regard to the discrepancies which arose in the oral evidence of the sponsor at the hearing.

40. The appeal fails and the decision of the First-tier Tribunal is upheld. We dismiss the appellant's appeal.

Notice of Decision

41. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law.
We do not set aside the decision but order that it shall stand.

Akbar Khan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 1 October 2024