



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02060/2017
HU/02062/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3rd May 2018

Determination & Reasons Promulgated
On 22nd May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR RAJU DAMMARPAL THAPA
(2) MISS SUNITA DAMMARPAL THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:

For the Appellants: Mr R Jesuram (Counsel)
For the Respondent: Ms K Pal (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge D. Ross promulgated on 8th January 2018, following a hearing at Taylor House on 21st November 2017. In the determination, the judge dismissed the appeals of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are both nationals of Nepal. The First Appellant, is a male, and was born on 29th July 1987. At the date of the determination he was 31 years of age. The Second Appellant, a female, was born on 25th July 1991 and at the date of the determination by the judge was therefore 26 years old. Both applied for entry clearance certificates in order to settle with their UK based dependant, a former Gurkha soldier father, Chabilal Thappa, who was born in January 1949, and was 68 years old presently, having settled in the UK on 18th July 2012, together with his wife, Parbati, who was born in March 1961. She is 56 years old.

The Appellants' Claim

3. The evidence before Judge Ross, as given by the sponsoring father, Chabilal Thappa, was that the Appellants were currently the only children of his who were not living within the UK. He had enlisted with the British Army on 17th November 1967 at the age of 18 and was discharged in 1983 as a corporal, having served for fifteen years. He has six children from his first marriage. Two of his sons are in Hong Kong. His eldest daughter is married and lives with the family. His first wife continues to live in Nepal with two of her children. He, the Sponsor, provided for their maintenance. He married his second wife, Parbati, while he was still in the army. After he was retired from the army he went back to Nepal. If he had been given the opportunity to settle in the UK at the time, he would have settled here with all his children. However, the right to settlement was granted only in 2009 and he did not find out about this until 2010. By this time, the Appellants had already turned 18, and it was not until 2012 that he applied for settlement in the UK with his wife and three children. He immediately contacted the Appellants in Nepal on the telephone and he stated that he relies on state pension and benefits but uses people in the local Nepalese community to take money for the Appellants there. The Sponsor gave evidence that life was very tough for his children in Nepal. He sent them money. They bought essentials with this money. He had already been to Nepal three times. On two occasions he took his wife. He goes there to give support to his children. He gave evidence that it was very unfair to keep his children separated from him. He wanted them to be with him. There were also statements from the children themselves in the bundle of documents before the judge. These stated that they had no family in Nepal other than their step-mother and half-siblings. They were both unemployed. They were both unmarried. They were fully dependent on their father for financial support (see paragraph 6 of the determination).

The Judge's Determination

4. The judge held that the evidence of financial support was limited in kind. There were a total of twelve money transfers. They were all made between 2015 and 2016 in the name of the First Appellant. The judge held that, "there do not appear to be any transfers prior to 2015 and the amounts are irregular" (paragraph 15). The judge also went on to say that at the date of the application the Appellants had already lived apart for four years from their sponsoring parents in the UK (paragraph 17). The judge went on to recall how the evidence was that the Sponsor had visited his children on three occasions over the last five years and was in regular contact with them on the internet.

5. The judge observed that “there is some evidence of financial support since 2015. Nevertheless, I do not consider that this amounts to a financial and emotional dependence”. The judge went on to record that,

“I would have expected to see regular amounts of money being transmitted to the Applicants since the time when the Sponsor arrived in the UK in 2012. There is no documentary evidence of emotional dependence as between the parents and their children. I do of course accept that they keep in touch with their children ...” (paragraph 18).
6. Finally, the judge held that, “it is significant that the Appellants are not living alone in Nepal as was claimed by the Sponsor. There is at least one sister and brother-in-law who lives there, and probably two ...” (paragraph 20).
7. The judge dismissed the appeal.
8. The Grounds of Appeal state that the judge had erred in law because the approach to Gurkha cases was misconceived. This is demonstrated by the fact that a two year separation is permitted in such cases. The context of the separation, where the father had to travel to the UK in order to access his Gurkha rights, was not taken into account. There was a letter on the Armed Forces Concession, and this makes it plain that the terms of Annex K are not to be constructed as a “hard and fast rule”. Moreover, the parents had travelled to Nepal many times and it was arguable that the two year separation period did not apply in any event. Furthermore, in terms of financial and emotional dependency, the determination was inadequately reasoned. It was not clear why the trips made to Nepal by the parents for a substantial period of time were insufficient to establish emotional dependency. The judgment did not engage with the legal principles as set out by the jurisprudence in **Ghising** and **Rai**.
9. On 13th February 2018, permission to appeal was granted on the basis that it was arguable that the judge did not engage with the evidence as to financial and emotional dependency, or give reasons for why such evidence was not accepted. The evidence of the Sponsor was that money was not only sent by money transfers but also sent with people from the local community and left with the Appellants on visits and this aspect does not appear to have been addressed by the judge at all. It was also arguable that the judge should have considered emotional dependency in the context of the length of visits made by the Sponsor to Nepal.

Submissions

10. At the hearing before me on 3rd May 2018, Mr Jesuram, appearing on behalf of the Appellants, relied upon his detailed and comprehensive skeleton argument. First, it was difficult to understand what the judge meant by the statement that, “there is no documentary evidence of emotional dependence as between parents and their children” (paragraph 18). The emotional dependence was, submitted Mr Jesuram, borne out by the lengthy visits that the sponsoring father was making to the Appellant children. Moreover, to suggest that there should be “documentary evidence” of emotional dependence, was to install a higher standard of proof than was required for emotional dependence.

11. Second, the approach to Article 8 was misconceived because although the Gurkha policy looks only at “dependence” of the Appellants on the sponsoring Gurkha, Article 8 looks at the position in relation to the whole family and their dependence on each other. Unlike the policy, Article 8 does not require that the Applicants be dependent on the Sponsors both emotionally and financially. Furthermore, “dependence” under the policy may be of necessity whereas under Article 8(1) it need not be.
12. Third, the judge was wrong to have concluded that the Appellants were not living alone, just because there was another sibling and a brother-in-law living there. They, however, were living at another address in their own home and this is clear from paragraph 20 of the witness statement. Similarly, submitted Mr Jesuram, the judge had mistaken the evidence, when stating that there was nothing to show that prior to 2015 monies were being sent to the Appellants because paragraph 13 of the witness statement makes it clear that the Sponsor was relying upon Nepalese family members to take monies to the Appellants in Nepal. The fact that there is an omission of this reference by the judge suggests that he erred in law. The seriousness of this error is then compounded by the judge taking the view that there had been a deliberate omission of the evidence (see paragraph 20).
13. On the contrary, the witness statement provides a full account (see paragraph 4 and paragraph 6) of why the siblings are living in Nepal, and it was wrong for the judge to rely simply on the oral evidence of the Appellants, because there plainly was no deliberate concealment by the Appellants or the fact that they had siblings living nearby in separate property.
14. For her part, Ms Pal submitted that the judge had adequately dealt with the policy (at paragraphs 16 to 17 of the determination) but Mr Jesuram immediately objected to say that it was no part of this appeal to be relying upon the policy, which he claimed was irrelevant as to the success of the Appellants’ case.
15. Ms Pal went on to say that, in any event, at paragraphs 18 to 20, the judge had gone on to make findings in relation to a factual and emotional dependency, and this could not be faulted because the sponsoring father had been in the UK since 2012. In the same way, the judge was correct in seeing no special features of emotional dependency (at paragraph 20) over and above the normal.
16. In reply, Mr Jesuram stated that the fact that the remittances had been overlooked in full, such that very scant findings were made in relation to them, made the decision unsustainable. There was financial and emotional dependency here. He relied upon the established jurisprudence in Gurkha cases.

Error of Law

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
18. First, the judge has reached an irrational conclusion as to fact in concluding that “there do not appear to be any transfers prior to 2015” (paragraph 15). This is because the

Appellants' claim, as evidenced in the witness statements, was that money was being remitted through friends and relatives prior to 2015 and this was overlooked by the judge.

19. Second, the judge fell into error in stating that "there is no documentary evidence of emotional dependence as between the parents and their children" when the Sponsor had made three visits over the last five years, spending considerable periods of time with his children, which is to say nothing of the fact that documentary evidence is not a requirement of emotional dependency, when other evidence is known to exist.
20. Third, it is not the case that the Appellants had deliberately misled the Tribunal by stating that they were not living alone in Nepal when there was one sister and brother-in-law living there as well, because one only has to look at the witness statements to see that this is not the case.

Remaking the Decision

21. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.
22. First, it is well established that the provision of support is the deciding factor as to whether there is family life (see **Rai v ECO, Delhi [2017] EWCA Civ 320** at paragraph 36). Moreover, where a young adult has not formed an independent family life of their own they may be considered to be part of the wider family (see **Ghising [2012]** and **Gurung [2013] 1 WLR 2546**). The common error is to focus on the choice to separate, by the sponsoring parent coming to the UK, without taking into account the practical and financial realities, and this was addressed in **Rai [2017] EWCA Civ 320** at paragraph 38. Against this background, it is clear that the Appellants live in the sponsoring father's home (see witness statement at page 9 paragraph 20). The sponsoring father provides "real" and "effective" support, in a way which is "committed". The sponsoring father made it clear that he did not know about money transfer companies until after 2015, and used to rely upon family members and others taking monies for his dependent children (see his witness statement at page 7 paragraph 13). He used to leave money with his son in Nepal, as he left them to return back to the UK (see his witness statement at page 7 paragraph 9). In addition, he visited his children three times, and often took his wife with him, and these were not short visits (see his witness statement at page 8 paragraph 15).
23. Second, it cannot be said that there was a deliberate "omission" not to mention the Appellants' sister and brother-in-law in the evidence-in-chief, because the witness statements have been adopted as evidence-in-chief, and these make it quite clear that there is a step-mother and half-siblings living in Nepal, with whom the Appellants are not close (see the witness statement at A2, page 1, paragraph 4). The Sponsor himself gave a full account of his family with his first wife (see his witness statement at page 6 paragraph 4).
24. Accordingly, this is a case which falls within the paradigm of **Rai [2017] EWCA Civ 320** where Lindblom LJ considered it significant that the "Appellant had demonstrated

that he had a family life with his parents which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did" (paragraph 39). This is the essence of the "historic injustice" remedy because it shows that even now there is a separation, which would not have occurred if the sponsoring Gurkha father had been allowed to settle in the UK earlier, the Appellants would also have settled earlier with their father and would have stayed together as a family unit. This was expressly recognised by Lindblom LJ in **Rai** who observed that, "his parents would have applied upon the father's discharge from the army had that been possible". His Lordship went on to say that, "the stark choice they had to make was either to remain with the Appellant ... or to take up their long withheld entitlement to settle in the United Kingdom" (paragraph 41).

Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

18th May 2018

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

18th May 2018