



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004544
First-tier Tribunal No:
HU/54608/2021
IA/11574/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 26 January 2023

Decision & Reasons Promulgated
On the 13 February 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SACHIN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel instructed by Everest Law Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal Judge Courtney promulgated on 7 June 2022 following a face-to-face hearing at Hatton Cross on 16 May 2022 (“the Decision”). By the Decision, Judge Courtney dismissed the appellant’s appeal from the decision of the respondent made on 20 April 2021 to refuse to grant him entry clearance in the capacity of an adult dependent child of a Gurkha veteran who was discharged from service prior to 1 July 1997.

Relevant Background

2. The appellant is a national of Nepal, whose date of birth is 22 June 1987. On 26 January 2021 he applied for entry clearance as the adult dependent child of his father who was a former member of the Brigade of Gurkhas. In his application, he said that he had lived at his current address for 30 years. The address was a property owned by his parents. His application was supported by a copy of the sponsor’s Kindred Roll held by the Records Office at Pokhara as of 6 November 2020. The Kindred Roll showed that the sponsor had two wives, the first of whom, Devi, was born on 17 September 1946, and the second of whom, Mala, had been born on 13 November 1960.
3. In his letter of support, the sponsor said that he had been granted a settlement visa on 22 October 2009, and his wife Mala had been issued with a settlement visa on 24 May 2010. By compulsion, rather than choice, they had left behind their dependent children in Nepal, Sachin and Shonika. As they were close to their grandparents, the parents of Mala, they had arranged for them to be accommodated with them. Since coming to the UK, he had stayed in close contact with the children through phone calls, and later through Viber and Facebook Messenger. He sent them money for their assistance through relatives and friends who travelled to Nepal from the UK, and also through money transfers. In 2011, Shonika, who was younger than Sachin, had been granted a settlement visa. After Shonika’s visa, *“Sachin was left alone in Nepal.”* The sponsor went on to give details of the three visits that he had made to Nepal to meet Sachin. His son was single, and financially and emotionally dependent upon him, so he strongly believed that he was eligible for a UK settlement visa.
4. In the reasons for refusal, the respondent said that the appellant did not meet all the requirements for settlement as an adult child of a Gurkha discharged prior to 1 July 1997. While he might receive some financial support from the sponsor and remain in contact with him, he had not demonstrated that he was financially and emotionally dependent upon his father beyond that normally expected between a parent and an adult child. In addition, he was 33 years of age at the date of application, whereas applicants must be between 18 and 30 years of age at the date of application.

5. In respect to a claim under Article 8 ECHR, he had not shown that he had established family life with his parents over and above that between an adult child and his parents, or that he demonstrated real or committed or effective support from his parents. So, he had not shown that Article 8 was engaged.

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

6. The hearing of the appellant's appeal took place at Hatton Cross on 16 May 2022. Both parties were legally represented, with Mr West of Counsel appearing for the appellant.
7. The bundle of documents compiled by the appellant's solicitors for the hearing contained signed witness statements from, among others, the appellant and the sponsor. In his witness statement, the appellant said that he had no family in Nepal from whom he could receive emotional or financial support.
8. In his witness statement, the sponsor said that he had brought both his wives to Pokhara where he built them a house and kept them together. Pokhara was also where the children were born. His daughter had arranged for him to go back to Nepal in December 2018 and he had simply stayed there with Sachin. Both of them would visit the village to see their other relatives and then roam around Nepal. His first wife in Nepal was well enough to look after herself. She lived in the same house as Sachin. She occupied her own room. Sachin helped her to go around and he took her to the village when she wanted. The money that he had arranged in Nepal was for both of them.
9. As is recorded in the Decision, the sponsor gave oral evidence through a Nepali Interpreter, and he was cross-examined by the Presenting Officer.
10. The Judge's findings began at paragraph [9] of the Decision. The Judge accepted that the appellant lived in a property owned by his parents. The Judge accepted that the appellant had not found work and had not begun an independent family life of his own. The Judge noted that the sponsor's evidence that he stayed in contact with the appellant via Viber and Facebook Messenger was supported by call logs exhibited in the appeal bundle at pages 69-91. As to visits, the Judge accepted that the sponsor had spent time in Nepal between 19 November 2012 and 11 February 2013; between 21 February and 19 March 2018; and between 3 December 2018 and 31 October 2020, as evidenced by the passport stamps in the appeal bundle.
11. The Judge also accepted that the sponsor's second wife had provided regular financial support to her son in Nepal, as evidenced by 10 money transfer receipts dated between 21 June 2020 and 10 October 2021.
12. On the issue of whether the appellant also drew on his father's pension, the Judge observed at paragraph [18] that the documentation showed

pension payments going into the sponsor's bank account in Pokhara and cheque withdrawals in favour of Devi Gurung. The Judge held that there was no evidence that the appellant personally benefited from this money. The Judge continued:

19. The Appellant currently lives with Devi, who is 77 years of age. Mr Gurung gave evidence at the hearing that his son was brought up by his step-mother and that now he looks after her.

20. In his application form the Appellant states that he intends to live with the Sponsor permanently [Q1.18]. In his witness statement the Sponsor states: *"My health and my wife's advancing age has put us in a very difficult position. Our need for my son has increased many folds. While I was in Nepal with him, I did not realise how much dependent I had become on him. Now that I am back in the UK, I look for help but there is no one around. I cry at times at my loneliness. My wife and daughter cannot leave their work for me. If my son comes to the UK he will look after me together with my wife and daughter. I enjoy his company a lot and miss him more and more every passing day."* However, in cross-examination Mr Gurung said he would go back to Nepal to look after Devi if his son arrives in the UK and secures a job. He explained that he would have to go and look after his first wife, because otherwise she would be alone.

21. Mr West submitted in his skeleton argument that the Appellant and his father were mutually dependent upon one another for emotional support. He contended that *"The sponsor is elderly and is unlikely to have much time remaining to be reunited with his son. He was only denied this opportunity due to long delayed right."* In his closing submissions he submitted that what may or may not happen in the future was not of material significance in this appeal. The only question to be answered was whether or not there was support of the **Kugathas** characterisation. The issues set out at paragraph 39 of *Rai*, where whether the appellant had family life existing with his Sponsor father (and mother) before they left Nepal, and whether that family life had continued notwithstanding their having left the country.

22. Protestations that the Appellant and his father wish to resume their life together in the UK ring hollow when the evidence is that Mr Gurung Senior will leave the country once his son is settled here. I cannot accept that this has no bearing on my decision. In my view the Appellant's core family life is with his step-mother Devi Gurung in Nepal. They are mutually supportive of one another. I do not accept that more than normal emotional ties exist between the Appellant and his parents in the UK.

13. The Judge went on to find that, even if she was wrong about that, and the refusal of entry clearance did constitute an interference with the exercise of the appellant's right to respect for family life with his parents, she did not consider that the contemplated interference was disproportionate. It was not intended that family life with the Gurkha Ex-serviceman would be pursued in the UK, since Mr Gurung Senior would be returning to Nepal on a permanent basis of his own accord. Entry into the UK would not facilitate the pursuance of family life between the Appellant and his father.

This was not a case where compelling circumstances existed, such that a good claim for LTE could be established outside the Rules.

The Reasons for the Grant of Permission to Appeal

14. Permission to appeal was granted by Judge Hollings-Tennant on 19 July 2022 for the following reasons:
 1. The application is in time. Ground [1] asserts that the Judge erred in law by failing to consider relevant factors and in placing weight on irrelevant matters in her assessment of Article 8(1) of the ECHR. Having found that the Appellant lives in a family home, is single and unemployed, remains in regular [contact] with the Sponsor, and receives financial support, it is at least arguable that the Judge failed to give adequate reasons for finding that Article 8(1) was not engaged. While she refers to the Appellant's "*core family life*" being with his step-mother in Nepal, this in itself does not preclude the existence of family life with his Sponsor.
 2. Ground [2] asserts that the Judge erred by considering immaterial factors in her alternative findings on Article 8(2) of the ECHR. It is argued that Ghising confirms that the historic injustice will always prevail in the proportionality assessment and the Judge should not have considered what the Sponsor would do in the future. There is some merit in this argument insofar as it is incumbent upon the Judge to consider the situation as at the date of the hearing. That said, if the Sponsor intends to leave the United Kingdom it is hard to see how a refusal amounts to a disproportionate interference with the Appellant's right to family life with that Sponsor in this country.

The Hearing in the Upper Tribunal

15. At the hearing before me to determine whether an error of law was made out, Mr Balroop submitted that the sponsor would have brought his first wife to the UK, if he had been allowed to bring both his wives. His understanding was that the reason for the sponsor's lengthy stay in Nepal between 2018 and 2020 was because the sponsor wished to spend time with his first wife. He submitted that the Judge had been wrong to treat the family life which the appellant had with his step-mother as being mutually exclusive. The Judge had not taken into account that the appellant also had ties to his birth mother and sister in the UK. From the findings which the Judge had made in the appellant's favour, she ought to have found that family life with the sponsor and the other family members in the UK was established.
16. On behalf of the respondent, Ms Everett said that she had found the case to be very challenging. The Judge's decision seemed perfectly sensible and reasonable, but she questioned whether the Judge was entitled to look at the sponsor's intentions in order to determine whether there was existing family life.

Discussion

17. Ground 1 is that the Judge erred in law by taking into account irrelevant factors, and failing to take into account relevant considerations, in her assessment of the question whether there was subsisting family life between the appellant and the sponsor.
18. The case advanced in the grounds of appeal settled by Mr West and adopted by Mr Balroop is that the findings of fact made by the Judge at paragraphs [15]-[18] of the Decision constitute a more than sufficient basis on which to find that the low bar for the engagement of Article 8(1) has been crossed. Mr West poses the rhetorical question: "*What more could the appellant have demonstrated for the engagement of family life under Article 8(1)?*".
19. Mr Balroop submits that the only question for the Judge to determine in respect of Article 8(1) was whether there was support which was either real or committed or effective between the sponsor and the appellant and/or whether there were more than normal emotional ties between them. He submits that the fact the sponsor may go to Nepal to look after his first wife in the future does not bear upon this question.
20. Mr Balroop submits that the Judge failed to appreciate that having a core family life with his step-mother does not preclude the appellant from having family life with his sponsor and other family in the UK. On the contrary, in no way are these two matters mutually exclusive. It is also submitted that the Judge's finding that the appellant's core family life is with his stepmother is inadequately reasoned.
21. I accept that, taken at their face value, the contents of the witness statements, together with the supporting primary material which underpins the Judge's findings at [15]-[18], were sufficient to establish that family life continued to subsist between the appellant and the sponsor. However, as was highlighted by the Judge in subsequent paragraphs, the evidence which emerged at the hearing revealed a different factual matrix from that which had been presented hitherto.
22. The role that the sponsor's first wife continued to play in the life of the appellant and the sponsor was completely hidden in the application. The false picture presented in the sponsor's letter of support was that the appellant was entirely alone in Nepal, with no close family member to turn to for support or companionship. Although the presence of the appellant's step-mother in the household was acknowledged in the appeal statement of the sponsor, her historic and ongoing role in the appellant's life was minimised. It emerged from the sponsor's oral evidence at the hearing that, in truth, the appellant's step-mother had played, and continued to play, a central role in the appellant's life. Although the appellant was the biological son of Mala, Devi had brought up the appellant, and they had continued to live together under the same roof after the other family members had settled in the UK. In addition, contrary to what the sponsor had said in his witness statement, Devi was not capable of living on her

own, but required to be looked after; and she was currently being looked after by the appellant.

23. In the light of this oral evidence, it was open to the Judge to find that the appellant's core family life was with his step-mother in Nepal. This finding was adequately reasoned, as the Judge identified the passages in the oral evidence from which her inference was drawn.
24. The fact that the appellant's core family life was with his step-mother did not of course necessarily exclude him from also enjoying family life with the sponsor. But in the light of the misrepresentation of the appellant's family circumstances which had pertained hitherto, it was open to the Judge not to take at face value the picture which had been presented in the written representations and witness statements. In short, whereas in uncontradicted form the material might have been sufficient to sustain a finding of subsisting family life, it was open to the Judge to find that it was not sufficient in the circumstances.
25. In any event, the Judge supplied a further reason for holding that there were not more than emotional ties between the appellant and his parents in the UK. This was that the sponsor had declared that, if the appellant came to the UK and got a job, he would have to go to Nepal to look after his first wife, because otherwise she would be alone.
26. As the Judge indicated in her discussion, the sponsor's expressed intention was wholly inconsistent with what he had said in his witness statement about how emotionally dependent he had become on his son, to the point where he cried at times at his loneliness, despite having his second wife and daughter in the same household as him.
27. Although the sponsor was giving the evidence about his future plans, the very fact that he currently had a plan to swap roles with the appellant so that they would continue to live on different continents - albeit that the appellant would now be in the UK, whereas he would be living with his first wife in Nepal - was reasonably treated by the Judge as demonstrative of the fact that, in reality, there was not a sufficiency of emotional dependence between them such that Article 8(1) was engaged.
28. The Judge's reasoning does not apply to the appellant's birth mother, as it is not suggested that it was part of the plan that she would accompany the sponsor to Nepal, rather than to remain in the UK with the appellant. However, Mala Gurung had only gone back on one visit to Nepal since settling in the UK in 2011, and in his skeleton argument for the hearing in the First-tier Tribunal, Mr West only relied on the proposition that there was emotional support between the appellant and the sponsor, citing the fact that they were in regular contact using social media, and the fact that the sponsor had spent 2018, 2019 and 2020 in Nepal with the appellant.
29. For the above reasons, I find that Ground 1 is not made out. I am not persuaded that in arriving at the conclusion that Article 8(1) was not

engaged the Judge failed to consider relevant factors or placed weight on irrelevant matters. I find that the Judge reached a conclusion on the engagement of family life that was reasonably open to her on the evidence, and that she gave adequate reasons for her conclusion.

30. Ground 2 is that the Judge erred in law by considering immaterial factors in her alternative finding on proportionality. I do not consider that the sponsor's plan was irrelevant to proportionality assessment. However, I accept that the Judge erred in not weighing in the balance the fact that, but for the historic wrong, the appellant would have been settled in the UK long ago, and that this consideration would ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant's favour, as was held in Ghising [2012] UKUT 00160 (IAC). However, the Judge's error is not material, as she did not err in law in finding that Article 8(1) was not engaged.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law. Accordingly, the decision stands. The appellant's appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and nor do I.

Signed Andrew Monson

Date 5 February 2023

Deputy Upper Tribunal Judge Monson