Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002996
HU/07848/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2023	**On 28 February 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR DILLI LIMBU
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ahmed, counsel
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Nepal born on 18 August 1985. He appeals against the decision of Judge of the First-tier Tribunal Thapar sitting at Birmingham Justice Centre on 11 October 2021. She dismissed the appellant's appeal against a decision of the respondent dated 10 January 2020. That decision was to refuse the appellant's application (dated 21 November 2019) for leave to enter as the adult dependent child of a

former member of the Brigade of Gurkhas who had been discharged from military service before 1 July 1997.

The Appellants' Case

2. The appellant's case was that he was the adult dependent child of the widow of a former Gurkha soldier who had not been allowed to settle in the United Kingdom at the end of his service. The appellant's claim was that he was the victim of an historic injustice since if the appellant's father had been granted entry clearance the appellant might have been born British or have been able to accompany his father as a child. The appellant's mother ("the sponsor") was granted settlement under the 2009 discretionary policy on 30/01/2016 and settled in the UK on 12/02/2016. The appellant's sister was granted settlement at the same time. The appellant was in receipt of financial support and dependent upon the sponsor who at the date of the hearing at first instance was 79 years old.

The Decision at First Instance

3. The respondent was not represented before the judge at first instance. The judge was told that the appellant's father who had been suffering from ill health since a stroke in 2007 passed away in November 2009. The 2009 discretionary policy was amended in 2014/15 and applied to applications for settlement made after 5 January 2015. At that time the appellant was aged 29 years. Nevertheless the appellant stated he had not applied then because there was a delay in the provision to him of the kindred roll. By the time it was provided to him on 28 August 2015 he had just turned 30 years and was by then outside the policy.

4. Transfer receipts were produced to the judge but at [19] the judge stated that those receipts only showed monies sent from April 2019 to 2021 and there was nothing to corroborate the claim that the appellant was financially dependent upon the sponsor prior to April 2019. The appellant had provided no documentary evidence to demonstrate that he lived with the sponsor at the same address prior to her arrival in the United Kingdom. At [20] the judge noted the appellant's claim to live in the sponsor's address but a letter from the ward chairperson which was before the judge stated that the appellant's address had changed.

5. At [22] the judge said that merely sending funds was insufficient to demonstrate the existence of a family life. There was no evidence of financial support before April 2019 and it was not properly explained why the appellant had not sought to join the sponsor earlier than he had. The sponsor had only returned to Nepal once, in 2017, since her arrival in the United Kingdom in 2016. No bank statements had been provided to support the claim that the appellant could access funds from the sponsor's account. There was little evidence of emotional dependency.

6. Given the fact that only one visit had been made by the sponsor to Nepal there was nothing to suggest that the relationship between the appellant

and the sponsor could not continue as it presently existed. Historic injustice was just one of the factors to be considered but was not determinative of itself. The judge was not satisfied that the appellant had a family life with the sponsor. Nor did the impact of the historic injustice outweigh the legitimate aim of maintaining immigration control. The appeal was dismissed.

The Onward Appeal

7. The application for permission to appeal to the Upper Tribunal was refused in the first place by the First-tier. The application was renewed in grounds dated 7 July 2022. They complained that the judge had made no reference to a skeleton argument lodged in support of the appeal. As the respondent had chosen not to attend the hearing the evidence of the appellant was not subject to challenge. No issues of credibility were raised by the judge at the hearing. Without giving the appellant's witness and counsel an opportunity to address credibility, it was not open to the judge to have made adverse credibility findings. The appellant was over the age of 30 when the kindred roll was issued. It was not a question of when the kindred roll was produced but when the appellant obtained it. In any event the appellant could not meet the requirement of the policy once he was over 30.

8. The appellant had been a full-time student between 2011 and 2014 and had been studying law between 2015 and 2018. The appellant had always been dependent upon his mother both financially and emotionally. The appellant was not afforded an opportunity to explain the alleged discrepancy between the appellant's claimed address and the letter from the ward chairperson. It was not the appellant who had changed his address but it was the name of the local authority which had changed. Development committees had replaced rural municipalities changing wards etc.

9. The test of dependency was whether there was real or effective or committed support. The judge had not referred to this test. The appellant lived in his mother's house on money she provided from the United Kingdom. There was regular contact between the appellant and the sponsor. As to the claim there had been an historic injustice, unless the respondent relied on more than the ordinary interests of immigration control such as criminality or a bad immigration history (nether of which applied in this case) the weight to be given to the historic injustice would normally require a decision in the appellant's favour. There were no countervailing factors to vitiate that. The historic injustice was a strong reason for holding that it was proportionate to let the adult child join his family now.

10. In granting permission to appeal, Upper Tribunal Judge Jackson wrote: "It is arguable that the First-tier Tribunal misunderstood the evidence as to the Appellant's address and arguably failed to put the apparent inconsistency to the Appellant during the course of the hearing

so that he had an opportunity to explain that it was a change of name of the same address. This in turn had an impact on the Tribunal's assessment of whether Article 8 was engaged, as did an arguable misunderstanding of the age of the Appellant when the kindred roll was received (as he was already over 30 at this date, having passed his 30th birthday).

11. In respect of the other grounds of appeal the judge stated: "It is less arguable that the Tribunal erred in its assessment of the evidence of communication and of financial support (or lack of evidence thereof prior to 2019). The final ground of appeal is only relevant if the First-tier Tribunal erred in finding that Article 8 was not engaged as the balancing exercise is only relevant should an assessment be needed under Article 8(2). The first ground of appeal has little if any arguable merit as it is not necessary for the Tribunal to refer in its decision to all documents before it, or specifically to a skeleton argument or every applicable guidance or authority."

The Hearing Before Me

12. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

13. Counsel for the appellant in oral submissions stated that the judge had misdirected herself in relation to the existing jurisprudence on Gurkha cases. In the appellant's witness statement the appellant's had said what financial support had been made available to him by the sponsor when she left for the United Kingdom. The judge had not dealt with that. As to the address issue, there was an answer to the concern raised by the judge on the documents. The ward chairperson had written that the appellant had been living at an address in Ward number 4 in Phedap but in "previous Ward number 7 Samdu". The judge should have read all the papers in the case before starting the appeal.

14. In reply the respondent relied on the refusal letter. The judge was not obliged to refer to the appellant's skeleton argument. At [9] and [10] the judge made clear that she had considered the documentary evidence of the case. The Surendran guidelines were just that, guidelines, even if there was a breach that would not of itself make an error of law. As to the issue of the appellant's age, the point was made by the entry clearance officer that the appellant was 34 at the date of the application whereas applicants were obliged to be between the ages of 18 to 30 to bring themselves within the policy.

15. On the issue of dependency the ECO had said: "Even if I accept that you do receive financial assistance from your mother, I am satisfied that you are a fit and capable adult who is able to look after yourself. I

am also mindful that you appear to have a number of adult siblings who still reside in Nepal to whom you can turn for assistance if required."

16. There was an inconsistency in the letters about the appellant's address as there was one that said the address had changed. The remaining grounds put forward by the appellant were a mere disagreement with the judge's decision. It was not correct to say that there was unchallenged evidence that the appellant was dependent on the sponsor as the point had not been accepted by the ECO (see above). The argument as to the weight to be given to the claim of historic injustice did not assist the appellant in this case because the judge had found that article 8 was not engaged.

17. In conclusion counsel for the appellant reiterated that the right time to raise concerns over the documents which dealt with the appellant's address was during the hearing. The judge had not resolved the issue of the appellant's circumstances in particular that he was unemployed. If the appellant could demonstrate non-compliance with the Surendran guidelines he was in a better position to show unfairness. The key issue in the case was whether there was family life, the legal test was not as set out by the judge.

Discussion and Findings

18. The argument in this case put forward by the appellant is largely a reasons based argument. The first issue was whether the appellant had applied in time to join his mother in the United Kingdom, the judge (and the ECO) having held against the appellant that he had delayed. Children of widows could not bring themselves within the terms of the relevant policy and in any event the appellant was 34 years old by the time he did make his application. The appellant had had the kindred role confirming his status as the son of a Gurkha some four years before finally making his application for entry clearance. The judge was entitled to observe at [18] that she did not accept as credible that the appellant had not applied earlier because of his age.

19. The appellant also criticises the judge for allegedly wrongly assuming that the appellant had changed his address when in fact it was the municipality which had changed not the appellant. That criticism misinterprets what the judge said at [20]. When the appellant made his witness statement in these proceedings on 7 May 2021 he said that he had lived at an address in Samdu since he was born. The letters from the ward chairperson referring to a change of address because of a change of the municipality were dated a month before the appellant's witness statement. It was reasonable for the judge to question why if the appellant had lived in the same address for 34 years he was apparently unaware that the municipality had changed because he had made no reference to such a change in his witness statement.

20. The presenting officer pointed out in submissions what the judge had noted at [20] that there was a different address altogether given for the recipient of the funds sent by the sponsor. It was for the appellant to show on the balance of probabilities that he had lived at the same address all his life in a property owned by his mother. In the light of the confusion over the address in particular the fact that the appellant did not deal with the change of municipality in his witness statement, it was open to the judge to conclude that there was an inconsistency in the evidence which might entitle the judge to consider that the credibility of the appellant's claim was undermined.

21. The appellant's complaint is that it was not put to the sponsor or counsel at the first instance hearing that there were such difficulties in the evidence. It was of course a matter for the judge what questions she asked of the witness but the burden of proof rested upon the appellant. No reason was given to me why the appellant still referred to his address under the old name if indeed that was the old name. I do not find that there was procedural unfairness in this case. The appellant was aware of what case he had to meet, but the judge took the view that he had not met it. I would respectfully agree with Judge Jackson's view of the appellant's ground complaining about the lack of a mention of the appellant's skeleton argument or other documents. Judge Jackson observed: "[this] ground of appeal has little if any arguable merit as it is not necessary for the Tribunal to refer in its decision to all documents before it, or specifically to a skeleton argument or every applicable guidance or authority."

22. The key issue was whether the appellant was dependent upon the sponsor in the United Kingdom and therefore whether there was family life between the two which went beyond normal emotional ties. The appellant's case on this point is, I find, largely a disagreement with the decision of the judge. Evidence of financial support in the form of remittances sent by the sponsor was limited, as the judge pointed out there was no documentary evidence of support before April 2019. That point has still not been dealt with. I do not accept that it is a valid criticism of the judge that money left by the sponsor in 2016 when she went to the United Kingdom was not properly taken into account. If the sponsor had left such a large sum of money that the appellant could manage on it for 3 years until remittances began, it is reasonable to expect that the amount would have appeared in the evidence. The sponsor and appellant claimed that the sponsor brought money with her during her 2017 visit. The problem for the appellant was that the judge's concern was the lack of documentary evidence to show monies paid and that applied equally to a claim that the sponsor had taken money with her to Nepal.

23. The sponsor has only made one visit to the appellant since she arrived in the United Kingdom. I appreciate that she is a lady of advanced years and that international travel was substantially disrupted during the Covid pandemic but face to face contact has been very limited since

2016. The parties are apparently in regular telephone contact with each other but on the facts as found by the judge, the test of dependency was not met in this case. The entry clearance officer had raised the question of whether the appellant (who had apparently studied extensively) could find a source of employment for himself. There was no real answer to the question of whether there were others in Nepal who could assist the appellant even if he was unable to find work for himself. It was a matter for the judge to assess whether dependency was met in this case and it is evident from [19] that due to a lack of evidence the test had not been met. Given the paucity of evidence to show dependency that was a conclusion open to her.

24. As Judge Jackson pointed out when granting permission to appeal on other grounds, the issue of historic injustice only arose if the case reached as far as an article 8 assessment of the appellant's family life and the interference with that family life caused by the respondent's decision. In fact the case did not reach far because the judge found that there was no protected family life see [22]. The judge was aware of the historic injustice argument and referred to it at [24] but it could not be determinative of the case when there was insufficient evidence to support an article 8 claim. For these reasons I do not find that there was any material error of law in the judge's determination and I therefore dismiss the appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

No anonymity order was made at first instance and I find no public policy reason for making such a direction.

Signed this 2nd day of February 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this

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Judge Woodcraft
Deputy Upper Tribunal Judge