



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004316

First-tier Tribunal Nos: HU/55417/2021
IA/13612/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 30 August 2023**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**Purna Kumar Rai
(NO ANONYMITY ORDER MADE)**

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr Wilford, Counsel, instructed by Bond Adams LLP Solicitors
For the Respondent: Mr Wain, Senior Presenting Officer

Heard at Field House on 4 August 2023

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Louveaux, dated 17 June 2022, dismissing the appellant's appeal against the decision made by the Entry Clearance Officer on 22 October 2021, refusing him entry clearance to join the sponsor Ms Rai, his mother, a widow of an ex-Ghurkha soldier in the United Kingdom.

Background

2. The appellant is a citizen of Nepal born on 22 April 1977. He previously applied for entry clearance to join his mother, Ms Rai on 7 June 2018. That application was refused and the appeal against that refusal was dismissed by First-tier Tribunal Judge Bartlett in a determination promulgated on 11 June 2019. Further applications for permission to appeal were refused by Upper Tribunal Judge Martin and then by Upper Tribunal Judge Macleman.
3. The appellant asserts that there is real or committed or effective support between himself and his mother. He claims to be unemployed in Nepal and reliant on his mother for financial support. His evidence is that they always lived

together as part of a family unit until his mother exercised her right to enter the United Kingdom under the provisions righting the historic wrong which previously denied ex-Ghurkhas and their families the right to settle in the United Kingdom. He contends that he has a strong emotional attachment to his mother, that they speak on a regular basis and provide emotional support to each other in addition to the financial support he receives. He asserts that he has established a family life pursuant to Article 8 ECHR with the sponsor.

4. The respondent's position is that family life pursuant to Article 8 ECHR is not engaged between the sponsor and the appellant.

The Decision of the Judge

5. The judge took the findings of First-tier Tribunal Judge Bartlett in the decision dated 11 June 2019 as his starting point. The judge found that there was very little, if any, evidence before him that would justify him departing from the previous decision. The judge found that First-tier Tribunal's Bartlett's reasoning was partially flawed when finding that the sponsor was lacking in credibility because he was not aware of the relevant social security legislation which restricted the sponsor's visits to Nepal to 28 days. However, the judge found that the previous determination was not unlawful. The judge ultimately decided that the new evidence was insufficient to depart from the findings of the previous judge. The judge found that Article 8 ECHR was not engaged and dismissed the appeal.

Grounds of Appeal

6. The grounds of appeal are put on one basis only that is that the judge misapplied the Devaseelan guidelines. It is submitted that instead of considering the evidence before him to determine whether family life could be said to exist at the date of the hearing, the judge considered whether he should depart from previous findings. The judge's approach to Devaseelan was incorrect because the judge failed to take into consideration facts that had happened since the first judge's determination. Further, the judge failed to reconsider the credibility of the sponsor in the light of the new evidence which was not available to the previous judge when she made negative credibility findings. The previous judge gave great weight to the fact that the sponsor was not able to explain why she could not visit Nepal for more than 28 days and this influenced her conclusion that the sponsor was a poor witness.

Rule 24 Response

7. There was no Rule 24 response although Mr Wain indicated that the respondent would oppose the grounds of appeal.

Ground 1 - misapplication of the Devaseelan principles.

8. Mr Wilford made brief submissions. He submitted that the judge had erroneously considered the issue of whether First-tier Tribunal Judge Bartlett had materially erred instead of examining the evidence to determine whether family life was engaged in June 2022. The judge used Devaseelan as a sledgehammer. He failed to make factual findings in respect of events subsequent to the previous decision.
9. Mr Wain responded briefly. His submission was that the matter was settled. It was not the judge's role to go behind First-tier Tribunal Judge Bartlett's decision.

The judge was well-aware that the sponsor had now provided an explanation as to why she could not visit Nepal for more than 28 days and had factored this into his decision making. He had found that First-tier Tribunal Judge Bartlett's decision was not erroneous. At [33] the judge accepted the sponsor's evidence but having considered the new oral evidence along with the new documents regarding ongoing contact and financial support, the judge was entitled to find "family life" did not exist and that this was no more than a normal parent/child relationship. The judge had clearly applied Devaseelan correctly and used the previous findings as a starting point, which were not binding upon him.

10. Devaseelan v the Secretary of State for the Home Department [2002] UKIAT 000702. Devaseelan does no more than provide guidance and is subject to the overriding principle that there is a fundamental obligation to decide each new application on its individual merits in accordance with Djebbar v the Secretary of State for the Home Department [2004] EWCA Civ 804. Devaseelan states:

"37. We consider that the first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.

38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not - or could not be - raised before the first Adjudicator; or evidence that was not - or could not have been - presented to the first Adjudicator.

39. In our view the second Adjudicator should treat such matters in the following way.

(1) The first Adjudicator's determination should always be the starting-point.

(2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.

(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator."

11. The remainder of the Devaseelan guidelines concern mainly Article 3 and protection claims.

12. This appeal concerned the appellant's assertion that he had family life with his mother, the sponsor because there was real or committed or effective support

between them. First-tier Judge Bartlett found that family life did not exist when he considered the matter in June 2019. First-tier Tribunal Judge Louveaux was considering the issue three years later.

13. The judge correctly identified that the previous judge's findings are the starting point. The judge spent some time setting out the previous judge's findings and reasoning. At [11] he itemised the judge's previous findings as follows:
- (i) the appellant and sponsor's claim to dependency is overstated;
 - (ii) the appellant has not been financially dependent upon the sponsor;
 - (iii) the appellant supports himself by working and that work provides him with adequate sustenance;
 - (iv) the appellant and sponsor do not miss each other desperately;
 - (v) the sponsor was a poor witness because she could not explain why she believed the advice that she had been given that she could not leave the United Kingdom for more than 28 days;
 - (vi) the appellant lived rent free in accommodation which was not owned by any family member and not owned by the sponsor; and
 - (vii) the sponsor and the appellant are in regular telephone communication.
14. In the more recent claim, the appellant provided more evidence of dependency. This was in the form of evidence of remittances from the sponsor to the appellant in Nepal, which were found at pages 62 to 66 of the appellant's bundle and copies of the pension account in Nepal, from which the appellant drew money. (This evidence was not before the previous judge). The appellant also provided call records from 2018 to 2021 at pages 74 to 155 of the appellant's bundle and evidence of two visits by the sponsor to Nepal in 2020. All of this evidence postdated the previous appeal.
15. The sponsor also provided a witness statement in which she confirmed that she had always lived with her son the appellant in a family unity prior to travelling to the United Kingdom in order to settle. At the time she travelled to the UK, her son was aged 33 and when she left they were living together. He remains single without a family of his own. The sponsor confirmed that in the past she supported her family through her husband's army pension and through some labouring work around her neighbour's fields, for which she received a small amount of money. She confirmed that she saves money out of her benefits to send remittances to her family including the appellant in Nepal. She continues to visit Nepal as often as she can. She has increased her contact with her son because she now has a new smartphone which has made contact much easier. She speaks to her son several times a day and her conversations are very emotional. She continues to send remittances to her son and has taken out a loan in Nepal. She confirms that her son is not married, nor employed in regular paid work. He would not be able to survive in Nepal without her support. She confirms that she is not literate and heard rumours that she was not allowed to leave the United Kingdom for more than 28 days because it would affect her benefits. She did not want to get into trouble. She has increasingly poor health. Her son supports her emotionally.

16. The appellant also provided a witness statement. His evidence was that he continues to remain in the family home, which is not owned by the family. The family owns a cow and two to three goats. When the animals get older, they are sold to buy a new ones. The produce is used for food and sold. They grow some wheat, maize, mustard, and potato which is to provide food. The appellant is not working. He is unemployed. He has the authority to collect his father's family pension and his mother brings him money when she visits Nepal. The appellant uses the money for all of the family's living needs as well as his deceased brother's children's education.
17. The sponsor gave oral evidence at the hearing. She stated that she was all alone in the United Kingdom and needs someone to help her. She loves her children like any mother and she misses the appellant so much she has cried many times.
18. I am satisfied that the judge approached First-tier Judge Judge Bartlett's previous findings as an end point rather than as a starting point from which new evidence could be considered if it postdated the previous findings. I note in this respect that the existence of family life is not fixed nor immutable. In theory a family member could cease to have family life with another family member and then reestablish family life if circumstances changed. Unlike a protection appeal where the fist judge will have evaluated past events, a consideration of whether family life exists at the date of the appeal involves an evaluation of all of the circumstances including a history of relationship, what has happened since the last appeal and evidence of current support.
19. There was increased evidence of financial support in the sense that the appellant's father's pension contributions were paid into the Nepali bank account and from there to the appellant. The judge comments, "I therefore do not know whether their evidence was before him or not however, either way it does not give me ground to depart from FtT Bartlett's finding that the sponsor supports himself and that the support given by the sponsor is used for other family members." The problem with this approach is that the sponsor's evidence and that of the appellant in this appeal was that the appellant was not employed and was reliant on his mother financially. Even if the money also went to support other family members this would not necessarily mean that the sponsor was not providing real and committed support to her son. Both witnesses had provided more information about their living circumstances.
20. There is no consideration by the judge as to whether the situation has changed in the last three years and no unambiguous findings in respect of the circumstances as at the date of the appeal.
21. The previous judge found the sponsor to be a poor witness because she was unable to explain adequately why she did not remain longer in Nepal and this was used as a reason for undermining her claim that she was close to the appellant. The judge in the current decision accepts that the appellant has provided an explanation for staying in Nepal no longer than 28 days and that this evidence was not before the previous judge.
22. It is not entirely clear what the judge makes of the sponsor's current evidence in light of this. Indeed, the judge at [33] seems to accept the sponsor's evidence where he states "I am not insensitive to the sponsor's oral evidence". He also notes at [37] that the Presenting Officer did not challenge the sponsor's evidence that the sponsor speaks many times a day with her son and that there is an

increase in the frequency of calls. I am unable to discern whether the judge now finds the sponsor to be a credible witness.

23. The judge has failed to make a finding as to whether the appellant is currently employed and dependent on his mother based on the evidence before him, which postdated the previous evidence.
24. Instead of looking at the current situation and the closeness between the appellant and the sponsor at the date of the hearing in terms of the increase in phone calls, the reason that the sponsor does not make longer visits to Nepal and despite accepting the appellant's sponsor's evidence that she misses her son and speaks to him three or four times a day, there was no analysis of whether this amounts to real or effective or committed support.
25. The judge merely comments at [37], "however increased contacts have nothing of the quality and duration of that content and the mobile phone records submitted do not assist in that respect". This is to ignore the appellant's and sponsor's witness statement and oral evidence. If the judge meant to reject this evidence, he should have explained why. It was not sufficient to state that the evidence was not sufficient for him to depart from the previous findings.
26. It seems to me that had the judge approached Devaseelan correctly, the judge would have gone on to look at the new evidence before him and made findings on that evidence in light of the evidence and the sponsor's explanation for the short visits.
27. I am satisfied that the judge has misapplied Devaseelan in this appeal by failing to consider the evidence that postdated the previous appeal and by failing to make careful factual findings on that evidence to evaluate whether it amounted to family life. I am satisfied that this error is material to the outcome of the appeal and that for this reason the decision should be set aside in its entirety.

Disposal

28. Mr Wilford submitted that the appeal should be remitted to the First-tier Tribunal to make further findings of fact. Mr Wain submitted that if evidence needed to be taken again, in the interests of fairness the appeal should be remitted, otherwise it could be retained in the Upper Tribunal.
29. The normal course of action is for appeals to be retained and remade in the Upper Tribunal however this will depend on the extent of factual findings. In this appeal, no findings have been made on the extent of the current emotional and financial dependency between the appellant and the sponsor and I find that it is appropriate for the appeal to be remitted for fresh factual findings to be made and for the judge to decide at the date of the hearing, taking Judge Bartlett's finding as a starting point, in light of the further evidence, whether there is real or effective or committed support between the appellant and the sponsor, such that Article 8 ECHR is engaged.

Notice of Decision

- (1) The making of this decision involved the making of an error of law.
- (2) The decision is set aside in its entirety with no findings preserved.
- (3) The appeal is remitted to be heard de novo by a judge other than First-tier Tribunal Judge Louveaux and First-tier Tribunal Judge Bartlett.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 August 2023