IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006543

First-tier Tribunal Nos: HU/51192/2022
IA/01884/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

BISHWAS GURUNG
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. R. Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms. S. Cunha, Senior Home Office Presenting Officer

Heard at Field House on 4 July 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Moon (the "Judge"), promulgated on 8 December 2022, in which she refused the Appellant's appeal against the Respondent's decision to refuse entry clearance to the United Kingdom. The Appellant applied as the adult dependent child of his mother, the widow of an ex-Ghurkha soldier. The Appellant appealed against the decision on Article 8 grounds.

2. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 19 January 2023 as follows:

> "2. The Judge has arguably failed to give adequate reasons for his finding that the Appellant's financial circumstances are not as claimed and that it is likely that he is working based on entries in the Bank statements. In particular the Judge has arguably failed to give sufficient reasons as to why in his view the sponsor

> could not afford financial payments to the Appellant as she is in receipt of State benefits.
>
> 3. The Judge has also arguably failed to give sufficient reasons for rejecting the evidence of the sponsor that she discusses happiness and sadness with the Appellant as amounting to emotional support.
>
> 4. The Judge has additionally arguably failed to give adequate reasons for rejecting that there is protected family life in this case based on the evidence before him." _

3. I heard brief submissions from Mr. Jesurum. Ms. Cunha then stated that the Respondent accepted that there had been a procedural error insofar as the Judge had not given the Sponsor the opportunity to address the issue of the Remi IME Ltd deposits in the bank statement. She submitted that where an error of procedural impropriety was found, the appeal would normally need to be remitted to the First-tier Tribunal, but left it in my hands.

4. I stated that I agreed that the decision involved the making of an error of law in this respect, but also that the other grounds were made out. Having heard brief submissions from Mr. Jesurum I stated that I considered it to be in the interests of justice for me to remake the decision in this Tribunal.

5. I set aside the decision of First-tier Tribunal. I heard brief submissions on the remaking. I reserved my decision.

Error of Law

6. Ground 1 asserts that there was procedural unfairness, and is the ground which Ms. Cunha conceded was made out. At [28] when setting out the evidence of finances the Judge states:

> "I had noticed that there were also credits into the account with the reference Remi IME Ltd. I asked the sponsor if she knew what these credits related to but she did not".

7. At [40] she finds:

> "I am not satisfied that the appellant does not work because there are regular credits from a company being paid into a bank account that he holds in his sole name which could not be explained".

8. In the grounds of appeal at [7] it was submitted that this point was not put to the Sponsor at the hearing. Further, it was submitted that this issue was not taken by the Respondent in her decision. The Respondent accepted the financial support and made no objection to transfers into the Appellant's account from IME Ltd.

9. At [9] of the grounds it states:

> "Had the judge invited submissions on the point, it would have been trivial to confirm (in court, without need for an adjournment) that 'IME Ltd' is a reference to IME (UK) Limited, a money transfer company."

10. I find that the Judge made a finding that the Appellant was likely working on the basis of observing that there were credits from a company being paid into his

bank account. She asked the Sponsor what these were but when the Sponsor said that she did not know, she did not put to the Sponsor that these were payments for employment. I find that, had she raised it at the hearing, the Appellant's representative could easily have shown the Judge that this was a money transfer company. I find that this is a procedural error of law.

11. The grounds assert that the Judge also failed to put to the Sponsor her supposed inability to afford remittances based on the fact that she is dependent on state benefits and her pension in Nepal. At [41] she states:

> "Whilst I accept that the sponsor has sent the appellant money recently, I do not accept that she has done for a prolonged period. That is because she is dependant on state benefits (and her pension in Nepal) and it is difficult to see how she can afford to make regular payments, in addition, there is no evidence of payments having been made before October 2021. No documents have been provided confirming the appellant's access to the income from the widow's pension from 2013."

12. No question of affordability was raised by the Respondent in her decision. The Respondent accepted that financial support was sent by the Sponsor to the Appellant in Nepal. The Judge did not raise any concerns over affordability with the Sponsor or ask her any further questions on this issue. I find that this ground indicates a further procedural impropriety.

13. In relation to emotional support the Judge states at [43] and [44]:

> "In relation to emotional support, I do not agree with the suggestion that there can be no better example of emotional support than the description provided by the sponsor of her discussing happiness and sadness with her son. I consider this description to be deliberately vague. If there was emotional support which was real, or effective or committed, in my assessment, the sponsor would have been able to provide an example of something that made her or the appellant happy or sad which they had discussed. Frequent conversations are not more than would normally be expected between adult relatives.
>
> Although not advanced at the hearing, I am mindful that support can be exercised both ways. I accept that the sponsor is not in good health and that when she went to Nepal her sons looked after her. She would benefit from her son being present in the United Kingdom to help her through her illness. However, the sponsor has sought treatment for her condition and she was accompanied to the appointment by a family friend, she is not therefore totally isolated in this country and I find, not dependant on the appellant for support".

14. It was submitted in the grounds that the evidence of the Sponsor was not challenged, but that the Judge had held the absence of a reason for the Appellant's lack of friends against him despite seeking no explanation from the Sponsor. At [34] the Judge had set out the Sponsor's oral evidence that the Appellant had never been in a relationship and had never had a friend.

15. Ground 2 is related to the findings on emotional support. It is submitted that there was a failure to give adequate reasons for rejecting this evidence of the Sponsor in relation to emotional support. At [45] the Judge states:

> "I have rejected the evidence that the appellant's life is empty and I have gone further and found that his circumstances are not as they have been presented. The appellant is aged 48, he lives in a city with his brother and there is regular activity demonstrated in his bank statements. I accept he communicates with his mother

> but I am not satisfied that this, together with money that the sponsor pays to him go beyond ties that would normally be expected between adult relatives".

16. Nowhere in this paragraph, or in the earlier paragraphs considering emotional support, [43] and [44], does the Judge give a reason for not accepting the evidence of the Sponsor. I find that this is an error of law.

17. Ground 3 also relates to [45] and submits that the Judge erred in failing to apply the law correctly when finding that there is no family life. The case of Rai [2017] EWCA 320 held that, when considering whether family life exists, "the concept to which the decision-maker will generally need to pay attention is 'support' – which means, as Sedley L.J. put it in *Kugathas*, 'support' which is 'real' or 'committed' or 'effective'". The Court of Appeal clarified that there was no need to show any exceptional or compelling circumstances above and beyond this dependence. The Judge has not considered this test at all at [45]. I find that this is an error of law.

18. Given that these errors relate to the core issue before the Judge, I find that they are material.

Re-making

19. In his brief submissions Mr. Jesurum relied on his skeleton argument prepared for the First-tier Tribunal dated 24 September 2022, and the supplementary bundle which contains evidence of continued financial support, and evidence that the Sponsor has recently undergone surgery for breast cancer. He submitted that this pointed to the emotional support that she would be receiving from the Appellant.

20. Ms. Cunha relied on the submissions in the refusal letter. She accepted that, were I to find that family life existed, the case law indicated that the appeal should be allowed. She made no objection to the admission of the further evidence referred to at [19].

21. The issue before me is whether there is family life between the Appellant and Sponsor for the purposes of Article 8. I have taken into account the case of Rai, as set out at [16] above.

22. In relation to financial support, the Respondent accepted that the Sponsor provided financial support to the Appellant in Nepal. In her decision letter she accepted that the Appellant received financial assistance from the Sponsor, but she was satisfied that he was a fit and capable adult who was able to look after himself, and that he had a number of adult siblings residing in Nepal to whom he could turn for assistance if so required. She found that he had provided limited details as to his financial commitments in Nepal.

23. I find that, contrary to the finding of the Judge that the Sponsor had not been sending money to the Appellant for a prolonged period, there is evidence of payments being made since 1 November 2020. I have considered the evidence of the financial support provided by the Sponsor. As set out above, the entries in the Appellant's bank statement referring to IME Ltd are money transfers from the Sponsor. As accepted by the Respondent, I find that the Sponsor financially supports the Appellant. I find that the bank statements show that she has been supporting him since November 2020.

24. The Appellant's evidence is that he does not work. He tried but could not find a job because he has only got basic education. This evidence was not challenged. Even in her decision the Respondent did not suggest that the Appellant was working, but that he should be able to support himself. The Sponsor gave evidence at the hearing in the First-tier Tribunal that the Appellant did not work but that he did miscellaneous tasks meaning that he looked after her when she was in Nepal and assisted doing household tasks. The Sponsor was asked to confirm whether the Appellant had ever worked and her evidence was that he had not. The reason why the Judge found it likely that he was working was due to the regular credits into his account, but it has been established that these are from a money transfer company.

25. I find on the balance of probabilities that the Appellant does not work. I find that the only income that he receives is from the Sponsor. I find that the financial support that she provides is real, effective and committed and has been provided since at least late 2020.

26. In relation to emotional support, the oral evidence at the First-tier Tribunal hearing was that the Sponsor spoke to the Appellant two or three times a week using video calls. The Judge referred to the fact that there was evidence of video calls between the Appellant and Sponsor dating back to 2019. The Sponsor's evidence was that, prior to this, she had used telephone calling cards but did not realise the importance of keeping them. The issue taken by the Judge was that the Sponsor was not able to provide information about the Appellant's life, although it is recorded that she said he did not do much apart from staying at home, buying necessities and eating food, which is what the Appellant had also said in his statement when setting out his daily routine. At [34] it is recorded that the Sponsor said that they talked about their happiness and sadness together.

27. It was submitted by Mr. Jesurum that this was evidence of emotional support, and in terms of emotional support given to the Sponsor by the Appellant, she was illiterate, living alone in the United Kingdom without any family members, having recently undergone breast cancer surgery. He submitted that there would clearly be emotional support for the Sponsor from the Appellant in these circumstances.

28. I find that the Appellant and Sponsor speak to each other two or three times a week and have been doing so since the Sponsor came to the United Kingdom. They discuss things which make them happy and sad. I find that this likely includes the fact they have been apart for so long. I find that the Appellant provides emotional support to the Sponsor, especially now taking into account her circumstances and her ill health. I find that there is emotional support between the Appellant and Sponsor which is real, committed and effective.

29. As set out in Rai, there is no requirement for any exceptional or compelling circumstances over and above this real, committed or effective support. I therefore find that there is family life between the Appellant and Sponsor for the purposes of Article 8(1).

30. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being regular a immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all

citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

31. Following the case of Ghising [2013] UKUT 00567 (IAC), having found that there is family life, I find that the decision would be a disproportionate breach of the Appellant's and Sponsor's rights under Article 8, as was accepted by Ms. Cunha. Headnote (4) states:

> "*Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.*"

32. I have taken into account the factors set out in section 117B of the 2002 Act, insofar as they are relevant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I find that there are no other factors in the Appellant's case, such as criminality, on which the Respondent relies. In relation to sections 117B(2) and 117B(3), the weight to be given to the English-language skills and financial independence of the Appellant does not outweigh the weight to be given to the effect of the historic injustice. Sections 117B(4) to (6) are not relevant.

33. The Sponsor said in her witness statement that her husband had always wanted to settle in the United Kingdom but the policy was not available when he was discharged from the army. Had the policy had been available, they would have moved to the United Kingdom and raised their family in the United Kingdom. It has not been suggested by the Respondent that the Appellant and Sponsor would not have settled in the United Kingdom had the Appellant's father been granted settlement, which was denied to him due to the historic injustice. I find that, had the Sponsor's husband been granted settlement when he was discharged, the Appellant would already be settled in the United Kingdom.

34. With reference to the historic wrong and the case of Ghising, I find that the Appellant has shown on the balance of probabilities that the decision is a breach of his rights, and those of the Sponsor, to a family life under Article 8.

Decision

35. The decision of the First-tier Tribunal involves the making of material errors of law. I set the decision aside.

36. I remake the decision, allowing the Appellant's appeal on Article 8 grounds.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 July 2023