Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13485/2019 (R)**

THE IMMIGRATION ACTS

Remote Hearing by Microsoft Teams	**Decision & Reasons Promulgated**
On the 28th January 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

BISWARAJ LIMBU
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Khalid, instructed Direct Access
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

1. The hearing before me on 28th January 2022 took the form of a remote hearing using Microsoft Teams. Neither party objected. Neither the appellant nor his sponsor joined the hearing. I sat at Field House, and I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that no party has been prejudiced; and that, insofar as there

has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it is in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing to avoid delay. I was satisfied that a remote hearing will ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case and the complexity of the issues that arise. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

The Background

2. The appellant is a national of Nepal and was born on 16 November 1989. He is now 32 years old. He is the son of a former Gurkha soldier who sadly passed away on 7th February 2005. On 27th March 2019, the appellant applied alongside his mother, for entry clearance to the UK as the dependent child of his mother, the widow of a former Gurkha soldier. The application made by the appellant's mother was successful and she was granted entry clearance for settlement in the United Kingdom. The appellant's application was refused by the respondent for reasons set out in a decision dated 25th June 2019. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Craft ("Judge Craft") for reasons set out in a decision promulgated on 16th April 2021.

3. The appellant applied for permission to appeal to the Upper Tribunal. The appellant claims that in paragraph [12] of his decision, Judge Craft erroneously found that the appellant had returned to Bangladesh in August 2019 to work under the supervision of Dr Shrestha. Reference is made to the 'Letter of Recommendation' dated 3 March 2020 provided by Dr Mohan Shrestha which confirms that he is based at the 'Hit Polyclinic and Diagnostic Center Pvt Ltd', based in Bhakatpur, Nepal and not in Dhaka, Bangladesh as Judge Craft appears to have understood. Furthermore, the appellant claims his mother was honest in her evidence and had no intention to mislead the Tribunal. Her lack of knowledge and inability to describe her son's medical career, was the result of her lack of

knowledge regarding careers in medicine. The appellant needed to register with the NMC before being able to practice as a doctor and the evidence before the Tribunal demonstrated his commitment to achieve registration. The appellant claims his dependency and family life transcends the normal family ties, and he had only lived apart from his family for some six or seven years to complete extensive studies overseas.

4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Gumsley. He said:

> "3. The appellant asserts that the judge mistakenly found that the appellant had travelled to and worked in Bangladesh following his mother's departure for the United Kingdom. The appellant contends that this arguably makes the judge's assessment as to whether family life exists, flawed.
>
> 4. Although it is noted that the judge indicates that even if there had been family life the respondent's decision would still have been proportionate, I am satisfied that it is at least arguable that the mistaken assumption that the appellant had been able to live and work in another country following his mother's move to the United Kingdom (as opposed to it being accepted he only studied there whilst she lived in Nepal) in the context of this case, had an effect both on the assessment of whether family life existed and any proportionality assessment, which was such so as to amount to a material error of law."

The appeal before me

5. Before me, Mr Khalid submits the appellant's mother was allowed to settle in the UK as the widow of an ex-Gurkha soldier. When his father passed away, the appellant was 15 years old. The appellant and his mother applied for entry clearance when the appellant was 29 years old. If his father had been alive, the appellant would likely have succeeded under Annex K of the Immigration Rules.

6. Mr Khalid accepts the appellant does not qualify for leave to enter under the immigration rules and that the appeal concerns the assessment of an Article 8 claim outside the rules. He acknowledges the appellant previously studied in Bangladesh. He qualified in 2016 but was unable to find work. Mr Khalid submits that when the appellant's mother came to

the UK, the appellant remained in Nepal and continued to receive financial and emotional support from her. He submits the decision of Judge Craft is infected by a material error of law, because he proceeds in the mistaken belief that the appellant returned to Bangladesh after his mother had come to the UK. He submits Judge Craft is likely to have taken the view that the appellant had therefore formed an independent life of his own and that impacts upon the decision that there is no family life. In fact the letter that was before the Tribunal from Dr Shrestha clearly shows that Dr Shrestha is based in Nepal. The letter from Dr Shrestha confirms the appellant had not achieved Nepal Medical Council Registration, but the appellant had done well under his supervision between 10 August 2019 and the date of his letter (3 March 2020). The work being undertaken in Nepal was voluntary and was being undertaken with a view to appellant completing the steps necessary for registration. Mr Khalid submits it is unsurprising that the appellant's mother would be unable to explain the complex stages that one has to go through to qualify as a doctor. He submits the criticism made at paragraph [43] of the decision that the appellant's mother had limited knowledge of what the appellant has been doing in Nepal since her departure and that presents a fragmented and incomplete picture, is unfounded. The appellant had explained in paragraph 2 of his witness statement that in Nepal there are no employment prospects and nepotism, and cronyism are rampant. He explained that it is essential that an individual has not only academic qualifications, but also political and business contacts who can assist in securing employment. His father had no such connections.

7. In reply, Mr Diwnycz relied upon the Rule 24 response filed and served by the respondent. He submits there was little evidence before the First-tier Tribunal regarding what the appellant was doing in Bangladesh or Nepal. Even if the Judge proceeded on the erroneous understanding that the appellant was in Bangladesh, Mr Diwnycz submits that is immaterial, because at paragraph [45] of his decision, Judge Craft state that even if he had found that the appellant has established a family life with the appropriate degree of dependence at the time of his application and the

dependence had continued, he would have found that the decision to refuse entry clearance was proportionate.

Discussion

8. I accept Judge Craft proceeds upon a mistake as to fact at paragraph [42] of his decision, when he states that the appellant has *"... been able to return to Bangladesh since then for at least six months to extend his medical experience since the refusal of his application to enter the UK"*. At paragraph [43] of his decision, Judge Craft refers to the limited knowledge of the appellant's mother as to *"... what he has been doing in Nepal since her departure ...".* That indicates Judge Craft understood the appellant had remained in Nepal following his mother's departure, but at the end of that paragraph Judge Craft concludes with the sentence; "*He has also been able to travel to Bangladesh and pursue demanding voluntary work on his own account in that country since his mother left Nepal.".* From the contradictory remarks made by the Judge, I cannot be satisfied that Judge Craft properly understood the appellant had remained in Nepal and undertook voluntary work with Dr Shrestha following the departure of his mother. I am quite satisfied Judge Craft proceeds upon a mistake as to fact because when one looks at the letter in support that was provided by Dr Shrestha, it is plain that Dr Shrestha is in Nepal, not Bangladesh.

9. The issue for me is whether that mistake is to fact is material to the outcome of the appeal. The judge concluded at paragraph [44] of the decision that following careful scrutiny of all the evidence and documentation placed before him, taking into account the resilience and independence which the appellant required to pursue his medical studies and the surprising paucity of information as to his current circumstances and in particular, his inexplicable failure to pursue his medical career in Nepal, that his relationship with his mother is not one that is over and above the normal emotional ties and dependence that will normally exist between a mother and her son.

10. In his submissions before me, Mr Khalid submits that had the judge properly appreciated that the appellant had not travelled from Nepal to Bangladesh to undertake voluntary work with Dr Shrestha, Judge Craft may have reached a different conclusion. He says that the judge's assessment of whether there is a family life between the appellant and his mother is vitiated by the mistake as to fact.

11. I have given the matter some careful consideration and in the end, I cannot be satisfied that the judge would have reached the same conclusion had he not made the mistake as to fact. Dependency, in the *Kugathas* sense, is a question of fact. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed. The love and affection between an adult child and parent do not of itself justify a finding of a family life. There has to be something more. Each case is fact sensitive, and the existence of family life after an individual has achieved his or her majority is a question of fact without any presumption, either positive or negative, for the purposes of Article 8. In paragraphs [42] and [43] of his decision, Judge Craft was considering the circumstances the appellant found himself in, and the ongoing ties between the appellant and his mother. In both of those paragraphs, Judge Craft refers to the appellant having been able to return to Bangladesh following his mother's departure. In my judgement, as Mr Khalid correctly submits on behalf of the appellant, that gives the strong the impression that in considering whether there is anything over and above the normal emotional ties and dependence that will normally exist between a mother and her son, the Judge was influenced by his understanding that the appellant has been able to form some sort of independent life of his own following the departure of his mother, and that infects his understanding that there has been far less ongoing contact between the appellant and his mother than had been described to the Tribunal.

12. Although Judge Craft states at paragraph [45] that even if he had found that the appellant had established a family life with the appropriate

degree of dependence with his mother, he would have found that the refusal of entry clearance is proportionate, Judge Craft deals with 'proportionality' in a couple of very short sentences and in my judgement fails to give adequate reasons for his conclusion. In any event, at paragraph [45], Judge Craft states *"Such a decision takes account of the appellant's circumstances already described above..."*. As I have already found, the decision is vitiated by Judge Craft's understanding of the *"appellant's circumstances"*, and I cannot be satisfied that Judge Craft would have reached the same conclusion, but for the mistake as to fact.

13. I am in all the circumstances satisfied that the decision is vitiated by a material error of law and must be set aside.

14. I must then consider whether to remit the case to the F*t*T, or to re-make the decision in the Upper Tribunal. Both Mr Khalid and Mr Diwnycz submit that in light of the error found, and the fact sensitive assessment that will be required afresh, the appeal should be remitted to the First-tier Tribunal for hearing *de novo* with no findings preserved. Having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, the nature and extent of any judicial fact-finding necessary will be extensive. No findings can be preserved. I am satisfied that the appropriate course is for the appeal to be remitted to the FtT for hearing afresh. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

NOTICE OF DECISION

15. The decision of First-tier Tribunal Judge Craft promulgated on 16th April 2021 is set aside.

16. The appeal is remitted to the First-tier Tribunal for rehearing, with no findings preserved.

Signed **V. Mandalia** Date; 18th February 2022

Upper Tribunal Judge Mandalia