



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

Appeal Number: HU/24126/2016

THE IMMIGRATION ACTS

Heard at Field House

On 26 January 2018

**Decision & Reasons
Promulgated**

On 23 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MISS BARTA RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy, Counsel instructed by Everest Law Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal, born on 27 September 1986, who applied for entry clearance to settle in the UK as the adult dependent child of a former Gurkha soldier who is present and settled (along with the

appellant's mother) in the UK. The application was refused on 22 September 2016. A subsequent appeal to the First-tier Tribunal was heard by Judge Nicholls who, in a decision promulgated on 13 September 2017, dismissed the appeal. The appellant is now appealing against the decision of the First-tier Tribunal.

Decision of the First-tier Tribunal

2. The core issue before the First-tier Tribunal was whether there is family life between the appellant and her parents in the UK that engages Article 8 ECHR.

3. At paragraph 18 the judge concluded that:

*"[T]he appellant has not shown to the required standard of probability that she continues to be dependent **only on her parents** who give her **all the** real effective and committed support she receives. I find, therefore, that it has not been shown that the appellant continues to have a family life with her parents."* (emphasis added)

4. Before reaching this conclusion the judge made the following observations about the evidence of the appellant's father:

(a) At paragraph 14 the judge stated:

"Mr Rai gave answers to questions extremely slowly, often speaking very indistinctly and frequently giving an answer that was not to the question he had been asked".

(b) At paragraph 17 the judge stated:

"I have looked very carefully at the testimony given by Mr Rai which was frankly, not very impressive. One characteristic of former Gurkha soldiers whose evidence I have heard through a number of appeals is that they are precise and accurate when it comes to details, especially where that concerns money. Mr Rai was not precise and accurate unless there was a document to confirm what he said. I do not, for one moment, think that he was not telling the truth as he sees it but elements began to emerge during his evidence which conflicted with the initial basis. One such was the mention of aunts of the Appellant by whom she was brought up and who continue to financially support her. Counsel for the Appellant asked for the opportunity, during the course of cross-examination, to elicit evidence in chief about that statement. There was nothing mentioned about it in the documents submitted by either party for the hearing of the appeal and, of course, the tribunal's procedure rules envisage that all the evidence to be given in support of an appeal will be set down in witness statements served before the commencement of the hearing. I was also mindful that by that time the hearing had been going on for quite a long time with a witness who might be vulnerable and uncertain particularly when being questioned in a formal court setting. I declined, therefore, to allow counsel a further period of examination in chief."

The Grounds of Appeal

5. The grounds contain three arguments.
6. Firstly, it is argued that the judge applied too stringent a test as to the existence of family life. At paragraph 18 of the decision the judge found against the appellant because she was not solely dependent on her parents. The grounds submit that there is no requirement that the sponsor must be the only provider of support and it is sufficient that he provides support to the appellant that is real and committed.
7. Secondly, it is argued that the judge erred by finding as damaging to the sponsor's credibility that his evidence was not as precise and accurate as other Gurkhas who had given evidence before the judge.
8. Thirdly, it is submitted that it was unfair of the judge to prevent the sponsor being re-examined on a material matter.

Error of Law Hearing

9. Before me, Mr Walker accepted there had been procedural unfairness. Both parties expressed the view that the matter should be remitted to the First-tier Tribunal.

Assessment

10. In my view, the decision contains three material errors of law.
11. The first error is the approach taken to the assessment of whether family life exists between the appellant and her parents. It is clear from the Court of Appeal judgment in *Rai v ECO New Delhi* [2017] EWCA Civ 320 that the question to be asked is whether the sponsor provides the appellant with real, effective or committed support, not whether the sponsor is the appellant's only source of support; and that family life can exist even where a sponsor is not the only source of support. Accordingly, it was an error of law for the judge to dismiss the appeal because the appellant had failed to show that the sponsor was her only source of support.
12. The second error of law arises from the judge's approach to the evidence given by the sponsor. The judge observed at paragraph 14 that the sponsor was having difficulty answering questions and there might be indications of mental decay. However at paragraph 17 the judge appears to have held against the appellant that his evidence was not precise and accurate. Given the judge's observations about the appellant's difficulty in answering questions and potential mental health problems there was clearly a good reason why his answers were not as precise and accurate as the judge appears to have expected.
13. The third error of law arises from the judge's decision to refuse to allow the appellant's Counsel to re-examine the sponsor on an issue that was

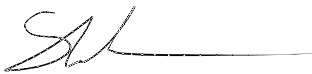
material to the negative credibility finding. The appellant should have been given a full opportunity to present her case. An issue that arose in the course of proceedings concerned the extent to which she was supported by family members other than her parents. I cannot discern from the decision any reasonable basis for the sponsor to not have been given the opportunity to give evidence on this issue when Counsel for the appellant requested that he be given the opportunity to do so. In these circumstances there has been a procedural unfairness which undermined the decision.

14. Both parties expressed the view that the appeal should be remitted to the First-tier Tribunal as a full re-hearing on all factual issues will be necessary in order to re-make the decision. I agree.

Decision

15. The decision of the First-tier Tribunal contains a material error of law and is set aside.
16. The appeal is remitted to the First-tier Tribunal to be heard afresh before a Judge of the First-tier Tribunal other than Judge Nicholls.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 19 February 2018