



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16168/2016
HU/16170/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30 April 2018

Decision & Reasons Promulgated
On 15 May 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

TIRSANA RAI
KAMINDRA RAI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellants:

Mr R Jesurum, instructed by Everest Law Solicitors

For the respondent:

Ms Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are appeals against the decision of Judge of the First-tier Tribunal Raymond (the judge), promulgated on 11 August 2017, in which he dismissed the appellants' appeals against the respondent's decisions dated 23 May 2016 and 24 May 2016 refusing their applications for entry clearance as adult dependents of a

former Gurkha soldier. The applications amounted to human rights claims and the refusals of the applications amounted to refusal of the human rights claims, giving the appellants a right of appeal to the First-tier Tribunal.

Factual Background

2. The appellants are nationals of Nepal. The 1st appellant was born on 20 February 1984, and the 2nd appellant was born on 24 June 1991. At the date of the respondent's decisions the 1st appellant was 32 old, and the 2nd appellant was 23 years old.
3. The appellants' father, Mr Bhakta Bahadur Rai (the sponsor), served in the Gurkha Brigade between 6 October 1964 until his discharge on 11 February 1970. He was granted Indefinite Leave to Enter the UK on 4 May 2010 and entered the UK on 26 June 2010. The sponsor's wife joined him in the UK on 17 February 2012. Two of the sponsor's sons, who were minors at the time, entered the UK having been issued with settlement visas on 20 July 2011 and 27 April 2012.
4. Both appellants applied for entry clearance based on their relationships with the sponsor and their mother. The applications were considered and refused in line with the Home Secretary's policy outlined in Annex K of the Immigration Directorate Instructions (IDIs), Chapter 15, section 2A, 13.2, as amended on 5 January 2015. It is accepted by the appellants that they cannot succeed under Annex K.
5. The respondent noted that the appellants' parents migrated to the UK over 4 years before the applications for entry clearance were made. The respondent accepted that the appellants' parents had visited Nepal almost bi-annually since migrating to the UK but this was not considered unusual for people who had left their country of origin and did not demonstrate that the appellants were dependent on their parents. The respondent noted that the appellants' parents migrated to the UK by choice and there was no evidence of any care arrangements put into place. The 2nd appellant was studying in Japan, although there was said to be no evidence of his four-year Fashion Design course, and he first travelled there on 17 February 2012, after his parents had already migrated to the UK. As the appellants were adults the respondents believed they could take care of themselves. The appellants were in good health, educated to secondary school level, and there are no obvious factors preventing them from working in Nepal. The respondent considered that the 1st appellant would have been employed at some point since finishing school. It was additionally noted that the appellants had at least one brother in Nepal who had not applied for settlement in the UK. The respondent noted that cash deposits in the 1st appellant's bank account were put in by 'Rajan', and that Rajan was the name of the appellant's brother who supposedly lived in Hong Kong, although there was no documentary evidence on this point. It was unclear why the 2nd appellant had not submitted a Japanese bank account given that he was living in Japan. The bank account he provided had been dormant

except for interest payments since April 2012. The respondent was not satisfied that the appellants met the requirements for entry clearance as adult dependent relatives, and concluded that there was no family life sufficient to trigger the protection of article 8 between the appellants and their parents.

The decision of the First-tier Tribunal

6. The respondent was not represented at the appeal hearing. The judge heard oral evidence from the sponsor and his wife and considered a bundle of documents running to 188 pages which included statements from the appellants, statements from the sponsor and his wife, copies of the appellants' passports and those of the sponsor and his wife, certificates that the appellants were not married and that the 1st appellant was not employed, educational certificates and bank account details and money transfer slips.
7. The judge set out the background to the applications and the evidence before him in extensive detail, including evidence relating to remittance slips. The judge additionally set out the applicable policy in Annex K and applicable judicial decisions including Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), Gurung and others [2013] EWCA Civ 8, and Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320. At [54] the judge referred to the travel stamps in the parents' passports setting out the frequency and length of their trips to Nepal since their entry into the UK, and at [55] recorded the sponsor's description of their village home and, at [73], the sponsor's description of the *hundi* system, an unofficial way by which money is transmitted via agents to the sponsor's acquaintances in Nepal and either deposited in the appellants' bank accounts or given to them in cash.
8. In the section of his decision containing his reasons ([98] *et seq*) the judge found there were, "... a number of obscure and uncertain areas surrounding the core issue of whether there has been a dependency, constituting "support" that is "real" or "committed" or "effective", of the appellants upon their father the sponsor." At [99] the judge did not find it credible that the sponsor and his wife would spend nearly 3 months of every year in Kathmandu living in rented accommodation with the 1st appellant since at least 2015/16 while she was studying. Nor was the judge satisfied that the sponsor and his wife would have been "sharing primitive living conditions in the family village." At [100] the judge said there was no credible basis for finding that the sponsor and his wife did not stay in their village home "in comfortable circumstances" given their income in the UK and the income of their sons in the UK. Nor did the judge find it plausible that the appellants would not have obtained work following their academic achievements. The judge drew adverse inferences from the absence of any evidence from the sponsor's two sons who were resident in the UK and from the "complete obscurity" surrounding Rajan, the appellants' other brother, and consequently rejected the sponsor's description of the primitive family village home.

9. At [102] the judge stated,

“It is not credible that they [appellants’ parents] would have been travelling to Nepal for up to around 3 months annually, thereby reducing the earning potential that would enable them to provide help for their adult children, who are supposed to be looking to them for their financial and emotional welfare, but acting instead as a drain upon the resources of those children.”

10. The judge found the sponsor to be an incredible witness. The judge found the evidence of remittances to the 1st appellant to be a “hollow sham” and found the sponsor’s explanation as to the loss of original documents to be “ultimately incoherent.” Having considered the bank account documentation, the judge doubted the reliability of evidence of remittances to Japan and did not consider that the sponsor was capable of providing the financial support he claimed to provide. The sponsor was “... not a credible and honest witness in this appeal, whatever may have been the merits of his army service in the past”. The only other reference made by the judge to the character assessment contained in the discharge paper appears at [7]. The judge did not make any reference to the manuscript references contained in the Assessments of Military Conduct and Character to the sponsor being a person who was “honest and trustworthy”, and referred only to the ‘Very Good’ Military Conduct assessment. The judge concluded that the appellants were leading independent lives and that there was no family relationship between them and their parents sufficient to trigger the protection of article 8.

The challenge to the First-tier Tribunal’s decision

11. The grounds, amplified and expanded upon by Mr Jerurum at the ‘error of law’ hearing, essentially contend that the judge made adverse findings in respect of points that were not previously raised as being in issue and upon which the sponsor was never cross-examined and which were not identified by the judge as being in issue. This included the judge’s findings in respect of the informal *hundi* system of transferring money. It was further submitted that the judge failed to consider evidence that the sponsor was a man of positive good character and had been described by his commanding officer as “honest and trustworthy.” It was incumbent on the judge to consider this positive evidence when assessing discrepancies in the sponsor’s evidence. The grounds further contend that the judge’s finding that it was not credible that the appellants’ parents travelled to Nepal for 3 months annually was never raised as an issue, and that the judge failed to consider the travel stamps in the passports belonging to the sponsor and his wife.

Discussion

12. The judge’s decision is, in many ways, a carefully considered assessment of the evidence presented by the appellants and their parents. I am however concerned that the judge nevertheless failed to raise a number of issues of concern with the

representative at the hearing upon which he subsequently relied in concluding that the sponsor was not a credible witness.

13. From [23] to [27] the judge considers the evidence relating to the 1st appellant's residence, her educational achievements and her lack of employment. At [27] the judge found it difficult to envisage how the Local Registrar, whose certificate dated 30 March 2016 asserted that she was unemployed, would know whether she was employed given that she appeared to be studying in Kathmandu during 2015/16 and given that the Local Registrar was some 4 days travel from Kathmandu. The judge has drawn an adverse inference from this evidence, but this point does not appear to have been raised as an issue at the hearing. The 1st appellant, through the medium of the sponsor's evidence, has therefore been deprived of an opportunity of responding to this concern and offering an explanation. The failure to raise this concern, which was not apparent on the face of the papers, constitutes a procedural impropriety.
14. At [99] and [100] the judge does not find it credible that the sponsor and his wife would live in rented accommodation with the 1st appellant in Kathmandu, and rejects the sponsor's description of the very basic accommodation in the family village. There is no indication in that part of the decision recording the sponsor's evidence that the description of the primitive village home was an issue with which the judge had concerns. There is no indication that the judge raised his concerns with the sponsor or the representative. Nor does it appear that the sponsor was asked to describe in any detail the 1st appellant's rented accommodation in Kathmandu, which the judge appears to suggest would not be suitable accommodation.
15. At [102] the judge holds against the appellants the fact that their parents spent around 3 months a year in Nepal, "thereby reducing the earning potential that would enable them to provide help for their adult children." This suggests that the judge believed the sponsor was employed and earning money in the UK, and that by spending 3 months a year in Nepal there would be a reduction in the amount of money he would be able to earn and therefore provide to the appellants. There was however no evidence that the sponsor was employed in the UK. The documents before the judge suggest that the sponsor received a pension income. There was no evidence that the sponsor was employed. The judge therefore attached weight to an irrelevant consideration in reaching his conclusion that the sponsor was not credible.
16. The judge gave a number of reasons for finding the sponsor a dishonest witness. Some of these reasons were based on the absence of other supporting evidence, the unreliability of certain documents, and inconsistencies in the evidence. Although the judge made brief reference to the sponsor's military record, there was no reference to the manuscript description of the sponsor being "honest and trustworthy". In determining whether the sponsor was an incredible witness it was incumbent on the judge to fully consider the specific evidence before him,

from a person in authority who knew the sponsor well, who assessed the sponsor as being an honest man. While the judge was in no way bound to conclude that the sponsor was honest he was required to evaluate the evidence in support of the sponsors asserted good character. The failure to do so amounts to a material legal error as it could not be said that the judge would inevitably have found the sponsor to be dishonest.

17. The judge has focused his attention on the relationship between the appellants and their father (see, for example, [98]). The judge recorded the evidence from the appellants' mother at [93] to [95]. In her statement the appellant's mother indicated that she talked to the 1st appellant regularly and claimed that the appellants needed her emotional support and that they were miserable in Nepal. She indicated that she could not sleep or concentrate on her routine life because she was thinking about the appellants. They were said to be financially and emotionally reliant on her and her husband. It was accepted by the Presenting Officer that the judge did not make any findings in respect of the mother's evidence. The mother's evidence was relevant because it was broadly corroborative of the sponsor's evidence and was potentially capable of meeting the Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 test.
18. For the reasons set out above I am satisfied that the judge did her in law and that his legal errors rendered his decision unsafe.
19. Having considered the representations from both parties, and having regard to section 7.2 of the Tribunal Practice Statement, I am satisfied that the identified errors of law have deprived the appellant of a fair hearing and the First-tier Tribunal's factual findings are rendered unsafe. In these circumstances I consider it appropriate to remit the case back to the First-tier Tribunal, to be heard afresh by a judge other than judge of the First-tier Tribunal Raymond.

Notice of Decision

The First-tier Tribunal's decision is vitiated by material legal errors and is set aside. The case is remitted back to the First-tier Tribunal for a fresh hearing before a judge other than judge of the First-tier Tribunal Raymond.



Signed
Upper Tribunal Judge Blum

9 May 2018
Date