Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13306/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 September 2019	**On 27 September 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR DURGA PRASAD RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nepal born on 10 December 1983, so he is currently 36 years old. He appeals against the decision of First-tier Tribunal Judge Seelhoff promulgated on 16 May 2019 following a hearing at Hatton Cross some thirteen days earlier on 3 May 2019, when the judge dismissed his appeal against the respondent's decision refusing to grant him entry clearance to join his parents and siblings in the UK.

2. The appellant's case is that his father was a former Gurkha soldier and that but for what has been described in past cases as the "historic injustice" would have been permitted to join his family at a time when his father ought to have been allowed to make an application for entry clearance and bring his minor children with him. It is established now that save in unusual circumstances such an application by an adult child will usually succeed where first, the historic injustice is established (that is, that the father would have been entitled to entry clearance earlier but for that historic injustice) and secondly, that at the time of the application there is still family life extant between the now adult child and the father.

3. In this case, the judge made a decision that there was not family life between the appellant and his family and in the course of his decision he made a number of findings with regard to the integrity of the witnesses who gave evidence.

4. There are a number of issues raised within the grounds but it is sufficient for the purposes of this decision if I refer just to two of them, because on behalf of respondent, Ms Cunha has accepted that these particular submissions are well-made. The first is that during the hearing it is apparent that Mr Jesurum, who represented the appellant before the First-tier Tribunal as well as before this Tribunal, had expressed concern that the questions and answers were not being accurately interpreted and that in consequence the witnesses were confused within the evidence that they were giving. In this case, this is particularly important because the vagueness and lack of detail in the evidence was particularly relied upon (see e.g. at para 47) by the judge when considering the accuracy and reliability of the evidence in what at paragraph 46 the judge had described earlier as "a very finely balanced case". Mr Jesurum told this Tribunal, and Ms Cunha does not seek to challenge this, that what he was particularly concerned about, among other aspects of the evidence given, was that although he was asking questions in the past tense the translations were given in the present tense and that this suggested that there was something going wrong with the translating. Ms Cunha in particular accepted that the judge's reasons for dismissing these concerns of Counsel were not sustainable, where at para 35 of his decision, the judge had stated as follows:

> "[In regard to particular evidence] the sponsor's answer again did not make sense with Counsel suggesting that the interpretation must be wrong. I noted that Counsel did not speak Nepalese and that the questions were being broken down and put simply."

5. Ms Cunha was particularly concerned that the judge had not dealt properly with the concern that Counsel was obliged to express that there had been translation errors. Having regard to what Mr Jesurum informed the Tribunal today, the criticism is, in my judgment, justified, because one cannot simply dismiss a concern about translation because Counsel does not speak the language, where it is clear, as it was to Counsel, that the answers given did not relate accurately to the questions which had been asked. This is material because it has a bearing on the findings that the witnesses' evidence was unreliable.

6. There is moreover a further and more fundamental challenge to the decision which again Ms Cunha accepts is made out and it is that the judge had in mind the wrong test for family life. Addressing the Tribunal, Ms Cunha stated as follows:

> "The judge considered that there had to be shown 'dependency' per se. This was not the right test. The right test is the *Kugathas* 'family dependence test' which has been endorsed in *Rai* [2017] EWCA Civ 320 at paras 17 to 36. The real test is whether there is 'real, effective or committed' dependency; in other words, not just financial. By not applying the right test, we accept there was a material error affecting the rest of the judgment."

7. In his submissions, Mr Jesurum emphasised this aspect of the decision and referred the Tribunal to the decision within *Kugathas* of Sedley LJ where (in an independent judgment) he had referred to "dependency" as amounting to real, or effective or committed support (at para 17) and that this had been upheld in *Rai*. It was clear that the judge in this case had not applied the correct test.

8. In light of the submissions made on behalf of both parties, but also having independently considered this aspect of the case, I agree. This is particularly material in a case which was described by the judge as "a very finely balanced case" and accordingly the error of the judge in not applying (or not demonstrating that he had been applying) the correct test is a material one, because a judge applying the correct and less strict test of support might very well have made a finding that there was family life still between the appellant and his family, and this might very well have led to a successful appeal. It follows that the decision will have to be remade.

9. Both parties are agreed that on the facts of this case the appropriate course is to remit this appeal back to the First-tier Tribunal so that it can be remade by any judge other than Judge Seelhoff and with no findings of fact retained and I will so find.

Decision

I set aside the decision of First-tier Tribunal Judge Seelhoff as containing a material error of law and direct that the appeal be remitted to the First-tier Tribunal sitting at Hatton Cross, to be reheard by any judge other than Judge Seelhoff with no findings of fact retained.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 23 September 2019