



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12379/2018

THE IMMIGRATION ACTS

Heard at Field House
On 19 August 2019

Decision & Reasons Promulgated
On 12 September 2019

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

DHAN KUMAR RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:

For the Appellant: Mr. A. Malik, Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms. S. Jones, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Housego ('the Judge'), issued on 29 April 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant entry clearance was refused.
2. The appellant appeals with permission of Upper Tribunal Judge Pickup by way of a decision sent to the parties on 18 July 2019.

Anonymity

3. No anonymity direction was issued by the Judge and no application for such direction was made before me.

Background

4. The appellant is a citizen of Nepal and is presently aged 41.
5. The appellant's sponsor, his father, served in the Brigade of Gurkhas for 7 years before his discharge in 1971 when the appellant was aged 6 months old. His father was one of a number of former members of the Brigade of Gurkhas who were denied the opportunity to settle in this country until a change of policy in 2009. By this time, the appellant was aged over 18. The sponsor was issued with settlement entry clearance on 30 November 2010 and entered this country in October 2011.
6. The appellant applied for entry clearance on 25 January 2018, when aged 40. He sought to enter this country to settle as the adult dependent relative of his father. The respondent considered the application in light of the Home Office's policy as outlined in Annex K, IDI Chapter 15 section 2A 13.2 as amended on 5 January 2015 and refused it by way of a decision dated 22 May 2018. The respondent observed, *inter alia*:

'You state that you are unemployed and emotionally and financially dependent on your parents. You were 40 years, 4 months and 3 days old at the date of application. Your father migrated to the UK by choice nearly four years (sic) before the date of application. There is no evidence of any care arrangements put in place by your sponsors before they migrated to the United Kingdom. That your parents were content to leave for the United Kingdom without you and without making any obvious care arrangements are factors I have considered. In view of the circumstances presented I am minded that the decision was made by your parents that an adult you were able to care for yourself.'

'You are in good health, educated and there are no obvious factors preventing you from working in Nepal. You also have siblings in Nepal who have not applied to settle in the UK. Therefore, I am satisfied that you have close family ties in your country of origin for social and emotional support.'

7. I observe that the reference to the appellant's father relocating to the United Kingdom some 4 years prior to the application appears to be erroneous on the chronology presented to me, which suggests he arrived some 6 or more years before his son's application for entry clearance.

Hearing before the First-tier Tribunal

8. The appeal came before the Judge sitting at Hatton Cross on 11 April 2019. He decided that no family life existed between the adult appellant and his sponsor and dismissed the appeal.

Appeal

9. The appellant relies upon two grounds of appeal. He complains that the Judge materially erred in law by misdirecting himself as to the family life threshold to be met under the respondent's policy. He further complains that the Judge erred in his approach to the facts arising in this matter when considering 'dependence'.
10. In granting permission to appeal UTJ Pickup reasoned:

"It is arguable that the First-tier Tribunal Judge has made a material misdirection in law as to the relevant test and standard to be applied in this 'historic injustice' case involving the son of a former Gurkha soldier. The appellant may still be in difficulties given his very mature age and the fact that he has been separated from his sponsoring parents for some four years, living an arguably independent life in Nepal. Further, some of the grounds are little more than disagreements with the findings. However, there is at least an arguable material error of law in the application of the principles elaborated in the current case law to the facts of this case. All grounds may be argued."

11. No Rule 24 response was filed by the respondent.

Decision on error of law

12. In *Patel v. Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, the Court of Appeal considered an appeal concerned with entry clearance applications from relatives of British overseas citizens who had settled in the United Kingdom after having been prevented from doing so by a discriminatory law. The Court observed that if, by the time they were refused entry clearance, the adult children of those citizens were still part of their family life, the history of the discriminatory arrangements would be a potentially decisive factor in determining whether the children's right to respect for their family life under article 8 had been breached. Sedley LJ held at [14]:

"You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute

family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2)."

13. As for dependents of Gurkhas who were subject to historic injustice, the Court of Appeal held in *Rai v. Entry Clearance Officer, Delhi* [2017] EWCA Civ 320, at [36] - [37], that the concept to which the decision-maker will generally need to pay attention is 'support', which is 'real' or 'committed' or 'effective'. The Court warned as to looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them. Such an approach elevates the threshold of 'support' that is 'real' or 'committed' or 'effective' too high. Lindblom LJ further held, at [38]:

"Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach."

14. The Court of Appeal conformed in *Pun v. Secretary of State for the Home Department* [2017] EWCA Civ 2106; [2018] 4 W.L.R. 80 that the policy of redressing the historic injustice which had prevented Gurkhas from settling in the United Kingdom carried far less weight where non-dependent adult relatives of a Gurkha applied for indefinite leave to remain than it did when dependent relatives applied.

Did the Judge incorrectly apply the family life threshold?

15. It is clearly apparent upon reading the decision that the Judge sought to consider the issues before him with care. He appropriately analysed the policy and relevant judicial precedent over 12 pages of his decision and reasons and no criticism is made as to his precis of the relevant law. The appellant presented a copy of the judgment in *Rai* to the First-tier Tribunal at [70] - [86] of his bundle and the record of proceedings confirms that it was relied upon by the appellant's counsel at the hearing, Mr. Jesuram, in his submissions. It is further apparent that the Judge had the judgment of *Rai* in his mind, citing at [15] of his decision two paragraphs of the Court of Appeal judgment, namely [17] and [47], and later expressly referring to [34]. He further noted at [14] of his decision and reasons:

“At paragraph 20 of Rai the test in [Singh v. Secretary of State for the Home Department [2015] EWCA Civ 630; [2016] Imm. A.R. 1] was approved – there must be ‘something more’ than natural love and affection, but (at paragraph 36) there is no requirement for the case to be ‘exceptional’. What is required is ‘real’, ‘committed’, ‘effective’ support. It appears these are intended to be 3 different ways of stating the same thing, rather than a 3-limbed test.”

16. It is appropriate to observe the Judge’s reasoning at [45] - [49]:

“Annex K is specific in its requirements, and the appellant was over 30 at the date of application so does not fall within its remit, save that Annex K contains provision for article 8 to be considered even in such cases. It specifically applies to children born after leaving the Brigade. It points out that the assessment of whether there is a family life depends on the individual circumstances.

I accept that the sponsor would have settled in the UK on discharge.

I accept that the appellant and his parents lived together, but not that there is a family life between them sufficient to engage article 8 rights or was when they were all in Nepal. They lived together, and doubtless there is the natural love and affection between them to be expected in a parent/child relationship. There is no evidence of the ‘something more’ required by case law (‘real’, ‘committed’ or ‘effective’ support), even allowing for the lower hurdle this represents for former Gurkha families to establish, for the following reasons:

Nepal

- *When in Nepal, the appellant was fit and healthy and able to work and did so, and was not physically dependent on his parents. He was working in Nepal, on his own account in the village. The 4 shared a home, but it could not be said that, while in Nepal, this was a family life in an article 8 sense.*
- *The sponsor and his wife were well themselves when they came to the UK, and so did not need care from the appellant. They still do not.*

At date of decision

- *They have not lived together for over 4 years.*
- *Application was made by the appellant much later than by the sponsor and his wife.*
- *The appellant is not in want in Nepal.*
- *The parents of the appellant and he are doubtless now in frequent contact and have been since the appellant’s parents came to the UK. That can be evidence of emotional dependence, but there is nothing to indicate any dependency (either way), more than a wish to keep in touch with the son who lived with them in Nepal.*

- *There may be some financial support given but fathers are expected to support their children financially, and ‘such support does not suggest a bond over and above that usually to be expected between adult parents and their children.’ [Gurung, paragraph 48)*
- *If there was family life in Nepal, it ceased 4 years ago when the sponsor and his wife came to the UK, and the appellant was between the ages of 36 and 40 for those four years. He is not someone with any particular need, and nor do his parents have any particular need which he was meeting. A family life was not in existence at the date of decision (or application).*
- *The appellant has lived an independent life for the last 4 years, as a subsistence farmer and local handyman.*

As there is not family life between [the] appellant and his parents, the article 8 right to family life is not engaged, and the appeal fails for this reason.”

17. The reference to the judgment in Gurung is to the Master of the Rolls’ observation at [48]:

“The First-tier Tribunal considered whether, in these circumstances, the claimants enjoyed family life with their parents. The judge said, at para 27, that there was very little evidence of family life between the claimants and their father (who was their sponsor). There was, however, evidence that he supported them financially, but this was expected in Nepalese culture. It did not, therefore, suggest a bond over and above that usually to be expected from the relationship between adult parents and their children. The judge said: “The sponsor stated that they have regular contact with each other, but there was no real evidence about how the claimants related to their parents and the effect on them of being separated from their parents or what emotional sustenance they received from their parents.”

18. I am in agreement with Ms. Jones that the Judge did not impose a higher test when assessing article 8. The core of his assessment is as to support, both financial and emotional. The reference to ‘dependent’ is in relation to physical dependency whilst the appellant’s parents lived in Nepal and seeks to identify that he was not receiving additional support through ill-health. This is non-contentious as it is not the appellant’s case that he suffers poor health, and the Judge was entitled to place this into his assessment as to support. I further find that the reference to ‘emotional dependence’ is clearly a reference to emotional support and this is supported by the Judge clearly noting earlier in the paragraph that he is required to consider whether the appellant enjoys ‘real’, ‘committed’ or ‘effective’ support. The Judge applied the correct standard of proof when undertaking his assessment and the appellant cannot succeed on this ground of challenge.

Did the Judge err in his approach to the facts?

19. The appellant complains by way of ground 2 that notwithstanding the absence of challenge by the respondent in the decision letter, or notice as to the point prior to the hearing, the Judge found that the appellant was living independently because he was working as a subsistence farmer and a local handyman. It is asserted that this is a conclusion unsupported by evidence and is speculative in nature. It is further observed that the respondent was unrepresented at the hearing and reliance is placed upon the unchallenged evidence of the appellant's father and mother detailed by way of their witness statements, affirmed before the Judge. The appellant's father, the sponsor confirms by way of a witness statement dated 21 March 2019 that whilst he resided in Nepal he had *'no income at all. I had to work for daily wages in order to provide for my family. I used to work, day and night to earn a daily living.'* He further details:

"When my youngest child was 5 years old, I started getting charity pension of about 1200 NPR a month. I did not have to work so hard after that. I started work as an electrician. I was not qualified at all but because of some knowledge of wires and batteries I was able to help others how knew nothing. My son [the appellant] used to go with me at times. We tried to raise livestock for additional income as well but failed.

...

Since 2004 ... [the appellant] and I used to spend all the time together in doing different chores in and around our house. Rarely, we would be asked to fix someone's lightbulb, etc. It was not a paid job. I started sending [the appellant] for such jobs on his own as he got older. It is more of a social help than anything. Rarely did we get a request for help and even rarer was the remuneration paid for it.

...

The phone I had brought from Nepal did not work in the UK. I contacted my neighbour in Nepal through my friend's phone in the UK to speak to [the appellant]. I had no money to leave him with. I told him to borrow some from others in the town at the behest of me being in the UK. That helped him given assurances to others that their money would be repaid.

As soon as I received the pension in the UK, I bought a new phone. I sent much of the money to Nepal to my son [the appellant] through proper money transfer remittances IME. I had many receipts of money transfers to Nepal to my son which I sent to [the appellant] in Nepal for his application.

He used the money to pay off the loan in Nepal and also to buy himself food, pay the rent and other bills.

...

[The appellant] is single. He has never been in employment in Nepal. He is not highly educated. We have lived in the village which has very reserved population. All

the people grow their own food and mostly remain within a certain vicinity. We have electricity and water supply whereas gas has to be bought in cylinders.

When we went to Nepal in 2013, my wife encouraged the children to raise chickens. We built a small chicken den in the house. It has been an activity for the children to take eggs from the den daily. Clean the den once a week. Let the chicken out and let them back in. It helps them relax and stay in the house."

20. The appellant's mother details by way of her witness statement dated 21 March 2019, *inter alia*:

"I have been taking care of [the appellant] since his birth until I departed to the UK in 2011. I was cooking for him and cleaning for him. He was helping around the house doing other chores. As he has not been able to find any employment. It is very unfortunate that we had to be separated. It is unfair and unjust. Had the current policy been available at the time of my husband's discharge we would never had been separated.

At present [the appellant] lives in the same house in the town. His daily activities include doing household chores and looking after some chicken I had brought in the house in 2013. My husband and I are responsible for [the appellant] and Nabina. The other children are making a good living on their own."

21. The appellant further relies upon a letter from the ward secretary of Khandbari Municipality dated 24 May 2017, confirming that the appellant is unmarried and is unemployed.
22. I observe that a reasonable Judge could doubt the veracity of the evidence being presented, particularly as to the notion of a willingness to work for free in circumstances where it is said that finances are limited. The evidence lacks clarity as to whether the family own or have access to land upon which to grow crops and also as to why there is a lack of farm labouring opportunities in the vicinity or as to why the appellant has not sought employment in a town or city. There is a lack of detail as to why there were difficulties in raising livestock. The family home appears to have access to electricity so is not in the most inaccessible 10% of Nepal that lacks such access. Consideration would have to be given to the weight that can be enjoyed by the letter from the ward secretary.
23. However, in this instance the Judge made a finding at [48] that the appellant had lived an independent life for the last 4 years as a subsistence farmer and local handyman, without first putting this issue to the witnesses at the hearing or raising it with the appellant's counsel and further without engaging with the written evidence before him. I observe from the record of proceedings that Mr. Jesuram expressly asserted that the evidence from the witnesses was unchallenged and that they should have been alerted to any challenge as to this issue, which they were not. The Judge appears to have given no notice to Mr. Jesuram at the hearing as to his concerns to the veracity of the evidence before him. Further, he

provides no reasons for this important finding of fact. To proceed without giving the appellant notice of his concern as to the evidence of his employment or otherwise was procedurally unfair, as was the failure to give reasons for the decision reached. I accept Mr. Malik's contention that such errors were material in this matter as they went to the core of the Judge's article 8 assessment. I therefore set aside the decision of the First-tier Tribunal.

Remittal

24. Both Mr. Malik and Ms. Jones opined that if I were to find a material error of law, this would be a suitable matter to be remade by the Upper Tribunal. However, upon reflection, there are issues arising from the evidence relied upon that a reasonable judge would expect to be addressed, and the appellant should be properly be on notice that he is to address. In such circumstances, and noting paragraph 7.2 of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, the only fair step is to remit this appeal back to the First-tier Tribunal sitting at Hatton Cross.

Notice of Decision

25. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 29 April 2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
26. This matter is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge other than Judge of the First-tier Tribunal Housego.
27. No findings of fact are preserved.

Directions

28. This is not a matter that should be subjected to unwarranted delay. In addition to any standard directions to be issued by the First-tier Tribunal, I direct:
- i) The respondent is directed to attend the hearing before the First-tier Tribunal.
 - ii) This matter is not suitable for the float list.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 7 September 2019