



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/20305/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 6th July 2021

Promulgated

On 15th July 2021

Before

**UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH**

Between

**SUNDAR LIMBU
(ANONYMITY ORDER NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R Jesurum, of Counsel, instructed by Everest Law Solicitors Ltd

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Interpretation:

Ms D Gurung in the Nepali language

DECISION AND REASONS

Introduction

- 1.** The appellant is a citizen of Nepal born on 27th February 1979. He applied to come to the UK as the adult dependent relative of his father Mr Dambar Bahadur Limbu, a former Gurkha soldier, on 1st June 2018. On 29th August 2018 the application for entry clearance was refused. He lodged an appeal, which was dismissed on human rights grounds in a decision of First-tier Tribunal Judge Mace promulgated on 18th September 2019.
- 2.** Permission to appeal was granted by Judge of the First-tier Tribunal F Appleyard on the 20th January 2020 and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision dated 13th October 2020 appended as Annex A to this decision.
- 3.** It was decided in my decision on the error of law that the remaking hearing would need to consist of evidence about the appellant's work history and support from his father and submissions from both parties as to whether the appellant has family life with his parents. I preserved the finding of the First-tier Tribunal that the appellant lives in the family home in Nepal, and that the appellant and his parents love, respect and miss each other but that these factors alone do not suffice to meet the test of showing emotional ties over and above the norm, and thus family life in Article 8 ECHR terms.
- 4.** The hearing to remake the appeal on 17th March 2021 had to be adjourned due to the lack of an interpreter. However, it provided an opportunity to narrow the issues between the parties. Mr Clarke, for the respondent made a concession that if the appellant is able to show, on the balance of probabilities, that he has the financial dependency on his parents/sponsors in the UK that he claims then the respondent concedes that in the context of the preserved findings (that the appellant has a loving relationship with his sponsors and lives in the family home in Nepal) that there is an Article 8(1) ECHR family life relationship.
- 5.** Unfortunately, due to multiple technical problems with Skype for Business the hearing on 19th May 2021 also had to be adjourned. It was agreed that the hearing should be heard via a face to face hearing at the first available date.
- 6.** The matter comes before us now to remake the appeal.

Evidence & Submissions - Remaking

- 7.** The relevant evidence of Mr Dambar Bhadur Limbu, sponsor and father of the appellant, from his witness statement and oral evidence, is, in summary, as follows.

- 8.** He was a Gurkha soldier in the British army for 16 years with an exemplary record who was assessed by his commanding officer as a “thoroughly dependable man”. After he retired from the British army in 1986, when the appellant, was seven years old, he built a small house in Dharan, Nepal. His children grew up in this house. As his army pension was insufficient to keep his children he took employment in Brunei in the Gurkha Reserve Unit in as a security guard until 2007, when he returned home and applied to settle in the UK. He came to the UK on 21st September 2007. At that time he was not allowed to bring the appellant to the UK as his dependent because the appellant was over the age of 18 years.
- 9.** The appellant obtained his school leaving certificate examinations in Nepal, but he has never worked in Nepal as he does not good qualifications and there is high unemployment in that country. The appellant remained in the family home in Nepal until August 2000 when he attempted to make an independent life for himself by going to work in Dubai as a domestic worker. The appellant stayed there until September 2006 but could not sustain this independent life as he suffered abuse from his employer and developed problems with weight loss, type 2 diabetes and high cholesterol, and was forced, for health reasons, to return to Nepal to the family home.
- 10.** Since the appellant returned to Nepal he has lived in the family home relying on money for all of his needs from his father’s army pension which he is able to withdraw using pre-signed cheques and more recently using an ATM card, and other money which his father has sent to him from the UK using money transfer agencies. The appellant continues to be unable to obtain work due to his lack of qualifications, high unemployment in Nepal and his health problems which include back pain for which he takes medication.
- 11.** In addition, the appellant has provided a short witness statement which says that he is entirely reliant on funds from his father, the sponsor for all of basic living needs such as food, electricity, water, phone bills and medication. He has used cheques his father has left in Nepal to access his funds, but in January 2020 his father left an ATM card which he now primarily uses to access funds. He attaches a copy of himself holding a VISA ATM card in his father’s name, and also of a cheque book in his father’s name with signed blank cheques.
- 12.** Ms Everett stating having reviewed the documentary evidence and heard from the sponsor that she was not resisting the appeal in light of the facts preserved from the First-tier Tribunal decision; the concession of Mr Clarke; and given she had no reason to doubt the credibility of the sponsor.

- 13.** In these circumstances it was not necessary to hear from Mr Jesurum. We informed the parties that we would be allowing the appeal. We did not give an oral judgement but said we would put our reasons in writing.

Conclusions – Remaking

- 14.** In view of the historic injustice against the Gurkhas once it is determined that there is Article 8 ECHR family life between the appellant and his parents that will normally be determinative of the appeal.
- 15.** To establish family life between an adult child and his parents will need evidence of more than normal love and affection and emotional ties, but there is no test of exceptionality. The conclusions of the Court of Appeal in Rai, derived from Kugathas and the Strasbourg cases, are that what is needed is a fact sensitive analysis looking for real or effective or committed support in the personal sense and not evidence of dependency as, applying the conclusions of the Court of Appeal in Patel and others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17, family life “falls well short of what constitutes dependency” and “ a good many adult children... may still have family life with parents who are now settled here”.
- 16.** As recorded at the start of the decision, we have retained findings from the First-tier Tribunal that the appellant and his parents love, respect and miss each other and the appellant lives in the family home. It is accepted for the respondent today that the evidence that the sponsor provides all of the appellant’s financial support is credible. In these circumstances we conclude that there is family life between the appellant and his sponsor, and that in all of the circumstances of this case the appeal therefore falls to be allowed.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal.
3. We re-make the appeal by allowing it on Article 8 ECHR human rights grounds.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 6th July 2021

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

- 1.** The appellant is a citizen of Nepal born on 27th February 1979. He applied to come to the UK as the adult dependent relative of his father Mr Dambar Bahadur Limbu, a former Gurkha soldier, on 1st June 2018. On 29th August 2018 the application for entry clearance was refused. He lodged an appeal, which was dismissed on human rights grounds in a decision of First-tier Tribunal Judge Mace promulgated on 18th September 2019.
- 2.** Permission to appeal was granted by Judge of the First-tier Tribunal F Appleyard on the 20th January 2020 on all grounds but principally on the basis that it was arguable that the First-tier Tribunal had erred in law in the approach to the historic injustice to Gurkhas and the case law relating to Gurkha family reunion, and in failing to correctly assess the Article 8 ECHR appeal with reference to the relevant and correct facts .
- 3.** The matter came before me to determine whether the First-tier Tribunal had erred in law. The hearing was held at a remote Skype for Business hearing in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. There were no significant issues of connectivity or audibility with the hearing.

Submissions - Error of Law

- 4.** In grounds of appeal and in further submissions provided to the Upper Tribunal, drafted by Mr A Malik and Mr R Jesurum for the appellant, and in oral submissions from Mr Jesurum it is argued for the appellant, in summary, as follows.
- 5.** The appellant's father, who was a Gurkha soldier in the British army for 16 years with an exemplary record who was assessed by his commanding officer as a "thoroughly dependable man", was only permitted the opportunity to settle in the UK in 2007 after the unequal provisions were corrected to permit Gurkha soldiers to do this. By this time the appellant was an adult. The appellant's mother joined his father in 2015. The appellant argues he should be permitted to join his parents as he would have done so if his father had been allowed to make his application when he was a minor and in light of the continuing Article 8 ECHR family life relationship between them.

6. Firstly, it is argued that the First-tier Tribunal erred in law by not having regard to the correct test to determine whether there was family life between the appellant and his parents at paragraphs 22 to 26 of the decision. It is argued that wrongly it was required that the appellant be dependent by reason of some necessity on his father, rather than investigating whether the appellant had family life with his father and mother because of real or effective or committed support over and above normal emotional ties, as would have been established if properly applying the test set out in Rai v ECO Delhi [2017] EWCA Civ 320. It is argued that this test, from Lord Justice Sedley's judgment in Kugathas, was the one which the Court of Appeal focused on in Rai rather than Lady Justice Arden's judgement. It is argued that in the judgement of the European Court of Human Rights in AA v UK that family life with a young adult was to be found where that young adult had not founded a family of their own. It is argued that there was inadequate consideration given by the First-tier Tribunal to the generally very low threshold for engagement of Article 8(1) ECHR. It is argued that it is clear from the case law relating to the other limb of Article 8 ECHR, which protects the right to respect to the home, that this even applies to entirely unnecessary holiday homes, see Demades v Turkey [2003] ECtHR 6219/90, and that other qualified rights, for instance Articles 9,10,11 and 12 ECHR, give the right to individual choice and do not require necessity.
7. Secondly, it is argued that there was a failure to have accurate regard to the evidence in the case, and by having regard to irrelevant considerations. It is argued that there was a failure to have regard to the full evidence with respect to the appellant's work in the UAE, which he did for six years, but which ended as a failed attempt at the appellant achieving independence in September 2006, prior to his father being granted indefinite leave to enter the UK in April 2007, due his being ill-treated, losing weight and being diagnosed with cholesterol problems and diabetes. It is further argued that in any case as Article 8 ECHR protects choice then it does not matter why the appellant returned from the UAE. It is argued that it was not fair to have regard to the inconsistent age on the card from the Institute of Health Sciences as this was not put to the witnesses; and that it was irrelevant to take into account the income of the sponsors in the UK. It is argued that there was an incorrect factual consideration with respect to the issue of the appellant's father's pension, which was drawn by his mother until 2015 when she travelled to the UK and then was drawn by the appellant after that time. It is also argued that there was a failure to have regard to the evidence of the appellant's mother in the decision, particularly as this explained that the appellant did not work due to his lack of qualifications and the high rates of unemployment in Nepal rather than any issues with the appellant's health. The evidence of the father ought to have

considered in light of the assessment of his commanding officer that he was a “highly dependable man”, and that ought to have been placed in the balance when assessing his credibility as a witness.

- 8.** Thirdly, it is argued that ultimately the decision errs in law for failure to give proper reasons to explain to the appellant why he had lost his appeal. This appellant had returned home in 2006 from the UAE, he has remained in the family home and is financially supported by his parents because of the lack of work in Nepal (not for reasons of his ill health). The fact that he receives financial support and lives in the family home out of love and affection due to family ties suffices to show that Article 8(1) is made out, and the decision fails to give proper reasons for the fact the appeal is dismissed.
- 9.** Mr Melvin, in his written and oral submissions and defended the decision of the First-tier Tribunal. He argued that the First-tier Tribunal Judge directed herself properly with respect to the test being simply whether there is family life and that there was no element of exceptionality. The conclusion that there was no family life was based on the following findings: that there was no reason why the appellant did not travel to the UK with his mother in 2015; that he had spent six years working in the UAE prior to his father leaving for the UK; that it was not clear under what circumstances the appellant returned to Nepal; there was no credible evidence why the appellant was not working in Nepal; there was no evidence that there were more than normal emotional ties between the appellant and his parents as the father’s evidence was vague; that there had only been one visit by the appellant’s parents to Nepal in the last 4 years; the First-tier Tribunal did not find that the full picture had been given and there was insufficient evidence relating to the financial remittances. It is argued that this was a holistic consideration of the facts of the case and a rational conclusion that there was not anything more than normal love and affection which justified a finding of family life.
- 10.** I reserved my determination at the end of the hearing. I discussed however the various possible outcomes of this hearing. If I found that there was an error in the definition of family life but found that on a proper application of the definition it could be made out on the basis of findings made by the First-tier Tribunal it was agreed that I could go on to remake the appeal by allowing it without a further hearing. If I found that there was no legal error clearly no remaking would be needed and the First-tier Tribunal decision dismissing the appeal would be upheld. If, on the other hand, I found that a wrong definition of family life had been applied but that there needed to be further fact finding due to problems with that as well a further remaking hearing would need to take place in the Upper Tribunal.

Conclusions – Error of Law

- 11.** There is a correct legal direction at paragraph 22 of the decision of the First-tier Tribunal that in view of the historic injustice against the Gurkhas that once it is determined that there is Article 8 ECHR family life between the appellant and his parents that will normally be determinative of the appeal. This is clearly the position returned to at the end of the conclusions of the First-tier Tribunal at paragraph 26 of the decision too. It is correctly recorded at paragraph 23 that to establish family life between an adult and parents will need more than normal love and affection and emotional ties, and that there is no test of exceptionality.
- 12.** At paragraph 22 of the decision it is also said however that there must be an element of dependency, this, the appellant contends is not a lawful direction. I find that this direction was not consistent with the conclusions of the Court of Appeal in Raj which find, from Kugathas and the Strasbourg cases, that what is needed a fact sensitive analysis looking for real or effective or committed support in the personal sense and not evidence of dependency as, applying the conclusions of the Court of Appeal in Patel and others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17 family life “falls well short of what constitutes dependency” and “ a good many adult children... may still have family life with parents who are now settled here”.
- 13.** The next question is therefore whether the First-tier Tribunal, despite an inaccurate direction on the issue of dependency, a fact sensitive analysis looking for real or effective or committed support in the personal sense is conducted to see if family life exists between the appellant and his father. This is of course challenged in the grounds by saying some of the consideration was inaccurate; some evidence was ignored; some issues were unfairly dealt with without notice to the sponsors who gave evidence; and some irrelevant considerations were brought into the balance.
- 14.** The First-tier Tribunal accepts at paragraph 9 of the decision that the appellant is the biological son of his parents, the sponsors, despite confusing evidence from the Kindred Roll, in light of DNA evidence which is highly supportive of this fact.
- 15.** I find that the reasoning with respect to doubting the history with respect to the work the appellant did between 2000 and 2006 in the UAE as a domestic servant in a private household at paragraphs 10 to 16 of the decision lacks logic and clarity in the reasoning. It is not clear why it was not believed that this was a failed attempt for the appellant to be able to obtain financial independence or why it is not believed that it ended because he was exploited (causing him to lose weight and have high cholesterol, diabetes and back pain), particularly as there was

evidence of this work, evidence of his diabetes and cholesterol problems and a reasonable explanation from the Nepali notary as to why this was not included in the original affidavit due to a misunderstanding. It is also not clear what the relevance of any of this is in any case as it appears to be accepted that whatever happened in the UAE that it ended in 2006 prior to the appellant's father coming to the UK. The faults in the analysis aside, I find that it was lawfully open to the First-tier Tribunal to have regard to the uncontested history that the appellant had a period of independence of 6 years prior to his father leaving the family home as part of the fact sensitive analysis at paragraph 25 of the decision when considering whether family life is to be found, as the past may be telling of the current situation.

- 16.** It is clear that the First-tier Tribunal did not accept that the appellant had more than normal emotional ties on his parents or support from them at paragraphs 19 and 25 of the decision, despite frequent visits by the appellant's father over the whole period he has been in the UK (although there has only been one in the four years since the appellant's mother joined his father in the UK) and regular contact by phone and a finding that a loving family relationship existing. The conclusion that there was no more than normal emotional ties was reached on the basis of the appellant's father's lack of detailed knowledge as to what he had been doing with himself in Nepal with respect to work, daily activities, relationships as set out at paragraph 19 of the decision. I find the ultimate conclusion at paragraph 25 that "there is love, affection, and respect between them and they no doubt miss each other, the evidence does not support a level of emotional support over and above normal emotional ties" is one which is sufficiently reasoned and rationally open to the First-tier Tribunal on the evidence.
- 17.** With respect to more practical support it is insufficiently clear what is accepted by the First-tier Tribunal. Paragraphs 17 and 18 sets out the detail of the evidence but do not actually state what is accepted and what is not accepted. At paragraph 25 it is accepted that: "There is evidence of remittance of funds and that the appellant lives in the house that his family lived in", and that there is "some extend to financial dependence". It is not clearly reasoned but I find that the implication at paragraph 25 is that the evidence of the sponsor is not fully accepted and so it is not accepted that the appellant is not working and earning to some degree, as it is not believed that his ill-health means that he could not work and in the context of it not being believed that he left the UAE for the reasons given. I have already found legal error in the reasoning with respect to the UAE in paragraph 15 above; and I also find that the First-tier Tribunal has failed to take into account relevant evidence before it that the appellant was not working due to high unemployment in Nepal and his lack of qualifications and not due to his health issues as identified by Mr Jesurum; and to consider the

positive assessment of the sponsor's character by his commanding officer when considering the credibility of his evidence on the issue of financial support.

- 18.** I conclude that there is a material error of law by the First-tier Tribunal because ultimately an inaccurate test was applied to whether family life exists in this case, and because faulty fact finding as detailed above means that it is not possible to say that the appellant could not have succeeded if the fact sensitive analysis had been conducted accurately and lawfully. I preserve the findings with respect to the level of emotional ties at paragraph 25 of the decision of the First-tier Tribunal as cited at paragraph 16 above, and also the finding that the appellant lives in the family home in paragraph 25 of the decision of the First-tier Tribunal as these findings are reasoned, lawfully and clearly made. The appeal needs to be remade with fact finding as to the appellant's history up to the current time of work and receipt of remittances/financial support from his father to conclude whether this combined with the normal loving ties with his parents and the fact he lives in the family home amounts to family life sufficient to meet the requirements of Article 8(1) ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal and the findings of the First-tier Tribunal bar those identified at paragraph 18 of this decision with respect to emotional ties and the family home.
3. I adjourn the re-making of the appeal and find that it should be remade in the Upper Tribunal given the limited extent of fact-finding required.

Directions

- (i) The remaking hearing will consist of evidence in chief and cross examination on the issues of the appellant's work history to date and the history of remissions/ financial support by his father and submissions from both parties on whether the appellant has family life with his parents in a remote Skype for Business hearing.
- (ii) Any further documentary evidence relied upon should be filed and served ten days prior to the remaking hearing.

- (iii) If an interpreter is required the Upper Tribunal must be notified when the notice of hearing is sent out.
- (iv) The time estimate is 3 hours.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 19th October 2020