Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08669/2018
HU/08672/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 July 2019	**On 6 August 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

DAWA TAMANG
LOMA TAMANG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:
For the Appellant: Mr R Jesurum, instructed by Everest Law
For the Respondent: Ms A Everett, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are Nepalese nationals who were born on 16 January 1990 and 19 January 1989 respectively. They are siblings. They appeal against a decision which was issued by the First-tier Tribunal on 14 March 2019, dismissing their appeals against the respondent's refusal to grant entry clearance as the dependent adult children of a retired Gurkha serviceman.

2. The appellants were represented by Mr Jesurum before the FtT. The respondent was unrepresented. The sponsor – who served in the Brigade of Gurkhas for nine years before being discharged with an exemplary service record in 1970 – adopted his witness statement but was asked no additional questions by Mr Jesurum or the judge. Having heard submissions in amplification of Mr Jesurum's comprehensive skeleton argument, the judge reserved her decision.

3. The judge's reserved decision is carefully structured and thoroughly reasoned. She rehearsed the relevant background and the respondent's decision at [1]-[3] and [4]-[9]. She summarised the evidence given by the appellants and the sponsor at [11]-[24]. She set out the submissions made by Mr Jesurum at [26]-[34] before turning to her findings at [34]-[54]. In those findings, the judge concluded that, although the appellants receive funds from the sponsor and live in the sponsor's home in Nepal, the relationship between them is not one which reaches the irreducible minimum of what constitutes a protected family life under Article 8 ECHR. Had she reached the stage of assessing proportionality, she would have allowed the appeals but she did not reach that stage, and dismissed the appeals as a result of her finding as to the engagement of Article 8 ECHR.

4. Permission to appeal was sought on five grounds. The first two grounds concerned a finding which the judge had reached at [47], which was that the first appellant had not been unemployed since leaving Malaysia. It was submitted that this finding – which implicitly rejected the evidence given by the appellants' father in his witness statement – was vitiated by two legal errors, in that the judge had failed to put any such concern to the sponsor and had failed to take his character into account before making the finding.

5. Grounds three to five concerned the judge's application of the law to the facts. It was submitted that she had misapplied the law regarding the provision of financial support; failed to recall in her assessment of family life that the appellants lived in the sponsor's house; and failed to take other material matters into account in determining that Article 8 ECHR was not engaged in its family life aspect.

6. Permission was granted by First-tier Tribunal Judge Kelly on grounds three to five but refused on grounds one and two, which Judge Kelly considered to be predicated on an erroneous belief that the judge had made adverse findings of fact.

7. The appeal first came before the Upper Tribunal (Deputy Upper Tribunal Judge Hutchinson) on 4 June 2019. Counsel for the appellants (Mr Wilford) applied orally and in a Speaking Note for permission to argue the first two grounds, on which permission to appeal had been refused by the FtT.

Judge Hutchinson granted permission on those grounds and the appeal was adjourned to enable the respondent to consider his position in relation to those grounds.

8. So it was that the appeal came before me on 17 July 2019. Mr Jesurum made submissions on each of his grounds of appeal. Having heard from him, I expressed my concern to Ms Everett about the safety of the finding which had been made at [47] of the judge's decision, in relation to the first appellant having been unemployed since leaving Malaysia. I was concerned that this rejection of the sponsor's evidence had been reached without notice. Ms Everett initially submitted that a related point had been taken in the respondent's decision. She also initially suggested that any such error would not have been material to the disposal of the appeal. On being pressed, however, Ms Everett accepted that the judge had erred in reaching this finding without alerting the sponsor to her concerns and that the error was material to the judge's decision as to whether family life existed or not. With characteristic fairness, Ms Everett accepted that the decision could not stand in these circumstances.

9. I invited the advocates to address me on the appropriate relief. Mr Jesurum submitted that the Upper Tribunal was able to remake the decision without any further hearing. Ms Everett submitted that there was no dispute as to the facts and that it would be disingenuous for the respondent to seek a further oral hearing when he had been unrepresented before the FtT. She was content for the decision to be remade on the papers. I indicated that I would do so, and that my decision on the remaking of the appeal was reserved.

Analysis

10. Since Ms Everett accepted that the First-tier Tribunal judge had fallen into error in her decision, I can express my reasons for agreeing with that concession comparatively briefly. In order to do so, it is necessary to consider the applicable law and the decision under appeal in a little more detail.

11. There is a substantial body of authority on the 'historic injustice' suffered by the Brigade of Gurkhas and the consideration of applications such as those made by the appellants. The judge was plainly aware of those authorities and set out an impressive summary at [27]-[33]. In relation to the assessment of proportionality, the law remains as set out in Ghising (No 2) [2013] UKUT 567 (IAC):

> *"(4) where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer*

> *consist solely of the public interest in maintaining a firm immigration policy."*

12. In relation to the assessment of whether there is a family life between adult relatives, the test remains whether there are more than normal emotional ties but in Jitendra Rai [2017] EWCA Civ 320, the Court of Appeal highlighted that Sedley LJ had said in Kugathas [2003] INLR 170 that real committed or effective support "represents … the irreducible minimum of what family life implies".

13. With the latter dictum firmly in mind, the judge of the First-tier Tribunal embarked on her findings of fact. She accepted at [39] that the appellants live in the sponsor's home in Nepal. At [40], she considered the funds which have been remitted by the sponsor to the appellants, comprising 37 payments between 22 March 2015 and 9 February 2019. It was the sponsor's evidence that there had been more but that he had not saved the remittance slips. At [42], the judge considered it 'inexplicable' that he had not done so, in circumstances in which he had been hoping to bring the appellants to the United Kingdom since 2015. At [43], she also noted that there was 'no excuse at all' for the lack of further documentary evidence of remittances from April 2017 (when the applications for entry clearance were prepared). She therefore reached the following finding at [44] (reproduced verbatim):

> "Accoringly, I dod not accept that the appellant's had discharged he burden of showing *committed* financial support from the sponsor. There is some support but it is intermittent."

14. At [45], the judge expressed concern about the ability of the sponsor to remit funds to the appellants when he himself was in receipt of a small pension. At [47], she reached this conclusion (again, reproduced verbatim):

> "Further and in any event, the appellants are fit and well and of an age where she should be able to secure employment, even if it is in low paid manual work. Dawa worked in Malaysia for significant periods between 2012 and 2015 and was plainly capable of fining work and supporting himself during that time. I did not accept on the b alance of probabilities that Dawa has been unemployed since leaving Malaysia and that he returned as he said to his father's dependency."

15. The latter finding was plainly of the greatest significance to the judge's assessment of whether there was real, committed or effective support between the sponsor and the first appellant. Having concluded that the first appellant was not unemployed as claimed, it was hardly surprising that the judge concluded that Article 8 ECHR was not engaged in its family

life aspect notwithstanding her acceptance that some money had been sent to Nepal by the sponsor between 2015 and 2019.

16. The difficulty with the findings at [41]-[47] is that the judge's concerns were not raised at the hearing. I reach the conclusion that the findings are vitiated by procedural impropriety but I reach that conclusion by a slightly different route to that employed by Mr Jesurum. He relies on Browne v Dunn (1893) 6 R.67 (HL) and MS (Sri Lanka) [2012] EWCA Civ 1548 to submit that points which are not put to a witness are taken to be accepted by the respondent. But the respondent was not represented at this hearing and I do not consider the same principles to apply to a judge.

17. The procedure to be adopted by a judge when the Home Office is unrepresented are to be found in the Surendran guidelines (MNM * [200] UKIAT 5, as modified by subsequent authorities, including R (Maheshwaran) v SSHD [2002] EWCA Civ 173; [2004] Imm AR 176 and WN (DRC) [2004] UKIAT 213. In the latter decision, in a departure from the guidance given in MNM, Ouseley J stated that it was not necessary that every point which concerned a judge needed to be put to an appellant but that the 'major points of concern are better put, especially if they are not obvious': [28].

18. The sponsor is a man of good character. He said in his witness statement that he had been remitting money to the appellants regularly but that he had only retained some of the remittance slips. He stated in terms that the first appellant had been unemployed since he had returned from Malaysia in 2015. If the judge was concerned that these assertions were untrue, whether because an application for entry clearance was in contemplation from 2015 or because the appellants were fit and well and able to work, those concerns were not obvious and should, in my judgment, have been put to the sponsor. Whether the judge asked questions of the sponsor herself or whether (as recommended in the Surendran guidelines) the judge alerted counsel to the points so that they could have been covered in chief, I consider that it was procedurally improper to take these points against the sponsor without giving him an opportunity to address the judge's concerns.

19. As I have recorded, Ms Everett accepted that the judge's approach was erroneous. Considering the significance of the finding to the critical question of whether there was real, committed or effective support, she also accepted that the judge's error was material to the outcome of the appeal. It follows that I set aside the decision of the FtT.

20. Having reached that conclusion at the hearing, Mr Jesurum invited me to remake the decision on the appeal myself and to allow it. Ms Everett was content for me to do so and did not seek to make any submissions on the

final disposal of the appeal. She did not seek, in particular, to put the FtT's concerns to the sponsor.

21. In my judgment, the unchallenged facts establish that there is undoubtedly a protected family life between the sponsor and the appellants. I accept the submissions made in Mr Jesurum's skeleton before the FtT in that regard, the salient parts of which are as follows.

22. Although the appellants attained their majority a number of years ago, and despite the first appellant having worked in Malaysia between 2012 and 2015, they receive real, committed or effective support from the sponsor at present. The appellants live in the sponsor's home. Although they participate in collective subsistence farming, they are otherwise entirely dependent upon the sponsor's financial support from the UK. He remits in the region of £150-£200 per month to them, although he did not keep all of the remittance slips because he had not appreciated the need to do so. The reasons for that dependency are not, as Mr Jesurum submitted before me, material. What matters is that such dependency exists.

23. The separation of the family occurred not by choice, properly so called, but because the sponsor was unable to bring the appellants to the UK whilst the historic injustice against the Brigade and their family members was operating. The sponsor, his wife and the appellants are in very regular contact and the anxiety of separation is intense because the sponsor was diagnosed with prostate cancer in 2013 and the appellants' mother suffers from high blood pressure and thyroid problems. His illness prevented him from returning to Nepal until 2016 but when he did return (with his wife), they stayed with the appellants for three months. The appellants and their mother are often distressed when they speak as a result of the sponsor's ill health and their ongoing separation. The sponsor and his wife do what they can to maintain the appellants' morale but the appellants' mother loses sleep due to her separation from her children.

24. In my judgment, therefore, the relationship between the sponsor and his adult children displays more than normal emotional ties and is characterised by real, committed or effective support. It follows that Article 8 ECHR is engaged in its family life aspect.

25. As I have recorded, the FtT concluded that the appeal would have been allowed if it had reached a different conclusion on Article 8(1). The respondent has not sought to submit that this conclusion was wrong in law and I consider that stance to be fully in accordance with the authorities I have mentioned above. In the circumstances, the appeal will be allowed on Article 8 ECHR grounds.

Notice of Decision

The decision of the FtT was materially erroneous in law and is set aside. I remake the decision on the appeals and allow both appeals on Article 8 ECHR grounds.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

24 July 2019