



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/25738/2016**

Appeal Number

THE IMMIGRATION ACTS

**Heard at Field House
On 11th April 2018**

**Decision and Reasons Promulgated
On 27th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

**KISHORE THAPA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisru (Counsel, instructed by Sam Solicitors)
For the Respondent: Ms A Everett (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Nepal, he applied for entry clearance as an adult dependent relative of his father, a former Gurkha soldier. The application was refused on the 27th of October 2016. The Appellant's appeal was heard by First-tier Tribunal Judge Behan at Hatton Cross on the 9th of October 2017 and allowed for the reasons given in the decision promulgated on the 9th of November 2017. The Secretary of State's grounds of application for permission to appeal are dated the 6th of December 2017, permission was granted on the 2nd of January 2018.
2. The background to the case is not run of the mill. The Appellant lived in the UK for 11 years to 2011. He did not live with his family who were still in Nepal with the Sponsor arriving in the UK in 2009. The Sponsor and then the Appellant returned to Nepal in 2011 before the Sponsor returned to the UK again. As the Judge noted in paragraph 26 there was no evidence from the Appellant at all.

3. In paragraph 28 the Judge found that there were more than the usual emotional ties between the Sponsor and the Appellant on the basis of a very high degree of financial dependency, the Appellant is single and shares accommodation with his parents when they are in Nepal. The Appellant did not appear to have an active social life and that would increase the importance of his relationship with his parents.
4. In paragraph 29 the Judge questioned the level of dependency claimed given that the Appellant studied in the UK and the Sponsors exercised their right to live in the UK. It had been submitted that would not be right to conclude that there could not have been unusually close emotional bonds if the Sponsors were prepared to leave the Appellant behind. The Judge found that the separation did not undermine the Sponsor's evidence as to the nature of the relationship.
5. The grounds set out the background to the case and argue that the Appellant had lived as an independent adult between the ages of 20 and 30, the finding that article 8 was engaged was apparently on the basis of financial dependency. The finding of emotional dependency based on the Appellant's lack of money suggested he was not emotionally dependent between 20 and 30 but reverted to emotional dependency when he returned to Nepal and his parents moved to the UK. Emotional dependency was rooted in more than cash. Permission was granted by First-tier Tribunal Judge Grimmett on the basis that it was arguable it was an error to find that there were unusually close ties where the Appellant, who was 37, had lived apart from his parents for many years.
6. The Judge's findings are set out in paragraphs 24 to 35 of the decision. The Secretary of State's case was summarised in paragraph 24 including the submission that there was no evidence that the Appellant had tried to find work in Nepal. The Judge accepted the evidence that the Sponsor had always supported the Appellant financially and that the Appellant had been unemployed since his return to Nepal. There was no evidence from the Appellant at all. In paragraph 27 the Judge noted that the Sponsor could not give any examples of what decisions he still makes for the Appellant.
7. In paragraph 28 the Judge accepted that there was a high degree of financial dependency and the Appellant was single and shared a house with his parents when they were in Nepal which could be for over a year and a half at a time. The Appellant did not appear to have an active social life or to have been taken in by his siblings that would increase the importance of his relationship with his parents.
8. The Judge discussed whether, with the Appellant having studied in the UK for so many years and his parents coming to live in the UK whether there was the level of dependency claimed. The fact the Sponsor and his wife left the Appellant behind did not mean that such ties did not exist, it could mean a difficult decision had to be made. The Judge accepted the Sponsor's evidence that, for whatever reason, the Appellant had not progressed to a degree of independence that would come with earnings. In paragraph 30 the Judge was satisfied that ties over and above the normal ties had and still existed. The Judge accepted that for whatever reason the Appellant had not been able to progress to a degree of independence.
9. In paragraph 30 the Judge found that when the Sponsor came to settle in the UK there existed emotional and other ties over and above the normal ties between adult family members and that those ties still existed.
10. In paragraph 31 it was found that refusal of entry clearance was lawful being made for the purpose of safeguarding the economic well-being of the UK and to maintain immigration control. In paragraphs 32 to 35 the Judge discussed the proportionality of the exclusion of the

Appellant and concluded that the only factor counting against the Appellant was the need to maintain immigration control.

11. In submissions the Home Office relied on the grounds of application and observed that the findings needed to be highly nuanced. Less evidence of dependency would be needed for a 9 year-old or an older child with special needs. In this case it was difficult to see the evidence that supported the findings. They had lived apart for many years, the main thrust was financial and the Appellant was unemployed, that was not synonymous with dependence, that his parents might be his first port of call did not equal dependence. Dependence needed more than a desire to be together and there was no evidence that the Appellant could not function adequately and there was no evidence from the Appellant himself. There was too much emphasis on the Appellant's unemployment and age, financial dependency did not require the protection of article 8. If there was an error the decision should be set aside and remade.
12. For the Appellant it was argued the findings were a lawful consideration of the facts. The family situation was considered by the Judge, especially the time in the UK and the Appellant's age and emotional dependence. The decision was a balanced assessment and reasons were given, the Home Office might not like it but the decision was lawful and not perverse. It was accepted that the Sponsor had funded the Appellant's education and visited the Appellant in Nepal. Paragraph 31 was a clunky expression of the Razgar test.
13. There are a number of issues that arise from the decision in this appeal. The burden of proof rests on the Appellant but there was no evidence from the Appellant to give his account of his personal circumstances in Nepal or to explain how those circumstances had developed. That absence ought to have been a cause for concern and was a feature that meant that the evidence of the Sponsor was not given in context.
14. In paragraph 31 the Judge found that the decision was lawful and made for a legitimate purpose. There is no express reference to the Immigration Rules or to Annexe K and so by implication it appears that the Judge found that the Appellant did not meet the Immigration Rules or applicable guidance. In those circumstances even if article 8 was engaged evidence of compelling circumstances would be required to show that the refusal to grant leave to enter was disproportionate.
15. It is questionable that the financial dependency of the Appellant on the Sponsor, in the absence of evidence from the Appellant putting matters in context was sufficient for the Judge to find that there were more than the usual ties between adults thereby engaging article 8. That however is not the main difficulty that I find with the decision. There remained the need to find compelling circumstances to justify a grant of leave outside the rules.
16. Annexe K provides for the separation of a family unit in certain circumstances but not exceeding 2 years. The periods of separation in this case have been extensive and the Appellant lived in the UK for years in the absence of the Sponsor and his wife and more recently the situation has been reversed.
17. The finding in paragraph 35 that the only matter counting against the Appellant is the public interest in maintaining immigration control is in my view an error. There being no finding that the Appellant met the Immigration Rules or guidance the Judge was obliged to consider whether there were exceptional circumstances and failed to do so. Having considered the facts as presented I can see no basis for finding that such circumstances existed in this case and there was no evidential basis on which the Judge could have found that such circumstances existed that would justify a grant of leave under article 8 outside the Immigration Rules.

18. I note that the Sponsor and his wife have chosen to exercise their right to settle in the UK but that is a choice that they have made and they clearly retain links to Nepal as evidenced by their repeat visits. The exercise of that choice does not attract significant weight Rai. To some extent Ghurka cases are treated differently in part reflecting the longer period that family life is enjoyed by members of that society. Those cultural differences are reflected in the Immigration Rules and the guidance. The age of the Appellant, the lengthy period spent largely apart from his parents and the absence of evidence from the Appellant are such that I find that the circumstances are not sufficiently compelling to justify a grant of leave outside the Immigration Rules under article 8.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of Kishore Thapa.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:



Deputy Judge of the Upper Tribunal (IAC)

Dated: 25th April 2018