



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002118
First-tier Tribunal Nos:
HU/55746/2023
LH/01637/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 31 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

Sushma Shahi
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Miss. K. McCarthy, Counsel instructed by Everest Law Solicitors
For the Respondent: Miss. S. McKenzie, Home Office Presenting Officer

Heard at Field House on 16 July 2024

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Cowx (the "Judge"), promulgated on 19 March 2024, in which he dismissed the appellant's appeal against the respondent's decision to refuse to grant entry clearance to the United Kingdom. The appellant is a national of Nepal who applied for entry clearance on the basis of her relationship with her mother. She appealed on human rights grounds.
2. Permission to appeal was granted by First-tier Tribunal Judge Veloso in a decision dated 13 May 2024 as follows:

"The in-time grounds argue that the Judge erred in **1-** their approach to the Article 8(1) ECHR; **2-** assessing the evidence about the sponsor's financial support and contact without putting concerns to the witness; **3-** taking into account irrelevant matters, specifically whether the appellant was previously employed, when the relevant date was the date of the hearing

With regards to ground 1, at [25] the Judge finds that they are not satisfied that the sponsor provides the appellant with “real, committed **and** effective support”. Whilst at [7], they set out the correct Article 8(1) test of “real, committed **or** effective support” it is arguable that the wrong test was applied, which may have been of relevance in connection with such support being provided to the sponsor.

With regards to ground 2 and 3, whilst the Judge referred to October 2023 as the last money transfer receipt instead of November 2023, the fact remains that the appellant did not provide any money transfer receipts going up to the date of the hearing. It was open to her to upload more recent receipts. The grounds do not suggest that an opportunity to do so was sought. An assertion in a witness statement is not necessarily accepted. The refusal took issue with Article 8(1), which encompasses previous and current financial and emotional support; financial dependence necessarily involves an assessment of whether the appellant is or has ever been in employment.

The grounds do not dispute the Judge’s findings of the period covered in the call printouts, the length of these calls, that most of the messages related to the appellant’s appeal, the printouts started a mere 3 months prior to the application and the first money transfer a mere 10 months prior to the date of application.

Ground 1 is arguable.

Ground 2 and 3 do not disclose any arguable error of law.”

3. There was no Rule 24 response.

The hearing

4. The sponsor attended the hearing.
5. I heard oral submissions from both representatives, following which I stated that I found the decision involved the making of a material error of law. I set the decision aside.

Error of Law

6. Miss. McCarthy submitted that, while the grant of permission was limited, a grant was a grant of permission on all grounds. She submitted that grounds 2 and 3 were relevant to the assessment under ground 1. While the grant is limited, in order to assess whether ground 1 is made out and whether the Judge has in fact applied too high a test, it is necessary to look at the decision as a whole. Ground 1 cannot be assessed without looking at the Judge’s treatment of the evidence before him.
7. It was accepted by Miss. McKenzie, that the Judge had made an error at [25] when stating that the test was “real, committed **and** effective support”. He states at [25]:

“For the aforementioned reasons I am not satisfied that SS’s relationship with US goes beyond the normal emotional ties that exist between mother and daughter. I am not satisfied US provides such real, committed and effective support to SS as to constitute family life. SS provided additional reasons for wanting to come to the UK in her statement which were to look after her mother in her old age and to find work. In the absence of genuine family life, I find these are SS’s true motive for applying to settle in the UK.”

8. However, Miss. McKenzie submitted that at [7] the Judge had set out the correct test - “real, committed **or** effective support”. She submitted that he had not made a material error as he had set out the correct test of “beyond normal emotional ties” in the first sentence of [25].
9. I find that at [7] the Judge simply set out the test. He did not apply it at that stage. It is at [25] that he applies the test. I have considered whether this is just a “a slip of the pen”, taking into account the decision as a whole, and whether the Judge has applied a higher standard, i.e. a cumulative approach to the support provided as opposed to a disjunctive one.
10. I find that solely because the Judge has referred to the correct test of whether there are more than “normal emotional ties” does not mean that he has subsequently applied the correct test to assess whether this is the case. I find that weight is added to the submission that he has not understood the correct test by the fact that he has also stated at [25] that the appellant provided “additional reasons” for wanting to come to the United Kingdom which were “to look after her mother in her old age and to find work”. This indicates a failure to acknowledge that ties of mutual support can flow in both directions, from the child to the parent as well as from the parent to the child, and therefore add weight to the argument that Article 8(1) is engaged.
11. When considering whether the Judge has applied a higher test looking at the decision as a whole, I note the following. First, the respondent was not represented at the hearing and therefore the witness evidence of the sponsor was unchallenged. It was submitted that the Judge raised no issues with the witness statements of the appellant or sponsor, and I find that this is made out. There are no findings in the assessment of the evidence from [20] to [26] that he cannot rely on the evidence of the appellant and sponsor, or that he has given it little weight. The weight he has attached to their evidence is unclear given that he has not taken into account the evidence which was in the witness statements when making his findings from [20] onwards.
12. In relation to finance, the evidence in the witness statements was that the sponsor travelled regularly to Nepal and gave money to the appellant on these visits. It is not clear whether the Judge accepted this evidence. At [20] he states: “I am therefore not satisfied that US’s evidence about giving annual amounts of money to SS when she visited Nepal is true”. However, at [21] he seems to accept that she was given this money as he states: “If the money transferred to SS was used for her essential living needs, I would expect to see some supporting documentation, in the form of bills or invoices, but these have not been provided. Without such evidence, the possibility that the money is used for an alternative purpose cannot be eliminated.” He accepts that some money has been transferred to her but that it is not used to meet her essential living needs. It had not been suggested that the money was used for another purpose. In her witness statement the appellant said that, if the money was not given to her, she could not provide for herself. This was repeated in oral evidence by the sponsor at the hearing, as set out in Counsel’s notes in the grounds of appeal, to which the respondent has made no objection.
13. In relation to the evidence of contact, the Judge states at [22]:

“The screenshots of messages do not deserve the weight that SS and US seek in terms of being proof of regular, emotionally supportive contact between the two.

Voice calls predominate and the content of those are unknown. But one would expect more and lengthier messages between the two if their relationship was as close as claimed. Many of the messages relate to immigration matters and I draw the inference from this that the same is likely to be true of the voice calls. There is also a 3-month gap in the call/messaging evidence which undermines the assertion of close and regular contact. Furthermore, this form of contact (according to the material provided) appears to have begun less than 3-months before SS's application. No evidence of similar regular contact by alternative means has been provided."

14. The contents of any voice calls would clearly be unknown. In reference to the fact that there were no earlier messages, the Judge failed to take into account the evidence in the witness statement, which was not challenged, and which he has not stated cannot be relied on. Earlier calls were made through the appellant's landlord following which the sponsor bought the appellant a phone, but it did not work well. It was only relatively recently that a phone had been bought which enabled the calls to be made and recorded. As set out above, the Judge made no adverse finding about the witness statements, but he has failed to take the contents into account.
15. I find that the Judge's assessment of the evidence indicates that he has applied too high a burden, and that the statement at [25] that the appellant needed to show "real, effective **and** committed" support cannot be said to be a slip of the pen when considered alongside his findings.
16. I find that the decision involves the making of a material error of law in the failure to apply the correct test under Article 8(1). The Judge has applied too high a test when considering whether the bonds between the appellant and sponsor went beyond normal emotional ties.
17. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."
18. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). Miss. McCarthy submitted that it could be remade on the papers, especially as the respondent had not attended the hearing in the First-tier Tribunal. Miss. McKenzie submitted that further fact-finding would be needed. I have carefully considered these submissions. I find further fact-finding is needed, and that it is appropriate therefore to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

19. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside. No findings are preserved.
20. The appeal is remitted to the First-tier Tribunal to be heard de novo.
21. The appeal is to be heard at Manchester.
22. An interpreter in Nepali is to be booked for the hearing.
23. The appeal is not to be listed before Judge Cowx.

Kate Chamberlain
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 July 2024