



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01689/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22<sup>nd</sup> February 2019

Decision & Reasons Promulgated  
On 11<sup>th</sup> March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR RAJMANI RAI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

**Representation:**

For the Appellant: Mr D Balroop, Counsel

For the Respondent: Mr S Walker, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Walker promulgated on 17<sup>th</sup> December 2018 dismissing his appeal on the basis of his human rights in relation to an application for entry clearance considered automatically on the basis of his being an adult dependent relative, but in the context of his being the son of a late former Gurkha soldier, Mr Dil Prasad Rai, and being sponsored by his mother Mrs Phul Sari Rai, the Sponsor and widow of the late Mr Rai. The decision of Judge Walker was appealed against and permission was granted by First-tier Tribunal Judge Buchanan in the following terms:

“The Grounds of Appeal contend that the FTTJ arguably erred on the basis that:-

1. The approach was unfair because a point was taken without notice of the parties and because there are no reasons given for rejecting the Sponsor’s evidence.
2. There was a failure to consider that evidence.
3. There was a failure to apply the correct test for family life between adults and there was an error in relation to proportionality.

In relation to the second ground of appeal the appellant contends that the FTTJ failed to consider evidence relating to accommodation. At paragraph 25, the FTTJ states that no details are given of the appellant’s home and nothing said about whether it is owned or rented. By reference to the sponsor’s statement it is plain, as contended in ground 2, that details are given of the home and details are given about rented accommodation.

In relation to the second part of the second ground of appeal, the appellant contends that the FTTJ failed to consider evidence relating to financial support. It is argued that the FTTJ incorrectly stated at paragraph 23 that only an additional four money transfer receipts had been provided showing transfers between August and November 2018. By reference to the addendum bundle on file, it is plain that there are more than an additional four money transfer receipts and that some fall out with the period defined by the FTTJ (see addendum bundle at page 3 as an example showing two receipts dated April 2018 and May 2018 respectively).

As the foregoing matters go to issues of dependency which were at issue in the appeal, in my judgement the appellant identifies alleged errors of law in the decision.

It is arguable by reference to the grounds of appeal that there may have been errors of law in the decision. I grant permission to appeal.”

2. I was not provided with a Rule 24 reply by the Entry Clearance Officer but was given the indication that the appeal was resisted.

**Error of Law**

3. At the close of the hearing I indicated I would reserve my decision, which I shall now give. I find that there is a material error of law in the decision, such that it should be set aside. My reasons for so finding are as follows.
4. In respect of the second ground of appeal, which Mr Balroop did not draft adopted in full, as observed by Judge Buchanan in granting permission, there are indeed errors of law which I do find to be material in that they go to the key issue of

dependency by the Appellant upon his sponsoring mother, the widow of his late father Mr Rai, a former Gurkha soldier. In respect of Ground 2, firstly concerning the contact between the Appellant and the Sponsor, the oral evidence given which the FTTJ has failed to consider is that there were lengthy telephone calls between the Sponsor and the Appellant and there was never a gap of more than a day or so between their conversations. In addition to that evidence the documentary evidence also does not sit well with the judge's finding at §22 of the decision which stated that it was unclear whose telephone number was given on the telephone records, and that the records only revealed that the majority of calls lasted a few seconds or a few minutes, which pointed to insufficient irregular and meaningless contact between the Appellant and his mother. In fact, looking at pages 58 to 64 of the Appellant's bundle and the telephone records contained therein, on page 58 I note that the customer name given is that of the Appellant, and moreover I note that the mobile number identified for this itemised bill is that of the Appellant's, which matches his personal details given in the Visa Application Form at page 85 of the Respondent's bundle (in answer to question 21 on the application form where his primary contact number given there matches that given on the first page of the itemised telephone log). Furthermore, turning to the length of these calls I note from the calls that over the time period concerned, a matter of three months approximately, there were 175 calls, and attempted calls made between the Appellant and Sponsor, which is not an insignificant amount for a three month period. Taking the Appellant's evidence at its lowest, there was at least an extremely lengthy call every week between the Sponsor and Appellant, not to mention calls of lesser duration during the week which were by no means wholly insignificant. Thus it is plain that the assessment of the contact between the Sponsor and Appellant at §22 is inconsistent with the evidence before the judge and there has been a lack of anxious scrutiny given to the evidence, both documentary and oral that was before the First-tier Tribunal Judge in relation to this topic.

5. Turning to the findings in §23 regarding the money transfers passing between the Sponsor and Appellant and his dependency not being established (at least by financial means), as noted in the Grounds of Appeal there are in fact more than the stated four money transfer receipts provided to evidence the financial support between the Sponsor and Appellant and these do go far beyond the period of August to November 2018. Looking at the addendum trial bundle there are twenty receipts therein which, when combined with the other four receipts mentioned, cover a period of approximately June 2017 to November 2018 and at least arguably establish dependency by the Appellant upon the Sponsor, for a period of approximately one-and-a-half years. As noted in the grant of permission, these are contained at pages 1 to 10 of the addendum bundle, and in combination with the failure to consider the evidence within the Sponsor's witness statement at paragraph 14 (that she did not see the significance of these money transfer receipts and did not keep any, thus explaining the absence of any prior to June 2017), it is plain that the assessment of the financial dependency of the Appellant upon his sponsoring mother has not been looked at with anxious scrutiny either.

6. Turning to the issue of accommodation at §25 and the statement that there is no reference to the Appellant's living circumstances, I note that the Sponsor's witness statement at paragraph 2 does in fact mention that the Sponsor's family did not have any money to purchase or build a house of their own and that they lived in rented accommodation and the Appellant is residing at the address where his parents formerly did prior to their departure from Nepal. Thus in that light it is plain that the judge did not have a complete and accurate picture of the Appellant's circumstances in Nepal, nor his dependency, as alleged, upon his sponsoring mother, such that the First-tier Tribunal Judge could have lawfully assessed the question of whether the Appellant was dependent upon his sponsoring mother as an adult in his own right and whether the support was "real" or "effective" or "committed" in nature, as it would need to be pursuant to Lord Justice Sedley's judgment at [17] of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31.
7. Although the Grounds of Appeal also cite the decision of *Patel & Ors v Entry Clearance Officer (Mumbai)* [2010] EWCA Civ 17, wherein at [14] it was stated by Lord Justice Sedley that "what may constitute an excellent family life falls well short of what constitutes dependency", I note the decision in *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 at [17] wherein the decisions of *Kugathas* and *Patel* are cited with approval, as well as that of *Ghising* in the Upper Tribunal at [18] in the context of analysing whether or not Article 8 family life is engaged (that matter being a Gurkha family life appeal). I find that the approach in *Rai*, *Kugathas*, *Patel* and *Ghising* were not followed, nor was the approach given later in *Rai* concerning the application of Section 117 of the Nationality, Immigration and Asylum Act 2002 wherein Lord Justice Lindblom pointed to the parties submissions with approval at [56] to [57] that "in view of the 'historic injustice' underlying... such considerations would have made no difference to the outcome, and certainly no difference adverse..." to an Appellant; and that in that context "...considerations arising under section 117A and B could not have made a difference...".
8. Having identified material errors of law in respect of the First-tier Tribunal's assessment of dependency and contact between the Sponsor and Appellant, notwithstanding my observations regarding the approach in *Rai* not being followed in relation to Ground 3, I do not go on to consider the remaining grounds given that I have clearly identified material errors of law as argued in relation to the evidence before the First-tier Tribunal Judge which was not taken into consideration.
9. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

### **Notice of Decision**

10. The appeal to the Upper Tribunal is allowed.
11. The decision of the First-tier Tribunal is set aside in its entirety and this matter is to be remitted to be heard by a differently constituted bench.

**Directions**

- (1) The appeal is to be remitted to IAC Hatton Cross.
- (2) A Nepalese interpreter is required.
- (3) The Sponsor shall give evidence as before.
- (4) Consequently the time estimate given is two hours.
- (5) No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Saini