



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

Case No.: UI-2023-005611
First-tier Tribunal No:
HU/60008/2022
LH/00676/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 31 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MANI SUNDAR RAI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Keelin McCarthy, Counsel instructed by Everest Law Sols Ltd

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

At Field House on 23 July 2024

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of First-tier Tribunal Judge Jean-Gilles Raymond promulgated on 31 August 2023 (“the Decision”). By the Decision, Judge Raymond dismissed the appellant’s appeal against the decision of an Entry Clearance Officer made on 27 November 2022 to refuse his application made on 13 July 2022, when he was 41 years of age, for entry clearance to the UK as an adult dependent child of his father and sponsor, who was a former member of the Brigade of Gurkhas.
2. The background to the appeal is that the sponsor was discharged from the Brigade of Gurkhas as a Lance Corporal on 20 August 1971 with a record of Exemplary Service. He settled in the UK on 5 August 2010,

accompanied by his wife and the mother of the appellant, and by their son Prem Sundar, who was born on 9 March 1994, and who was thus eligible to accompany his parents as he was still a minor under the then applicable 2009 Gurkha policy.

3. They left behind their son, Bhim Prasad Rai, who had been born on 29 October 1987. He fell outside the policy due to him being over the age of 18. However, a determination of 14 February 2017 allowed his appeal against the refusal of his application of April 2017 that was made under the Amended Policy that included adult children up to the age of 30.
4. The appellant is the oldest of the four sons of the sponsor by his second wife. The appellant was born on 19 November 1980.
5. As was noted by Judge Raymond at para [11], the determination of 14 February 2017 made no mention of the appellant as being a member of the family in 2016/2017, or in 2010 when the parents and Prem (his younger brother) left Nepal leaving behind Bhim. The witness statement evidence of the sponsor before the Judge in that appeal was that all his adult sons except Bhim were married and independent of him. Only Bhim and Prem had remained living with the family in Nepal. Bhim had a half-brother in Nepal, but they had never been close, as there was a 22-year age difference. The sponsor had a son, Tirtha, who was an ex-Gurkha and who was settled in the UK. The rest of his children were in India.
6. In the refusal decision dated 27 November 2022, the respondent relied upon the fact that the appellant's parents had been settled in the UK for in excess of 11 years prior to the date of application. They acknowledged that his parents had made short visits back to Nepal, but this was only after the family unit had moved to the UK. He had lived apart from his sponsor for more than two years, "*other than by reason of education or something similar*". While it was acknowledged that he had received some financial support from this father, and he had remained in contact with him, he had not demonstrated that he was financially and emotionally dependent upon his father beyond that normally expected between a parent and one of their adult children.
7. Even if it was to be accepted that refusal might be an interference with private life, he had not established family life with his parents over and above that between an adult child and his parents, and he had not demonstrated real or committed or affective support from his parents. So, it was not demonstrated that Article 8 was engaged.
8. The evidence filed for the appeal hearing by the appellant's solicitors included a witness statement from the sponsor signed on 24 March 2023. In his statement, he said that when he applied for settlement in the UK, Mani had gone away from home to look for work. His third son, Tirtha, from his first wife, had bought unregistered land in Morang which Mani occupied and looked after. Initially he had left home to apply to the British Army, and then the Indian Army, and then the Nepalese Army. He applied

consecutively for three years, but he was not successful. He could not apply anymore, so he did some farming and labour-type work in Morang. They had lost direct contact with him for some time because they did not have phones. They would communicate once every two to three months.

9. On coming to the UK, he started living with his son Tirtha, who was in contact with Mani in Nepal on a more regular basis than him. Tirtha was arranging money for Mani in Nepal. He did not have to send money to Mani himself. He did not see Mani when he returned to Nepal in 2012 for three months, but he saw him in Nepal when he made a return visit in 2015. Mani came to live with him in Khotang at that time.
10. When they applied for Bhim to settle in the UK in 2017, he did not realise that it was said in his statement that all his adult children were married. He did not remember whether Mani was discussed. He told his representatives that his children were living in other places independent of Bhim. Mani went back and forth from India and Morang, and spent time in India with his sister and brother there. He confirmed that Mani had never been married. In 2017 Tirtha had sold the property in Morang and had bought a house in the UK. Since then, Mani had had to return to Khotang to live in his house in Khotang. Mani was not independent in the sense that he was making his own living completely. He had been living away, trying to make a living on his own, and he was relying on the support from his half-brother who was in the UK. Since 2018 at least, he (the sponsor) had been sending money to him in Nepal, and he continued to pay for his living costs.
11. In the Respondent's Review, the respondent addressed the question of whether Article 8(1) was shown to be engaged. Having highlighted various asserted discrepancies in the evidence, the respondent submitted at para 34 that there were issues around the appellant's marital status; the address provided for his purported family home; the fact that the appellant had been previously employed and had moved out of the family home; and "*a distinct lack of evidence*" to demonstrate that family life had been re-established. Therefore, it was not accepted that Article 8(1) was engaged, or that the sponsor's support was real, effective and committed in line with the principles of *Kugathas* [2003] EWCA Civ 31. However, if the Tribunal found that Article 8(1) was engaged, it was accepted that the refusal was no longer proportionate owing to the historical injustice principle.

The Decision of the First-tier Tribunal

12. In the Decision at para [33], the Judge found that while there was an obvious family connection between the appellant and his parents and his three brothers already in the UK, and that this was sufficient to engage the low threshold of family life for the purposes of Article 8(1), there was an evidential void for him having ever had any relationship of dependency with real or committed or effective support from his parent or parents whilst he had been an adult.

13. At para [37] he found that the claimed presence of the appellant at a house owned by his brother in Morang “up to 2017” was a complete fabrication. Such a conclusion was reinforced by sponsor’s evidence before the Judge at the previous appeal that all the adult children of the sponsor was married, save for Bhim, and were all living in India. At [38], he found that Mani had provided the only credible evidence in this appeal in saying that he was in India in 2017, and he concluded that this provided a window upon his independent life in India over the space of very many years. His brother Prem was also credible in his evidence by describing him as living an independent life, albeit he said that this was in the house of Tirtha in Morang, which he considered to be a complete fiction for the reasons given. There was no evidence of Tirtha ever having owned such a property, whereas there was multiple documentary evidence from the local council in Khotang of the sponsor having owned a property there. At para [39] the Judge found that there was a lack of credibility arising from inconsistent elements of the account given by the appellant and his family of his life as an adult, which was reinforced by him saying in his application that he had not travelled out of Nepal in the last 10 years, whereas he had been regularly living in India; and in him saying that he had lived at the Khotang address for the last 42 years, whereas he was supposed to be also living in Morang and in India.
14. At para [40] the Judge said that while the evidence in the appeal was supported by, in effect, self-serving statements from village councils all insisting that he was not married, the index of the documentation submitted on behalf of the appellant included a “*divorce judgment of appellant*”. This was also listed in the documentation submitted with the application, according to the refusal decision. But the document was in fact missing, without any explanation having been given for this. In light of the inconsistent and doubtful features highlighted previously, he interpreted this as indicative of a false picture of dependency upon his parents and brothers in the UK that had been portrayed in the application and the appeal.

The Grounds of Appeal

15. The grounds of appeal were settled by Counsel who had represented the appellant at the hearing in the First-tier Tribunal. Ground 1 was that the Judge had materially erred in law in making inconsistent findings as to whether the appellant enjoyed family life with his parents. Ground 2 was that the Judge had erred in law in disbelieving the claim that the appellant had lived at Tirtha’s property when it was not a matter in dispute between the parties. Ground 3 was that the Judge had adopted a procedurally unfair approach and/or had made a material error of fact regarding an alleged attempt on the part of the appellant’s solicitors to conceal the fact that the appellant had previously been married and divorced.

The Error of Law Hearing in the Upper Tribunal

16. Permission to appeal on all three grounds was granted by a First-tier Tribunal Judge, and accordingly the appeal came before me at Field House to determine whether an error of law was made out. After hearing from the representatives, I reserved my decision.

Discussion and Conclusions

17. Before turning to my analysis of this case, I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *Volpi & another v Volpi* [2022] EWCA Civ 464 at [2].
18. I also keep in mind that the outcome of the analysis conducted in *E & R* [2004] EWCA Civ 49 was summarised by Carnwath LJ at para [66] as follows:

In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in a statutory context where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal’s reasoning.

Ground 1

19. In holding that family life was engaged for the purposes of Article 8(1), but at the same time also holding that there was an absence of evidence of dependency or of real or committed or effective support, the Judge clearly misdirected himself in law. The law was correctly set out by the respondent in the refusal decision, and also in the Respondent’s Review. The Judge was wrong to approach the question of whether Article 8(1) was engaged on the premise that it was capable of being engaged even if there was an absence of dependency or support. Ms Cunha sought to persuade me that the inconsistent findings made by the Judge could be salvaged on the basis that what the Judge was in effect saying was that, due to the obvious family connection, Article 8(1) was potentially engaged, but it was not actually engaged for the reasons he went on to give. However, I do not consider that the Judge’s line of reasoning is susceptible to this interpretation, not least because later on the Judge reiterates that Article 8(1) is engaged.
20. It is reasonable to question whether the Judge’s clear misdirection in law is material since, even on the non-contentious evidence, the Judge was

bound to answer the question formulated by the Court of Appeal in *Rai -v- ECO* [2017] EWCA Civ 320 in the negative.

21. Giving the leading judgment of the Court, Lindblom LJ held at para [39] that the real issue under Article 8(1) in the case before him was whether, as a matter of fact, the appellant had demonstrated that he had family life with his parents which existed at the time of their departure to settle in the UK, and which had endured beyond it. Lindblom LJ returned to the issue at paragraph [42], where he reiterated that the critical question under Article 8(1) was whether the appellant's family life with his parents had subsisted at the time that they chose to leave Nepal to settle in the UK, "*and was still subsisting at the time of the Upper Tribunal's decision*".
22. In order for the appellant to obtain an affirmative answer to this question, he would have to have shown that the *Kugathas* criteria were met at the date of his parents' departure in 2010, and that they continued to be met at the date of the hearing in the First-tier Tribunal. Moreover, it was not enough that there should be continuing financial dependence or financial support. There had to be a sufficient degree of emotional dependence or emotional support that went beyond that which is inherent in normal emotional ties.
23. However, as was recognised in the Respondent's Review, although it could not be said that there had been subsisting family life at the time of the parents' departure, the Tribunal needed to consider the alternative possibility that family life in the *Kugathas* sense had been re-established (after a period when the appellant had been living independently of his parents). At para [46] the Judge accepted the evidence of the appellant's family connection with his family in the UK, "*engaging Article 8(1) as I have said, and as evidenced by social media content, and photographs of his parents when they would have been recently visiting Nepal.*"
24. The Judge went on to reiterate his earlier findings that the family life which the appellant enjoyed with his family in the UK was not sufficient to constitute any dependency consisting of real or committed or effective support from his parents. So, on the one hand, the Judge found that family life had been re-established so as to engage Article 8(1), but on the other hand he found that it had not been re-established.
25. Accordingly, I am persuaded that the Judge's error is material, and that the error is so fundamental that the Decision as a whole is unsafe and must be set aside.

Ground 2

26. Ground 2 relates to the Judge's findings at paras [37] and [38]. I consider that it was open to the Judge to find that the claimed presence of the appellant at a house owned by his brother in Morang "*up to 2017*" was a complete fabrication, as it contradicted the evidence that was given at the previous appeal and it also ran counter to the appellant's evidence in this

appeal that he was living in India in 2017. However, the Judge went too far in finding that Tirtha's ownership of a property in Morang was a complete fabrication, given that in the Respondent's Review the respondent did not dispute that the appellant had looked after land in Morang owned by his brother Tirtha. The respondent submitted that this showed that the appellant had formed an independent life outside of his parents. So, Ground 2 is made out.

Ground 3

27. As to Ground 3, Ms Cunha did not invite me to reject the explanation given for the reference in the index to a divorce judgment. The explanation is that there never was a divorce judgment, and the reference in the index to such a document is a typographical error on the part of the solicitors perhaps caused by copying and pasting from a template or from another case.
28. It is apparent from a perusal of the bundle that the document referred to in the index is in fact a certificate from the appellant's local ward in Khotang dated 22 March 2023 certifying that he has never married.
29. Accordingly, I am satisfied that the Judge has made a mistake of fact (a) as to the existence of a divorce judgment and (b) as to its deliberate suppression, and I am also satisfied that the appellant's solicitors should not be held responsible for this mistake of fact. So, Ground 3 is made out.
30. Although the Judge gave other sustainable reasons for finding the appellant not credible, it cannot be said that, absent the mistake, the outcome was bound to have to been the same.
31. For the above reasons, I am persuaded that the proceedings before the First-tier Tribunal were vitiated by material unfairness, and hence there is an additional reason for setting aside the Decision as being unsafe.
32. I have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.
33. I consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and I therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Raymond.

Anonymity

The First-tier Tribunal did not make an anonymity order in favour of the appellant, and I do not consider that the appellant require anonymity for these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 July 2024