



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/08586/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 30 November 2018

Promulgated

On 21 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**DEEPENDRA RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr S Jaisri, Counsel instructed by Sam Solicitors

For the Respondent: Ms Z Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge S.H. Smith) dismissing his appeal against the decision of the respondent to refuse him entry clearance as the adult dependant relative of a Gurkha veteran. The Judge found that the appellant did not meet the criteria in Annex K for admission under the Rules, and that there was no family life between the appellant and his parents for the purposes of Article 8 ECHR, and therefore Article 8(1) was not engaged.

The Reasons for the Grant of Permission to Appeal

2. On 1 October 2018 First-tier Tribunal Judge Mark Davies granted permission to appeal for the following reasons:
 - “2. It is arguable that the Judge committed an error of law when he made findings in relation to documentation produced on the appellant’s behalf having not raised this issue during the course of the hearing.
 3. It is arguable that the appellant placed insufficient weight on the visits made by his parents to the appellant in Nepal.”

Relevant Background

3. The appellant is a national of Nepal, whose date of birth is 29 June 1989. His father retired from the Gurkha Brigade on 21 October 1971, and in 2012 he applied for settlement in the UK pursuant to 2009 discretionary policy, which was published in May 2009 following the outcome of **R (Limbu & Others) -v- Secretary of State for the Home Department [2008] EWHC 2261 (Admin)**. The application was successful, and he and the appellant’s mother entered the UK for the purposes of settlement on 6 June 2012. Due to his age, the appellant was not eligible for admission under the 2009 discretionary policy.
4. On 5 January 2015 Annex K was published following a review of the 2009 discretionary policy. On 12 March 2017 the appellant applied for entry clearance under Annex K as the adult dependant relative of a Gurkha veteran.
5. On 19 July 2017 an Entry Clearance Officer (“ECO”) gave his reasons for refusing the application. His parents had been present and settled in the UK for over 5 years at the time of his application, and so he had been living apart from them for more than 2 years on the date of application. This was as a direct result of his parents migrating to the UK rather than as the result of him being away from the family unit as a consequence of education or other requirements. Accordingly, his application fell to be refused under paragraph 9(8) of Annex K.
6. He stated that he was dependent upon his parents. But he had provided no details regarding his financial commitments in Nepal, and he had not submitted evidence of financial and emotional support from his parents. Accordingly, he had not demonstrated that he was wholly financially dependent upon his father. The ECO was also not satisfied that he was emotionally dependent upon his father. Accordingly, his application also fell to be refused under paragraph 9(5) of Annex K.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. The appellant’s appeal came before Judge Smith sitting at Hatton Cross on 25 June 2018. Mr Jaisri of Counsel appeared on behalf of the appellant, and the respondent was represented by a Home Office Presenting Officer.

The appellant's father was called as a witness, and he was cross-examined by the Presenting Officer.

8. In his subsequent decision, the Judge set out his findings of fact at paragraphs [16] onwards. He began by addressing the issue of funding. At paragraph [19], he held that, although the sponsor had made a number of cash gifts to his son in person upon leaving the country and during subsequent visits, there was no additional evidence of financial support for the appellant.
9. At paragraph [20], he accepted that the appellant resided in the house owned by the sponsor, and to that extent there was a degree of material support. But he held that this factor did not aid the appellant to any significant extent. It was hardly surprising that the appellant remained in the family home during the absence of his parents. This was a common arrangement in many locations, from the UK to further afield, and it could not, without more, demonstrate a breadth and depth of dependency necessary to engage Article 8.
10. At paragraph [21], he addressed the sponsor's evidence that the appellant was unable to find work. In cross-examination, when pressed as to what steps his son had taken to find work, the sponsor was - in the Judge's view - light on detail. The Judge said that he was ascribing little weight to the evidence of the sponsor that, despite the fact that there was a smallholding attached to the family home, the appellant was simply unable to work the land. The sponsor was confident that the appellant would be able to have more job opportunities in the UK. If that was so, it followed that the appellant must be able to work the land in Nepal, *"and in all likelihood, has been doing so in his parents' absence."*
11. At paragraph [22], the Judge turned to address the issue of emotional support and dependence. He accepted that the sponsor and his wife had made a number of visits to their son and daughters in Nepal. He accepted that the sponsor and his wife had stayed in their own home with the appellant during these visits: *"Again, it is hardly surprising that the sponsor stays in the home that he has retained in Nepal upon making return visits. This is a factor which goes towards establishing wider dependence necessary to engage Article 8, but cannot be so taken in isolation."*
12. At paragraph [23], the Judge said that the other strand of the appellants' case was that his emotional dependence was established by the evidence of regular communication between him and his parents. A number of voucher top-up receipts were included in the bundle. The Judge did not consider that the receipts established regularity of contact between the appellant and the sponsor and his wife. Taken at their highest, they simply established that the sponsor had purchased a number of credits, which could have been used to call anyone in Nepal. He had three children in Nepal, and he had lived there until 2012; *"There is any number of people he could have been in touch with."*

13. At paragraph [24], he said that although the sponsor's evidence was that the communication with his son was conducted using his mobile telephone, there was no evidence in the form of call log screen-shots in the sponsor's telephone, or even photographs of a handset. Such material would be very easy to provide to the Tribunal. Yet, there was nothing of this sort.

14. The Judge reached the following conclusions at paragraph [25]:

"In the light of this survey of the evidence, I make the following findings. There is a degree of financial dependency of the Appellant upon the Sponsor, but I am only satisfied that such support is modest. It does not extend to regular cash payments claim to have been sent by the Sponsor, on the basis that I have been unable to ascribe much weight to the financial transfer documents, when considered in the light of the evidence in the case as a whole. A number of visits have taken place, although I do not accept that the Sponsor and his wife spent time only with the Appellant during these times. There is nothing to suggest that the visits were not of the sort expatriates regularly make to their countries of origin, where there are many people to see - including, in this case, grandchildren born to the Sponsor's other children. I do not accept that there has been regular telephone contact with the Appellant to the extent claimed by the Sponsor, as the telephone receipts provided are not specific, and could have been used to place calls to anywhere."

15. At paragraphs [26]-[29], the Judge reviewed the case law in respect of Article 8 and adult relationships. He cited various passages from **Kugathas -v- SSHD [2003] EWCA Civ 31**. At paragraph [30], the Judge said:

"Applying these authorities and the findings of fact that I have made in the present matter, it is clear that the relationship between the Appellant and the Sponsor remains firmly within the territory of normal emotional bonds expected between adult children and their parents. There is nothing about the continuing arrangement between the Appellant and the Sponsor which attracts the labels 'real', 'committed' or 'effective'. There is no evidence of dependence on the sort that would engage Article 8. The Appellant lives in the family home in Nepal, and is able to utilise the family farm. He is a grown man of working age. There are other adult family members in Nepal available to him."

The Hearing in the Upper Tribunal

16. At the hearing before me to determine whether an error of law was made out, Mr Jaisri developed the grounds of appeal which he had pleaded. In response, Ms Kiss submitted that the Judge of the First-tier Tribunal had directed himself appropriately, and that no error of law was made out.

Discussion

17. Grounds 1 and 3 have a common theme, which is that of asserted procedural unfairness. Mr Jaisri pleads that the the Judge made adverse

findings of fact which were “*unlawful*” as he failed to give the appellant or his representative an opportunity to address his concerns. He cites **AM (Fair hearing) Sudan [2015] UKUT 6656 (IAC)**.

18. The background to Ground 1 is that the appellant’s bundle included three letters to the sponsor from Pokhara Travel & Money Transfer Ltd (“the Bureau”). In a letter dated 9 May 2016, the Bureau itemised 14 money transfers which they said the sponsor had made to his son in Nepal between 20 November 2013 and 3 May 2016. In a letter dated 27 February 2017, the Bureau itemised eight transfers which they said that the sponsor had made to his son in Nepal between 9 May 2016 and 30 January 2017. In a letter dated 7 June 2018, the Bureau itemised 11 transfers which they said had been made by the sponsor to his son in Nepal between 18 February 2017 and 4 May 2018.
19. At paragraph [17] of the decision, the Judge said that he had some concerns surrounding the currency bureau documents at pages 48 and 49 of the bundle. This was a reference to the letters of 2017 and 2018. The Judge’s concerns were that the use of English in the documents was poor; the letters featured only a mobile telephone number which he considered was unusual for a financial transaction; they denoted the sending and receiving parties as father and son respectively; while the documents featured the amount in sterling, there were no details as to the amount of transaction in Nepalese rupees, nor the exchange rate applied; the documents had features one would not expect to see, namely an email address given as a hotmail account; there were no details of the bank account into which the monies were paid in Nepal, which was odd in his view, as the sponsor had said during cross-examination that he sent money to his son’s bank account in Nepal; there were no corresponding bank statement entries surrounding the transactions included in the documents; and one of the transactions (9 February 2018) was said to have been made when the sponsor claimed to have been visiting his son in Nepal. The Judge continued: “*As there is no suggestion that these payments are funded electronically by the sponsor ... the only plausible explanation is that they were cash payments. Yet at the time of one of the transactions, on the sponsor’s own evidence he was out of the country, and so could not have funded the transfer in this way.*” The Judge further commented that there was not a single receipt for any of the individual money transfers.
20. I accept that some of the concerns raised by the Judge are mistaken or tendentious. The letters feature a landline and fax number as well as a mobile telephone number. The Judge has not given an example of the poor English that he has in mind, and in any event, the Managing Director of the Bureau is a Mr Gurung, which indicates that he is of Nepali heritage and that English is not his first language.
21. However, I consider that the majority of the concerns raised are sustainable. Of particular note is the apparent inconsistency between the sponsor’s evidence in cross-examination that he paid money direct into

the appellant's bank account in Nepal, and the message of the currency bureau letters which is that the father used the currency bureau to make cash payments to the appellant in Nepal, which the appellant collected in cash from a local bureau in Nepal.

22. I do not consider that there has been any procedural unfairness. The appellant was at all material times legally represented. His legal advisers knew that an issue in the appeal was whether the appellant was wholly financially dependent upon his father. The currency bureau letters were produced in order to support this proposition. However, in cross-examination, the sponsor said that he sent money direct to his son's bank account. It is apparent from the Judge's typed record of proceedings that the Judge raised this issue with Mr Jaisri while Mr Jaisri was making his closing submissions. Mr Jaisri submitted that the appellant had demonstrated remittances of money since 2013 by the currency bureau letters at pages 48-51. He added that the Judge had heard evidence today that the father had "*also*" remitted money directly to the appellant's bank account. The Judge asked him to clarify that his case was that there were money transfers via the Bureau and (my emphasis) payments direct to a bank, "*albeit undocumented.*" Mr Jaisri answered in the affirmative.
23. The Judge was not bound to accept that it was credible that the father had been sending money directly to the appellant's bank account in Nepal as well as making the money transfers detailed in the currency bureau letters. It was open to the Judge to treat the sponsor's oral evidence as undermining the probative value of the currency bureau letters. More broadly, it was open to the Judge to find that in the absence of money transfer receipts or identifiable transfers of money direct into the appellant's bank account in Nepal, the appellant had not demonstrated that the extent of the financial support provided by his father went beyond that which the Judge accepted at paragraph [17] of his decision.
24. Ground 3 relates to the findings of fact made by the Judge at paragraphs [22]-[24] on the topic of emotional support and dependence. At paragraph [22], the Judge observed that what took place during those visits was no before the Tribunal. At paragraph [23], the Judge said that the sponsor could have used the voucher top-up receipts to call anyone in Nepal.
25. Mr Jaisri submits that this was procedurally unfair, as the respondent had not challenged the sponsor's evidence that he and his wife had travelled to Nepal to spend time with the appellant; and it was not suggested by any party that the telephone calls were to persons other than the appellant.
26. However, it is apparent from the Judge's typed record of proceeding that in her closing submissions the Presenting Officer submitted that the sponsor could have going back to see his daughters in Nepal. In addition, in Mr Jaisri's closing submissions, the Judge put to Mr Jaisri that it was putting it "*too high*" to say that the sponsor was seeing his son "*in isolation.*" Mr Jaisri submitted that only one of his daughters was near to

his son, and that the sponsor's "primary explanation" was that the purpose of the visit was to see his son.

27. The thrust of the submissions made by the Presenting Officer were that the evidence given by the sponsor and the appellant on the topics of financial and emotional dependency should not be taken at their face value. Accordingly, Mr Jaisri embarked on his closing submissions in the full knowledge that nothing had been conceded. Additionally, the interventions of the Judge detailed above highlighted some of the Judge's concerns about aspects of the case that Mr Jaisri was putting forward, and Mr Jaisri thus had the opportunity to address such concerns as best he could.
28. The findings made in paragraphs [22]-[24] were properly open to the Judge, and they do not disclose an error of law either on the grounds of inadequate reasoning or on the grounds of procedural unfairness.
29. Grounds 2 and 4 relate to the Judge's finding that Article 8(1) was not engaged. Mr Jaisri submits that the Judge erred in law in failing to apply the test articulated in **Rai -v- Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320**; and that he "unlawfully" found at paragraph [20] that the appellant's continued residence in the house belonging to his father and mother did not aid him to a significant in establishing that family life between him and his parents subsisted.
30. The facts of **Rai** were that the appellant was born in Nepal on 1 January 1986, and his father entered the UK with ILR on 26 June 2010. His mother followed his father to the UK with ILR on 17 February 2012. On 2 October 2012 the appellant, then 26 years old, applied for entry clearance to settle in the UK as his father's dependant.
31. Giving the leading judgment of the Court, Lindblom LJ held at [39] that the real issue under Article 8(1) was, "*whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the UK and had endured beyond it, notwithstanding their having left Nepal when they did.*"_At paragraph [42], Lindblom LJ reiterated that the critical question was whether family life between the appellant and his parents had subsisted at the time when they left Nepal to settle in the UK, "*and was still subsisting at the time of the Upper Tribunal's decision.*"
32. The Judge did not in terms ask himself whether the appellant had enjoyed family life with his parents before they left Nepal in 2012 to settle in the UK. I accept that arguably they did enjoy family life, simply by virtue of the fact that they were all living under the same roof. However, family life in a literal sense clearly ended with the parents' departure, and the evidence of the sponsor was that he and his wife had not gone back to Nepal until 3 February 2015. The visit on that occasion had lasted until 1 May 2015. There was then a second visit from 5 February 2016 to 25 April 2016, and a third visit from 25 January 2018 until 20 February 2018.

33. It was open to the Judge not to treat these short visits as being indicative of a continuation of family life, for the reasons which he gave, and also in the light of the **Kugathas** line of jurisprudence.
34. **Kugathas -v- SSHD [2003] EWCA Civ 31** and **ECO (Sierra Leone) -v- Kopoi [2017] EWCA Civ 1511** are particularly pertinent to this discussion. In **Kugathas** at paragraph [20] Arden LJ said:
- “... Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8.”
35. The duration of the family visit is a relevant consideration, as adumbrated by Sales LJ in **Kopoi** at [30] in the passage cited below. The context was a proposed visit to the UK, but the underlying principle is equally applicable to a return visit to see family members in the country of origin:
- “A three week visit would not involve a significant contribution to family life in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind would not establish a relationship between any of the individuals concerned of support going beyond normal emotional ties ...”
36. The key question was whether the appellant had discharged the burden of proving that family life in the **Kugathas** sense had endured from 2012 until the date of the hearing in the First-tier Tribunal. The Judge gave adequate reasons for finding that the appellant was not emotionally dependent on his parents, and hence that family life had not endured.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

Signed

Date 13 December 2018

Deputy Upper Tribunal Judge Monson