



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001700

First-tier Tribunal No: HU/54750/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2nd of October 2024

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR PRABESH KUMAR LIMBU
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms C Physsas, Counsel, instructed by Everest Law
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 2 August 2024

DECISION AND REASONS

1. The appellant is a citizen of Nepal who appeals with permission against the decision of First-tier Tribunal Judge Davison ('the Judge') who dismissed their appeal against the respondent's decision to refuse entry clearance.

Background

2. The appellant applied for entry clearance as the dependent of his mother on 20 December 2022, who is the widow of a former Gurkha soldier. This was refused by the respondent on 1 March 2023, the respondent was not satisfied that the appellant and his sponsor enjoyed a family life for the purpose of Article 8 of the European Convention of Human Rights. It was common ground before the Judge that the matter could only succeed outside the immigration rules, and further that the only issue before him was whether Article 8(1) was engaged or not. If it was engaged the respondent accepted by virtue of the historic injustice suffered

by former Gurkha soldiers and their families that the decision would be disproportionate.

3. The case came before the Judge on 5 February 2024 over video link. The Judge found that:

22. The appellant's father sadly died in June 2008. The appellant's mother was granted Indefinite Leave to Enter in January 2013. The couple had one son, the appellant. The appellant's father had a previous family.

23. After her arrival, the sponsor remained in the United Kingdom for approximately 2 years. She returned to Nepal in November 2014 (SB 54). Her passport evidences that she has, in the main, resided in Nepal. Having returned in 2014 she came back to the United Kingdom from February to July 2016. March to April 2018. For 2 weeks in March 2020. From February to March 2022. She last entered the United Kingdom on 21 June 2023. I accepted her evidence that she has remained in the country since due to this appeal being prepared and then heard. Looking at her past pattern of travel, had she not had this hearing, she may well have already returned to Nepal.

24. Despite the fact that the sponsor has spent extensive periods of time in Nepal I do not find, having considered the evidence, that it is for the reasons given. The sponsor claims it has been to spend time and live with her son. I do not find this to be credible. At (SB 51) is a copy of the sponsor's current passport. This was issued in January 2022. A 'Thebe Mangal Maya' resident in Dharan, Sunsari is listed as the contact in case of emergency. This is the appellant's mother. The appellant stated that her mother died many years ago. She stated it was at least 7- 8 years ago. She could offer no explanation as to why her mother would be listed in her current passport as an emergency contact. She simply stated "in Nepal put mother's name". Whilst it is possible, as suggested by counsel in submissions, that these details could have simply been transferred from the sponsor's previous passport, her old passport (SB 57) lists her next-of-kin as her husband. There is other evidence that links the sponsor to Dharan, Sunsari. The application form (SB 271) stated that the appellant and sponsor lived together, in a property owned by the sponsor, in Dharan, Sunsari. At pages (SAB 6 - 9) are details of medical treatment that the sponsor had during a recent visit to Nepal. She was treated at Dharan Hospital. Her bank account is registered in Sunsari, Dharan (eg SB 87).

25. I find that the sponsor's mother is still alive. I find that she resides in the ancestral home in Dharan Sunsari. I find the sponsor has spent extensive time out there with her mother.

26. The appellant states that he lives in rented property in Lalitpur. Although very limited financial information has been provided his Standard Chartered bank account branch is in Lalitpur (SB 121). In his witness statement (SB 38 paragraph 4) the appellant claims to have rented accommodation in Lalitpur in 2018. He would have been about 30 years of age at this time. I find that the Appellant has resided away from the family home for at least 6 years.

27. I do not accept that the sponsor resides in the rented accommodation in Nepal with her son as claimed. I find the sponsor has claimed to have lived with the appellant in an attempt to show continuity of family life. I find the sponsor returns to Nepal to live in the ancestral home with her mother. Whilst I accept

that during these visits she may well see her son. I do not find that they are cohabiting in the manner claimed. Dharan to Lalitpur is a distance of over 350 km. I find that for the majority of her time in Nepal, for the reasons given, the sponsor resides in Sunsari Dharan and not with her son.

28. The fact that only one page of banking information for the appellant covering 3 months in 2023 has been provided also leads me to doubt the financial situation. I do not accept that the appellant is as destitute as claimed. I find this evidence has been generated in an attempt to show financial dependency upon the sponsor. Only post application information has been provided. The claim is that her son has been dependent for over a decade. If this had been the situation I find further evidence could easily have been adduced to evidence the same.

29. I find the other "official" documents that have been submitted to be equally unreliable. There are three documents from the 'Dharan Sub-Metropolitan City' (SB 268ff). All three state that the appellant resides in Dharan. This does not accord with his own evidence. The place of residence was not the purpose of these letters the first was to claim that the appellant is single, the second that he is unemployed and the third to confirm his identity. I find these letters have been generated in an attempt to deflect from the real position. I place no weight on them for the reasons given above.

30. Whilst I accept from the evidence provided that the appellant and sponsor are in contact I find this does not meet the lower threshold for family life in these "historic injustice" appeals.

31. In considering 13.2 as set out above I find that (b) cannot be met. Even reading the rule that the appellant's could be living with the widow of a Gurkha at the date of application he was not living in the same household as his mother. She had come to the United Kingdom many years before and he had moved out of the family home 5 / 6 years previously. Even applying a very broad definition to the word "household" i.e. if it were a household that his mother were maintaining in Nepal I would find that this definition could not be met for the reasons given above. I find the appellant is living an independent life in rented accommodation away from the family's ancestral home. He has been able to do this as he has a source of income either from his own employment or it is even possible that he has married and there is money on his wife's side of the family. For these reasons I would also find that the application under paragraph 13.2 would fail under subparagraphs (d) and (e). I find the appellant has lived in a different household for a period of longer than 2 years. I find the appellant and sponsor have tried to hide the true position which is that the appellant is leading an independent life in Nepal.

32. In considering the 3 stage test, for the reasons given above I do not find that Article 8 is engaged even to the low threshold applicable in "historic injustice" cases. I also remind myself that the nature of these cases is in part to correct this historic injustice where it is appropriate to do so. But the necessary elements of both family life and real and effective support must be met.

33. If I were wrong in this conclusion about family life I would not find that the support provided by the sponsor is real, effective and committed. I accept that the sponsor has visited Nepal and stayed there for extensive periods. I accept that she stays in contact with the appellant and I also find that some financial remittances have been made. However, in combination this is not real and

effective committed support. I find it to be no different to any adult sibling and parent relationship. I accept that the sponsor is ageing and has had various health concerns in the United Kingdom. This is not a reason to grant her son entry clearance to care for her. She has support in the United Kingdom from extended family members. It is of course open to her to return to Nepal and reside with her family. The tests applicable in this type of appeal are set out above. For all the reasons given I find they are not met.

4. The appellant appealed. He relied on the following grounds of appeal:
 - a. The Judge made findings based on a mistake of fact as to the sponsor's mother being alive in Nepal. The appellant sought to adduce evidence of the sponsor's mother's death certificate by virtue of Rule 15(2A) to show she is in fact dead. Further it was never put to the sponsor that her mother was in fact dead at the hearing.
 - b. The Judge acted in a procedurally unfair way by coming to findings on material issues which were not put to the sponsor.
 - c. The Judge failed to consider whether there is real, effective and committed support between the appellant and sponsor to engage Article 8.
 - d. The Judge erred in considering whether the sponsor could return to Nepal or not because such a finding ignores the historic injustice ex-Gurkha's and their families have suffered.
5. Permission to appeal was granted by Upper Tribunal Judge Perkins on 28 May 2024.

The hearing

6. We heard submissions from both advocates, a note of which the tribunal has a record of, we do not set them out specifically here save as to record that the respondent opposed the appeal and submitted that the Judge had not fallen into legal error.

Decision and reasons

Rule 15(2A) application

7. We begin with consideration of the rule 15(2A) application which comprises of:
 - a. Death certificate for the sponsor's mother, it is unclear the date of this document.
 - b. A name verification certificate dated 17 March 2024 confirming the sponsor's mother's name
 - c. A transaction history of the sponsor
 - d. Evidence of communication in the form of text messages
8. We are not persuaded we should admit the evidence relied on. It was evidence which the appellant and his representatives ought to have submitted to the First-tier Tribunal, no reasonable explanation has been given as to why it was not. We consider that as experienced representatives not only in this jurisdiction but in particular on these type of case they should have obtained this material sooner, and did not do so. The appellant had the burden of showing that his mother and he enjoyed a family life together, that family life being dependency beyond the

normal emotional ties. Part and parcel of that was their claimed cohabitation and the lack of any other family in Nepal.

9. Applying the principles from E&R we do not consider that the material should be admitted.

Grounds of appeal

10. In terms of the first ground of appeal we do not consider that the Judge made a material mistake of fact on the evidence before him, He was entitled to consider the material, including the oral and documentary evidence, and come to findings on that. As we have rejected the rule 15(2A) application there is no material to make good the finding that the Judge came to a material mistake of fact.
11. Ground two is however the substantive challenge to the Judge's findings on the issue. The appellant complains that the Judge fell into procedural error by making findings of fact on matters which were not put to the sponsor. We have carefully considered this ground, and the arguments advanced, however conclude that there was nothing procedurally unfair about the Judge's findings on this.
12. The sponsor was asked questions as to why her mother was named in her passport, this was something therefore that the sponsor was asked about, and why her mother appeared named in a passport issued in 2022 when she had been dead for some time. The Judge was entitled to consider this evidence and make findings on it. We do not consider that the Judge erred by doing so, he had to make findings of the evidence before him. It would have been open to counsel for the appellant to re-examine on the point; or even apply for an adjournment to seek the evidence of her death. However, the Judge cannot suspend belief in coming to his findings, and can only consider the evidence that was put before him.
13. This is all the more relevant given that the respondent did not accept that the appellant and his mother enjoyed family life together, one of the reasons being that the appellant and his mother did not live together. The Judge was entitled to find that the sponsor had not shown that her mother was not dead, indeed the Judge was entitled find that on the evidence he was not satisfied that the sponsor and appellant lived together as claimed.
14. Ultimately the sponsor was asked questions going to the heart of the issue at hand, whether there was a family life for the purposes of Article 8(1), that inquiry would always have engaged in issues such as where the appellant was living in relation to where the sponsor was living when she was in Nepal at any material time. That inquiry also would have to taken into account the documentary evidence which included disputes as to where each of them was living at any material time.
15. It was for the Judge to consider and assess that evidence and come to findings on it. We do not consider that the Judge fell into any error procedural or otherwise in relation to what he was required to do.
16. Grounds 3 and 4 can be read together. We do not consider that the Judge has failed to ask himself the correct test. He had to make findings of fact as to whether Article 8(1) was engaged, that is a well known test. The Judge set out the

test at paragraph 15, having rehearsed the established authorities between paragraphs 9 and 12.

17. The Judge considered the evidence, and in making his findings concluded that the appellant is living an independent life in rented accommodation away from the family's ancestral home.
18. He then at paragraph 33 set out why he did not consider the support provided is real, effective and committed. The only error we can see from the Judge's analysis is to separate the question of Article 8 engagement with the question of real and effective support, however this error is without substance. The Judge, having found that the appellant is living an independent life, was not persuaded that the limited support his mother gave him from afar went beyond the normal adult sibling and parent relationship.
19. In relation to ground 4 the Judge was not finding against the appellant because of what his mother could elect to do, he was not finding against the appellant because of a choice his mother had made, indeed such a finding would arguably be contrary to the established authorities. The Judge was simply, in conclusion, observing what the family could elect to do, it was not part of his reasoning as to why there was no real and effective committed support.

Notice of Decision

There was no error of law in the Judge's decision.

This appeal is dismissed.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 20th September 2024