



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005523
First-tier Tribunal No: HU/50162/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

SUKRA PRASAD LIMBU
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE
HOME DEPARTMENT

Respondent

Representation:

For the Appellant:

Mr G Dingley, Counsel instructed on a Direct Access basis

For the Respondent:

Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 28 February 2024

DECISION AND REASONS

1. The appellant brings this appeal against the decision of First-tier Tribunal Judge Malik ('the Judge') who dismissed his appeal against the respondent's decision refusing him entry clearance on 9 November 2023.

Background

2. The appellant is a citizen of Nepal. His late father served in the Gurkha's from November 1959 to August 1972. He was discharged in 1979. He was denied the chance to settle in the UK because of a historical injustice. This was rectified to an extent in 2019 when his wife moved to the UK, by which point the appellant was an adult.
3. He applied on 3 July 2022 for entry clearance to join his mother in the UK. This application was refused by the respondent on the basis that the appellant could not meet the

immigration rules. In relation to Article 8 it was not accepted that the appellant had shown that there were ties beyond the normal emotional ones meaning that Article 8(1) was not engaged.

4. The appellant appealed. His appeal came before the Judge on 7 November 2023. In the decision the Judge found that Article 8(1) was not engaged, in particular:

13. *The respondent, as part of their review, provided additional evidence, namely the sponsor's statement of 10/01/21, used as her evidence in the appeal of her stepdaughter, Kalpana, heard on 19/01/21, which was allowed.*

14. *At paragraph 13 of this statement the sponsor says she had two sons with her husband – Parbat (2004) and Prabal (2009); they were fully dependent on her and lived with her in the UK. She made no mention of the appellant.*

15. *At paragraph 17 of the sponsor's then statement she said, "My step-daughter Kalpana is the only child still dependent on me....". At paragraph 24 the sponsor also said, "When I travelled to the UK, I moved my daughter to Jhapa in a rented accommodation....". At paragraph 27, the sponsor said "My sons miss their sister so much. They were very close to each other. It is difficult to answer their simple question that why I left her on her own in Nepal" [sic]. At paragraph 28 the sponsor said, with reference to her daughter, "She has no one except me in this world". At no point did the sponsor mention the appellant as her son, that he was in Nepal, that he was dependent on her, or that he was living with her daughter Kalpana in Nepal.*

16. *In the FtT decision for Kalpana's appeal, it is recorded that the sponsor's oral evidence mirrored and expanded on her written evidence. It was accepted Kalpana lived with the sponsor and her two half-brothers as a family unit until the sponsor and the two half-brothers came to the UK. There was no mention of the appellant living with them – but it was recorded that the appellant had recently moved back to Nepal having lived and worked in Malaysia and "The sponsor was cross-examined about why she would send Sukprasad to Malaysia to work when he was aged 18 years....". It was also recorded at paragraph 18 that "Although the appellant's brother has moved back to Nepal in recent months due to lockdown, he is not working and does not provide for [t]he appellant".*

17. *At paragraph 28 of the decision of the FtT for Kalpana it is recorded "Although the appellant has one brother left in Nepal, he has recently joined her due to the global pandemic, her mother and half-brother are in the UK and I find that her primary attachment remains with them.....".*

18. *In the sponsor's statement of 11/07/2023 for this appeal, admitted as her evidence in chief, she said "I am solely responsible for...." the appellant. She says they all lived together as one family unit and the appellant continues to live in her house in the village in Nepal. Yet this contradicts what she said in her statement of 10/01/21. She also made no mention in this statement of the appellant having lived and worked in Malaysia from the age of 18 - or as in her oral evidence - that he had gone there in 2019 and returned to Nepal in January 2020.*

19. *The appellant in his statement provided for this appeal of 07/11/23 makes no mention whatsoever of having lived and worked in Malaysia since he was 18 or from 2019 to 2020. He says, "Before my mother left to go to the UK and when my father was alive, we all lived together". He says at paragraph 3, "I tried but could not find any job and walked for many miles to try and get something, but I have not been successful. I did not finish school so do not have the necessary qualifications to enter the workforce"; again, no mention of going to Malaysia at 18 or between 2019 –2020. At paragraph 5 he says "I went to a local school and studied up to age 13. I could not study further mainly due to the poor financial situation of our family. I stayed at home and helped my father with the small holding, we worked to grow vegetables and look after the animals. I have continued this lifestyle to this day, and it is a tough life". Again, no mention of having left the country to work abroad - and on the sponsor's account he was not in Nepal when she made her application in 2019 to come to the UK if in Malaysia from age 18 and/or 2019 to 2020.*

20. The sponsor has tried to address the inconsistencies in her additional statement of 18/09/23 by saying she “gave evidence in my eldest daughter’s appeal in 2020, although it is a long time ago so I cannot remember much of what I said. Anyway, we used an agent via a Gurkha NGO to prepare my son, the appellant’s application, I never had sight of it other than to sign to cover letter. I cannot read English very well so I do not know what the letter has said and I never saw the application until this appeal. My son has lived continually at our village home in Sidingba 6, Taplejung, Nepal apart from when he left to go and work in a labouring job in Malaysia. Even when he moved there important documents would still get mailed to the house” . It is unclear as to why the sponsor would not know what she had said at her daughter’s appeal as it appears, from the Judicial Case Manager platform, the same representatives have been used. It also does not address what she said in her statement for her daughter’s appeal - that “My step-daughter Kalpana is the only child still dependent on me.... ”. Whilst the sponsor in her oral evidence said maybe the person who did (her statement) for her daughter’s appeal did not do it right, the statement says it had been translated to her in Nepalese and it was true to the best of her knowledge and belief. It would also not explain why both she and the appellant failed to mention he was living and working in Malaysia from the age of 18 or from 2019-2020 in their initial statements for this appeal and not until the respondent raised it in their review.

21. The appellant also stated no, (or a representative on his behalf), in his application form, completed on 03/07/22, in the section titled “Travel history (other)” in having been to any other countries in the past 10 years. If, as the sponsor now says, they used an agent via a Gurkha NGO to prepare the appellant’s application and she never had sight of it, it was open to the appellant to provide evidence from this Gurkha NGO to confirm they completed it, and that it was their error. This would equally to the application form stating the appellant had lived at the address cited for 26 years, when this cannot be the case as he has lived in Malaysia.

22. Other than one money remittance sent by the sponsor to the appellant on 23/11/21, there is no other documentary evidence to confirm monies have been provided by her – and this one receipt has been duplicated three times. There are no other money remittances from the sponsor to the appellant since she moved to the UK - nor for any time he was in Malaysia. Whilst there are other remittance forms, these are blank. The sponsor said in her oral evidence that she had sent other documents for the appellant’s support, that the appellant was living with his sister, and she used to send money in her name. This contradicts what she said in the statement used in her daughter’s appeal - namely that her daughter was her only dependent and that when she travelled to the UK, she moved her daughter to Jhapa to rented accommodation. Therefore, if the appellant was in the village home, it is unclear as to how these monies were also for him if sent to her daughter. This causes me to find the appellant is not financially dependent on the sponsor.

23. I accept the sponsor has other sons and family in Nepal who she remains in contact with and that she visited Nepal in 2022. I accept there are WhatsApp messages between the sponsor and the appellant. There is also WhatsApp evidence as between the sponsor’s other son and grandson in Nepal, and it is not unusual for family members living apart to remain in touch in this way. They do not though suggest contact every day or emotional dependence.

24. Even if I were to ignore the statement the sponsor made in support of her daughter’s appeal and the resulting decision, the sponsor also says in her undated letter provided to the respondent in support of the appellant’s application that “He has always been with me since he was born, and we had never lived apart from each other until my settlement to UK” [sic]. This cannot be right if he had lived in Malaysia – and again if it was not written by the sponsor and/or she did not understand what was said, the appellant had the opportunity to provide evidence from the author to confirm its content or otherwise.

25. I accept but for the historical injustice the appellant would have been born in the UK and that it was his father’s intention to settle here with his family. Yet given the inconsistencies highlighted in this decision above, I find I have not been provided with a full and accurate account of the claimed family life between the sponsor and the appellant – and when taken with the limited evidence of financial

support to suggest financial dependence, real, effective or committed or emotional dependence – and evidence of the appellant working and living independently from age 18 and/or 2019-2020, I find Article 8 is not engaged.

5. The appellant appealed, permission was granted by First-tier Tribunal Judge Boyes on 13 December 2023:

*3. In ground 1 the appellant complains that as certain matters were not put to him and/or his witnesses it is not fair for the Judge to find against him on those matters. The Court of Appeal have very recently dealt with this issue in *Abdi & Ors v Entry Clearance Officer* [2023] EWCA Civ 1455 . The question really is whether it was an obvious point. That is a reasonable question and an arguable point which means I grant permission.*

4. Further, I grant permission in relation to the dependency issue. Exceptionality in the dependency was removed a number of years ago and the explanation as to why the Judge believes it applies is arguably incorrect.

The hearing

6. Mr Dingley made submissions relying on his skeleton argument. In light of the respondent's record of proceedings he withdrew paragraphs 5 and 6 of his grounds of appeal, but nevertheless maintained that in relation to what was completed on the application form, this was not a matter put to the sponsor and nor were submissions made on that particular point.
7. In relation to ground two, he submitted that Article 8 does not operate in a vacuum and that simply because someone has left the family unit to go somewhere else to look for work does not prevent them returning and being dependent once again. The Judge has erred by expecting something exceptional rather than considering the question of dependency. Separation in and of itself does not mean that an Article 8 family life has extinguished.
8. In response Mr Melvin submitted that on ground one the point about the application form was raised by the respondent in his review, and was therefore a live issue. The appellant gave an explanation, and the Judge was entitled to come to a conclusion on the point, there was nothing unfair about the approach.
9. In relation to ground two the Judge's conclusions were ones he was entitled to come to. The Judge was not satisfied he had been provided with a clear set of circumstances. As such the Judge has given reasons for why Article 8 is not engaged and the grounds do not amount to anything more than a disagreement.
10. In response Mr Dingley highlighted that the leading case is TUI (UK) Ltd v Griffiths [2023] UKSC 48 and it is not sufficient for the respondent to rely on the review, the respondent had every opportunity to question the sponsor on the issue and chose not to.

Findings and reasons

11. I do not consider that the Judge materially erred in law in dismissing the appeal. My reasons for finding as such are as follows.
12. In relation to ground one I do not consider that the case of Tui has the purchase that Mr Dingley advances in this case. The paragraph of the decision which he criticise is 21:

21. *The appellant also stated no, (or a representative on his behalf), in his application form, completed on 03/07/22, in the section titled "Travel history (other)" in having been to any other countries in the past 10 years. If, as the sponsor now says, they used an agent via a Gurkha NGO to prepare the appellant's application and she never had sight of it, it was open to the appellant to provide evidence from this Gurkha NGO to confirm they completed it, and that it was their error. This would equally to the application form stating the appellant had lived at the address cited for 26 years, when this cannot be the case as he has lived in Malaysia.*

13. This issue arose in the context of the documentation the respondent submitted with its review of the case which showed that the appellant lived in Malaysia for a period of time. The criticism Mr Dingley makes is that the point the Judge makes was not put to the sponsor in evidence, however the explanation the sponsor gave is captured. The sponsor however is not the appellant, and it is the appellant whose application it is. The appellant is an adult. The appellant also did not take part in the hearing in the FTT because he lives in Nepal.
14. It is noteworthy that the appellant, having been notified of the respondent's position in the review, did not file any further evidence to address the application form matter other than a supplementary statement from the sponsor. This is significant because the appellant's original witness statement reads as follows:

2. At present, I am unmarried and unemployed. I live in my parents old house in our village which is the same house I grew up in. All my expenses are paid for by my mother. Before my mother left to go to the UK and when my father was alive, we all lived together. After my mother left, my siblings and I continued to live together and share expenses because we are poor and reliant on my mother.

3. I tried but could not find any job and walked for many miles to try and get something, but I have not been successful. I did not finish school so do not have the necessary qualifications to enter the workforce. I have managed to get so temporary labouring jobs but they don't last for longer than a week or two and are not enough to sustain me. This means I have to rely upon my mother financially. There is also not much work in our local area and these temporary jobs tend to be seasonal and I cannot rely on this temporary arrangement to survive. On a day-to-day basis I grow vegetables on a small holding and look after the animals, but this is not enough to sell to earn money or to survive without my mother sending money to me.

...

5. When living in Nepal my father took care of us while mother cooked food and did other household chores. He worked as a farmer after his service in the Gurkha's ended. I went to a local school and studied up to age 13. I could not study further mainly due to the poor financial situation of our family. I stayed at home and helped my father with the small holding, we worked to grow vegetables and look after the animals. I have continued this lifestyle to this day, and it is a tough life.

...

7. My siblings and I used to live with my parents under the same roof and ate from the same kitchen until my mother left for the UK. Even after migrating to the UK, my mother has sent money to me for my upkeep and for my brother. My mother calls me on Viber and WhatsApp almost every day to speak. We are one family unit. My mother has continued her support of me since my father died. Without her support I could not survive, and I have tried to get employment but have not been able to secure anything.

15. The appellant in his statement therefore not only does not mention going to Malaysia, but directly implies that he has also lived in the family home before his mother left and subsequent to that. There is clear accepted through the sponsor's latest statement that in fact this is incorrect and that the appellant did leave and go to Malaysia. As a consequence it is

difficult to understand what ought to have been put to the sponsor in cross examination to ensure a fair hearing.

16. The significance of this point was for the Judge to determine, but given the sponsor's explanation, the Judge was entitled to note that there was no supporting evidence from the agency they had used to make the application. In any event the principle point which arose was as to whether the appellant had been, as originally claimed, continuously dependent on his mother, matters going to that issue were clearly put to the sponsor in the course of the hearing, and the sponsor had an opportunity to answer those questions.
17. There was no unfairness arising out of the failure to cross examine on the application form, because the relevant matter which arose, i.e. whether the appellant has in fact been in Malaysia, was accepted. The form was incorrectly completed, but the consequence of that is not that the form was incorrectly completed, but that the appellant had been to Malaysia. This was a relevant consideration as to whether Article 8(1) was engaged and as both parties agreed the factual position there can be no unfairness arising.
18. The real question in this case is, as per ground two, whether the Judge erred in law in finding that Article 8(1) was not engaged. The Judge, in my judgment, gave clear reasons for having concerns over the evidence provided as to the appellant and his mother's ongoing family life together. In particular the judge found:
 - a. The sponsor made no mention of the appellant in her statement for her daughters appeal in 2021.
 - b. In the statement for that appeal she expressly said that her step daughter was the only child still dependent on her, and further that she was left on her own in Nepal. The sponsor made no mention of the appellant, that he was in Nepal, dependent on the sponsor or living with her daughter.
 - c. The FTT decision in the daughters appeal mirrored and expanded the written evidence. No mention was made of the appellant living with them, but it was recorded he had recently moved back to Nepal having lived and worked in Malaysia. The decision went on to find that although the appellant had recently returned to Nepal he is not working and that the daughters primary attachment remained with the sponsor.
 - d. The Judge noted that in this appeal the sponsors first statement made no mention of the appellant going to Malaysia, and says that she is solely responsible for the appellant, which contradicted her statement in the daughter's appeal.
 - e. The appellant himself made no mention in his statement of living in Malaysia, and his evidence was inconstant with that of the sponsor as on her account he was no in Nepal when she came to the UK.
 - f. The sponsor's additional statement sought to address the discrepancies, it was unclear to the Judge why the sponsor could not remember what she said what was said in her step-daughter's appeal because the representatives are the same firm. The statement also does not address what was said in the 2021 statement that her step daughter was the only child still dependent on her. There was also no explanation for why the both she and the appellant failed to mention him working in Malaysia in their original statements when it was known to them, and only raised by the respondent in the review.
 - g. There is no documentary evidence to confirm money being provided by the sponsor other than one money remittance sent on 23/11/21. No other remittances have been

provided, including when he was in Malaysia. Other remittance forms have been provided but they were blank.

- h. There was a contradiction in the evidence that the sponsor said that the appellant was living with his sister and she would send money to her for the appellant, whereas in the evidence in her step-daughters appeal she said that her step-daughter was her only dependent in Nepal, and that after she moved to the UK she moved her step-daughter to rented accommodation.
 - i. There were WhatsApp records showing communication but that did not show dependency beyond the normal emotional ties.
19. In my judgment the Judge's findings were open to him on the evidence to come to, as a consequence it is not at all surprising that it was found that Article 8(1) was not engaged. The appellant's complaint that Article 8 does not operate in a vacuum does not answer the significant findings of the Judge. In essence the Judge found that there was no evidence of a dependency beyond the normal emotional ties as at the date of hearing. Whether there was historical dependency is irrelevant to the findings of fact the Judge came to. The absence of any supporting documentary evidence in addition to the inconsistent evidence from the sponsor spanning two appeals, as well as a clear lack of candour from the appellant in his statement, all led the Judge to conclude that the evidence did not show that Article 8 was engaged. There was no error of law in the Judge's approach or findings.
 20. Mr Dingley's submission that the Judge erred in failing to acknowledge that there is a presumption of family life ignores the facts of the case in which the appellant emigrated to Malaysia to work, and where there was evidence given in a previous appeal that he was not dependent. That evidence clearly showed that if there had been historical dependency it had ended.
 21. The submission that the Judge appears to have expected the appellant to show an exceptional requirement is unarguable in my view. The Judge simply did not have evidence capable of showing that there was a family life between the appellant and his sponsor. The Judge did not fail to consider the relevant test, and I find there was no error of law in his decision.

Notice of Decision

The Judge did not materially err in law.

The appeal is dismissed.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 17th May 2024