



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004172

First-tier Tribunal No: HU/52314/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17th of November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

MR NARAYAN GURUNG
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE

Respondent

Representation:

For the Appellant: Mr M West (Counsel instructed by Everest law solicitors)
For the Respondent: Ms S Mckenzie (Senior Home office presenting officer)

Heard at Field House on 1 November 2023

DECISION AND REASONS

1. This is an appeal against a decision issued on 15 April 2022 by First -tier Tribunal Judge S Khan (“the Judge”) which dismissed the appellant’s appeal as a dependent relative refused by the respondent on human rights grounds.
2. The appellant, a citizen of Nepal, claimed to be a dependent relative of his mother who was married to a former Gurkha soldier and who died on 29 April 2004. She had been granted settlement on 1 June 2011 and her younger son granted a visa in 2018, but he no longer lives with his mother and is working. It was accepted that she provided financial support for the appellant. She used to work but is now in receipt of pension credit and housing benefit.
3. The hearing proceeded in the absence of the respondent and the Judge relied on the Surendran Guidelines as confirmed in MNM v SSHD [2000] UKIAT 00005.
4. The Judge recorded that the respondent accepted that the sponsor sends money to the appellant [22]. The Judge considered evidence as to the appellant’s address in Nepal which appeared to be inconsistent. The sponsor’s oral evidence was that he lived in Kaski in a rented house. The visa application stated that the

appellant lived at an address in Tanahun owned by his mother [25]. The Judge raised this apparent discrepancy with counsel during submissions at the end of the hearing. She recorded that Counsel submitted that the respondent had not taken any point on this issue and ought not to be considered by the Tribunal. The Judge disagreed that the point could not be ignored. The Judge at [26] concluded that the evidence relied on by the appellant, his brother and mother as to the appellant's circumstances in Nepal was not credible. She found that the sponsor used to work but was now in receipt of state benefits. She found that it was not credible that the appellant was dependent on his mother who was ill and in receipt of benefits, whilst his brother was in the UK and earning a reasonable wage [27]. The Judge found that there was contact between the appellant and his mother but that this was normal emotional family ties.

5. In grounds of appeal it was argued that the appellant gave evidence that he is officially resident in Tanahun district and was not able to get documents from Kaski district where he now lives (and was living with his mother at the time of the application) because he never officially transferred his residence.
6. Ground 1 - The Judge breached the *Surendran* guidelines (MNM) as follows:
 - A) the judge should not adopt an inquisitorial role (guideline 6)
 - B) It is not the function of the Judge to expand on the refusal letter (guideline 6)
 - C) where matters emerge from new evidence they should be put to the witness (guideline 5)
7. The Judge raised the matter with counsel. Her failure to raise the matter with the witnesses deprived him of the opportunity to respond - the appellant and his mother could have been asked to address the point. Further the Judge raised a point about the source of funds which was not raised with the witnesses.
8. Ground 2- failure to give adequate reasons- the Judge failed to engage with the explanation given by the appellant about his official and actual addresses and concluded that he lacked credibility. The issue as to the source of funds was not raised with the witness and goes behind the concession that finance was paid to the appellant by the sponsor.
9. Ground 3 - misapplication of family life threshold- the Judge found that the life as between the appellant and his mother was part of "normal emotional ties"[28]. If there is support then it goes beyond the normal emotional ties. The Judge ought to have focused on whether there was support ? The Judge failed to take into account the evidence that constituted emotional support.
10. Permission to appeal was granted by FTJ Bibi on 26 September 2023. She considered that the Judge's failure to provide adequate reasons as to why she proceeds from the existence of two address to a conclusion of untruthfulness, elevating possibility to probability without sufficient reasoning, was an arguable error of law.
11. At the hearing before me both representatives made submissions which I have recorded and taken into consideration. Mr West emphasised that the Judge had taken issue with points not raised by the respondent who was not represented at the hearing and that the correct approach would have been to raise the points with the witnesses rather than with counsel at submissions. She had in effect stepped into the arena and taken the case of the respondent beyond that which was stated. The Judge failed to consider the explanation provided in the evidence that was in fact before her and which showed no discrepancy. Ms McKenzie submitted that the issue arose during the hearing and which would not therefore

have formed part of the respondent's case. The Judge applied the guidelines correctly.

Discussion and decision

12. The Judge cited the Surendran guidelines in her decision and reasons and further cited MNM at [17]. I repeat the relevant findings. The Judge took the decision letter as setting out the respondent's case which she particularised at [14]. She found that the respondent accepted that the sponsor sends money to the appellant but did not find that this was dependency. She found that the appellant, his brother and mother lack credibility as to the appellant's circumstances in Nepal - a finding which appeared to be grounded in her assessment of the evidence as to the discrepancy in the addresses [26]. She went on to find that his brother was in work and earning a reasonable wage whereas the sponsor was in receipt of benefits and has health problems. She concluded that there was no real committed or effective support by the sponsor for the appellant [27]. The emotional ties were part of the normal family life [28].
13. In considering the decision and reasons and taken into account the grounds and submissions made, I am just persuaded that the Judge's consideration of the evidence amounted to a breach of the Surendran guidelines. She raised the issue of the addresses with counsel but this was during submissions at which point the witnesses had already given their evidence. It may be that at this juncture the Judge could have recalled the witnesses so that her concerns as to the addresses and the source of funds could have been put to them, but this did not happen. In any event Counsel responded that the respondent had not raised such points in the refusal letter, which is correct. Overall, I am satisfied that the Judge failed properly to give adequate reasons for finding that the witnesses were lacking in credibility given that there was an explanation from the appellant in his witness statement and other consistent evidence adduced. The Judge did not explain why she did not find the explanation to be credible. Further I am satisfied that given that the respondent had accepted that the sponsor sent funds to the appellant and the main issue was dependency, she failed to direct any questions on the issue of the source of funds and speculated that it was the appellant's brother who provided the funds. The issue of support is critical to dependency and the Judge found normal emotional ties to exist, but arguably her findings in respect of the addresses and the source of funds were flawed by inadequacy of reasons. The appellant may well conclude that he was treated unfairly in the circumstances. Even if the point as to the address arose during the hearing, the Judge fairly ought to have raised it at that time rather than with counsel during his submissions and given the appellant an opportunity to deal with the concerns. The Judge's failure contravenes the *Surendran* guidelines and amounts to a material error in law. I conclude that grounds 1 and 3 are made out.

Notice of Decision

There is a material error of law in the decision and reasons which is set aside. The matter is remitted to the First -tier Tribunal for hearing do novo (except Judge S Khan). No findings are preserved.

G A Black

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 November 2023