



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003393

First-tier Tribunal No: HU/60192/2023
LH/00764/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th December 2024

Before

UPPER TRIBUNAL JUDGE LOUGHRAN

Between

Hom Bahadur Purja Pun
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Moriarty, instructed by Everest Law Solicitors Ltd

For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 28 October 2024

DECISION AND REASONS

Introduction

1. The Appellant appeals with the permission of Upper Tribunal Judge Mahmood against the decision of First tier Tribunal Judge Courtney ('the Judge') dated 13 May 2024 dismissing his appeal against the refusal of his human rights claim.

Factual Background

2. The Appellant, a national of Nepal, was born on 1 August 1976. He applied for entry clearance on 17 April 2023 to join his mother, Ruk Maya Pun ("the Sponsor") in the UK.
3. The Appellant's father, Dan Bahadur Pun served in the British Army's Brigade of Gurkhas for nearly 10 years. On 5 April 1999, the Appellant's father died.

4. On 23 February 2007, the Appellant married his wife. They lived with the Sponsor in the family home in Nepal.
5. On 11 February 2013, the Sponsor arrived in the UK having been issued a settlement visa under the discretionary arrangements for widows of Gurkhas, discharged before 1 July 1997.
6. On 26 November 2018, the Appellant and his wife's son was born.
7. The Appellant has two older sisters. One is married and lives in Nepal and one lives in the UK.

The Appeal to the First tier Tribunal

8. The appeal came before the Judge on 24 April 2024, via Cloud Video Platform ('CVP'). The Appellant was represented by Mr Moriarty and the Respondent was represented by Mr White, a Home Office Presenting Officer.
9. The Sponsor gave evidence using a Nepalese interpreter as did a witness called Tul Bahadur Pun Magar.
10. In a decision dated 13 May 2024, the Judge dismissed the Appellant's appeal. The Judge found the Appellant's core family life is with his wife. The Judge did not consider that the nature of the relationship between the Appellant and the Sponsor demonstrated more than emotional ties and concluded that they therefore did not enjoy a protected family life within the meaning of the Article 8(1) ECHR.
11. The Judge considered that even if she was wrong and Article 8 did have a purchase in this case, the refusal of entry clearance would not result in unjustifiably harsh consequences for the Appellant or the Sponsor and refusal was proportionate for the purposes of Article 8(2) ECHR because although the historic injustice carried weight on the Appellant's side of the balance, the Appellant and his mother have lived apart for the past 11 years, the Appellant was outside Nepal working in Malaysia and Qatar for five out of the nine years before his mother's departure, the Appellant has been married to his wife for 16 years and the couple have a five year-old son and the Sponsor has a close bond with her landlady and her daughter who also resides in the UK.
12. The Judge dismissed the Appellant's appeal.

The Appeal to the Upper Tribunal

13. The Appellant sought permission to appeal to the Upper Tribunal. The Appellant's grounds can be summarised as follows:
 - a. Ground 1: The Judge erred in approach to the applicable legal test for engagement with Article 8(1) ECHR by finding that the Sponsor provided the Appellant with "committed support", but that was not sufficient to "found a claim of dependency" or to engage Article 8(1) ECHR.

- b. Ground 2: The Judge failed to take account of relevant matters by failing to consider the evidence that there this almost daily contact between the Appellant and Sponsor, that the Appellant is the Sponsor's main source of emotional support and that the Appellant and his wife, and child remained living in the family home as part of a broader family unit which includes the Sponsor and that they had decided the Appellant was best placed to support his mother in the UK whilst his mother and child remained in Nepal.
14. In a decision dated 26 June 2024, First tier Tribunal Judge Fisher refused the Appellant permission to appeal to the Upper Tribunal. The Appellant renewed his application to the Upper Tribunal and in a decision dated 19 August 2024, Upper Tribunal Judge Mahmood granted the Appellant permission to appeal.
15. I heard submissions from Mr Moriarty and Ms Ahmed. I reserved my decision which I now give.

Discussion

16. I have considered the decision of the First-tier Tribunal, the evidence before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing before coming to a decision in this appeal.
17. I have had regard to the fact that the First tier Tribunal is an expert tribunal and I note that the Judge correctly identified and cited the relevant authorities at [12]-[15] of the determination. However, I am satisfied that it is clear from the language of the decision that the Judge has failed to apply the relevant authorities to the Appellant's case. The Judge's finding that "committed support" was not sufficient to "found a claim of dependency" demonstrates that she applied an elevated legal test in considering whether Article 8(1) ECHR was engaged. The Judge was required to apply the test in *Kugathas* and determine whether there was real or effective or committed support between the Appellant and the Sponsor. I am satisfied that the Judge interpreted the judgments in *Kugathas* too restrictively and required evidence of exceptional dependency
18. I am also persuaded that the Judge failed to address the Appellant's submission that the Sponsor was dependent on the Appellant. As explained in *Kugathas* there can be more than emotional ties between an adult child and his parent if it is the parent who is dependent on the adult child. It was the Appellant's case that the Appellant was the Sponsor's primary source of emotional support. The Judge recorded the Appellant's submission that the Sponsor visited her son "as regularly and frequently as possible", and accepted the evidence "show calls on an almost daily basis" between the Appellant and the Sponsor. However, the Judge failed to address the Appellant's submission that this and other evidence demonstrated the Sponsor's emotional dependence on the Appellant.
19. Accordingly, I am satisfied that the Judge failed to have regard to relevant matters and that failure was material to her finding that Article 8(1) was not engaged and her finding that if it had been the Respondent's decision refusing the Appellant entry clearance was proportionate.
20. I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement and *AEB v Secretary of State for the Home*

Department [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), and taking into account the representatives submissions. The hearing will need to be heard afresh. In all the circumstances, I accept that the proper course is to remit rather than to remake the decision on the appeal in this Tribunal.

Notice of Decision

21. The First-tier Tribunal decision involved the making of an error of law.
22. I set aside the decision of the First-tier Tribunal and remit the case to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

G. Loughran
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2024