



IAC-AH-SAR-VI

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

Appeal Number: IA/16027/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 21<sup>st</sup> December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**GANGA BUDHATHOKI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Norman, instructed by Westkin Associates

For the Respondent: Ms Sreeraman, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The appellant is a citizen of Nepal born on 23<sup>rd</sup> September 1956 and she applied for a residence card as confirmation of a right to reside in the UK as the dependent family member of an EEA national under Regulation 7(1)(c). That application was refused on 23<sup>rd</sup> April 2013 because in the view of the respondent she had failed to demonstrate she was genuinely dependent on her EEA family member. She claimed

to have entered the UK on 9<sup>th</sup> May 2012 having previously been refused visitor's leave on 2<sup>nd</sup> June 2009. The application for the residence card was made on 12<sup>th</sup> October 2012.

2. In the letter of refusal dated 23<sup>rd</sup> April 2013 it was stated that the appellant had not shown that she was living with or was financially dependent on her sponsor Pradip Budhathoki and Nirmala Budhathoki.
3. Judge Davies of the First-tier Tribunal heard the appeal on 23<sup>rd</sup> January 2015 and dismissed that appeal on 6<sup>th</sup> February 2015. He found at paragraph 25 that given the assets which the appellant owned in Nepal valued at around £120,000 in UK money in 2009 she could meet her essential needs without the support of her son and daughter-in-law. She had accommodation and could obtain income from the land. She confirmed that her late husband had obtained an income from the land. He found that as recently as 2009 she declared her intention to return to Nepal as she had valuable assets. The judge also found that the credibility of the appellant and that of her son and daughter was undermined by their evidence in 2009. It was contended that as she owned such valuable assets in Nepal it would not be credible to suggest she would not return.
4. An application for permission was made to the First-tier Tribunal which was refused and then renewed to the Upper Tribunal which was granted by Upper Tribunal Judge Canavan.
5. The application for permission to appeal cited **MR and Others (EEA extended family members) Bangladesh [2010] UKUT 449** which confirmed that "dependency had to be genuine, not contrived and that its interpretation had to be informed by the principle of effectiveness" and **Reyes (EEA Regs: dependency) [2013] UKUT 314** that there should be a holistic examination of a number of factors "including financial, physical and social conditions, so as to establish whether there is dependence that is genuine" and  

"the essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances bearing in mind the underlying objective of maintaining the unity of the family"

and  

"the test is one of the present and not past dependency".
6. **Lebon C-316/85 [1987] ECR 2811** confirmed that "there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment".
7. The application for permission to appeal submitted that at [25] of his decision Judge Davies erred in assessing the appellant's dependency as not genuine. It was clear from the appellant's bank statements that the financial support she received from her family and her husband was not contrived as each credit was derived from them and

there was no alternative income. At question 8 of the decision Judge Davies had questioned large deposits made in other names such as "Tara Devi" despite testimony explaining the nature of how money was transferred to Nepal via agents. The dependency was not contrived.

8. Secondly, dependency was a present consideration and relevant as at the time of appeal.
9. Third, there was no assessment of the holistic examination of the appellant's circumstances with regard to her physical and social condition and Judge Davies placed significance on the appellant's ability to arrange the sale of property despite the fact that she was illiterate. She would not be able to take sufficient actions to generate an income.
10. There was no consideration from Judge Davies of the important underlying objective of maintaining the unit of the family as set out in Reyes.
11. Fifth, in Re J family life was protected by Article 8.
12. Sixth, family life would not normally exist between them within the meaning of Article 8 at all and there would be absence of further elements of dependency.
13. A Rule 24 response was served in which the respondent made clear that she opposed the appellant's appeal, save to say that the evidence found by the appellant and her supporters was not credible.

### The Hearing

14. At the hearing Miss Norman relied on her grounds of appeal and submitted that the examination of dependency by the claimant was hypothetical and futuristic. There was no suggestion that the appellant had income other than the sponsor's since May 2012 when she moved to the UK. In relation to the Immigration Rules it may be appropriate to consider future maintenance but that was not permissible under the EEA Regulations. The judge did not look holistically at the appellant's position and there was no investigation as to the proposed sale of land or income. The husband had previously paid a labourer and there was no firm finding in relation to income from the land. The judge did not look at the practical considerations of restarting an income. The issue was current dependency. This was a depressed, illiterate woman and there was no explanation of how practically she currently was deriving income from the land.
15. Ms Norman asserted that there was no consideration of Article 8 but I pointed out that this was irrelevant as no Section 120 notice had been served.
16. Ms Sreeraman stated that the judge had applied the principles in Reyes and was entitled to make findings on the dependency. There had been a gap in remittances of eighteen months between the dates of 14<sup>th</sup> November 2009 and 15<sup>th</sup> March 2011 and no satisfactory explanation of this. She had assets able to meet her needs and the

judge had made reference to this at paragraphs 25 to 26. The judge had taken a holistic approach. Ms Sreeraman submitted there was a clear finding there was income from land and little evidence as to deterioration of that land or the property on it. The gap of eighteen months had not been challenged by the appellant.

17. Miss Norman submitted that there was no suggestion the land presently provided a source of income or that the judge dealt clearly with the testimony regarding the transferred money from agents. There was no record of when payments were made and the amounts.

## Conclusions

18. The respondent's case was summarised by the judge at paragraph 6 where he recorded that the appellant was not genuinely dependent on her son and daughter-in-law and the witnesses were not being truthful and had failed to provide evidence of genuine dependency.

19. Although the judge cites **Reyes (EEA Regs: dependency) [2013] UKUT 314 (IAC)** he does not appear to follow it. **Reyes** provides guidance on dependency, and the judge correctly states that the test is a factual one which must not consist solely of a bare calculation of financial dependency but should holistically examine a number of factors including financial, physical and social conditions should assess the present position and must not interpret the term so as to deprive it of its effectiveness. However, at paragraph 16 the judge finds that

“Given the assets which she owns in Nepal valued at around £120,000 in UK money in 2009 she can meet her essential needs without the support of her son and daughter-in-law. She has accommodation. She can obtain an income from the land. She confirmed that her late husband had obtained an income from the land. While I accept that the appellant may not have the skill or experience to arrange either the sale of the assets or to arrange arrangements for income from the land it is likely that she could obtain help in doing that. As recently as 2009 she had declared her intention to return to Nepal as she had valuable assets”.

20. The difficulty with this is that it is framed in the past and the future, not the present. The judge at [10] recorded evidence from the son to the effect that

“There was no income from the land. The land had in the past provided food for the family. His father had got someone to cultivate the land so as to provide some months of food from the land. Asked about his mother's statement that the land had been farmed and that there was income from the land he said that she might have forgotten. It would need considerable time for him to go to Nepal to sell the land for his mother”.

There was no finding as to the amount of income and whether this was genuinely presently available.

21. In **Lim (EEA dependency [2013] UKUT 00437** Upper Tribunal Judge Storey considered at [25] the issue of dependency of choice in that he made specific reference to choosing not to live off savings. He had this to say

“25. Whilst the jurisprudence has not to date dealt with dependency of choice in the form of choosing not to live off savings, it has expressly approved dependency of choice in the form of choosing not to take up employment: see above Lebon [22]. I readily acknowledge that in SM (India) Sullivan LJ saw it as possible that there was a distinction relating to the situation of a claimant who preferred living off savings and a claimant who preferred not to work (see above [14]). But it is very difficult to discern any principled basis for differentiating between the two different forms of dependency of choice when the test is simply a question of fact and the reasons why there is dependency are irrelevant. Indeed, if anything, one might have thought that expecting a retired person to utilise existing financial resources after a lifetime of work is more problematic than expecting a young able bodied person to earn a wage” . .

22. It is correct to say that for dependency to arise it is not necessary that the person be wholly or even mainly dependent if a person requires material support for essential needs in part that is sufficient.
23. Despite alluding to a holistic assessment the judge did not appear to undertake one. I can accept that he made adverse credibility findings and he might have found the evidence in relation to income and the ability to derive income from the land not credible but there were no findings regarding the income from the land merely that it could be sold. As **Reyes** makes clear dependency is not a matter merely of financial dependency but a question of essential living needs and although the judge looked at the health of the appellant, there did not appear to be an overall assessment of her accommodation and financial requirements. I therefore find an error of law which may be material. Article 8 is not relevant in this case. There is no Section 120 notice and no removal decision.
24. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.
25. No anonymity direction is made.

Signed

Date 4<sup>th</sup> December 2015

Deputy Upper Tribunal Judge Rimington