



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

Appeal Number: HU/13137/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 5th April 2018**

**Decision & Reasons Promulgated
On 23rd April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

**MR UJWAL RAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr A Jafar, Counsel

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 6th April 1986. The Appellant applied for entry clearance to settle in the United Kingdom as the dependent son of Krishna Rai, a former Gurkha soldier. The Appellant's application was refused by the Entry Clearance Officer on 6th November 2015.
2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Green sitting at Taylor House on 26th May 2017. In a Decision and Reasons promulgated on 9th June 2017 the Appellant's appeal was allowed on human rights grounds.

3. Grounds of Appeal were lodged by the Entry Clearance Officer to the Upper Tribunal on 14th July 2017. On 16th January 2018 Judge of the First-tier Tribunal Doyle granted permission to appeal. Judge Doyle noted that the Grounds asserted that the judge had misdirected himself in law and failed to give adequate reasons for his findings. The Grounds challenge the judge's findings that family life (involving a familial relationship of dependency) existed between adult relatives. The Grounds also argue that the judge's Article 8 proportionality assessment was flawed. Judge Doyle noted that at paragraph 11 of the decision the judge had found that the Appellant cannot meet the Respondent's policy and that the Appellant was not financially and emotionally dependent on the Sponsor at the time of application. The judge's proportionality assessment is to be found at paragraph 13 of the decision. The Grounds of Appeal go on to argue that the judge did not take into account Section 117B of the 2002 Act and that it was arguable that there is a tension between the judge's findings at paragraph 13 and his finding at paragraph 11 that dependency did not exist at the date of application. There is no Rule 24 response. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge.
4. I start by reminding myself that this is an appeal by the Entry Clearance Officer and consequently, for the purpose of continuity throughout the appeal process Mr Rai is referred to herein as "the Appellant" and the Entry Clearance Officer as "the Respondent". The Appellant appears by his instructed Counsel, Mr Jafar. The Entry Clearance Officer appears by his Home Office Presenting Officer, Ms Willocks-Briscoe.

Submissions/Discussion

5. Ms Willocks-Briscoe submits on the Entry Clearance Officer's behalf that there are inconsistent findings of an alleged dependency and takes me to the Grounds of Appeal. She submits that the Tribunal allowed the appeal in part because it found the Appellant to be financially and emotionally dependent upon the Sponsor, and whilst the evidence served supported the finding on the former, it was respectfully submitted that that was not the case for the latter. The Grounds go on to point out that the Appellant is an educated adult who lives alone in the family home and that the Sponsor claims to speak to the Appellant two to four times a week and that his wife does so on a daily basis. However, the Sponsor and the Appellant have lived apart for eleven years, the Sponsor's wife has lived apart from the Appellant for ten, and the Sponsor last visited the Appellant some seven years ago, although the Sponsor's wife has visited her son more recently. Ms Willocks-Briscoe submits that on this evidence the Tribunal found that the Appellant was emotionally dependent on his parents and that whilst it was not disputed there is family life it was submitted that that is not at the level to breach Article 8.
6. Ms Willocks-Briscoe refers me to the two principal paragraphs where there are contradictions. It is appropriate to engage with what has been said and to analyse it. Whilst it is not always appropriate for an Upper Tribunal

to recite verbatim the words of the First-tier Tribunal Judge, in this instance there is some merit in doing so, so far as the two paragraphs are concerned.

7. At paragraph 11 Judge Green states:-

“... ”

I do not accept that the Appellant had provided sufficient evidence to show that he was financially and emotionally dependent on the Sponsor as at the time he made his application. The Sponsor was too sparse to show financial dependency from the time that the Sponsor settled in the United Kingdom down to the date of the application.”

8. At paragraph 13 the judge states:-

“... ”

The Sponsor continued to support the Appellant financially and emotionally. His wife came to this country to join him and it was entirely understandable that he wanted to be reunited with the Appellant to fulfil his original retirement plans. By February 2009, his wife and two daughters were settled here. The Appellant could not have settled in the United Kingdom even if the rules had benefited the Sponsor in 2004 because of his age. It was only when the rules changed in 2015 that he came within the ambit of the more generous age policy that he made his application. It seems to me that the principal objection that the Respondent has in denying the Appellant entry is the maintenance of a firm immigration policy.”

9. Ms Willocks-Briscoe submits that in those two paragraphs the judge has made contradictory findings, firstly of there being no financial/emotional dependency, and then latterly making findings that there are. As a result she submits that there is a material error of law in the analysis made by the judge and this has to be a question to be considered when deciding whether or not there is a financial/emotional dependency.
10. In response Mr Jafar submits that it is necessary to read paragraph 11 of the First-tier Judge’s decision in its entirety and that the judge is not making a finding at that time other than saying that the judge was correct to refuse the application under the policy and then thereafter he goes on at paragraph 13 to give due consideration to the question of whether or not this appeal should be allowed outside the Rules and as to whether the level of emotional and financial dependency is met. He points out that it is not suggested that the findings made by the judge at paragraph 13 are in error and that any suggestion that the judge has come to a contradictory conclusion is perverse.
11. He also goes on to briefly address the point raised with regard to Section 117B and points out that that only addresses the issue of public interest and that there is no public interest issue here and that the Appellant must succeed. In brief response Ms Willocks-Briscoe submits that the judge had failed to carry out a proper proportionality assessment.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. The principal thrust of the appeal made by the Secretary of State is that the judge has made contradictory findings at paragraphs 11 and 13. I find that that is not the case. Firstly, the judge has made substantial notes as to the historical basis of this matter set out at paragraph 8 and in particular has noted the position that the Appellant found himself in at paragraphs 8(iv), (vi) and (vii). He further has noted that the Appellant at (viii) does not have many close friends in Nepal. What the judge has thereafter gone on to do is to consider the policies in relation to Gurkhas and to consider the current guidelines containing a list of bullet points that should be taken into consideration when conducting the proportionality exercise. The judge has made a finding that at the date of application the Appellant had been living apart from the Sponsor for more than two years and that the evidence was too sparse to show financial dependency from the time that the Sponsor settled in the United Kingdom. All he has done is make a finding analysing the Immigration Rules to show that the Appellant cannot succeed at the time of application under the Rules. Thereafter the judge has quite properly gone on to consider the application outside the Rules.
15. At paragraph 12 he has analysed thoroughly the most recent authorities and has gone on to consider the engagement of family life under Articles 8(1) and 8(2) of the European Convention on Human Rights.

16. Thereinafter at paragraph 13, which is a lengthy paragraph, he has made findings with regard to family life and with regard to the continuation of the support made by the Sponsor, both financially and emotionally, and has set these out in some detail in the second half of that paragraph. Succinctly towards the end of that paragraph the judge has stated:-

“... what is fundamentally at issue in this case is the proportionality of the disruption to his family life and the level of emotional and financial dependency that he has with his father. The evidence suggests a level of dependency is higher than the normal emotional ties that exist between adult relatives. I am not satisfied that the Respondent has established that her decision was proportionate. There are very compelling circumstances that justify allowing this appeal outside the Immigration Rules.”

17. That reflects a detailed and thorough analysis by the judge which is preceded within paragraph 13 by detailed reasons as to why the judge considers that there are compelling circumstances that this appeal should be allowed outside the Immigration Rules. If the whole decision is read as one it is clear that there is no conflict between the final conclusions made by the judge and the sentence upon which the Entry Clearance Officer seeks to rely to be found within paragraph 11. It is a misconceived view to take that sentence out of context, something which Mr Jafar has emphasised.

18. In all the circumstances this is a well-constructed and well-reasoned decision. Whilst accepting that the Entry Clearance Officer was entitled to raise the question of ambiguity and perhaps that it is appropriate that the matter be given due consideration by the Upper Tribunal, I am satisfied that there is no material error of law in the decision of the First-tier Tribunal Judge and that the decision is, when looked at in the round, self-explanatory and reflects a decision that the Judge was entitled to, on hearing the evidence, to come to. There is thus no material error of law and the decision is upheld and the appeal of the Entry Clearance Officer is dismissed.

19. No anonymity direction is made.

Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision upheld.

Signed

Date 16th April 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 16th April 2018

Deputy Upper Tribunal Judge D N Harris