



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/01350/2021
[UI-2021-000762]
HU/01351/2021 [UI-2021-000763]**

THE IMMIGRATION ACTS

**Heard at Field House
On the 28 February 2022**

**Decision & Reasons Promulgated
On the 25 April 2022**

Before

**UPPER TRIBUNAL JUDGE KAMARA
and
DEPUTY UPPER TRIBUNAL JUDGE MONSON**

Between

**(1) MR SURENDRA LIMBU
(2) MISS KHAGENDRA KUMARI LIMBU**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Ms Deborah Revill, instructed by Everest Law Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants appeal from the decision of the First-tier Tribunal (Judge Raymond sitting at Hatton Cross on 20 July 2021) dismissing their appeals against the decision of the respondent to refuse to grant them entry

clearance as the adult dependent children of their mother, a Gurkha widow.

Relevant Background

2. The appellants are twins, who were born on 1 January 1991. Their father was Bhim Parsad Limbu, born on 1 January 1936. He served in the Brigade of Gurkhas for 15 years, and was discharged on 7 November 1969, with a record of exemplary conduct. The appellants' mother and sponsor is Amrit Maya Limbu, a Nepalese national who was born on 23 March 1945. She was issued with a settlement visa as the widow of Mr Limbu on 4 February 2020, and she entered the UK on 11 February 2020. She was then granted indefinite leave to enter on 30 February 2020 valid until 31 December 2024. The appellants applied for entry clearance at the same time as their mother, but their applications were refused, whereas hers was allowed.
3. A Kindred Roll which is held at the Records Office of the British Gurkhas in Pokhara shows that Mr Limbu had two wives, and that he died on 4 May 1992. He married his first wife on 1 January 1957, and she died on 1 January 1979. They had three children. Mr Limbu married his second wife on a date which is not recorded on the Kindred Roll. They had nine children, of whom the appellants are the two youngest.
4. The applications of the appellants to accompany their mother to the UK for the purposes of settlement were refused on 18 December 2019. The respondent acknowledged that their sponsor had been issued with a settlement visa under the discretionary arrangements for widows of a Gurkha discharged prior to 1 July 1997. However, the discretionary arrangements in place for adult children of a Gurkha discharged prior to 1 July 1997 did not apply to the children of widows. Their father had passed away on 4 May 1992, before their mother had been granted a settlement visa.
5. In the refusal directed to Surendra Limbu, the respondent noted that he had declared in his visa application form that he had previously worked in Qatar from 20 June 2017 until 20 April 2019. It was thus not demonstrated that he was financially and emotionally dependent upon his mother beyond that normally expected between a parent and adult child.
6. In both refusals, the respondent cited **Ghising & Others [2013] UKUT 00567 (IAC)** for the proposition that, where Article 8 was engaged and, but for the historic wrong, the appellant would have been settled in the UK long ago, this would ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant's favour, where the only matter relied upon by the Secretary of State/Entry Clearance Officer was the public interest in maintaining a firm immigration policy.
7. They had grown up in Nepal. Their mother had chosen to apply for a settlement visa (which was her right) in the full knowledge that they did not automatically qualify for settlement. The respondent was not satisfied

that they had established family life with their mother over and above that between an adult child and parent, or that Article 8 was engaged, or that the consideration as outlined in **Ghising** applied to them.

The Decision of the First-tier Tribunal

8. It appears from the Judge's typed record of proceedings that the hearing was conducted on the Cloud Video Platform. Both parties were legally represented, with Ms Revill appearing on behalf of the appellants. The Judge received oral evidence from the appellants' mother, who was cross-examined by the Presenting Officer and also answered questions from the Judge.
9. In his subsequent decision, Judge Raymond extensively rehearsed the witness statement evidence of the first appellant, Surendra Limbu, and the witness statement evidence of the sponsor. He then went on to refer to some of the oral evidence given by the sponsor, and to some of what the second appellant had said in her witness statement.
10. The Judge set out his findings at paragraph [25] onwards. At paragraph [26], he said that all the indications were that the appellants were able, enterprising young adults who were living independently. At paragraph [28], he observed that while there may have been some remittances to the appellants in 2020, these were limited in number, and "*must seem ostensibly made to deliberately coincide with the applications, against a backdrop of there being absolutely no evidence at all for the lives and circumstances of the two appellants up to the age of just under 30 when the applications were made.*"
11. At paragraphs [29]-[32], the Judge addressed the evidence of the first appellant that he was trafficked into modern slavery in Qatar. The Judge held that it was incredible that he was tricked into this on two separate occasions, despite having at least one brother, if not two, who had been Nepalese expatriates working abroad - one having worked in Qatar throughout this period, and who (the Judge found) could presumably have helped him avoid such pitfalls. Moreover, the Judge found that his mother was not even aware that the first appellant had gone to Qatar on two occasions, "*and not only once as she would seem to think.*"
12. At paragraph [35], the Judge found that both appellants had taken the initiative to find their living accommodation away from the family home since their mother's departure, as would be expected of independent, young adults of their age. At paragraph [37], he said that the extensive family network that would be available to both appellants from the 11 children of their parents - all now adults and who had made their way in life, including the brothers who lived in a nearby village with their families - was "*also mired in deep obscurity*".
13. At paragraph [38] the Judge observed that the second appellant had asserted that apart from her mother she had no other relatives in Nepal

who would give them any emotional or financial support. The Judge found that, without evidence from her and her brother on what their connections were with their nine other siblings, and their extended family radiating out from this, it was impossible to accept such a bare statement at face value. At paragraph [39], he said that he found that this was deeply damaging to the credibility of the appellants and the sponsor, and that this was compounded by the sponsor having been obscure and evasive in oral evidence about the £300 she was providing to Shanti Maya Limbu every month, from her very modest income, *“and even regarding what her actual relationship to this young woman and her family amounts to”*.

14. At paragraph [40], the Judge said that the suggestion of the first appellant that he and his sister would die without the help of the sponsor was emblematic of the lack of seriousness at the heart of the applications.
15. At paragraph [41], the Judge concluded that the appellants and their mother had not established a dependency as identified in **Jitendra Rai -v- ECO (New Delhi) [2017] EWCA Civ 320**. As a result, the Judge found at paragraph [42] that Article 8 was not engaged, and that the personal circumstances of the appellants could not be seen to be such that the historical injustice outweighed the public interest in the maintenance of firm immigration controls.

The Reasons for the Grant of Permission to Appeal

16. On 27 October 2021 First-tier Tribunal Judge Swaney granted the appellants permission to appeal for the following reasons:

“It is arguable for the reasons set out in the grounds of appeal that the Judge erred in his approach to considering whether or not family life between the appellants and the sponsor exists. It is also arguable that the Judge makes findings that are perverse or irrational because they are based on the Judge’s assumptions without reference to any supporting evidence which have a material impact on the Judge’s assessment of credibility.”

The Hearing in the Upper Tribunal

17. At the outset of the hearing before us to determine whether an error of law was made out, Ms Ahmed announced that the respondent had accepted that the First-tier Tribunal Judge had materially erred in law. There had been a lack of focus by the Judge on whether family life had existed at the date of departure. She also accepted that the sponsor and his mother had not given inconsistent evidence on the topic of the first appellant working abroad. She added that the respondent’s concession was subject to any alternative view that the Tribunal might have.
18. We informed the parties that we were satisfied that a material error of law was made out, and that our written reasons for reaching this conclusion would follow.

Discussion

19. In the light of the guidance given by the Court of Appeal at paragraph [77] of **KM v SSHD [2021] EWCA Civ 693**, we recognise that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal Judge for his decision and that we should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out.
20. Ground 1 is that the Judge failed to have regard to a material matter, which was “the unchallenged evidence” that the appellants and sponsor had lived together in Nepal until the sponsor’s departure to the UK, when considering whether family life existed.
21. Although the Judge made specific reference to **Jitendra Rai -v- ECO (New Delhi) [2017] EWCA Civ 320.**, he did not direct himself that the crucial test which is laid down in **Rai** is firstly, whether there was existing family life between the adult child and the sponsor at the date of the sponsor’s departure from Nepal to the UK for the purposes of settlement; and, secondly, if so, whether family life has endured up until the date of the appeal hearing notwithstanding the intervening physical separation and/or the passage of time.
22. The appellants’ case was that the second appellant had always lived with her mother until her mother’s departure, and that the first appellant had returned to the family home before the mother’s departure after working abroad for 22 months. Ms Revill’s submission to the Judge in her skeleton argument was that, following **Uddin -v- SSHD [2020] EWCA Civ 338** at paragraph [40] where the Court said that “*continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life*”, both appellants should be treated as having continued to enjoy family life with their mother at the time of her departure for the UK in February 2020.
23. The Judge failed to make a clear finding on this submission, and his failure to do so was material, because the appellants had only lived apart from their mother for a relatively short period of time by the date of the appeal hearing, which, other things being equal, increased the possibility that any pre-existing family had not ceased.
24. Although the ultimate question to be resolved was whether family life was subsisting at the date of the hearing, a necessary antecedent finding was whether family life had existed at the date of the sponsor’s departure from Nepal. This was particularly important where the Judge was disposed to reject the appellants’ case that family life was subsisting at the date of the hearing on the basis of various adverse credibility findings and asserted gaps in the evidence. The upshot is that the Judge’s failure to engage with the antecedent question was procedurally unfair.
25. Ground 2 is that the Judge made a material error of fact by proceeding on the basis that the first appellant claimed to have worked abroad twice, when this was not the case; and Ground 3 is that the Judge perversely

found that it was incredible that the first appellant had been exploited by his employer in Qatar because his siblings had previously worked abroad.

26. We take these Grounds together, as they are interlinked. We find that the Judge made a factual error in finding that the first appellant's evidence was that he had been tricked into modern slavery on two separate occasions. We consider that the Judge misunderstood the evidence which he had extracted from the witness statements of the first appellant and the sponsor. We accept that in the extract from his witness statement set out in paragraph [9], the first appellant only referred to having one job in Qatar for 22 months; that, after returning to Nepal, he said he was lured into another agency for overseas employment; and that he said they kept his passport and later told him that they had lost it. Accordingly, while the first appellant said that he had gone to another overseas employment agency, he did not say that he had been given a job by this second agency. It is apparent from the extract from the sponsor's witness statement which is set out at paragraph [10] of the decision that the sponsor gave evidence to the same effect as that given by the first appellant. As acknowledged by Ms Ahmed, there is no discernible inconsistency between what each of them say on this topic.
27. The Judge's mistake of fact is material, as he bases a very strong adverse credibility finding on it both in relation to the first appellant and in relation to the sponsor. His incredulity at the first appellant's account of his experiences in Qatar is expressly based on the erroneous premise that the first appellant had allowed himself to be tricked into modern slavery on two occasions, despite having access to the guidance of his older brothers.
28. Ground 4 is that the Judge erroneously attached little or no weight to the evidence of contact between the appellant and the sponsor on the grounds that it was cursory and that the call records did not show the content of the calls made.
29. The Judge did not refer to documentary evidence of contact between the appellants and their mother in his discussion beginning at paragraph [25] of his decision. He addressed the evidence at an earlier stage, after reviewing the evidence of remittances. He said at [21]

"There is cursory evidence of social chat between the appellants and their mother, which at most indicate transfers of money, and not the content of any exchanges."
30. We consider that the observations which the Judge made about the documentary evidence of contact were reasonably open to him.
31. Ground 5 is that the Judge irrationally found that the financial transfers dated 2020 had been made deliberately to coincide with the applications, when prior to 2020 the sponsor had lived with the appellants and so had no need to send them money.

32. We consider that the Judge was well aware that the sponsor would not have needed to send the appellants money before she departed from Nepal. We consider that the Judge was making a more nuanced point in paragraph [28] than is expressed in Ground 4.

Conclusion

33. Grounds 1-3 are made out. As the Ground 1 error goes to the central issue in the appeals, procedural fairness requires that the decision is set aside in its entirety. Although some of the Judge's findings of fact are not challenged or are not shown to be erroneous in law, we consider that the errors that have been made out mean that it would be unsafe for any of the Judge's findings of fact to be preserved.

Disposal

34. In view of the fact that the appeal will need to be re-heard in its entirety, we consider that it is appropriate that the appeal is remitted to the First-tier Tribunal for a *de novo* hearing.

Anonymity

35. The Judge did not make an anonymity direction, and we have not been asked to do so. We consider that there is no good reason to impose an anonymity direction, having regard to the importance of open justice and the *Presidential Guidance Note No.1 2013*.

Notice of Decision

36. The decision of the First-tier Tribunal contained a material error of law such that the decision is set aside in its entirety.

Directions

37. The appeal shall be remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing before any Judge apart from Judge Raymond, with none of the findings of fact made by the First-tier Tribunal being preserved.

Signed Andrew Monson
Deputy Upper Tribunal Judge Monson

Date 8 March 2022