



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003762
First-tier Tribunal No:
HU/54092/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

CHHETRA BAHADUR THAPA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford of Counsel instructed by Everest Law Solicitors
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 9 April 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal born on 30 June 1978. On 12 January 2022 the appellant made an application to settle in the UK, to join his widowed mother. That application was refused by the respondent, on 24 June 2022, on the grounds that the relationship between the appellant and his mother did not engage Article 8(1) European Court of Human Rights (ECHR) as family life. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Zahed ("the judge") on 10 April 2023, following a hearing on 3 March 2023.
2. Permission to appeal was granted by Upper Tribunal Judge Owens on 8 March 2024, on the basis that it was arguable that there was procedural unfairness because the judge made findings in relation to the main witness without the adverse matters being put to him. It was also arguable that the judge failed to take into account material evidence in respect of financial support and the sponsor's health, or alternatively failed to give adequate reasons for rejecting that evidence.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether such error was material and thus whether the decision should be set aside.

Submissions – Error of Law

4. In the grounds of appeal Mr Wilford argued in short summary for the appellant as follows:
5. The judge found at paragraph [35] of the decision, that family life did not exist and that the evidence submitted had not been truthful and “has been manipulated so that the appellant may come and live in the UK”. The judge recorded that the appellant’s mother came to live in the UK in 2006 at [31] whereas, including as reflected in the refusal of entry clearance, this was in fact 2009. Additionally, it was submitted that the judge incorrectly recorded the name of both the Presenting Officer and Counsel, at the hearing on 3 March 2023.
6. The submissions referenced the sponsor, the appellant’s mother’s, extremely poor mental health including relying on a letter from Dr Kamalashy dated 13 December 2021 at page 87 in the appellant’s bundle. It was submitted that the sponsor has psychosis with symptoms of persecutory ideation and is under the care of the Community Mental Health Team. The submissions relied on the ‘capacity statement’ dated 27 October 2021 which indicated that the sponsor was unable to weigh up information in a coherent or rational way and that she therefore lacked capacity to make decisions about her treatment with medication being prescribed in her best interests under the Mental Capacity Act 2005 (Community Mental Health Team for Older Adults, Memorial Hospital, Shooters Hill, London SE14 3RG) (pages 81 to 84 of the appellant’s bundle).
7. The grounds of appeal referred to the evidence before the First-tier Tribunal that the sponsor, the appellant’s mother, receives support from a Mr Kaman Singh Thapa, with Mr Singh Thapa being a veteran of the Brigade of Gurkhas and speaking some English (although he was assisted by an interpreter at the hearing before the First-tier Tribunal). Although it was acknowledged in the grounds of appeal that Mr Singh Thapa is referred to as the sponsor’s “son-in-law” at several points in the correspondence including within some of the medical evidence relating to the sponsor Mrs Thapa, the witness statement from Mr Singh Thapa stated as follows (at pages 9 and 10 of the appellant’s bundle):
 - (i) “She calls me son-in-law as we are from the same village in Nepal though we are not related” (paragraph 1 of Mr Singh Thapa’s witness statement);
 - (ii) “I have been nominated as her carer in the Oxleas medical documents but in fact she lives in sheltered accommodation and is looked after by the Oxleas nurses” (paragraph 2);
 - (iii) “Recent times have seen me receive multiple reports from the Oxleas nurses and building manager/supervisor that Mrs Thapa has not let them in for her regular checkups resulting from paranoia and a fear of unknown others to her home” (paragraph 9);
 - (iv) “I am limited in the assistance I can provide to her as I have a disability myself” (paragraph 12).

8. The grounds of appeal asserted that it was never the respondent's case that Mr Kaman Singh Thapa was in fact the sponsor's son-in-law. At no point was it put to Mr Singh Thapa by either the respondent or the judge that he was in fact related to Mrs Thapa as her son-in-law and that he was not being truthful in his evidence. Additionally, the grounds of appeal note that the respondent at no time asserted that Mr Kaman Singh Thapa and his wife were responsible for the sponsor's care (rather than the nurses in the sponsor's sheltered Oxleas accommodation). Neither was it put to Mr Singh Thapa that he was not telling the truth about the nurses in the sheltered accommodation having responsibility for the sponsor's care. The grounds of appeal also submitted that this matter was not raised by the judge at the First-tier Tribunal hearing.
9. However the grounds noted, that at paragraph [29] of the judge's decision and reasons, the judge found as follows:

"29. I find that on a balance of probabilities that I am not willing to accept the evidence by the sponsor and Mr Thapa who I find is his (sic) real son-in-law who has taken the responsibility of looking after the sponsor. I find that the medical letters make it clear that both Mr Thapa and his wife are involved in the well fare of the appellant".
10. This followed the judge's findings at [25], [26], [27] and [28] in relation to the care of the sponsor including referencing the sponsor's eldest daughter Nanda.
11. Mr Wilford relied on his own note of the proceedings before the First-tier Tribunal and reference was made to **BW (witness statements by advocates) [2014] UKUT 564**, which requires that the respondent's Rule 24 response must engage specifically with evidence of this kind. Unfortunately there was no response from the respondent until the morning of the hearing. Ms McKenzie indicate before me, that there had been difficulties with the provision of the Rule 24 response but confirmed that there was no dispute in relation to Mr Wilford's note of the proceedings before the First-tier Tribunal and therefore no dispute in relation to him continuing to act before the Upper Tribunal.
12. It was the central argument, made by Mr Wilford that the judge had departed from the principles in **Browne v. Dunn (1893) 6 R. 67, (H.L.)** in terms of the principles of fairness and if the evidence of a witness is to be rejected then fairness requires that the witness be made aware of the implication that their evidence was untrue.
13. It was submitted that the judge had made significant errors in his approach to the evidence including in finding that Mr Singh Thapa was in fact married to a daughter of the sponsor and was responsible for her care as opposed to the Oxleas nurses. It was argued that the judge exceeded the terms of the dispute between the parties and displayed a flawed approach to Mr Singh Thapa's evidence as a whole, particularly as these matters had not been raised and if they had been it was the appellant's case that they could have readily been addressed.
14. It was Mr Wilford's case in ground 1, that the judge's approach to Mr Singh Thapa's credibility was infected by the error in his findings as to Mr Singh Thapa's relationship with the sponsor and that this infected his approach to Mr Singh Thapa's evidence in its entirety. Most notably, it was submitted that it was not put to Mr Singh Thapa that he was not telling the truth about:

- (1) Mrs Thapa's relationship with her other children;
- (2) the number of children in the UK;
- (3) the extent of Mrs Thapa's illness;
- (4) the support that he had witnessed her providing the appellant in Nepal;
- (5) the frequency and importance of the communication between Mrs Thapa and the appellant;
- (6) the contents of his communication with the appellant and the appellant's concern for his mother.

Discussion

2. It was conceded by Ms McKenzie at the hearing, properly in my view, that ground 1 was made out in terms of procedural unfairness, for the reasons set out in the grounds and summarised above.
3. Although Ms McKenzie initially submitted (although with no great force) that the Upper Tribunal should retain the decision including that grounds 2 and 3 may be arguable, I am persuaded by Mr Wilford's submission that the conceded error, in terms of the fairness in the judge's approach, cannot properly be said to not have infected the remainder of the judge's findings (with grounds 2 and 3 concerned with whether the judge failed to take into account material evidence in respect of financial support and the sponsor's health and/or failed to give adequate reasons for rejecting that evidence).
4. I have taken into account the guidance in **Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC)** in relation to whether the case should be remitted or retained in the Upper Tribunal.
5. The approach of the judge, in reaching conclusions on issues which were not disputed between the parties and in failing to put his concerns to the parties, raises fairness issues. Whilst **Begum** makes clear that unfairness in itself does not automatically cause the appeal to be one that should be remitted, I agree with Mr Wilford that the judge's failure in his approach to Mr Singh Thapa's credibility and the findings that he made which were not open to him on the evidence before the First-tier Tribunal, were such that the appellant would effectively lose the benefit of a two stage appeal if his case were to be retained in the Upper Tribunal.
6. I am satisfied that this is a case that should be remitted de novo to the First-tier Tribunal. Given that ground 1 is made out, there is no requirement to consider grounds 2 and 3.

Notice of Decision

7. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be heard before any judge, other than Judge Zahed.
8. No anonymity direction was sought or is made.

M M Hutchinson

Deputy Upper Tribunal Judge Hutchinson
Immigration and Asylum Chamber

17 April 2024