



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2023-004562**  
**First-tier Tribunal No:**  
**HU/60077/2022**  
**LH/01113/2023**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 07 December 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

**Between**

**KHUSBARI KHALING RAI SHERPA**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr M. West, Counsel instructed by Everest Law Solicitors  
For the Respondent: Mr M. Parvar, Senior Home Office Presenting Officer

**Heard at Field House on 22 November 2023**

**DECISION AND REASONS**

**Introduction**

1. The Appellant appeals against the decision of First-tier Tribunal Judge CAS O'Garro (and hereafter "the Judge") who, in a decision promulgated on 2 September 2023, dismissed the Appellant's appeal against the Respondent's decision to refuse her application for entry clearance as an Adult Dependent Relative under Article 8 ECHR.
2. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 11 October 2023; there were no limitations to the grounds which could be argued.

### **Relevant background**

3. In very brief summary: the Appellant is a citizen of Nepal who applied for entry clearance as the adult child of her father (a former Gurkha soldier, discharged from the British army on 26 March 1971) who unfortunately passed away on 24 March 2018. The Appellant sought to join her mother, who was granted Indefinite Leave to Enter as the spouse of a former Gurkha soldier in 2010.
4. The Respondent refused the application on 8 November 2022 and the Appellant appealed to the First-tier Tribunal.

### **The decision of the Judge**

5. As there is much common ground between the parties in respect of the error of law proceedings, I need not say very much about the decision of the Judge other than to highlight that she noted that two of the Appellant's siblings had been granted entry clearance to the UK after successful appeals in 2017, (para. 9).
6. The Judge also recorded the core case that the Appellant is dependent upon her mother in the UK for financial and emotional support, (para. 12).
7. It is also recorded that the Appellant had previously been married but had been subject to an abusive relationship and kicked out of her spousal home in 2015. This led to the Appellant returning to her mother's home in Nepal and later divorcing her husband in April 2019, (para. 8).
8. In the latter part of the decision, the Judge expressed concern about the reliability of the evidence in respect of both the claim that the Appellant is financially dependent upon her mother and the claim of emotional dependency.
9. The Judge ultimately concluded, at para. 48, that whilst she accepted that the Appellant and Sponsor are concerned about each other that this did not constitute Article 8(1) family life. In respect of financial dependency, at para. 45, the Judge indicated that she had seen some money receipts from the Sponsor to the Appellant but criticised the Appellant for not providing her bank statements in order to allow the Tribunal to assess the Appellant's financial circumstances and her need for the money being sent from the UK. The Judge rejected the claim to financial dependency and said, at the end of the same paragraph, that "*it cannot be assumed without more, that the money the sponsor sends can be viewed as "real, committed and effective" support*".

### **The error of law hearing**

10. At the beginning of the error of law hearing, Mr Parvar indicated to the Tribunal that he was not opposing grounds 1 and 2 of the Appellant's challenge to the Judge's decision.

11. Mr Parvar went further and accepted the consequence of his concession was that the Judge had materially erred in law such as to require the entirety of the decision to be set aside.
12. On the basis that the Respondent has conceded that the Judge materially erred I do not need to elaborate on this in any great detail.
13. It is however relevant to record that the Respondent accepted the Appellant's assertion that the Judge misapplied binding authority by applying a conjunctive rather than disjunctive version of the family life test as explained in Rai (Jitendra) v Entry Clearance Officer [2017] EWCA Civ 320, ("Rai").
14. For my own part, it is clear that despite properly directing herself to the Court of Appeal's decision in Rai at para. 35 of her decision, the Judge nonetheless did misstate the legal test for the assessment of family life between adults when assessing the claims of emotional dependency at para. 48.
15. Additionally, Mr Parvar confirmed that the Sponsor gave oral evidence in the hearing that the Appellant does not in fact have a bank account, as is also corroborated by the record from Counsel's note at para. 27 of the grounds of appeal.
16. I therefore further find that the Judge committed a material mistake of fact at para. 45 of her decision when assessing the claim of financial dependency.

### **Notice of Decision**

17. I overall find that the Judge did materially law such as to require the entirety of her decision to be set aside.

### **Remittal to the First-tier Tribunal**

18. In light of the agreement between the two representatives, I find that the remaking of the decision in this appeal should be carried out in the First-tier Tribunal on the basis that there will be a need for full fact-finding.

### **DIRECTIONS**

- (1)The remaking of the appeal is to be heard by the First-tier Tribunal other than by Judge CAS O'Garro.
- (2)The Tribunal is to provide a Nepalese interpreter.
- (3)The appeal hearing is to be listed for two hours.

***I P Jarvis***

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

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29 November 2023