Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04755/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th August 2017	**On 20th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR PARBIR PUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:
For the Appellant: Mr A O'Callaghan (Counsel)
For the Respondent: Mr E Tufan (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Sweet, promulgated on 5th June 2017, following a hearing at Hatton Cross on 24th May 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nepal, who was born on 27th May 1988. He appealed against the decision of the Respondent dated 29th July 2015 refusing his application for entry clearance to settle in the UK as a dependent son of a former Gurkha soldier, pursuant to the Respondent's policy in relation to former Gurkhas which is set out in Appendix K, IDI chapter 15, Section 2A, and is dated 5th January 2015.

The Appellant's Claim

3. The essence of the Appellant's claim is that, although he had been working in Malaysia, he had not been paid for the work and had therefore returned to Nepal, where his father spoke to him on a daily or weekly basis, supported him financially, and sent money transfers through the bank and sometimes by cheque from his disability pension. The father, Prem Bahadur Pun, had even visited the Appellant in Nepal on one occasion in November 2014 when the Appellant was working there.

The Judge's Findings

4. The judge dismissed the appeal on the basis that the Appellant was not part of an independent family unit (as he lived on his own), but he was still financially and emotionally not independent of his father. The judge accepted that the Appellant's father had been making payments to the Appellant by way of cheques and IME (a form of money transfer which enabled the Appellant to access his father's pension), and the father also financed the Appellant's visit to Malaysia for the purpose of work. Nevertheless, the judge held that,

> "It is also clear that the Appellant has been able to lead an independent life after his parents came to the UK in September 2013. His parents were not able to raise the necessary funds to support an application for the Appellant on an earlier occasion" (paragraph 19).

5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge failed in applying Article 8 properly to the facts of the Appellant's case and did not follow relevant current jurisprudence.

7. On 29th June 2017, permission to appeal was granted on the basis that this was a very brief decision and arguably failed to demonstrate the relevant provisions applicable in a case such as this.

8. On 17th July 2017, a Rule 24 response was entered by the Secretary of State to reflect that the judge clearly set out his reasons for the finding that there is no family life for the purposes of Article 8 between the Appellant and his parents.

Submissions

9. At the hearing before me on 18th August 2017, Mr O'Callaghan, appearing on behalf of the Appellant relied upon his Grounds of Appeal. He emphasised that the judge reached the conclusion that the Appellant was not financially and emotionally dependent on his father without providing any reasons for this finding. The judge also erroneously concluded that the Appellant had been able to lead an independent life because it was clear from the authorities that a period of separation does not necessarily split the family: see **UG (Nepal) [2012] EWCA Civ 58**. The judge also erred in placing weight on the presence of the Appellant's five married siblings in Nepal and this was irrelevant to assessing whether the Appellant had continuing financial and emotional dependence on his sponsoring father. He, after all, was unmarried. Moreover, the judge's statement that there had not been a breach of the Appellant's right to family life was not the relevant test to be taken into account in a case such as this.

10. Finally, the recognition by the judge that, "his parents were not able to raise the necessary funds to support an application for the Appellant on an earlier occasion" (paragraph 19) when the sponsoring father had himself come to the UK, was significant because in **Rai [2017] EWCA Civ 320**, to which the judge was referred, it was emphasised that the fact that the Appellant would have applied to come to the UK earlier if his parents could have afforded the application, was a significant factor in favour of allowing the appeal.

11. For his part, Mr Tufan submitted that the judge was not wrong in saying that there was no Article 8 case to be made out here. The Appellant had been living in his own home for a long time now. The existence of financial dependency does not trigger Article 8. (See paragraph 35 of **AAO [2011] EWCA Civ 840**).

12. In reply, Mr O'Callaghan submitted that, whilst it is true that the judge's main findings appear in his concluding paragraph at paragraph 19, one has to look at the preceding paragraphs from paragraphs 16 to 18 which do demonstrate that the Appellant had a strong claim to be given entry clearance. Against that background, the judge had wrongly concluded that the Appellant was able to live a separate life when his parents came to the UK, because this was only over a period of eighteen months, and the case law suggested that such separation is not fatal to an Article 8 claim where the Gurkha policy applied.

13. Second, as far as "financial" dependency was concerned, the judge had accepted that the Appellant was financially dependent upon his sponsoring father, and had even drawn from his sponsoring father's pension through an IME account. The father had not only made financial payments to the Appellant but had even visited the Appellant in Malaysia.

14. Third, it was simply wrong to say that there would be no breach of an Article 8 right to family life because the Appellant had five other married siblings who were living separately, because the Appellant was not asserting a right to a family life with them, but was asserting it in relation to his father and mother, being dependent only upon

them, not having established an independent family life of his own. When his parents left to come to the UK the emotional and financial dependency continued. It did not cease. The Appellant was 27 years of age then.

15. Finally, the case of **Rai [2017] EWCA Civ 320**, makes it clear that if the Appellant would have applied at the same time for leave to enter, as his parents (see paragraph 42), then that was a material factor. In the instant case, the Appellant did not apply (see paragraph 15) because of lack of funds at the same time as his parents, and the judge acknowledged (at paragraph 19) that this was because his father could not afford it. All in all, therefore, the judge ought to have assessed these matters in the context of the Gurkha policy at Appendix K, IDI chapter 15, Section 2A, of 5th January 2015.

Error of Law

16. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

17. First, the judge ought to have approached this matter with Appendix K, IDI chapter 15, Section 2A of the Home Office policy of 5th January 2015, actually at the forefront of his mind. Although this policy is set out earlier on in the determination (see paragraph 2), I am satisfied that its import is not applied and followed through in the determination itself. As the judge himself recognised, this is a case where, "his parents were not able to raise the necessary funds to support an application for the Appellant on an earlier occasion" (paragraph 19). Be that as it may, his father did make payments to him by way of cheques, by way of IME, and financed his visit to Malaysia for the purpose of work, and even visited him there.

18. The suggestion, against the backdrop of these facts, that, "but it is also clear that the Appellant has been able to lead an independent life after his parents came to the UK in September 2013" is unwarranted.

19. The decision in **Rai [2017] EWCA Civ 320**, which Counsel appearing on behalf of the Appellant laid stress upon in his submissions before the Tribunal was properly recognised and recorded by the judge. It is stated that,

> "It is clear that the Appellant would have applied to come to the UK if his parents could have afforded the application. … … the Sponsor would have made his application on discharge from the British Army if he had been allowed to do so and then the Appellant would have been born in the UK" (paragraph 15).

20. The case of **Rai** establishes that if the Appellant would have applied to come to the UK earlier, if his parents would have been able to afford to do so, was not immaterial to the success of an application. Finally, it is plain that dependency existed both emotionally and financially right the way through, and has continued to do so to the present day.

21. The error reached by the Tribunal lies in the statement that although the Appellant "is not part of an independent family unit (as he lives on his own)," that nevertheless "the Appellant has been able to lead an independent life after his parents came to the UK in September 2013" (paragraph 19).

22. In terms of the Gurkha policy, and the established jurisprudence, which has developed through long years of litigation in such cases, that conclusion was not open to the judge.

Remaking the Decision

23. In remaking the decision, I have taken into account the findings of the judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above. I can do no better than to echo the words of Lord Justice Lindblom in **Rai [2017] EWCA Civ 320** that:

> "Those circumstances of the Appellant and his family, all of them un-contentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the … judge under Article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the Appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the crucial question under Article 8(1) even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal Judge properly addressed it" (see paragraph 42).

24. If one were, accordingly, to properly address the critical question under Article 8(1) it is plain, to my mind, that this appeal succeeds.

Notice of Decision

25. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

26. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 19th September 2017

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, and because a fee has been paid or is payable, I make a fee award of the amount that has been paid.

Signed Dated

Deputy Upper Tribunal Judge Juss 19th September 2017