



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18200/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 29 January 2021  
*Extempore decision*

Decision & Reasons Promulgated  
On 25 February 2021

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

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

Appellant

**and**

**ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Mr J Khalid, Counsel, Direct Access

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge G C Solly promulgated on 18 April 2019. The judge dismissed an appeal brought by the appellant, a citizen of Nepal born in 1991, against a decision of the Entry Clearance Officer dated 6 August 2018 to refuse him entry clearance to settle in the United Kingdom as the dependent son of his mother, the widow of a former Ghurkha soldier.

*Factual Background*

2. The appellant was born in Nepal. His father served in the Gurkha regiment until 1960, but sadly died when the appellant was only two years old, in 1993. The appellant lived with his mother, also citizen of Nepal, in Nepal until she moved to this country pursuant to the Ghurkha settlement scheme in September 2014. The appellant remained in Nepal. On 14 May 2018, the appellant applied for entry clearance as the adult dependent relative of his mother, who is the sponsor in these proceedings. The respondent refused the application on the basis that there was no evidence that the appellant was unable to care for himself. No details of his financial commitments in Nepal had been provided, and the support he did receive could continue. Annex K to Chapter 15 of the Immigration Directorate Instructions did not make provision for the adult children of an ex-Gurkha widow. There were no exceptional circumstances meriting a grant of exceptional leave.
3. It is the refusal of that decision that was under appeal before the First-tier Tribunal.
4. Before the judge, the appellant's written evidence was that he had been funded by, and was dependent upon, his mother, from Nepal. He is unemployed, unmarried and fully dependent upon her. He pointed to the cultural practice in Nepal of adult sons remaining as part of their parents' household until they marry. His case was that "family life" existed between him and his mother, for the purposes of Article 8 of the European Convention on Human Rights ("the ECHR").
5. At the hearing, the sponsor's written and oral evidence was that she is employed as a kitchen assistant with a taxable income of just over £18,600. That, on the evidence before the judge, gave a net income in the region of around £1,319 monthly, although the judge noted that there was some evidence demonstrating that in February 2018 she had net pay of £1,429. The judge considered the evidence relating to the circumstances of the sponsor's living arrangements. She had provided a tenancy agreement relating to a two bedroom property, claiming one of the rooms was vacant, and could be occupied by her son. Her evidence was that she remitted £200 to £300 a month to the appellant, in individual consignments of around £100 or £110, £190 or £200.
6. The judge had credibility concerns with the evidence. She was not satisfied that the property the sponsor said she rented alone was solely occupied by her. The tenancy agreement suggested that there was another resident. Although the sponsor said that that person was her landlord, the judge rejected that suggestion, as the landlord was specified as a third party elsewhere on the tenancy agreement, with a different name. The judge was also concerned about the sponsor's ability to support the appellant to the sum claimed; given, as was her evidence, she paid £1,200 each month in rent, and based on her income in the region of £1,300 monthly, the judge was concerned that it would not be financially possible for the sponsor to have remitted the claimed levels of support: see [30]. The judge's concerns were compounded as the sponsor was also responsible for the utility bills in the property. The judge rejected the sponsor's evidence that utility bills and other ancillary expenses were

included in the rent of £1,200 a month, as the tenancy agreement said they were extra.

7. The judge reached global conclusions on the claimed financial dependency at [33]. She said that the sponsor's evidence was not credible. The judge noted that the appellant had some health conditions and did accept that they existed to an extent, but did not find that there was any significant feature to those health conditions which provided compelling or other reasons for the appellant to be dependent on his mother. At [47] the judge accepted the cultural practice in Nepal of adult sons remaining with their parents or their parents' household, but said:

"I am not on the evidence satisfied that the appellant is not reasonably financially independent given my findings in relation to his ability to care for himself, work and the provision of finance in Nepal. I am not satisfied that there are any special features in this case in support of emotional support save these cultural issues and the health I have accepted to the extent of my findings".

8. The references to the financial provision in Nepal were to the military pension that the appellant's father had accrued during his service which, the judge found at [31], was paid to the appellant.

9. Against the background of those findings of fact, the judge then said at [48]:

"I have considered whether Article 8 is engaged given my findings of fact."

10. The judge did not say in terms what her findings were in relation to Article 8, in particular whether it was engaged or not. At [50] the judge said that there was "currently family life ... split between Nepal and the UK". Then at [51] she outlined the leading authorities in relation to the existence of family life between adult family members, in particular Kugathas v the Secretary of State for the Home Department [2003] EWCA Civ 31 and said,

"given my findings of fact I consider that Article 8 is not engaged as the appellant is currently able to enjoy family life with his mother when she returns to Nepal."

### *Grounds of Appeal*

11. The grounds of appeal contend that the judge made inadequate findings relating to the so called historic wrongs suffered by former Ghurkha soldiers, and that the judge failed to demonstrate what is described as "a common sense approach" in relation to this issue. The grounds further contend that the judge failed in her assessment of the appellant's finances by reference to a pension the appellant received from his father's military service, and also contended that the judge's analysis of the sponsor's financial circumstances in this country were flawed.
12. Permission to appeal was granted on all grounds by Designated Judge McClure of the First-tier Tribunal.

*Discussion*

13. During the course of submissions, Mr Khalid developed the grounds of appeal, which were not settled by him, submitting that the judge's findings concerning Article 8 were flawed, as well as relying on the grounds' contention that the findings of fact were flawed. Ms Everett, for the respondent, submitted that the judge's primary findings of fact relating to dependency did not appear to be infected by any material error, but conceded that the judge's overall and operative Article 8 analysis was flawed. I agree that it was flawed for the following reasons.
14. I find that the operative analysis by the judge in dismissing the appeal did not address, in terms, whether Article 8 was engaged or not. That was surprising given the judge had identified at [48] that it was necessary to consider that very issue.
15. Ms Everett's concession was properly made. Confusion arises because the judge appears to make a finding that family life *does* exist between the appellant and the sponsor, stating that it was "split between Nepal and the UK". That appears to suggest that the judge found that family life *had* been found to continue to exist between the appellant and the sponsor. The term "family life" has a distinct meaning in this context, as is readily apparent from the judge's self-direction relating to the Article 8 jurisprudence, at [51] and also [14] to [17]. When the judge referred to "family life", she must have been referring to the concept as it exists for the purposes of Article 8.
16. The judge's finding at [51], namely that the appellant *is* currently able to enjoy family life with his mother when she returns to Nepal, is unclear. The judge appeared to find that Article 8 was *not* engaged on the basis of credibility findings. However, by suggesting that the appellant and his mother *are* able to enjoy family life when she returns to Nepal, taken with the judge's earlier reference at [50] to family life being split between Nepal and the UK, it is not clear whether the judge was applying the correct test for the engagement of family life. Ms Everett was right to concede that this aspect of the judge's decision was not defensible.
17. The approach taken by the judge in the final sentence of [51] appears to be based on the premise that family life is some form of oscillating concept, whereby upon the sponsor returning to Nepal it is revived, and upon her returning to this country it somehow ceases. As a matter of law, that cannot be correct. Family life either exists or it does not. If it is engaged, it will transcend the distance between Nepal and the United Kingdom, whereas if it is not engaged, when the mother returns to Nepal she will merely enjoy normal emotional ties with her son.
18. It appears that the judge's analysis in the final sentence of [51] conflated the quite distinct issues of, on the one hand, whether Article 8 is engaged, and, on the other, whether if it is engaged, any interference with it is proportionate. By referring to family life being enjoyed by the appellant and the sponsor upon her return to Nepal, the judge appears in fact to have been addressing the concept of *proportionality* of interference with family life, once established, whereas she presented those findings in the context of making a finding that Article 8 was not engaged. That finding of

course conflicted with her earlier finding that family life was split between Nepal and the United Kingdom.

19. It follows, therefore, that the judge's decision is not clear in relation to whether family life is engaged, and, if so whether any interference is proportionate. In this respect, I accept Ms Everett's additional concession that the judge took into account irrelevant matters in reaching that decision. At [46] the judge had found that the appellant's father would not have taken the opportunity to settle in the United Kingdom, had there been an earlier opportunity to do so, on the basis that there was no evidence of what his intentions would have been. Putting aside for one moment how the appellant would be able to adduce evidence concerning what his father may have done, had a highly restrictive and subsequently unlawful immigration regime not been in force when he was 2 years old, as Ms Everett notes that was not a valid consideration.
20. It follows that this decision must be set aside. The judge's reasoning concerning the engagement of Article 8 is not clear, leaving the reader of the decision wondering whether the judge found the Article was engaged or not, and whether she conflated Article 8(1) and (2). Secondly, the judge took into account an irrelevant consideration, namely the intentions of the appellant's father at the time of the appellant's birth, in the short period that elapsed before his father died.
21. The question then arises as to whether this decision should this be remitted to the First-tier Tribunal, or retained with the findings of fact preserved in this Tribunal. While there is considerable force to Ms Everett's submission that the primary findings of fact reached by the judge are sound, I consider that this is a case where the findings of fact are entwined with the judge's subsequent Article 8 analysis. I also take into account Mr Khalid's submission that the sponsor was unrepresented before the First-tier Tribunal. A supplementary appeal bundle was submitted for this appeal hearing which featured pay slips tending to demonstrate that the appellant's income was much higher than it had been thought to be by the First-tier Tribunal previously. Of course, those new documents are incapable of going to the issue of whether the judge erred in her findings of fact, which were established on the basis of the evidence before her. It may well be the case that there are good reasons not to treat those documents as reliable. It will be necessary to consider whether the appellant and the sponsor could reasonably have been expected to rely on those materials previously. There may be extensive findings of fact to be made.
22. In my judgment, the most appropriate course in light of the potential for extensive findings of fact, some of which could entail assessments of the credibility of the appellant and sponsor, notwithstanding that the fact that many of the judges' factual conclusions were within the range of findings open to her on the evidence, would be to remit this matter to the First-tier Tribunal with no findings preserved to be heard by a different judge.
23. I allow this appeal.

**Notice of Decision**

The decision of First-tier Tribunal Judge G C Solly involved the making of an error of law and is set aside. The case is remitted to the First-tier Tribunal to be reheard by a different judge with no findings of fact preserved.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 8 February 2021

Upper Tribunal Judge Stephen Smith