



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-
003876
First-tier Tribunal:
HU/53767/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 22 August 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

**AMAR BAHADUR KAUCHA
(NO ANONYMITY ORDER MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Jasiri, Counsel, instructed by SAM Solicitors
For the Respondents: Mr Terrell, Senior Home Office Presenting Officer

Heard at Field House on 4 August 2023

DECISION AND REASONS

Background

1. The appellant is a citizen of Nepal born on 7 December 1978 who appeals against the decision of First-tier Tribunal Judge I Howard (“the judge”) promulgated on 17 May 2023 dismissing his appeal against the respondent’s refusal, on 24 June 2021, of entry clearance on human rights grounds.
2. The appellant applied for leave to enter the UK as the adult dependant of a former Gurkha soldier, his father (‘the sponsor’).

3. Permission to appeal was granted by the Upper Tribunal with all grounds arguable. The appellant applied for permission to appeal on the following grounds: Ground 1: that the judge failed to assess the evidence in relation to Article 8(1) pursuant to the test in Rai [2017] EWCA Civ 320, including that it was argued that the judge failed to consider whether family life existed in 2011 between the sponsor and the appellant and whether it still subsisted. It was further argued that the judge erred in his focus on the appellant's family life with his siblings; and Ground 2, on the basis that the judge assessed the emotional support provided by the sponsor without reference to the emotional support provided from still residing in the family home and the credible evidence of visits and contact.
4. I heard submissions from both parties and at the end of the hearing I reserved my decision. I have reminded myself of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in Volpi & Anor v Volpi [2022] EWCA Civ 464 at [2] as follows:
 - i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
 - ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
 - iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
 - iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
 - v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
 - vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Discussion

Ground 1

5. Whilst Mr Jasiri conceded that the appellant's relationship with his siblings was relevant, it was submitted that the judge had applied the wrong approach in focussing on the relationship between the appellant and his siblings in Nepal.
6. Rai at [39] provides including as follows:

“... the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.”

7. The judge heard oral evidence from the sponsor whom he found to be credible and the judge at paragraph [29] was satisfied that the appellant is reliant on the sponsor for his financial needs:

“As to the issue of financial dependency I am quite satisfied that the appellant remains reliant upon his father for funds for his day to day existence. There is an abundance of evidence of money being sent to the appellant in Nepal by his father. That situation, on the evidence, has subsisted for seven years now.”

8. The judge then went on, primarily at [30] to [32], to look at the emotional ties between the appellant and his sponsors in the UK and there can be no error, in undertaking that consideration, that the judge considered the overall family situation, including that the sponsor and his now deceased wife had seven children, with all of those children bar the appellant, being married and settled in India and Nepal. The judge considered that the appellant at the date of the hearing was forty-three years old and had been living apart from his father and stepmother since 2011. Although he took into account that the sponsor and his wife had made visits to Nepal and were in regular phone contact, there was no error in his finding that ‘that is only half the picture’ and that those visits would have included visiting the sponsor’s other adult children and grandchildren and that some of the money spent on phone cards must have been to talk to other family members too.
9. Whilst the judge found the sponsor’s oral evidence credible, at [31] the judge noted that the sponsor was not able in his evidence, to account for his son’s circumstances, including his banking arrangements and attached weight, in considering the emotional ties between the sponsor and the appellant, to the fact that the sponsor did not know whether his son had a bank account. Those were entirely sustainable findings, as was the judge’s findings that the ‘great majority’ of the appellant’s siblings live in Nepal with their families and he distinguished the appellant’s case from those of individuals left without family in Nepal. The judge went on, at [32] to not find it credible that the appellant did not have a close relationship with his siblings.
10. Mr Jasiri submitted that the judge had erred, as even if the appellant had emotional ties with his siblings, Mr Jasiri submitted that did not preclude emotional ties with the sponsor and it was his submission that such were real, effective or committed even if they were lesser than those that the appellant had with his siblings.
11. That submission is in my view misconceived, as although that might well be the case in some family situations, on the facts before him, the judge having carefully assessed the emotional ties that the appellant had, concluded at [32] that he was ‘not satisfied the emotional support provided by the sponsor and his wife is committed and effective’. Although in slightly different terms, I am satisfied that the judge properly directed himself and gave adequate reasons why he was not satisfied that the appellant had shown real, or effective or committed support between him and the sponsor (and the sponsor’s wife), over and above normal emotional ties between a parent and adult child.

12. When considered fairly in the context of the entirety of the decision, which considered the family situation including the sponsor and his wife leaving for the UK in 2011, their separation from the appellant and the circumstances since then, it was not fatal to that assessment that the judge did not make any explicit findings about family life in 2011 when the sponsor left Nepal.
13. The respondent had not accepted the appellant had established family life with the sponsor or that Article 8 was engaged. The burden is on the appellant to establish that family life exists. I am satisfied the judge properly directed himself on the test to be applied and the judge considered in his decision the relevant jurisprudence, including Rai. The appellant had to show real or effective or committed support between him and the sponsor over and above normal emotional ties between a parent and adult child.
14. The judge took into account all the factors, including the sponsor's lack of knowledge of whether his son had a bank account, and that the appellant had the benefit of emotional support from other family members. It was not in dispute that the appellant had a considerable extended family of siblings and their families in Nepal. Whilst the judge's reasoning in respect of the appellant's siblings might have been expressed better, it was adequate. His relationship with them was a relevant (but not the only) factor and the judge was entitled to find as he did in terms, that all these factors undermined the existence of family life between the appellant and the sponsor. The judge's findings were consistent with the guidance in Rai. Ground 1 is not made out.

Ground 2

15. Ground 2 argued that the judge erred in failing to reference the emotional support provided from still residing in the family home and the credible evidence of visits and contact. As outlined above, whilst the judge accepted the visits and contact and the judge considered this at [30], he attached more limited weight to this because in his findings the sponsor would have been visiting and contacting the whole family, leading ultimately to the judge's finding that there was not real, effective or committed support specifically between the sponsor and the appellant.
16. The sponsor had set out, including at paragraph 11 of his witness statement, that the appellant was living in the family home, and I am satisfied that the judge took this into consideration both in his finding that the appellant was financially dependent on his father and in his holistic assessment of emotional dependency. Those findings were adequate and no error, material or otherwise, is disclosed by any claimed failure of the judge to specifically state why the appellant living in the family home did not tip the balance in the appellant's favour in terms of real, effective or committed support. It is evident that the judge considered and had in mind all the pertinent factors in reaching the sustainable findings he did.
17. Further and in the alternative, there can be no material error in the judge's findings including because he went on to make alternative findings that any interference with family life was proportionate to the legitimate public interest. Whilst the grounds of appeal to the Upper Tribunal referenced the need for a lawful application of the 8(2) proportionality exercise, in the context of the argument that family life existed and therefore the appeal should be allowed,

there was no substantive challenge in the grounds or in submissions before me, to the judge's findings on proportionality at paragraph [34].

18. The judge carefully considered the judicial guidance in relation to the historical injustice in Gurkha cases and the respondent's guidance. The judge took into account that the appellant did not apply promptly for entry clearance when he was eligible, as a consequence of his 'genuine and significant family life' with his siblings in Nepal. The judge concluded that on the facts of the case the refusal of entry clearance was proportionate.
19. The judge's findings on family life were open to him on the evidence before the First-tier Tribunal. I find there was no material error of law in the decision, and I dismiss the appellant's appeal.

Notice of Decision

The appeal is dismissed.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 August 2023