Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13929/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 September 2019	**On 27 September 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR GOBIND GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nepal, born on 16 July 1984, so he is now some 35 years old. He appeals against a decision of First-tier Tribunal Judge Seelhoff, promulgated on 16 May 2019 following a hearing some thirteen days earlier on 3 May 2019 in which he dismissed the appellant's appeal against a decision of the respondent refusing him entry clearance to join his family in the UK.

2. The basis of the claim was that the appellant's father was a Gurkha officer (a captain) who but for what has now been regarded as a "historic injustice" would have been

permitted to apply for entry clearance earlier while the appellant was still a minor and that if he had done so the appellant would have been granted settlement at a time when he would have been entitled to it. There have been a number of decided cases in which it has been established that absent other considerations entry clearance is likely to be granted to an adult child who would have been entitled to entry clearance while he was a minor but for the historic injustice, provided that at the time of application there is still family life between that applicant and his family. Accordingly, the crucial issue in this appeal was whether or not there was family life between the appellant and his family at the time this application was considered.

3. It is the appellant's case that the judge made a number of significant errors in his decision which were sufficiently serious to be material such that the decision must be remade. Although it is accepted on behalf of the appellant that there were discrepancies in the evidence which made this appellant's case less strong than it otherwise might have been, but it is argued that notwithstanding these discrepancies the judge failed to consider the evidence that there was properly.

4. The first major error which it is said that the judge made is where he set out at paragraph 27 what the appellant had to prove in the following terms:

> "27. It is for the appellant to prove on the balance of probabilities that family life is engaged in the case. That means that he needs to prove that there is family life in the *Kugathas* sense i.e. something beyond the normal emotional dependency, support or commitment that one sees between adult parents and their children".

5. It is accepted on behalf of the respondent by Ms Cunha, that this is not the correct test. Although Ms Cunha suggests that this may have just been a typographical error she accepts that what is necessary is for an applicant to establish that there is something beyond the "normal emotional ties" to be expected between adult parents and their children, which is clearly a much lower test.

6. The next error is at paragraph 28 where when considering whether "such support or dependency has been demonstrated on the balance of probabilities" the judge then stated that "starting with tangible evidence there is no evidence of any payment of money going from the sponsor to the appellant at any point between April 2016 and the date of application in February 2018". It seems clear that this statement is simply wrong because there is evidence (for example at pages 136, 137, 138 and 139 of the appellant's bundle which was before the judge), that money payments had been made by the sponsors of which the obvious recipient must have been the appellant. Although Ms Cunha suggests that it is possible that the judge might have intended to mean that there was no evidence that any payments which had been made had been received by the appellant he does not say this and it is not the natural meaning of what he says.

7. Another error is that at paragraph 31 the judge summarises the evidence of the father and the mother with regard to the appellant's friends within Nepal as follows:

> "Neither the father nor the mother appeared to know even the name of any of the appellant's friends or anything about what he does in Nepal beyond attending a gym",

going on to state that "this either suggests that they do not know him as well as claimed or that information is being concealed so as to suggest that he has less ties to Nepal than they want the Tribunal to know".

This is not a fair reflection of the evidence given by the appellant's father as recorded at paragraph 16 of the decision, which is as follows:

> "16. The sponsor was asked what he talked to his son about and he said he did not know and that his wife knew about that. The sponsor said that his son has no friends in Nepal and had never been in a relationship with anyone".

8. The judge also records in that paragraph that although the evidence appeared confusing and his Counsel had confirmed that his instructions were that the sponsor was fit to give evidence, nonetheless he had had a stroke. The fundamental point, however, is that what the father had said was that his son had no friends in Nepal, and not that he had said that he did not know the name of his friends. The inference that the judge made at paragraph 31 that this suggested either that the parents did not know him as well as claimed or that information was being concealed is difficult to sustain.

9. Then, at paragraph 33, the judge stated as follows:

> "33. Last is the very obvious point taken by the respondent in the decision that these are parents who left the appellant behind in Nepal eleven years ago and did not choose to apply for him to join them at any stage even when he was under the age of 31. Were I to accept that there have been legal obstacles at times … I note that there were prolonged periods of several years where there were no visits and no contact at all".

10. In fact, the witnesses in their witness statements had dealt with this issue. The sponsor in his statement at paragraph 13 had said that he and his wife did not have money to visit his children and that they were saving the money for the children's applications to join them when he had a stroke in 2009. His job had ended with that stroke and he became very weak. He had, he said, made efforts in December 2010 to go to Nepal and had stayed with the children for one month. His evidence was that they had spoken with the children over the phone at least two to three times in a week but it was the most that they could do because of the time difference and the network problems in the UK and Nepal.

11. At paragraph 14 he said that he and his wife had visited Nepal every year, and that when the settlement policy was changed in 2015 he and his wife were very hopeful that they could bring their children in. The difficulty, however, was that he did not have sufficient money to apply for both children to come in. The appellant's mother's evidence was that their other child had died in 2018 but that she spoke to the appellant now every day to express each other's griefs and worries (see para 12 of her witness statement) and (at paragraph 14) they have been supporting him

financially and emotionally. The judge did not appear to take any of this evidence into consideration within his decision and accordingly, in light of this evidence, which was not considered by the judge, his finding that there had been prolonged periods of several years when there were no visits and no contact at all is not consistent with the evidence which had been given on behalf of the appellant. Ms Cunha accepted that the judge's reference at paragraph 31 to the father and mother appearing not to know even the name of any of the appellant's friends was an error and was not justified by the evidence which had been given and she also accepted, as already indicated, that the legal test set out by the judge at paragraph 27 was wrong. Also, the judge had been wrong to state that there was no evidence of any payment of money going from the sponsor to the appellant (although, as I have already indicated above, she suggested that it was at least possible that the judge had in mind, although he did not state this, that there was no evidence that payments that had been made had gone to the appellant himself).

12. In my judgment, there are a sufficiently large number of errors which go to the crucial issue of whether or not there remained family life between the appellant and his parents that this decision is unsustainable and must be remade.

13. In light of this decision both parties are in agreement that the appropriate course is to remit this appeal back to the First-tier Tribunal so that the decision can be remade. There will have to be a complete rehearing of the evidence and it is appropriate for this to be conducted in the First-tier Tribunal. I accordingly will set aside Judge Seelhoff's decision and order that the decision be remade in the First-tier Tribunal.

Decision

I set aside the decision of First-tier Tribunal Judge Seelhoff as containing a material error of law and direct that this appeal be remitted to the First-tier Tribunal sitting at Hatton Cross for rehearing before any judge other than Judge Seelhoff.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 23 September 2019