



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: UI-2023-004768  
UI-2023-004766  
[HU/59961/2022; LH/00572/2023]  
[HU/59959/2022; LH/00551/2023]

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 December 2023**

**Decision & Reasons  
Promulgated  
On 5 February 2024**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK  
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD**

**Between**

**PURAN RAI  
SUMAN RAI  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellants: Ms J. Fisher, counsel instructed by Everest Law Solicitors  
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants, who are siblings, are citizens of Nepal, born in 1989 and 1984, respectively. On 1 June 2022 they made applications for entry

clearance as the adult dependent children of their father, a former member of the Brigade of Gurkhas. Their applications were refused in decisions dated 3 November 2022 with reference to paragraph EC-DR of Appendix FM, and with reference to Article 8 of the ECHR.

2. The appellants appealed the decisions and their appeals came before First-tier Tribunal Judge Moon at a hearing on 6 June 2023, following which their appeals were dismissed in a decision promulgated on 16 June 2023. Permission to appeal to the Upper Tribunal (“UT”) was granted by a judge of the First-tier Tribunal (“FtT”).

### ***Judge Moon’s decision***

3. At paragraph 4 of her decision Judge Moon noted that on behalf of the appellants the main issue was said to be that of whether there is protected family life between the appellants and their father, the sponsor, and the contention that if there is such family life the appeals ought to be allowed on the basis of ‘historic injustice’. Judge Moon indicated, however, that the issue of proportionality would have to be addressed in the light of the proportionality issues that arose from the decision of First-tier Tribunal Judge Nightingale, in particular at para 38, in an earlier appeal by the first appellant, heard on 10 August 2017.
4. Judge Moon concluded that Article 8 was engaged although said that the date that the sponsor met and married his wife may be relevant to the proportionality of the decision. This she said was because of the finding made at para 38 of Judge Nightingale’s decision that the first appellant’s appeal was not one where it could necessarily be said that he would have been born in the UK but for the historic injustice. She noted that that finding was made on the basis that the sponsor was not married to the first appellant’s mother when the sponsor was discharged from his army service, and Judge Nightingale had found that had the sponsor not remained in Nepal he may not have married the appellants’ mother and, therefore, the first appellant may not have been born in the UK, or at all.
5. At para 12 Judge Moon found that some of the evidence as to when the sponsor married the appellants’ mother had changed since the hearing before Judge Nightingale. At that hearing the sponsor’s evidence was that he was not married when he retired from the army, which was consistent with his witness statement before Judge Moon. However, the kindred roll in respect of the sponsor, provided for the hearing before Judge Moon, shows that the sponsor married his wife on 30 December 1981, which was before the date of discharge shown on the discharge certificate, namely 29 April 1982.
6. Judge Moon referred at para 15 to the certificates in relation to the appellants’ marital status which indicated that they were unmarried, are not in a relationship and have never been in a relationship or marriage. She found, however, that that was not consistent with the evidence given

before Judge Nightingale in the first appellant's appeal where the evidence from the sponsor was that all of his daughters were married and had their own families at that time and that the first appellant lived alone in Nepal.

7. At para 16 Judge Moon noted the findings made in the first appellant's earlier appeal that he had attempted to deceive the entry clearance officer in terms of having asserted that he had lost his passport (which would have revealed his work visa), and failed to disclose on his entry clearance application that he had left Nepal in the previous 10 years. Judge Nightingale had found that there was no evidence that the appellant had not been working in Saudi Arabia for a far longer period than the three months asserted by the sponsor at that hearing. Judge Moon noted that Judge Nightingale did not accept that the first appellant was reliant on the sponsor at the time the family departed Nepal to come to the UK in 2011.
8. In paras 17-21 Judge Moon referred to the oral and documentary evidence before her in relation to what employment the appellants have.
9. In paras 22-28 she set out the evidence as to the appellants' financial circumstances. At paras 29-30 she referred to the evidence of contact between the appellants and their parents. At para 30 she found that there was evidence of frequent telephone calls "of some duration".
10. Judge Moon's specific findings are contained within paras 32-42.
11. In relation to the first appellant, Judge Moon took the earlier appeal decision as the starting point. She then said the following at para 32:

"The relevant findings in relation to Puran [the first appellant] are the deception on the application form which is relevant to credibility and that he was living an independent life when the sponsor moved to this country and that he continued to do so. At this hearing further discrepancies have arisen in relation to the account of Puran's work in Saudi Arabia, in 2017 the evidence was that he worked there for three months and returned because of ill health but at this hearing the Tribunal was told he was abroad for a year and returned because his income from the work was not sufficient. On the basis of these further discrepancies I find that none of the witnesses are telling the truth in relation to the amount of time that Puran spent abroad."
12. In the next paragraph she said that she did not accept that the second appellant has not formed an independent life. This was because at the hearing in 2017 in relation to the first appellant the evidence was that he lived alone in Nepal and that all of his sisters were married. There was no mention of one sister remaining unmarried.
13. In addition, she did not accept that a reasonable explanation had been given for the inconsistency in the evidence as to whether or not the appellants work. Judge Moon said that the certificates of unemployment state that neither appellant had worked in any capacity, governmental or nongovernmental. At para 34 she concluded that either one or both of the

appellants have undertaken work as a porter, given that their mother said as much in her oral evidence. Judge Moon went on to state that her impression was that the account of work on a construction site had been fabricated, but the appellant's mother "momentarily forgot the account which had been rehearsed".

14. Judge Moon said at para 35 that there was no evidence of any financial support between 2011 and around 2016 when the first appellant made his first application for settlement. She found that the only evidence of financial support was very limited evidence at the 2017 hearing and evidence that there is a joint bank account in the joint names of the first appellant and the sponsor.
15. She did, however, accept that the credits to that joint account are from the sponsor's pension but the appellants had not established that this financial support was "real or effective or committed" because she did not accept that the evidence as to the appellants' income was as presented. She further found that there was insufficient evidence as to how the money was spent and whether it was required to meet their basic needs.
16. Judge Moon did not accept that the additional money of between £100 and £200 was sent regularly to the appellants because, she said, there was very little evidence of it. She also queried how the sponsor could afford those additional payments given that he is dependent on state benefits in the UK, as well as having debts in Nepal.
17. In addition, Judge Moon did not accept that the appellants' sister, Madina, sends money regularly given that she did not attend the hearing to have her evidence tested in cross-examination. She did not accept the explanation for her absence.
18. Similarly, at para 37 she said that she did not accept that conditions for the appellants were as poor as had been presented. She referred to the sponsor in his witness statement saying that there are no facilities such as gas, electricity and running water, yet in her oral evidence the sponsor's wife said that appellants needed money to pay for utilities.
19. Judge Moon accepted at para 38 that there was regular and frequent indirect contact between the appellants' parents and the appellants in terms of travel, as far as the sponsor's health and financial circumstances allow. However, she found that that contact does not constitute family life, given that they are all adults.
20. She concluded that neither the appellants nor their parents were honest about the appellants' circumstances in Nepal, given what she found were "clear inconsistencies" between the evidence given to her and that given at the hearing in 2017. She found that there was no family life between the appellants and their parents. She also concluded that it was more likely than not that the second appellant was married and remains married.

21. Given that she did not find that there was family life between them, concluding that there were no more than normal emotional ties between adults, she considered that it was not necessary to consider proportionality or the issue of historic injustice. She said that had it been necessary to consider those matters, questions as to whether the sponsor married his wife before or after his discharge from the army would have needed to be considered, as well as the reasons for the inconsistent evidence on that point.

### ***The grounds of appeal***

22. The grounds of appeal are fourfold. Ground 1 is entitled “fairness”. It accepts that Judge Moon was correct to take as her starting point the decision in the appeal of the first appellant in 2017. However, it is argued that she was wrong to treat the findings in that appeal as extending to the evidence of the witnesses and was wrong to reject evidence that was never challenged. It is said that the finding in relation to the first appellant in the 2017 appeal was that he was dishonest but that in relation to the sponsor the finding in that appeal was that he was unreliable, as distinct from dishonest.
23. It is argued in the grounds that the rejection of the sponsor’s evidence of sending money to the appellants on the basis that he is on benefits is a matter that was never raised at the hearing or relied on by the respondent. Similarly, what Judge Moon found to be an inconsistency in the evidence about whether the appellants worked on building sites or worked as “porters” was not in fact inconsistent evidence and in any event was not a matter raised as an issue at the hearing.
24. It is argued that in finding that the sponsor was dishonest, Judge Moon had failed to consider the fact that he was described as an honest man in his certificate of army service.
25. Ground 2 contends that Judge Moon based her conclusions on an error of fact in finding that the appellants are “not as poor as claimed” (misquoting para 37 of Judge Moon’s decision) given what she found was inconsistent evidence in relation to the payments made by the sponsor for facilities such as gas, electricity and running water.
26. Ground 3 asserts a failure on the part of Judge Moon to apply the correct standard of proof. The basis for that assertion is in terms of the evidence that the appellants live in the sponsor’s house in Nepal and the finding that there is regular and frequent indirect contact, including travel from the UK to see the appellants. It is contended that Judge Moon did not ask herself the question of whether the contact constitutes “support”, in the light of the unchallenged evidence that the sponsor gives the appellants advice and guidance.
27. Ground 4 argues that Judge Moon’s decision fails to consider “reciprocal ties” given the health of the sponsor and his wife, and her loneliness, and

her upset when speaking to the appellants or when they are spoken about. It is asserted that Judge Moon failed to consider whether the frequent contact may provide emotional support to the sponsor and his wife.

### ***The parties' oral submissions***

28. We summarise the oral submissions made before us.
29. Ms Fisher relied on the grounds of appeal. As regards ground 1 she accepted that a judge does not need to put every point to the parties but it was submitted that if there was a matter that concerns a judge it probably should be raised at the hearing.
30. As regards matters that were not put, it was submitted that the fact that the appellants' mother gave evidence through an interpreter should have been considered before deciding (at para 34) that the appellants' mother had fabricated an account that they had worked on construction sites, rather than as porters. The sponsor's evidence was that they carried things such as stones on a construction site.
31. It was accepted that in Judge Nightingale's decision of 2017 at para 34 she found that it was not established that the first appellant had not had employment prior to his time in Saudi Arabia or that he was reliant on the sponsor prior to the family's departure for the UK in 2011. However, it was submitted that the facts before Judge Nightingale were different.
32. In relation to ground 2 it was submitted that the issue of all the sisters being married was a matter that ought to have been explored at the hearing. We were referred to the 'kindred roll' for 2021 which names all of the children and which does not say that they are married. It was accepted, however, that this was not a matter raised in the grounds of appeal.
33. Submissions in relation to ground 3 reiterated the written grounds. As regards ground 4, Ms Fisher accepted that the witness statements of the appellants did not deal with the question of reciprocal support.
34. In relation to Ms Everett's submissions, it can fairly be said that she was not able to take a firm position in relation to the grounds. She suggested that Judge Moon's decision could be defended but questioned, rhetorically, whether something like the matter of the second appellant's marriage ought to have been raised at the hearing. It was accepted that if there were errors of fact, or if a judge has overlooked a matter, that could affect the outcome of the appeal.

### ***Assessment and Conclusions***

35. There are two appellants and their appeals require separate consideration. However, on the facts of this case that separate consideration, as the evidence presently stands, indicates that the outcome of the appeals will be the same for each of them.
36. As regards ground 1, although it seeks to make a distinction between the dishonesty and unreliability found by Judge Nightingale in 2017 in relation to the first appellant and the sponsor, respectively, we are not satisfied that there is any merit in that aspect of the grounds. Although in her decision Judge Nightingale did not use the word 'dishonest' in relation to the sponsor, which she did in relation to the first appellant, she said of the sponsor at para 31 that she did find him a reliable witness and at para 35 that she did not find him "reliable or credible". In other words, in material respects she did not believe his evidence.
37. At para 11 of the grounds, it is suggested that had certain matters that were of concern to the judge been raised at the hearing "evidence would have been obtained to address them", or the point could have been dealt with by the witnesses or an adjournment sought. However, Ms Fisher was not able to inform us what evidence could have been obtained to deal with the issues identified in ground 1.
38. Nevertheless, we do consider that there is merit in certain of the propositions advanced in ground 1 sufficient to find that that ground is made out. As the grounds point out, at para 36 one of the matters that Judge Moon took into account in assessing whether "additional money" of between £100 and £200 was sent every one or two months (para 26) was that the sponsor is on state benefits in the UK and has debts in Nepal. In para 36 she also said that there was very little evidence of that money being sent. However, because of the significance of this issue we do take the view that the ability of the sponsor to afford the additional sums is a matter that should have been raised at the hearing in order to give the sponsor and/or the appellant's representative the opportunity to with it. We also accept there is no evidence that this was a point of challenge raised by the Respondent either prior to, or at, the hearing. The failure to raise the point at the hearing thus amounts to an error of law.
39. We also consider that there is merit in the complaint in ground 1 about Judge Moon's finding of inconsistency in the evidence in relation to whether the appellants worked as porters or in construction (seasonally). Although it was a matter for the judge what she made of the evidence of their employment(s), the summary of the sponsor's evidence at para 19 and that of the sponsor's wife at para 20 does suggest that this was not so clear an inconsistency as Judge Moon found, at least not without further analysis or explanation in her decision. Again, we are satisfied that Judge Moon erred in law in her analysis of this issue.
40. Whilst the issue of the evidence concerning the marital status of the second appellant is not raised distinctly in the grounds of appeal, we

consider that Ms Fisher was entitled to raise it before us as an example of the complaint in ground 1 that “numerous findings” were made on matters that were not put to the witnesses or raised at the hearing.

41. Judge Moon very properly pointed out that at the hearing in 2017 the evidence was that all of the sisters were married, with no mention of one sister, i.e. the second appellant, being unmarried. However, it is correct as asserted on behalf of the appellants that the evidence from the ‘kindred roll’ does indicate that the second appellant is unmarried. At para 15 Judge Moon referred to an “unmarried certificate” in relation to both appellants. However, again, given the significance of this issue we conclude that what the sponsor said at the hearing in 2017 about all the sisters being married, as a matter of fairness, should have been put to him at the hearing or raised with the appellants’ representative, and the failure to have done so constitutes an error of law .
42. We are satisfied that ground 1 is made out in the respects to which we have referred.
43. We are similarly satisfied that there is merit in ground 2. In the sponsor’s witness statement dated 9 February 2023 at para 8 it is clear that he was not speaking in the present tense in relation to whether there are utilities at the home where the appellants are staying. However, at para 14 Judge Moon referred to the sponsor’s evidence in relation to the appellants’ accommodation, that evidence seemingly from that same witness statement, as distinct from his oral evidence. At para 37, when finding that the appellants’ conditions are not as poor as had been presented, Judge Moon stated that in his witness statement he confirmed “in the present tense” that there are no facilities such as gas, electricity and running water, but that is not in fact the import of his witness statement.
44. Thus, we agree with what is said in the grounds on this issue, namely that Judge Moon’s finding in relation to the appellants’ living conditions was made on a factually incorrect basis, at least in terms of the evidence that was before her.
45. Whilst an error of fact may not always, or even usually, amount to an error of law, we are satisfied that it does in this case given the significance of the issue of the extent to which the sponsor provides support for the appellants.
46. Grounds 1 and 2 having been made out, we are satisfied that that is a sufficient basis to mean that Judge Moon’s decision must be set aside for error of law, even though there are other findings adverse to the appellants.
47. It is not necessary in the circumstances to go on to determine ground 3 because the issue of support, and thereby family life, must be made on a legally sound footing in terms of the factual findings. In the circumstances,



it would be artificial to assess whether Judge Moon's assessment of family life on the basis of legally flawed factual findings was in error.

48. As regards ground 4, again it is not necessary for us to express a concluded view about the 'reciprocal ties' argument as it arises on the facts of this case. However, we are sceptical about the merit of a general proposition, if that is what it is, that the matters raised in paras 20-22 of the grounds in terms of the health and feelings of the appellants' parents could *on their own* amount to evidence of family life with adult children where otherwise the evidence in relation to adult children's circumstances does not support a finding of family life. On the facts of this case, we also observe that the emotional support relied on is not a matter that appears to feature from the appellants' perspective in their witness statements.
49. Having concluded that the FtT's decision must be set aside, we have considered whether it is appropriate for the decision to be re-made in the UT or remitted to the FtT for a fresh hearing. In the light of the Senior President's Practice Statement at paragraph 7.2 and the nature and extent of the fact-finding that is required, we are satisfied that the appropriate course is for the appeal to be remitted to the FtT for a *de novo* hearing, with no findings of fact preserved.

### **Decision**

50. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a *de novo* hearing, with no findings of fact preserved, before a judge other than Judge Moon or Judge Nightingale (the latter having heard the appeal of the first appellant in 2017).

A.M. Kopieczek

Upper Tribunal Judge Kopieczek

2/02/2024