



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/13756/2015
HU/13758/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 14th February 2018**

**Decision & Reasons Promulgated
On 8th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**TARA LIMBU
PABITRA LIMBU
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Puar, Counsel, instructed by N.C. Brothers & Co Solicitors

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are twins and are nationals of Nepal. They appealed to the First-tier Tribunal against decisions of the Entry Clearance Officer dated 19th November 2015 to refuse their applications for entry clearance to settle in the UK as the adult dependent relatives of the father, an ex-

Gurkha soldier. First-tier Tribunal Judge Moan dismissed the appeals and the Appellants now appeal to this Tribunal with permission granted by First-tier Tribunal Judge Mailer on 4th December 2017.

2. The background to this appeal is that the Sponsor joined the British Army in October 1965 and retired in May 1981 with a full pension and exemplary service record. He married in 1968. After his retirement he returned to Nepal to live with his family. One of his daughters lives in Hong Kong and he has three adult children who remained in Nepal after the Appellant and his wife came to the UK in June 2012 with their two youngest children.
3. The Appellants applied for entry clearance to join their father in the UK on 13th October 2015. The Entry Clearance Officer refused those applications under Annex K and EC-DR.1.1(d) of the Immigration Rules. The Entry Clearance Officer also considered Article 8 of the European Convention on Human Rights and considered that the Appellants had not demonstrated that they have family life with their parents over and above that between an adult child and parents.
4. In her decision the First-tier Tribunal Judge noted at paragraph 5 that the Presenting Officer confirmed that the Respondent accepted that there was a historical injustice point in the case which would be decisive in the proportionality assessment and identified that the issue for the appeal was solely whether there was family life between the Appellants and the UK-based family. It was noted that the Respondent accepted that if there was family life the decision would not be proportionate because of the historical injustice. Therefore the only issue to be determined was whether there was family life for the purposes of Article 8 between the Appellants and their parents. The judge considered the evidence and concluded that it was not sufficient to demonstrate that family life existed between the Appellants and the Sponsor continuously throughout the period from June 2012 until the date of the decision and dismissed the appeal [39].

Error of law

5. The Grounds of Appeal identify seven alleged errors in the First-tier Tribunal's decision. In his submissions Mr Puar began by outlining the argument in relation to Ground 7. He submitted that the judge did not deal with the credibility of the Appellants or the Sponsor in the decision but appeared to have rejected their evidence without giving reasons. He referred to the key findings in the decision and suggested that the only real finding in relation to the Sponsor's credibility was at paragraph 24 but in his submission this was a point in relation to which the judge drew no adverse conclusions.
6. Mr Puar highlighted a number of areas where the judge had, in his view, fallen into error. He highlighted paragraph 33 where the judge said: "However, it is equally likely that their brother was working and supporting the family in Nepal." In his submission there was no evidence to support

this conclusion and in fact the witness statement of the Sponsor indicates the contrary. Mr Wilding submitted that this sentence was an observation rather than a clear finding. He accepted that if this had been a clear finding and that if the judge had attached any weight to this assertion she may have fallen into error but this comment must be viewed in the context of the rest of the decision where the judge is pointing to the gaps in the evidence. I agree that this sentence is an observation rather than a finding and does not affect the finding in that paragraph that it is highly likely that the family lived as a single unit before the Sponsor came to the UK.

7. Mr Puar submitted that the comment by the judge at paragraph 38 that family life existed at the time of the separation and “this would be culturally usual” was not based on any of the evidence before her. The judge went on to find that she could not be satisfied that family life had existed since separation in 2012 but in his view the judge failed to deal with the evidence in the Sponsor’s witness statement at paragraph 20 where he said: “In Nepal girls do not normally work and their father provides for them until they are married.” In my view paragraph 38 would read equally without that sentence and I do not consider it to be significant when looking at the judge’s overall findings. In my view the judge has given sufficient reasons for finding that family life existed before 2012 and for finding that it had not been established that it existed after 2012.
8. Mr Puar submitted that the judge had failed to have regard to all of the evidence in relation to telephone calls and contact between the Appellants and the Sponsor and the family in the UK. He highlighted a number of matters in relation to this. At paragraph 16 of the witness statement the Sponsor said:

“We have had a regular contact with each other. We speak to each other by phone as well as through Viber. My wife and I do not know how to use Viber and my daughter Anita uses her mobile phone to chat on Viber when she is free. Both Anita and Yadav are in full-time education. As such I ended up using the calling cards to speak to my children in Nepal. I have provided some of the Viber data from my daughter’s phone as I understand from Anita that she deletes the data to free up the phone memory.”
9. Mr Puar submitted that the judge failed to take account of the Sponsor’s witness statement in relation to this. He also submitted that the judge had failed to take into account all of the Viber records in the Appellants’ bundle. At paragraph 23 the judge said that copies of mobile phone logs were in the bundle and that the summary of calls showed a total of eight calls from the first Appellant’s phone to the Sponsor whereas he said that the Sponsor had stated in his witness statement that the first Appellant deleted her call logs to save memory and the judge said that “this was a plausible explanation for why only eight calls were shown on her phone”.

10. I accept that the judge appears to have missed the summary at page 54 of the Appellants' bundle, which notes 35 outgoing calls from the first Appellant's phone to a number in the UK. However, I accept Mr Wilding's submission that quite a number of these calls were where there had been no contact showing 0 seconds where it was obviously an attempt to make contact which was unsuccessful. In any event, I do not consider this a material error because at paragraph 23 the judge accepted that there was a plausible explanation for why only eight calls were on the first Appellant's phone.
11. The judge also noted: "No evidence of contact was produced from the Sponsor's phone or that of his daughter in the UK." The judge came back to this at paragraph 34 where she said:

"The call logs were from the first Appellant's phone to the Sponsor's and so would not include any calls from the Sponsor's youngest daughter. The call logs were for a very limited period and I was not given an explanation why information could not be obtained from the Sponsor's phone or from his younger daughter's phone, which should have been easier to obtain. I had not been provided with any evidence to show the content of contact."
12. It is clear that the judge's concern in relation to the evidence of contact was that it related to the first Appellant's phone and not to any the UK phones. This is of particular significance when considering the context of the witness statement where the Sponsor referred to using calling cards to speak to his children in Nepal and speaking to the children in Nepal through his daughter in the UK's mobile phone (paragraph 16).
13. Mr Puar asserted that the judge failed to have sufficient regard to the Sponsor's evidence in the witness statement that he uses the cards to make phone calls to his family in Nepal, however there is no documentary evidence in relation to these cards which also could have easily been obtained. Therefore the judge was entitled to reach the conclusions she did at paragraph 34 that there was limited evidence in relation to the claimed ongoing contact. This was a finding open to her on the evidence. I do not accept that there was a misdirection on the facts as asserted by Mr Puar.
14. Mr Puar submitted that the decision reveals an overreliance by the judge on the documentary evidence without dealing properly with the Sponsor's witness statement or oral evidence. However, I accept Mr Wilding's submission that the burden was on the Appellants to demonstrate that their relationship amounts to family life within Article 8 and that, as the relationship is between adult relatives, it was incumbent on the Appellants to demonstrate that their relationship went beyond the normal emotional ties between adults and their parents.
15. The judge needed to consider all of the evidence before her and, in my view, she did so. In her findings from paragraphs 23 to 38 the judge

highlighted the aspects of the evidence which were not, in her view, sufficient. The judge summarised the contents of the Sponsor's witness statement and his oral evidence. It is clear that this was in the judge's mind in assessing this appeal as a whole. In considering the substance of the appeal the judge set out the deficiencies, as she saw it, in the documentary evidence and was entitled to draw adverse conclusions from these deficiencies regardless of the witness statements and oral evidence, particularly in light of the fact that the evidence highlighted by the judge was evidence which, the judge noted, would have been easy to obtain.

16. Mr Puar's final submission was that the judge erred at paragraphs 38 and 39 in that it appears that the judge was under the impression that she must be satisfied that family life existed from June 2012 (when the Sponsor left Nepal for the UK) until the date of the appeal. He referred to paragraph 39 of **Rai [2017] EWCA Civ 320**. He submitted that in this case the judge was looking at whether family life has been established on a continuous basis up until the date of the hearing. Mr Wilding submitted that the judge was dealing with the case put by the Appellants which was that the Appellants had been dependent on the Sponsor before and after his departure in June 2012. He pointed out that it was not put to the judge that the Appellants' dependency had ceased and that was re-established later but it was the Appellants' case that family life continued on the same basis up to the date of the hearing. In his submission at paragraphs 38 and 39 the judge was dealing with the issues before her.

It seems to me that the issue to be determined by the judge here was whether there is family life between the Appellants and the Sponsor within Article 8. This is exactly what the judge did. The judge correctly identified the relevant case law and noted the guidance given in the case of **Rai** at paragraph 39 [18]. There Lord Justice Lindblom identified the real issue under Article 8(1), which was whether

"as a matter of fact, 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".

17. At paragraph 38 the judge noted that it was for the Appellants to satisfy her that family life existed at the time of separation and post-separation. While the judge accepted that family life existed at the time of separation she could not be satisfied that family life had existed since separation. The judge was not satisfied with the evidence as to financial support or as to frequency of contact between the Sponsor and the Appellants. Accordingly the judge correctly engaged with the issue to be determined and came to a conclusion open to her at paragraph 39.
18. In conclusion, it is clear to me that the judge engaged with the evidence before her to determine the only issue, which was whether family life within Article 8 existed between the adult Appellants and their father and in particular whether, as highlighted in the case of **Rai**, the family life

which existed at the time of the Sponsor's departure to settle in the UK endured beyond that. The judge concluded on the basis of the evidence before her that it had not. This was a conclusion open to her on the evidence.

Notice of Decision

The decision of the First-tier Tribunal Judge does not disclose a material error of law.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 7th March 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed therefore there can be no fee award.

Signed

Date: 7th March 2018

Deputy Upper Tribunal Judge Grimes