Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/20426/2018
HU/20428/2018
(P)

THE IMMIGRATION ACTS

Decided without a hearing **Decision & Reasons Promulgated**
On 17 June 2020

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

JEEVAN KALA GURUNG (THE FIRST APPELLANT)
DIPAK GURUNG (THE SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal by the appellants against the decision of First-tier Tribunal Judge Herlihy ("the judge"), promulgated on 27 June 2019, in which she dismissed the appellants' appeals against the respondent's refusal of their respective human rights claims (made in the context of applications for entry clearance).

2. The appellants, who are sister and brother in their mid-thirties, and both citizens of Nepal, made the entry clearance applications in order to join their father ("the sponsor") in the United Kingdom. He is a retired Gurkha soldier who had settled in the United Kingdom in 2016.

3. The appellants' case throughout has been that they are, and always have been, materially supported by their father, with the consequence that they have enjoyed "family life" within the meaning of Article 8(1) ECHR. In turn, the historic injustice done to former Gurkha soldiers in the past meant that a refusal of entry clearance breached the appellants' protected rights with reference to Article 8(2).

Procedural issues

4. Before turning to the substance of these appeals, I address the procedural issues which have arisen as a result of the exceptional circumstances brought about by the Covid-19 pandemic.

5. Before these cases could be listed for oral error of law hearings before the Upper Tribunal, emergency measures put in place as a result of the pandemic took effect. In light of the Senior President of Tribunal's Pilot Practice Direction of 23 March 2020 and the Presidential Guidance Note No 1 2020, the ability of the Upper Tribunal to make decisions without a hearing, pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, was highlighted. This course of action was always, of course, subject to the central importance of ensuring fairness to both parties.

6. In the present cases, directions were sent out by the Vice-President on 1 May 2020. These stated that a provisional view had been reached that the error of law issue could be properly determined without a hearing. The parties were provided with the opportunity to raise any objections to this course of action within a stipulated timeframe. In the event, whilst the parties have provided helpful written submissions as the merits of the appeals, nothing has been said in respect of the method of reaching a decision.

7. In addition to the Pilot Practice Direction, the Presidential Guidance Note, and the need for fairness, I have taken full account of the following matters:

i. the overriding objective;

ii. the nature and content of the challenge to the decision of the First-tier Tribunal and the parties' respective written submissions;

iii. the guidance set out by the Supreme Court in Osborn v Parole Board [2013] UKSC 61.

8. Whilst the appellant's challenge does concern issues of procedural fairness, these have been clearly addressed in the written submissions. The scope of the appeals to the Upper Tribunal is narrow, given the restrictive grant of permission (see below). There are no other material matters that have arisen upon my consideration of the papers which would necessitate an oral hearing.

9. In all the circumstances, I have concluded that I can fairly and properly decide the error of law issue in these appeals without a hearing.

The respondent's refusal notices and review

10. The refusal notices for each of the appellants, both dated 17 August 2018, are essentially identical. They conclude that the appellants were in good health and had close family ties in Nepal. It was said that there was nothing preventing their parents from returning to live in Nepal. It is concluded that the appellants were not "wholly financially and/or emotionally dependent" on the sponsor. Dealing with Article 8, it is said that there was no family life as between the appellant and their parents, and that the refusal of entry clearance was proportionate.

11. Following the lodgement of appeal notices, the appellants' cases were reviewed by an Entry Clearance Manager on 28 February 2019. It is a fairly lengthy document, although much of it is taken up with somewhat generic references to case-law and the criteria set out in the respondent's policy (Annex K of IDI Chapter 15). The following passage is found in section C of the review:

> "I note that the appellant has provided some evidence of money transfer receipts and some WhatsApp messages dating from September 2017. However, this evidence is not sufficient to satisfy me that there is a relationship of dependency between the appellant and his sponsor. I take into account that his sponsor settled in the UK in February 2016. However, I note that his father was aged 69 when he settled in the UK. The appellant has failed to explain how he supported himself before his parents settled in the UK. I find it difficult to believe that a 69 years old man would have been working and supporting the appellant when he was residing in Nepal before February 2016, when his parents were settled in the UK. I am satisfied on the evidence before me that there is no relationship of dependency either financial or emotional between him and his father." (Underlining added)

12. The review maintained the original refusals in full.

The judge's decision

13. At [1.3]-[1.7] the judge sets out in some detail the reasons provided by the respondent in the refusal notices. At [2.2] the judge summarises the contents of the Entry Clearance Managers review, including the point underlined in the passage quoted above. The oral evidence of the sponsor is set out in some detail at [4.1]-[4.6]. [5.2] includes an express reference to Rai [2017] EWCA Civ 320.

14. The judge's findings of fact are set out at [5.6]-[5.8], with the conclusions drawn therefrom at [5.9]-5.10]. She did not accept that the appellants had been financially dependent upon the sponsor prior to the latter's settlement in the United Kingdom in 2016. One of the reasons for this finding was that stated by the Entry Clearance Manager in their review (see para 11, above) She did not accept that the appellants had been financially dependent upon the sponsor after his move to this country. The judge was unimpressed by the claim that the appellants were

themselves unable to find regular employment in Nepal. She was also not satisfied that the two appellants in fact resided together at the same family home, given that money transfer receipts appear to have shown different addresses. It was accepted that the entire family unit had resided together before the sponsor and his wife left Nepal in 2016. The judge accepted that there had been two visits by the sponsor to Nepal since his departure, and that there were telephone communications. However, she did not accept that this amounted to emotional dependency.

15. On the basis of these primary findings, the judge went on to conclude that there was no family life as between the appellants and the sponsor. In essence, the consequence of this conclusion was that the respondent's refusals of the human rights claims were proportionate. The appeals were duly dismissed.

The grounds of appeal and grant of permission

16. Four grounds put forward in the application for permission. First, it was asserted that the judge's adverse findings on the issue of financial dependency, both when the sponsor was still in Nepal and thereafter, were flawed by reason of procedural unfairness. Specifically, it was said that the sponsor had not been given the opportunity to address the judge's concerns: he had not been cross-examined on relevant matters; the judge had not raised the issues of her own volition; the points were not relied on by the Presenting Officer in submissions; and the points were not raised in the respondent's original refusal notices. As to the law, reliance is placed upon Browne and Dunn (1893) 6 R 67; Markem Corp v Zipher Ltd [2005] EWCA Civ 267; and MK (Sri Lanka) [2012] EWCA Civ 1548.

17. The second ground asserts that the judge erred by failing to take account of the sponsor's exemplary service record in the British Army when assessing his overall credibility.

18. The third and fourth grounds essentially argue that the judge misapplied the relevant test for the existence of family life, as set out in Rai, and, having done so, then went on to consider the evidence on an erroneous premise.

19. By a decision dated 2 December 2019, Upper Tribunal Judge Blundell granted permission on grounds 1 and 2, but refused it in respect of grounds 3 and 4. Judge Blundell raised the point that although the procedural unfairness challenge was arguable, it may be said that the sponsor had been given notice that his honesty had been put in question by what was said in the Entry Clearance Manager's review. In respect of this, the judgment of the Court of Appeal in Howlett v Davies [2018] 1 WLR 948 is cited.

20. There has been no subsequent application by the appellants to rely on grounds 3 and 4. I have proceeded to consider the appellants' challenge solely on the basis of the first two grounds.

The parties' written submissions

21. Detailed written submissions were provided by Mr Jesurum of Counsel, dated 12 May 2020. The two grounds upon which permission was granted are taken in reverse order, it being said that the success under ground 2 would be sufficient for the decision of the First-tier Tribunal to be set aside. It is submitted that in addition to the simple fact of the sponsor's long and unblemished service record in the Gurkha Brigade, there was supporting evidence (in the form of a Certificate of Service) which emphasised his reliability and honesty. The judge's failure to specifically take this into account when assessing the sponsor's credibility was a material error of law.

22. As to ground 1, the submissions adopt the following approach. First, it is said that the "rule" in Browne v Dunn applies in all cases before the First-tier Tribunal. In essence, points to be relied on by a fact-finder (in this case, the judge) against an individual's evidence *must* be put to that person at the hearing order that/she has an opportunity to address them. Second, even if Browne v Dunn does not apply in such proceedings, what is said in MK (Sri Lanka) does. In particular, the respondent should be taken as accepting, or at least not disputing, evidence that has not been the subject of challenge in cross-examination. In the present cases, it is said that the relevant matters held against the sponsor's honesty were not put to him at the hearing at all. Third, and in response to the point raised by Judge Blundell in his grant of permission, it is said that the passage in the Entry Clearance Manager's review quoted above and relied upon by the judge at the end of [5.7] did not constitute sufficient notice to the sponsor of the matters subsequently relied upon by the judge when finding several aspects of the evidence to be essentially untruthful. Fourth, even if the review had provided some form of notice to the sponsor, the fact that the particular point (or indeed any others) were not either raised in cross-examination or in submissions, or by the judge herself, rendered the adverse credibility findings procedurally unfair. Fifth, even if the judge was entitled to take the points against the sponsor without matters having been put to him at the hearing, it is said that she nonetheless mischaracterised the evidence before her (specifically in respect of the sponsor's Army pension as a source of income). It was an error for the judge not to have taken full account of the evidence when finding against the sponsor.

23. The respondent's written submissions are dated 21 May 2020. They assert that the respondent had never accepted the claim of financial dependency and that it was wrong to suggest that this issue was not before the First-tier Tribunal. No concessions of fact were made by the respondent at the hearing. Questions relating to financial dependency were put to the sponsor. Finally, it is said that the Entry Clearance Manager's review clearly put the sponsor's honesty in issue. Reference is made to Howlett v Davies.

Decision on error of law

24. I have concluded that the judge did err in law when reaching her adverse findings in respect of the sponsor's evidence. In this respect, grounds 1 and 2 have been made out.

25. There is in my view an interesting point of general importance which potentially arises in these appeals, namely whether what is said in Browne v Dunn applies to all appeals before the First-tier Tribunal (or indeed the Upper Tribunal when it remakes decisions). At pages 70-71 of the law report, Lord Herschell stated:

> "… I cannot help saying that it seemed to me to be absolutely essential to the proper conduct of the case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seemed to me, that is not only a rule of professional practice in the conduct of the case, but is essential to fair play and fair dealing with witnesses."

26. The implications of a strict application of this principle in this jurisdiction may well be considerable. However, on the particular facts of these appeals and for the reasons set out below, I need not address what might otherwise be described as the "bigger issue".

27. What I would say, however, is that it must surely be good practice on the part of any judge to identify the relevant issues in dispute at the outset of the hearing (certainly if this has not been done in advance, for example by way of skeleton arguments, but, to avoid any doubt, in any event). For these issues to be stated in writing within the decision (perhaps in a designated sub-section or within a summary of the representatives' submissions) would in my view be of real utility.

28. For the purposes of the present appeals, I take the starting point as being the need to ensure that a witness must be given a fair opportunity to meet points that may ultimately be held against them, particularly where their honesty is in question. It seems to me as though this general principle is uncontroversial.

29. The need to ensure fairness will therefore normally come down to the question of whether sufficient notice has been given to the witness. At its highest, the appellants' argument is that such notice can only properly be given if specific questions are put at the hearing itself (the passage from Browne v Dunn cited above, refers). However, approaching this issue from further down the ladder, so to speak, I take into account the conclusions of

the Court of Appeal in its judgements in Howlett v Davies and Deepak Fertilisers and Petrochemical Ltd v Davy McKee (UK) London Ltd [2002] EWCA Civ 1396. At [39] of the former case, the Court observed as follows:

> "39. It is perhaps worth adding two comments. First, where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide. Secondly, the fact that a party has not alleged fraud in his pleading may not preclude him from suggesting to a witness in cross-examination that he is lying. That must, in fact, be a common occurrence."

30. At [50] of Deepak Fertilisers and Petrochemical Ltd, Latham LJ held that:

> "Failure to cross-examine will not, however, always amount to acceptance of the witness's testimony, if for example the witness has had notice to the contrary beforehand or the story itself is of an incredible or romancing character"

31. On the respondent's case, the requisite notice was provided to the appellants (and, by extension, the sponsor) in the Entry Clearance Manager's review. In my view, even on the basis that notice of a dispute as to the sponsor's credibility was raised in that review, the effect of this was distinctly limited. First, it related to one, and only one, aspect of the assertions made in the entry clearance application and the subsequent grounds of appeal to the First-tier Tribunal: namely that the appellants had been financially dependent upon the sponsor whilst he was last living in Nepal. This suggestion was deemed by the Entry Clearance Manager to be "difficult to believe". No other specific credibility points were taken. It is also to be recalled that no such issues were raised in the original refusal notices. The second limitation is this. The comments contained within the review pre-dated the sponsor's evidence subsequently provided in his witness statement. This evidence expressly included the assertion that he had indeed been financially supporting the appellants prior to 2016, relying in the main upon his pension from the British Army (see para 7 at page 6 of the appellants' bundle). Thus, the aspersions cast upon the sponsor's honesty, such as they were, had not occurred within the full evidential picture.

32. Having regard to the above, I conclude that to the extent that any notice was provided to the sponsor within the review, a bare reliance upon the Entry Clearance Manager's comment was, *without more*, insufficient to find against the sponsor's honesty as regards the specific issue of the claimed financial support to the appellants pre-2016. From my reading of the judge's decision and her record of proceedings, I see no reference to the sponsor having been questioned by anyone as to *how* he had provided such support. Such questions could, and really should, have emanated in the first instance from the Presenting Officer. In any event, the judge, if

she was at least of the provisional view that this point might count against the sponsor's credibility, ought to have either clarified matters with the sponsor herself, or raised the point with the representatives at the outset of the hearing. The failure to address the issue at the hearing turns out to be significant. This is because the sponsor had provided evidence that he had been in receipt of a pension from the British Army (evidence that seemed to have been entirely unchallenged) and that it was *this source of income* which went to support the appellants (in combination with what appears to have been small-scale earnings from farm-work): it was never a question of the sponsor having to work as a 69-year-old in order to provide the support. This evidence was simply not considered by the judge. In this way, the failure to put relevant matters to the sponsor at the hearing very probably led the judge into error. The error can properly be described as procedural unfairness in the sense that the sponsor was not afforded the opportunity of addressing concerns as to his honesty in the context of *the evidence that he had put forward* (as opposed simply to a comment made by the Entry Clearance Manager soon after the appeals were lodged). Alternatively, the error could be categorised as a failure by the judge to take relevant evidence into account; a failure which resulted from relevant points not been put to the sponsor at the hearing. Either way, the error, relating as it did to the important issue of previous financial support, was my view clearly material to the overall assessment of whether there was family life.

33. The judge also did not accept that the sponsor had been financially supporting the appellants after his settlement in the United Kingdom in 2016. Given that the sponsor had specifically stated that he had provided such support (by using part of the public funds to which he was entitled, together with his Army pension: see paras 12-13 at page 7 of the appellants' bundle), the judge must be taken to have rejected the credibility of that evidence. The Entry Clearance Manager's review contains no assertion that anything said by the sponsor at that stage relating to support from the United Kingdom was untrue. I can see no reference in the decision or record of proceedings to the effect that the sponsor's evidence on this point was specifically challenged at the hearing. I conclude that on the specific issue of financial support being provided from the United Kingdom, the sponsor was not put on any notice that this aspect of his evidence was thought to be untruthful. It certainly cannot properly be said that the claim to have provided the appellants with some money from the public funds was fanciful: individuals are entitled to spend those funds as they see fit. Further, it cannot be right to suggest that a single reference to credibility concerns contained in the review constituted fair notice to the sponsor that *anything and everything* he might subsequently state in evidence was to be deemed untruthful. At the very least, if this was indeed the respondent's view, it should have been expressly stated to the judge at the outset of the hearing. In the absence of any such statement, cross-examination on the point, or closing submissions, it was incumbent upon the judge, as a matter of fairness, to raise any issues of concern herself. This did not occur, and I conclude that

the judge's adverse credibility finding this particular aspect of the sponsor's evidence is flawed by reason of procedural unfairness. This error is also material.

34. Similarly, although with less potency, the points held against the sponsor's evidence at [5.7] concerning the residence of the two appellants and the issuance of a passport to the second appellant in 2014 were neither raised in the review, nor addressed at the hearing in any form. Again, the sponsor cannot be said to have been put on any fair notice that these aspects of his evidence were considered to be untruthful. It follows that there was also material procedural unfairness here.

35. The errors I have identified above go to the core issue of whether family life existed as between the appellants and the sponsor. The judge's conclusion that there was no such family life is substantially undermined, as is the consequent conclusion that the respondent's refusal of the human rights claims was proportionate. On this basis, the judge's decision must be set aside.

36. I turn briefly to ground 2. It is of course the case that anybody, no matter what their professional or personal background may be, can give truthful or untruthful evidence. Each case is fact-specific. What is important is that all relevant evidence is taken into account when assessing an individual's credibility. In the present appeals, the sponsor provided his Certificate of Service document. This specifically stated that he had been deemed a "reliable" and "honest" individual over the course of his significant service for the British Army. In my view, this was evidence that should have been specifically taken into account by the judge when assessing the sponsor's honesty. It was all the more important to do so given that a number of matters going to his credibility had not even been put to him at the hearing. In all circumstances, I consider that the judge erred in this respect also. This is a second basis upon which her decision must be set aside.

Disposal

37. In their respective submissions, neither party has addressed the issue of disposal. I do not propose this stage to send out further directions seeking their views.

38. I have given careful consideration to para 7.2 of the Practice Statement: a remittal to the First-tier Tribunal is the exception to the rule that the matter will be retained by the Upper Tribunal. However, the core issue in these appeals involves the assessment of subjective evidence, in particular the credibility of the sponsor. I have concluded that the appropriate course of action is to remit these appeals in order that extensive fact-finding can be undertaken by the First-tier Tribunal as to the requisite component parts of the "family life" test under Article 8. There shall be no preserved findings of fact.

Anonymity

39. The First-tier Tribunal did not make an anonymity direction and I have not been asked to do so. I make no such direction.

Notice of Decision

40. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

41. I set aside the decision of the First-tier Tribunal.

42. I remit these appeals to the First-tier Tribunal.

Directions to the First-tier Tribunal

1) These appeals are remitted to the First-tier Tribunal (Taylor House hearing centre);
2) These appeals shall be reheard, with no preserved findings of fact;
3) The remitted appeals shall not be heard by First-tier Tribunal Judge Herlihy;
4) The First-tier Tribunal shall issue any further directions to the parties, as appropriate.

Signed: H Norton-Taylor Date: 5 June 2020

Upper Tribunal Judge Norton-Taylor