The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/03429/2014**

THE IMMIGRATION ACTS

Heard at Field House, London
On 11 August 2015

Decision & Reasons Promulgated
On 16 September 2015

BEFORE

DEPUTY UPPER TRIBUNAL JUDGE PICKUP
UPPER TRIBUNAL JUDGE EDWARD JACOBS

BETWEEN

Prakash Rai
Anonymity Order Not Made

Appellant

And

Entry Clearance Officer

Respondent

Representation:
For the appellant: Mr M A Rana of counsel
For the respondent: Mr Avory

DECISION AND REASONS FOR DECISION

A. History and background

1. Mr Rai was born on 16 June 1989 and is Nepalese. He lives in Nepal, where he is a student studying for a degree in Business Studies His parents live in the United Kingdom, as do all his family members. His father is his sponsor and works as a security officer, having had a distinguished career in the British Army. He is able to send money to his son and to maintain some contact by telephone.

2. On 20 January 2014, Mr Rai applied for entry clearance to settle in the United Kingdom. This was refused on 11 February 2014. Mr Rai exercised his right of appeal to the First-tier Tribunal. The tribunal dismissed the appeal, but gave Mr Rai permission to appeal to the Upper Tribunal.

3. At the hearing, Mr Rana argued on his behalf that the First-tier Tribunal had gone wrong in law in three respects:

- by overlooking the methods by which communication happens nowadays;
- by failing to adjourn;
- by failing to make appropriate allowance for the historic injustice done to Ghurkhas.

We take his arguments in that order.

b. Modern methods of communication

The argument

4. The sponsor, Mr Rai, attended the First-tier Tribunal and gave evidence. He told the judge that he kept in touch with his son by mobile phone, paying by top up cards. The judge found that 'in the absence of any supporting evidence of contact I do not accept that they have retained regular contact since his parent's departure.' Mr Rana argued that the judge had failed to take account of the modern methods of communication, which do not generate evidence that Mr Rai could have produced. We reject Mr Rana's argument.

Analysis

5. The Upper Tribunal's jurisdiction is limited initially to issues of law. An appeal to this tribunal lies on 'any point of law arising from a decision made by the First-tier Tribunal' (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). And it can only set aside the decision of the First-tier Tribunal if 'the making of the decision concerned involved the making of an error on a point of law' (section 12(1)). The assessment of the evidence is essentially a matter for the First-tier Tribunal. A disagreement with the way that the tribunal assessed the evidence does not of itself show an error of law. The Upper Tribunal has power to re-make the decision rather than remit it to the First-tier Tribunal for reconsideration (section 12(2)(b)(ii)) and, in doing so, it 'may make such findings of fact as it considers appropriate' (section 12(4)(b)). But those powers do not arise unless and until the Upper Tribunal sets the First-tier Tribunal's decision aside, and it can only do that for error of law, not for an error of fact.

6. On analysis, Mr Rana's argument is no more than a challenge to the way that the judge assessed the evidence given by the sponsor, Mr Rai. The judge was aware of the method of payment used by Mr Rai, because he told the judge in his oral evidence, and the judge must surely have understood that top up cards do not generate evidence. The passage we have quoted records the judge's conclusion having heard the whole of the evidence and had a chance to judge Mr Rai's reliability as a witness. The passage has to be read against that background. It is not, as Mr Rana argued, evidence of a lack of understanding on the judge's part. Rather, it is evidence of the judge's overall conclusion after hearing the evidence that on this issue he was not persuaded that regular contact had been maintained without supporting evidence. On this analysis, Mr Rana's argument is outside the Upper Tribunal's jurisdiction.

c. The refusal to adjourn

The arguments

7. Mr Rana argued that the First-tier Tribunal should have adjourned the hearing. There were a number of strands to this argument. Mr Rai had not prepared the case and told the judge so. He had recently obtained funds for a representative and was thinking of instructing one. He was at a disadvantage in not being represented and doubly disadvantaged by having to act through an interpreter. He needed to obtain evidence in support of his case that he had provided financial support for his son. Finally, Mr Rana emphasised that an adjournment would not prejudice the Home Office in any way.

8. Mr Avory argued that: (i) Mr Rai had had sufficient time to get his case in order; (ii) the tribunal had taken all relevant factors into account that were relevant to the adjournment; and (iii) it had, in any event, accepted that Mr Rai had sent money to his son.

9. We reject Mr Rana's argument and accept Mr Avory's.

The rules of procedure

10. These are the relevant provisions of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014 (SI No 2604):

> **2 Overriding objective and parties' obligation to co-operate with the Upper Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes-
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it-

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must-

(a) help the Upper Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

4 Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may-

…

(h) adjourn or postpone a hearing;

10 Representatives

(1) A party may be represented by any person not prohibited from representing by section 84 of the 1999 Act.

Analysis

11. Rule 4(3)(h) confers on the First-tier Tribunal the power to adjourn a hearing. That power must be exercised judicially and in particular it must be exercised in a manner that seeks to give effect to the overriding objective. There are a number of elements to that objective. One important element is participation in the proceedings. This is given more concrete expression in the right for a party to appoint a representative. But that is not all there is to the overriding objective. The tribunal must also seek to avoid delay and to devote a proportionate time to each case, taking account of the complexity of the issue. This case, whilst undoubtedly important to the Rai family, does not involve any complicated matters of fact or law. Inherent in the proportionate allocation of resources is the need to take account of other parties in other cases. An adjournment of this case would have meant that another case would be delayed waiting for its turn to come before the First-tier Tribunal, and so on down the line. Finally, and importantly, the tribunal must use any special expertise effectively. These various elements may have to be balanced, but they are not necessarily in conflict. All judges of the First-tier Tribunal have a special expertise not only in the law relevant to their jurisdiction, but also in assisting unrepresented parties to put their case in the particular jurisdiction as

effectively as they can, thereby enhancing their access to the proceedings, avoiding delay, acting proportionately in the interests of all users of the tribunal system, and adopting a flexible approach to the proceedings to meet the particular needs of the party in the case. For those reasons, Mr Rai was not put at a disadvantage by not having legal representation.

12. The duty on the parties under rule 2(4) is also relevant. They must co-operate with the tribunal. Part of this duty involves preparing a case in advance. In this case, the hearing took place on 5 November 2014 and Mr Rai had had since he decided to appeal against the decision refusing him entry clearance in February 2014. That was ample time within which to prepare the case and assemble the necessary evidence.

13. We are not saying that the judge would have been wrong to adjourn. That is not how the overriding objective works. All we are saying is that the judge was entitled to refuse to adjourn. Whether to do so is a matter of judgment. Our analysis shows that the judge was entitled to exercise that judgment in favour of continuing with the hearing.

14. As to the evidence that Mr Rai wanted to produce, this related to the payments he said he was making to his son. He had asked for an adjournment on the ground that the relevant office of the college where his son was studying would be shut until the end of November. In the event, this did not matter, because the judge accepted his oral evidence that he was making these payments. The absence of the evidence did not affect the outcome of the case. In legal terms, it was not material. Materiality is an essential element of an error of law, as Brooke LJ explained in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982. After setting out a list of the most common ways in which a tribunal may make an error of law, he concluded

> "10. Each of these grounds for detecting an error of law contain the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

d. The historic injustice

15. Mr Rana argued that the First-tier Tribunal had failed to apply the guidance given by the Court of Appeal in *R (Gurung) v Secretary of State for the Home Department* [2013] EWCA Civ 8. He also produced a copy of the decision of the Upper Tribunal in *Ghising and others v Secretary of State for the Home Department and the Entry Clearance Officer for New Delhi* [2013] UKUT 00567 (AAC). Mr Avory argued that the tribunal had dealt with those cases in paragraphs 25 to 28 of its reasons.

16. We reject Mr Rana's argument and accept Mr Avory's. The favourable treatment that is justified by the historic injustice arises at the stage when proportionality is considered. In this case, the First-tier Tribunal did not reach that stage. The judge found as a fact that there was no relationship between Mr Rai and his father and mother. The judge then considered the discretionary position outside the Immigration Rules and found that the policy had been properly considered. There is no error of law in that approach.

NOTICE OF DECISION

The appeal is dismissed.

The decision of the First-tier Tribunal issued on 19 November 2014 did not involve the making of an error on a point of law (sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007).

Signed on original
on 13 August 2015

Edward Jacobs
Upper Tribunal Judge