



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case Nos.: UI-2023-004986
First-tier Tribunal No:
HU/55442/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21st February 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

PREM KALE ALE

Appellant

And

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr R Sharma, Counsel instructed by Everest Law Solicitors Ltd

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on Tuesday 6 February 2024

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge S J Clarke dated 18 August 2023 (“the Decision”) dismissing the Appellant’s appeal against the Respondent’s decision dated 8 August 2022 refusing her human rights claim. That claim was made in the context of an application for entry clearance as the adult daughter (now aged 41 years) of a Gurkha veteran settled in the UK (“the Sponsor”). This is the Appellant’s second appeal, her first having been dismissed by First-tier Tribunal Judge Norris by a decision promulgated on 23 December 2020 (“the Previous Appeal Decision”).

2. It is accepted that the Previous Appeal Decision formed the starting point for Judge Clarke's determination in this appeal. The dismissal of the previous appeal turned on evidence which cast doubt on the evidence that the Appellant did not work in Nepal and discrepancies about her accommodation there. I come to the detail of that below.
3. Judge Clarke took the Previous Appeal Decision as her starting point. She considered evidence since that appeal. She considered whether the evidence showed that there was "real, effective or committed support by the [S]ponsor to the Appellant". Having regard to what she considered to be continuing discrepancies in relation to the Appellant's employment and accommodation situation, Judge Clarke did not accept that the Sponsor provides such support to the Appellant. She therefore dismissed the appeal for a second time.
4. The Appellant appeals the Decision on two grounds as follows:
 - Ground 1: The Judge "ignored the explanation given by the Appellant's father in his evidence as to how this incorrect information came to be recorded on the transfers". It is said that in the context of the Sponsor's "difficulties in communicating", the explanation he provided was "a sufficient answer".
 - Ground 2: The Judge asked herself the wrong question when considering whether Article 8 ECHR was engaged. The issue was not whether there was real, effective or committed support above the norm between adult children and parents but whether such support existed.
5. Permission to appeal was refused by First-tier Tribunal Judge O'Keeffe on 27 October 2023 in the following terms so far as relevant:
 3. The Judge stated that it was open to her to depart from the previous findings on the basis of the evidence now before the Tribunal. It is not necessary for the Judge to deal separately with all of the evidence before the Tribunal. At paragraphs 6 and 17 of her decision, the Judge sets out the legal test she needed to apply in deciding whether Article 8 was engaged. The Judge has not looked for exceptionality. The decision not to depart from the previous findings is fully reasoned.
 4. The grounds disclose no arguable material error of law and permission to appeal is refused."
6. The Appellant renewed the application to this Tribunal. The grounds were essentially the same save that it was said in relation to the first ground that "it is necessary for the Judge to deal with the evidence before the Tribunal when considering whether or not an explanation is provided for an 'inconsistency' ..[o]r put another way, it is not open to a Judge to find an inconstancy or lack of explanation when ignoring the evidence on that point".

7. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 3 January 2024 in the following terms:
 - “1. It is arguable that the judge erred by finding that there was no attempt to explain the contradictory evidence about the appellant’s employment, when the sponsor had arguably sought to explain it. Ground 1 is therefore arguable.
 2. It is arguable that the finding that the support provided to the appellant does not go ‘over and above’ the norm cannot rationally be reconciled with (and was therefore not open to the judge in the light of) the finding of fact that the appellant has access to the sponsor’s pension and has received remittances from him ‘spanning some years’. Ground 2 is therefore arguable.”
8. I had before me an indexed bundle of documents running to 236 pages to which I refer below according to the pagination in that bundle. That includes documents relevant to the appeal and challenge to the Decision as well as the Appellant’s bundle before the First-tier Tribunal and an application to adduce further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to which I do not need to have regard at this stage.
9. The matter comes before me to determine whether the Decision contains an error of law. If I conclude that it does, I must then consider whether to set aside the Decision. If I set aside the Decision, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
10. In the course of the hearing, I identified an issue about which I required further evidence after the hearing. I directed that both advocates should supply me with that by 4pm on Friday 9 February. Mr Wain filed the evidence for the Respondent later on 6 February. Mr Sharma complied with the direction albeit belatedly on 11 February 2024. At the conclusion of the hearing, I indicated that I would reserve my decision and provide that in writing after I had received the further evidence which I had requested and which I now turn to do.

DISCUSSION

11. I take the Appellant’s grounds in order.

Ground 1

12. As I have already noted, in the Previous Appeal Decision, the Judge had noted inconsistencies in the Appellant’s case in relation to her employment and accommodation situation. The Judge’s findings were the starting point for Judge Clarke. For context of the argument now made, I therefore set those out as follows (taken from the Previous Appeal Decision at [232]):

“7.5 However, there is no explanation for a number of different issues. The first is the question of the Appellant’s employment. I do not accept that she has been unemployed throughout her life. I find that she has been working on a salaried basis as a farmer. This is not, as Mr Jaisri asserts, inconsistent

with her living in Kathmandu. It would not be unreasonable to find that she lives in a house and travels to work on a farm, even if she lives in the middle of a city, but in fact there was no evidence as to the surrounding area in the vicinity of her accommodation. I cannot imagine why else the bank clerk would have written on the receipts that she was 'salaried' and/or a 'farmer'. They must have been told this by either the Appellant or her father. It was clearly not the sponsor to whom they were referring. I do not accept Mr Jaisri's submission that being 'salaried' does not connote an occupation of some description.

7.6 In addition, the Appellant has apparently sourced her own accommodation (two rooms in a shared house) and moved into it, both these actions being carried out without the assistance of her parents. Since she moved into the accommodation in February 2018, and (according to the sponsor) had moved to Kathmandu two or even three years before that, it is unclear exactly where her parents stayed when they visited Nepal in October to December 2018, and possibly the same applies to their visits in 2015 and 2017 as well. She has not lived in the family home for several years."

13. Those then were the issues raised in relation to financial support of the Appellant. Judge Clarke dealt with the evidence she had before her about those issues at [9-10], [12-13] and [15] of the Decision as follows:

"9. The thrust of the refusal is that the Appellant has not shown that she is dependent upon the sponsor. Part of the case against the Appellant was that the remittance receipts for the previous hearing showed the Appellant as having an occupation as 'salaried' or 'farmer' and the sponsor was insistent that the Appellant does not work and was unable to explain these references.

10. It was accepted by Judge Norris that he left his pension book for the Appellant and money was remitted on at least six occasions, roughly every other month in 2019/2020. It was not accepted the Appellant had been unemployed throughout her life and it was found that she had been working on a salaried basis or as a farmer and that it was a bank clerk who wrote these words on the receipt.

...

12. In the witness statement the Appellant states that the parents have 'always been my main support' but she is silent in her witness statement as to whether she has worked, still works or never worked. There remains the written words of 'salaried' and 'farmer' by a bank clerk on the remittances before Judge Norris and she does not engage with this by way of explanation at all. Judge Norris noted that there was no explanation for the question of her employment, and this led to the finding that the Appellant has not been unemployed throughout her life, and that she has been working on a salaried basis as a farmer. It was noted that there is no evidence of the surrounding area of where she lived, and none has been provided to me.

13. The Appellant has provided an Unemployment Certificate dated 27 December 2018 reading that she has been unemployed and owning no property to date of the certificate and a Certificate of Unmarried [sic] dated 27 December 2018 and the sponsor confirmed he asked for these. I place some weight upon them noting that it is difficult to prove a negative state of affairs - not working or being unmarried but it pre-dated the application and decision of Judge Norris.

...

15. I asked the sponsor the year the family home was sold, and he said in 1993. However, in the application form the Appellant states that she is living at her address for 25 years, and it is owned by the parents. The address is 08 Tokha, Gongabu and this is the address given in the witness statement. This is at odds with the claim before Judge Norris, and the finding was that the Appellant sourced her own accommodation of two rooms in a house without the assistance of her parents and moved into the accommodation in February 2018, and the sponsor said at that hearing that she had moved to Kathmandu two or three years before that and the finding that the Appellant had not lived in the family home for several years. The Appellant also claims for this hearing that she has been renting rooms and the sponsor said when he returns to Nepal, they use the other bedroom. There are clear contradictions in the evidence."

[my emphasis]

14. Based on that evidence, Judge Clarke made the following finding at [18] of the Decision:

"There remains the written words of 'salaried' and 'farmer' by a bank clerk on the remittances before Judge Norris and no attempt to explain this. There is the additional contradiction in where the Appellant claims she is living because of her statement in the application form that she is living at the home owned by her parents for the last 25 years. Whilst there is evidence of remittances spanning some years and the Appellant has always had access to the pension paid into the account of the father and the bank confirms she has access, the Appellant has not shown that she is not working, as found by Judge Norris, and she has not shown that she the sponsor [sic] gives her real, effective and committed support over and above what a parent would give to an adult child. The Appellant has not shown that she remains in the family unit with the sponsor, and the Appellant has not shown that Article 8(1) is engaged, and I dismiss the appeal."

15. The issue which arose in the course of the hearing concerned the evidence which Judge Clarke had before her. Mr Sharma accepted that the inconsistency about employment and accommodation was not dealt with in the written evidence of the Appellant or the Sponsor. Their witness statements are at [44-49]. The Appellant does not mention whether she works. She says that she is supported by her parents. She says that she lives in Tokha, Kathmandu in rooms which her father rents. The Sponsor's statement confirms that he rents the property in which the Appellant lives but is also silent on the issue of employment. One might have thought that the written evidence would have dealt with these issues since they were the two issues on which the previous Judge relied when dismissing the earlier appeal.
16. Mr Sharma said that the issues were however explained in oral evidence. The difficulty in that regard was that there was no record of what that oral evidence was. Mr Sharma suggested that it was for the Respondent to dispute if he did not agree the oral evidence which was given. However, I find it very difficult to see how the Respondent was supposed to agree or dispute evidence which was not provided to him and where it was not said

on what evidence the Appellant relied as being omitted by the Judge. There is no witness statement from either the Sponsor or Mr Sharma who appeared as Counsel before Judge Clarke setting out what evidence is said to have been ignored. There is not even Counsel's note of the hearing produced with the grounds of appeal.

17. Nor do I accept that it was for the Respondent to dispute the position in any event. The burden of showing that there is an error of law in the Decision is on the Appellant. It was for the Appellant to establish that there is an error of law and if that depends on what is said either to be an error of fact or a failure to take into account relevant evidence, then it is for the Appellant to show what that evidence was. As I pointed out to Mr Sharma, not only is it difficult for the Respondent to know what evidence it is said was ignored and therefore either agree or dispute the account of what occurred at the hearing, it is also impossible absent evidence for this Tribunal to consider the Appellant's argument. That becomes clear in this case when I set out the evidence which I received after the hearing.
18. Mr Sharma of course could not give evidence. He did not in any event have his notes of the hearing. The Appellant should perhaps have had regard in advance of the hearing to the guidance given in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). I appreciate that BW arose in a different context (allegations of judicial bias). It is however no less relevant to the issue of evidence about what occurred at a previous hearing. Nowadays, most First-tier Tribunal hearings are recorded, and it is possible for this Tribunal and, if necessary, the parties to obtain access to those recordings. Unfortunately, I did not have the recording as no-one had requested it.
19. For that reason, I took the pragmatic view that it would be possible to resolve any dispute of fact by obtaining from the parties after the hearing the advocates' notes of the hearing which could be produced with any submissions made in that regard. If there remained a dispute about what was said (as opposed to what that showed about the Decision in the context of the Appellant's first ground), I could if necessary, seek further submissions or reconvene the error of law hearing.
20. Mr Wain provided a full note of the hearing apparently taken by the Presenting Officer on the day of the hearing before Judge Clarke. There is a record of the Sponsor's evidence. The Sponsor's evidence in chief contains the following exchange:

"Supplementary Q: daughter full financial dependent on you - does she work?

A: She does not work, I bear the financial help to her

Q: why is your daughter's money transfers recorded as farmer or salaried?

A: I don't know why that's happened

Q: Had you ever said to the money transfer agent as working or salaried farmer?

A: I don't know the agent might have that reason but I don't know

Q: unemployed certification from the ward? How was that letter obtain?

A: we have a ward in our village, and I requested that from them.”

21. The Respondent’s cross-examination on these issues shows that the Sponsor was asked whether the Appellant worked in Nepal and said she had never been employed there. In relation to accommodation, the Sponsor said that he sold the family home in 1993 and had thereafter rented two rooms in Kathmandu.

22. Mr Wain’s covering email reads as follows:

“It appears that the point from Ground 1 is disputed, as the FTTJ’s findings at [12] and [18] of the decision are consistent with the answers from the sponsor in evidence in chief.”

23. Mr Sharma has provided his note only of the Sponsor’s evidence in chief as follows:

“ ...	
5-8	Adopted
Does daughter work	She does not work, that is why I
have to	bear the financial help to her
Why did historic money transfers record	I do not know what that is
about	
Daughter as being ‘salaried’ or ‘farmer’	I do not know
Had you ever said to money transfer agent	I don’t know, perhaps the
agent wrote	
Daughter was ‘salaried’ or ‘farmer’	that but I don’t know about that.”

24. In his covering email, he says the following:

“.. It will be noted that although there are minor differences between the recorded answers, it is clear that questions relating to the content of the ‘historic transfer receipts’ were asked and answers given - answers which form no part of the Determination.

I am afraid I disagree with Mr Wain’s position and I do not think there is any substantive dispute between the parties about what was said (*contra*: a dispute between the parties about whether or not an error occurred). If the tribunal disagrees and believes there to be a dispute, the appellant invites the tribunal to list the matter with appropriate directions (at which point, if the dispute is evidential, alternate Counsel will need to be instructed for the appellant).”

25. I agree with Mr Sharma that there is no evidential dispute about what was said at the previous hearing by the Sponsor. However, his submission misunderstands Mr Wain’s position. That is not that there is any dispute about what the Sponsor said but whether what is said by the Judge deals with that evidence. In that regard, I accept Mr Wain’s submission save that I do not think that it is [12] of the Decision which deals with this evidence but rather it is [9] of the Decision.

26. As I have noted in the emphasised passage from the Decision set out at [13] above, in relation to the Sponsor’s evidence about the Appellant’s

employment or otherwise, the Judge recorded that he “was insistent that the Appellant does not work and was unable to explain these references”. The Appellant’s grounds of appeal suggest that the Judge has failed to take into account the explanation given but there was no explanation; to the contrary, there is a lack of one. The Sponsor was not able to explain the references. It was even suggested to the Sponsor by Counsel that an explanation might be that the agent had written it because the Sponsor had said that to him/her. Even when that was put to him however, he simply said that the agent might have written it, but he did not know. He did not say that the agent had written it because he (the Sponsor) had said it.

27. I am quite unable to read the evidence given in any way other than that the Sponsor was unable to offer any explanation for the inconsistency between what was written on the money transfer receipt and the Appellant’s and Sponsor’s position that the Appellant did not work and had never worked. The Judge was entitled to record that evidence as she did and to take into account that no explanation had been given.
28. Of course, in this case, the Devaseelan guidance also required Judge Clarke to take into account as a starting point the findings of Judge Norris which included the finding that the Appellant had worked based on the same inconsistency. Absent any explanation or further evidence about the inconsistency, Judge Clarke was entitled to adopt the previous finding as she did at [18] of the Decision.
29. The extract from the Sponsor’s evidence provided by Mr Sharma does not extend to the evidence given about the unemployment certificate which is dealt with at [13] of the Decision. There is not said to be any error in that regard. In case that is a point which the Appellant intended to take, this evidence is taken into account. Judge Clarke has explained why less weight could be given to this evidence because it pre-dated the Previous Appeal Decision. That too is consistent with the Devaseelan guidance.
30. I also observe that the grounds do not take issue with Judge Clarke’s findings in relation to the Appellant’s accommodation position (as Mr Sharma confirmed at the hearing). That was the second issue on which Judge Norris had found against her. Again, due to inconsistencies in the evidence, Judge Clarke also found that the position was not as the Appellant and Sponsor claimed.
31. In conclusion on ground one, I do not accept that the record of the oral evidence which I now have discloses any error made by Judge Clarke. It may well be the case, since the Appellant and Sponsor were not the source of the comments made on the money transfer receipt, that they could not themselves say why those words were written. Judge Clarke accepted as much at [13] of the Decision. However, the Appellant and Sponsor knew from the Previous Appeal Decision what were the reasons why the Appellant had failed in her appeal. At the very least, I would have

expected them to make some enquiries of the agent who issued the money transfer receipt and to disclose the outcome of those enquiries.

32. As it was, absent an explanation, Judge Clarke was entitled to rely on the findings made in the Previous Appeal Decision and to find against the Appellant and Sponsor on the two issues which were decided against the Appellant on the previous occasion.
33. The Appellant's ground one is not made out.

Ground 2

34. Mr Sharma accepted that there was some overlap between this ground and the first but also submitted that it could be self-standing. For that reason, I consider it separately whilst taking into account my conclusion on the first ground.
35. The substance of the second ground is that the Judge has applied the wrong test when considering dependency. Of course, that must now be seen against the backdrop of the Judge's findings that the Appellant's account of her employment and accommodation status is not to be accepted.
36. Mr Sharma submitted that the Judge had accepted that the Appellant was in receipt of remittances over a number of years. It was accepted that the Appellant and Sponsor were in regular contact. It was also accepted that the Appellant had access to the Sponsor's pension. He submitted that based on that accepted evidence, the Judge had misdirected herself in law by requiring total dependency or requiring that the support be over and above the norm between parents and adult children.
37. Mr Wain drew my attention to the Judge's self-direction at [6] of the Decision as follows:

"The Appellant must show that there is effective, real or committed support to her by her sponsor see **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**. The test was also phrased as to whether there existed 'close personal ties' or a 'close personal relationship which has sufficient constancy and substance' in **Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075** in which the Court was concerned with whether family life existed in the adoption context."

I accept Mr Wain's submission that there is nothing wrong with that self-direction.

38. The issue for the Judge was whether Article 8 ECHR is engaged. It could only be engaged if the Appellant enjoys a family life with the Sponsor. She could not have a private life in the UK as she remains in Nepal. Whether family life exists between adult children and parents is dealt with in a number of cases including those to which the Judge refers. The two she selects are a Gurkha case and the other set in a wider context. The tests which she takes from those cases are consistent with the judgments.

39. Against that backdrop, the Judge's self-direction as applied at [18] of the Decision cannot be faulted. The Judge recognised the evidence in the Appellant's favour. There is nothing to suggest that she was looking for total dependency. Ultimately, though, she did not accept that the Appellant had shown herself to be dependent on the Sponsor due to the evidence which suggested that she may be employed and the evidence that she was not living in the family home as she had claimed. I repeat that, in this case, the Judge's approach was also informed by the findings of the Previous Appeal Decision which had reached the same conclusion based on largely the same evidence (see in that regard [17] of the Decision).
40. The Judge was entitled to reach the conclusion she did on the evidence she had for the reasons she gave. The Appellant's second ground does not disclose any legal error.

CONCLUSION

41. In conclusion, the grounds do not disclose any error in the Decision. Judge Clarke was entitled to reach the findings she did for the reasons she gave.
42. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of Judge S J Clarke dated 18 August 2023 did not involve the making of an error of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
19 February 2024