



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

Appeal Number: HU/06019/2015

THE IMMIGRATION ACTS

Heard at Field House

On 22 December 2017

**Decision & Reasons
Promulgated**

On 18 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**SANTOSH SHAHI
(ANONYMITY DIRECTION NOT MADE)**

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

Respondent

Representation:

For the Appellant: Mr S Ahmed, instructed by Everest Law Solicitors

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 15 October 1983. His father is a former Gurkha who was granted indefinite leave to enter the UK on 17 September 2009 on the basis of his service in the British Army and has been in the UK since 7 June 2010 along with his wife (the appellant's mother). The appellant has one brother, who now resides in the UK.

2. On 1 July 2015 the appellant applied for leave to enter the UK with a view to settlement as the adult dependent of his father. On 6 August 2015 the application was refused by the respondent. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on the basis that refusing him entry to the UK would breach Article 8 ECHR. The appeal was heard by Judge of the First-tier Tribunal Rowlands. In a decision promulgated on 20 February 2017, the appeal was dismissed. The appellant is now appealing, with permission, against the decision of the First-tier Tribunal.
3. As this was an appeal under Article 8 ECHR the task of the judge was to consider, firstly, if there was family life between the appellant and his family in the UK the interference with which was of sufficient gravity to engage the operation of Article 8(1) ECHR; and secondly, if (and only if) the answer to the first question was yes, whether refusing entry clearance to the appellant would be a disproportionate interference with his and his family's rights under Article 8 ECHR.
4. The judge dismissed the appeal on the basis that although the appellant has a family life with his parents in the UK, the interference with that family life arising from refusing him entry clearance would not have consequences of such gravity as potentially to engage the operation of Article 8. It was therefore not necessary to proceed to the second question, which concerns whether refusing entry to the appellant was disproportionate. The judge's reasoning for concluding Article 8 was not engaged is set out in paragraphs 18 and 20, where it is stated:

18. The appellant appears to be a single man from documents provided. He claims to be unemployed but, of course, there is no way of proving this. I am extremely concerned about the suggestion that he is wholly reliant on the sponsor for his income. I do not believe that I am being told the truth about his circumstances. The appellant has qualifications which would suit him in trying to get work. There is no evidence of the difficulties complained of. He lives in rent free, family owned accommodation and I do not accept, as the sponsor claimed, that the land has been sold. I believe the appellant to be self-sufficient and independent and that any monies sent over by the sponsor may assist but are not the only source.

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20. Clearly there is family life between the parents and their grown up children. However, for it to engage article 8 I have to be satisfied that it exists over and above that which normally exists between adult children and parents and in the case of his brother adult siblings. That is, of course, why the sponsor has referred to their culture and the emotions expressed by the appellant when they talk or communicate or even visit. I have looked at the text messages provided. Some of them are in a language that I do not understand and should have been translated and others reflect relatively mundane issues.... I do not accept that cultural issues should matter but normal relationships. The truth is they have not lived together as a family for many years and their relationship is not over and above similar others. I do not accept that refusal of his leave to enter interferes with their

family life such as to engage article 8 at all [sic] the appeal fails at the first Razgar hurdle.

5. The grounds of appeal submit that the judge's approach to assessing whether Article 8 was engaged was inconsistent with Court of Appeal case law which provides that the assessment of whether family life exists between adult children and parents depends on all of the facts. The grounds argue that important facts were not considered or were improperly discounted, such as:
 - a) That the unchallenged evidence of the sponsor was that Nepalese culture is such that parents are responsible for their children until they are married.
 - b) There were frequent telephone conversations (as opposed to just texts) between the family.
 - c) The appellant lives in his father's home, is unemployed and receives regular money transfers.
 - d) The only reason the family have lived apart is the historic injustice which prevented the family settling in the UK when these appellant's father was discharged from the army.
6. Before me, Mr Ahmed submitted that the judge's assessment of whether Article 8 was engaged lacked the fact sensitive review required by the case law. In particular, he argued that the judge erred by failing to take into account cultural factors, even though these were raised by the sponsor.
7. Mr Ahmed submitted that other relevant considerations were also omitted from the judges assessment. He maintained that the judge failed to have regard to the sponsor's recent visit to Nepal, the appellant's evidence about being handed money on that occasion, and his evidence about being unemployed.
8. Mr Kandola argued that the grounds are no more than a disagreement with the judge's conclusion. He argued that even if cultural issues are relevant, failing to consider them was not material given the judge's findings about the appellant not being dependent on the sponsor. He maintained that the judge considered all of the evidence and gave clear reasons for his decision. It was a matter for the judge whether or not to accept he was told the truth about the appellant's claimed financial dependency and circumstances in Nepal, and the judge was entitled to find that he was not.

Consideration

9. The issue of whether family life exists between adult children and a parent who is a former Ghurka is one that has been subject to considerable analysis by the Court of Appeal, most recently in Rai v Entry Clearance Officer [2017]

EWCA Civ 320. The case law makes clear that there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 and the assessment of whether there is family life is fact specific and will depend on consideration of all the relevant facts in the particular case.

10. In Rai, the Court of Appeal commented on some of the factors relevant to considering whether Article 8(1) is engaged. In particular, at paragraph 42, Lindblom LJ stated:

*Those circumstances of the appellant and his family, all of them uncontentious, and including - perhaps crucially - **the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1).** In my view they should have been. They went to the heart of the matter: **the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1).** Even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal judge properly addressed it. (emphasis added)*

11. Although Judge Rowland considered many of the factors relevant to the issue of whether Article 8 was engaged (including in particular whether the appellant was financially and emotionally dependent on the sponsor) it is apparent from the decision, when read as a whole, that the judge did not make any findings on or give consideration to the issues highlighted in paragraph 42 of Rai, namely: (a) the circumstances of the appellant and his parents at the time his parents left Nepal to settle in the UK and (b) whether the appellant and his parents would have come to the UK as a family unit had they been able to. Rai makes clear (at paragraph 42) that these are important factors. Failure to consider them was a material error of law.
12. Rai was promulgated after the decision of Judge Rowland and therefore the judge cannot be faulted for failing to follow it. Nonetheless, as the decision, for the reasons set out above, is inconsistent with Rai, it cannot stand.
13. A further error arises from the judge not taking into account the evidence before him about the culture in Nepal in relation to adult children. It was made clear in Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) that cultural factors are a relevant part of the factual matrix to be considered. At paragraph [68] of Ghising it is stated:

*68. We have found that the Appellant depends upon his parents for financial, practical and emotional support and guidance. They depend upon him as their only child still living at home. **Mr L. Ghising's evidence was that it is the custom among Nepalese people for the youngest son***

to remain living with his parents, even after marriage, to care for them when they become elderly. This evidence was not challenged by the Respondent. (emphasis added)

14. As I have found there to be a material error of law the decision will need to be set aside. Given the extent of judicial fact finding which is likely to be necessary for the decision to be re-made and having regard to Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal I consider this an appeal which is appropriate to remit to the First-tier Tribunal.

Notice of Decision

15. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside.
16. The appeal is remitted to the First-tier Tribunal to be heard afresh by a judge other than First-tier Tribunal Judge Rowlands.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 15 January 2018