Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07716/2019

HU/07722/2019

THE IMMIGRATION ACTS

Heard at Field House by video conference 25 November 2020 (V)	**Decision & Reasons Promulgated On 15 December 2020**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

BIKRAM OKHRABU LIMBU

First Appellant

SANDHYA LIMBU

Second Appellant

and

ENTRY CLEARANCE OFFICER (SHEFFIELD)

Respondent

Representation:

For the appellant: Mr D. Balroop, instructed by Everest Law Solicitors
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appealed the respondent's decisions dated 02 April 2019 and 11 March 2019 to refuse human rights claims in the context of their applications for entry clearance as Gurkha family members.

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2. First-tier Tribunal Judge Traynor ("the judge") dismissed the appeal in a decision promulgated on 06 May 2020. The judge summarised the entry clearance officer's reasons for refusal [3-16]. He noted that the respondent was not satisfied that the appellants met the requirements of the immigration rules or the respondent's policy relating to Gurkha dependents. The respondent was not satisfied that they had shown that their parents still provided them with real, committed or effective support. In relation to the first appellant the respondent's enquiries indicated that there was evidence to show that he left Nepal to work in Malaysia in 2014. Under the heading "Applicable Law" the judge set out basic principles relating to Article 8 with reference to the decisions in *Huang v SSHD* [2007] 1 FLR 2021, *MM (Lebanon) v SSHD* [2017] UKSC 10 and *Agyarko v SSHD* [2017] UKSC 11 [22-28]. He noted the submissions made by the appellants' representative with reference to the 'historic injustice' identified in *R (Gurung) v SSHD* [2013] EWCA Civ 8 but did not refer to other authorities that were relevant to the assessment of family life between adult relatives. The judge went on to set out the evidence contained in the appellants' unsigned witness statements and the oral evidence given by their father at the hearing [29-50].

3. The judge concluded that the appellants did not meet the requirements of the immigration rules for adult dependent relatives nor the respondent's policy relating to settlement of adult dependent children of former Gurkhas. The judge noted that there was some evidence of financial remittances to the appellants but concluded that there was limited evidence to show that "the Appellants have been continuously supported by the sponsor" since he came to the United Kingdom [55].

4. The judge considered the explanation given by the first appellant and his father relating to the respondent's assertion that he left Nepal to work in Malaysia. He found contradictions in their evidence [56]. He recorded that the appellant said that he did not go to Malaysia because the agent asked for more money and when he did not pay the agent kept his passport. The sponsor said that his son changed his mind about going to Malaysia after the agent had asked for further commission. He refused to return the passport. On the face of it these explanations were similar so it is difficult to see how their evidence could be found to be inconsistent. The judge's subsequent reasoning indicates that it was the plausibility of the sponsor's evidence that he seemed to have doubts about. He said that if the account were true it was surprising that the first appellant did not report the theft to the police. The judge noted that this was the document that might indicate whether the appellant went to Malaysia or not. He also noted that no evidence had been obtained from the Nepali authorities to confirm whether the first appellant left Nepal in 2014 or not [57]. The judge concluded that the first appellant and his father had not provided a credible explanation for the lack of passport or any evidence to show that he had not left Nepal in 2014 to work in Malaysia as asserted by the respondent. For these reasons he concluded that the first

appellant failed to disclose relevant information in an earlier entry clearance application [58].

5. The judge went on to find that there was no evidence to show that the appellants could not find work to support themselves in Nepal. There was some evidence to suggest that the first appellant might have done some seasonal work. He concluded that it was improbable that the appellants had not worked [59]. The judge went on to consider the decision in *Rai v ECO, New Delhi* [2017] EWCA Civ 320. He noted that the test was whether the appellants' parents provide 'real, committed and effective support.' In the same paragraph he went on to find [60]:

> "In this respect, I find that given my conclusions regarding the issue relating to the First Appellant's work permit for Malaysia, and the fact that his father informed me in oral evidence that the First Appellant has been working in Nepal, that this significantly undermines the suggestion that the Appellants are in fact dependent upon their parents to provide them with real, committed or effective support."

6. The judge said that he took into account the fact that the appellants lived in a family unit with their parents before they came to the UK. He appeared to accept that their parents had visited them in Nepal and that they continued to live in the family home. He concluded that "this, of itself, is not evidence of real, committed and effective support". He took into account the fact that they had been living apart from their parents for six years at the date of the hearing. Nor did the evidence of financial remittances show real, committed or effective support in a way "that has preserved their family life" [61]. The judge went on to say:

> "63. Even if I am wrong in the above respect, and their Article 8 rights are engaged, I do not agree with Mr Balroop's submission that the appeal ought to be allowed in order to right the historic injustice as referred to in the decision of **Ghising**. In this respect, I find that there is very limited evidence of the Appellants' life in Nepal and that whatever limited funds that are being forwarded to them, this cannot be accepted as amounting to real, committed or effective support. My findings in this respect are reinforced by the fact that the sponsor eventually told me in his oral evidence that the First Appellant has been working. Until that matter was clarified both the Appellants and sponsor would wish me to have believed that neither Appellant was working or capable of work and therefore self-sufficient. I find that claim is undermined by virtue of the fact that the First Appellant was able to secure a working visa for another country and that he is working, at the very least, in seasonal work in Nepal., Where I find that I cannot rely upon the evidence of the First Appellant and the sponsor, then I am obliged to conclude that I do not accept that the First Appellant, in particular, is dependent upon his parents in the way that is claimed. Moreover, I find there is almost no evidence pertaining to the life of the Second Appellant and what she is doing in Nepal. I find it difficult to imagine that she will be doing absolutely nothing, apart from speaking to her parents and looking after her brother. In any event, whatever family life that now subsists is entirely limited. Based upon the evidence, I find that the refusal of the Appellants' application is both reasonable and proportionate and cannot amount to a breach of their Article 8 rights."

7. The appellants appealed the First-tier Tribunal decision on the following grounds:

   (i) The judge failed to consider the nature of the information contained in the Document Verification Report (DVR) adequately when assessing whether the first appellant should have been refused on grounds of 'Suitability'.

   (ii) The judge erred in his application of the relevant test for 'family life' in a case of this kind, which did not require dependency. The fact that the judge accepted that there were financial remittances, that the appellants lived in the sponsors' house and continued to be in regular contact should have been sufficient to find that there was real, committed and effective support.

   (iii) The judge failed to give adequate weight to the 'historic injustice' relating to Gurkha settlement when proportionality.

Decision and reasons

8. The parties discussed the case before the hearing and agreed that the First-tier Tribunal decision involved the making of errors of law. Even though the judge referred to the test of real, committed and effective support Ms Everett accepted that he may have approached the assessment of family life incorrectly in the context of the way in which the case law had developed in Gurkha cases. Mr Balroop said that the judge incorrectly considered whether the appellants were dependent. Having accepted that they received financial support and lived in their parents' house that should have been sufficient to find that Article 8(1) was engaged. The judge mischaracterised the information in the DVR, which was not proof that the first appellant left Nepal. Although not pleaded, he also submitted that the judge erred in placing too much emphasis on his findings relating to the first appellant without considering the second appellant's circumstances adequately.

9. It is not necessary for me to go into detailed analysis of the decision when there is some agreement that it involved the making of errors of law. I also had concerns about the way in which the judge approached the assessment of family life. The line of authorities relating to the assessment of Gurkha cases including *Ghising*, *Gurung* and *Rai*, make clear that such cases must be put in their proper context. The judge accepted that the appellants lived with their parents in the same household until they came to the UK in 2014. The appellants' parents were taking up long withheld rights of settlement. At the time no application was made for the appellants to settle with their parents in the UK because they were over 18 years old. The respondent had not yet introduced the policy for adult Gurkha children contained in Annex K (June 2015), but both appellants would have met the age requirements at the time. The appellants applied for entry clearance in 2016, 2018 and

2019 with the clear intention of continuing their family life with their parents. When properly analysed, the period of six years separation was not as a result of a natural progression to independent living on the part of the appellants, but largely as a result of difficult choices made by their parents and repeated refusal of entry clearance. In the meantime, the judge appeared to accept that they remained in the family home and received financial remittances from their parents.

10. Although the judge referred to the test of 'real, committed and effective support' his other findings suggested that the test may have been applied incorrectly. Having accepted that the appellants received financial remittances, lived in the family home, that their parents visited them in Nepal, and they kept in regular contact, it is difficult to discern why he did not conclude that this was sufficient to amount to real, committed and effective support. The judge referred to the ability of the appellants to find work and the fact that the first appellant conducted some seasonal work. This indicates that he considered issues that were not relevant to the question of whether their parents continued to provide the appellants with real, committed and effective support. There was no requirement for the appellants to be wholly dependent upon their parents for support or for there to be exceptional circumstances still requiring support for adult children. Nor did the support provided need to arise from necessity. The fact that they could work and live independently mattered not if there continued to be family ties resulting from real, committed and effective support.

11. Some of the findings made by the judge as to whether the first appellant went to work in Malaysia, and thereby made false representations in the application form, were open to him to make. However, there is force in the submission that he may have mischaracterised the evidence contained in the DVR and failed to take into account relevant considerations. At highest, the DVR was said to record information held by the Nepal Government Department for Foreign Employment. Although the DVR asserted that the check indicated that the first appellant travelled to Malaysia, the details of the record arguably did not show actual travel. No information was provided to explain what the record held by the Nepal Government Department for Foreign Employment was i.e. whether it is necessary to register potential foreign employment when offered or obtain permission from the government before leaving the country. The attached print out stated that it was "For Malaysia labour approval". The record stated the name of the company the first appellant was offered work with, his passport number, the country, profession, salary, contract period (three years), and the decision date. However, it is not clear what the 'decision' was. In the absence of any information about the relevant procedures, the face of the document appears to show a record of the appellant having been offered employment abroad, which may have required some form of approval by the Nepali government before he could take up foreign employment. What the record does <u>not</u> appear to do is to show a date of travel. Given

this lack of clarify it is difficult to see how the DVR could amount to proof that the first appellant actually left the country.

12. The judge appeared to place weight on the DVR as proof that the appellant had left the country, when it is at least arguable that it was not. The document required some analysis, but none was carried out. Nor did the judge consider the fact that, even if the document indicated that the appellant might have left Nepal to work in Malaysia in 2014, the contract was only for three years. The judge appeared to place weight on the fact that the first appellant failed to produce evidence to show that he did not leave Nepal or to show that he reported his passport as stolen, but the burden of proof was on the respondent to show that a false representation was made and that the 'Suitability' criteria applied.

13. Although it was not pleaded in the grounds, I also accept that there is some force in the submission that the judge relied on the findings made in relation to the first appellant to reject the second appellant's claim without much analysis of her individual circumstances [60].

14. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside.

15. After discussing the matter with the parties, I was persuaded that this case is suitable for remittal to the First-tier Tribunal because the credibility issues made by the First-tier Tribunal judge are unsustainable and would need to be made again as part of a holistic assessment. The appellant has produced further evidence relating to the issue of whether he ever left Nepal after being offered employment in Malaysia, which will need to be considered. The lack of consideration of the second appellant's circumstances will also require further findings. Although the usual course of action would be for the Upper Tribunal to remake the decision even if further findings of fact need to be made, in this case, none of the First-tier Tribunal's findings are sufficiently sustainable to be preserved. Wholesale findings are likely to be required. The case will be remitted to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed M. Canavan Date 07 December 2020
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email