Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/13882/2019**
HU/13885/2019

THE IMMIGRATION ACTS

Heard at Field House (via Teams) **Decision & Reasons Promulgated**
On 5 July 2021 **On 05 August 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) BIDHAN RAI
(2) KABIRAJ RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Ms Jaja, instructed by Howe & Co Solicitors
For the Respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission granted by First-tier Tribunal ("FtT") Judge Gumsley, against FtT Judge Moon's decision to dismiss their appeals against the respondent's refusal of their human rights claims.

Background

2. The appellants are Nepalese nationals who are now 37 and 34 years old respectively. They sought entry clearance to join their mother, the sponsor. She is Diga Maya Rai, a Nepalese national who is settled in the UK. Mrs Rai's late husband and the father of the two appellants, Dal Bahadur Rai, was a soldier in the Brigade of Gurkhas between 1964 and 1980. Mr Rai passed away on 24 July 2001.

3. The sponsor and Mr Rai had four children. The appellants are the youngest two children. The other two children, a son and a daughter, are married and live in Hong Kong. The sponsor entered the UK as the widow of a Gurkha veteran on 26 July 2012.

4. On 25 March 2019, the appellants applied for entry clearance to join their mother in the UK. They stated that they had been born in Khotang but they gave a permanent residential address in Dhara. They stated that they were both unemployed; that they were supported by their mother; and that they were in contact with her by using Viber and telephone cards. Various documents were submitted with the application in order to support the family relationship and the sponsor's ongoing relationship with the appellants.

5. The applications were refused on 26 June 2019. The respondent did not consider her published policy to apply as the appellants were seeking to join their mother as opposed to a retired Gurkha soldier. She noted that the appellants had been described as married on their mother's application for settlement. The respondent did not accept that the appellants were reliant upon their mother. As for Article 8 ECHR, the respondent did not accept that there was a family life in existence between the appellant and the sponsor.

The Appeals to the First-tier Tribunal

6. The appellants appealed to the First-tier Tribunal and their appeals were heard together by Judge Moon ('the judge'), sitting at Hatton Cross on 22 October 2020. The appellants were represented by Ms Jaja, as they were before me. The judge heard oral evidence from the appellant, who attended the hearing remotely. She heard submissions from Ms Jaja and from the respondent's Presenting Officer before reserving her decision.

7. In her reserved decision, the judge proceeded – with the concurrence of the advocates – on the basis that the appellants had not married: [7]. The judge noted the evidence and the events at the hearing: [8]-[13]. At [14]-[20], the judge stated that the only issue before her was whether the refusal amounted to a disproportionate interference with the appellants' Article 8 rights and she cited relevant authority, including *Jitendra Rai v ECO* [2017] EWCA Civ 320 on the proper approach to such case.

8. The judge then grouped her analysis under two sub-headings: 'Emotional Dependency' and 'Financial Dependency'. At [22], she noted that there was an inconsistency over the number of times the sponsor had visited Nepal, in that she had said that there had been five visits in her witness statement but her passport only disclosed four visits. The judge stated that this was likely to be a simple mistake and that it made no material difference to her decision.

9. There was, the judge stated, 'as much direct contact as possible' between the appellants and the sponsor. For reasons she gave at [23]-[25], the judge found that the appellants were in contact with the sponsor once a week or every two to three days. She rejected Ms Jaja's submission that there was overwhelming evidence of almost daily contact. At [26]-[27], the judge noted that the appellants were not said to have any other relatives in Nepal and that they spent their time living on the money they were sent by the sponsor and socialising with their friends.

10. At [28]-[29], the judge expressed concern over what she thought was a second inconsistency in the evidence. She understood the sponsor to have stated in her witness statement that Dharan, where the appellants live, is a village, whereas she had stated in oral evidence that it was a city. The evidence suggested, the judge concluded, that Dharan was a larger town or city.

11. Having considered the evidence about the appellant's employment, or lack thereof, at [30], the judge returned to her concern about the description of Dharan. She noted that 'there is an inconsistency in the sponsor's evidence as to whether Dharan is a village or a city'. She did not accept that there were no job opportunities for these English speaking appellants: [31].

12. At [32], the judge accepted that the appellants had had the benefit of the sponsor's pension for two years. She did not accept that they had had access to the pension before then. The judge had similar concern in relation to the money remittance slips, in that there were none which were dated prior to November 2017. For reasons she gave at [35], the judge declined to draw an inference that there had been regular transfers since 2012. She concluded that the sponsor was simply not able – given her income – to afford to make regular payments in the sums claimed.

13. The judge was prepared to assume at [39] that the appellants lived rent-free in the family home but she was concerned that there was no evidence from the appellants to explain how they spent their mother's pension. This was evidence which would have been easy to obtain but the appellants had 'elected to remain silent in their own appeals': [40]. There was no evidence before the Tribunal to establish the amount that the appellants required to meet the monthly outgoings. All things considered, the judge concluded that there was insufficient evidence of financial dependency: [44].

14. In the concluding paragraphs of the decision, the judge recalled again what had been said in *Jitendra Rai* and *Kugathas*. At [47]-[48], she summarised her conclusions in this way:

> "[47] Considering the evidence as a whole and applying the factors set out by Arden LJ in *Kugathas* specifically, identifying the near relatives and considering the links between them. I have taken into account that these adult children, aged 34 and 36 have the support of each other, the possibility of emotional support from cousins in Nepal, the appellants are not therefore entirely, without family support in Nepal. I am satisfied that there is frequent contact between the appellants and the sponsor but, I find that telephone calls, even if made on a daily basis, do not in themselves demonstrate that more than normal emotional ties exist. Frequent and daily contact between adult family members by messages, telephone calls and other modern means of communication is not uncommon.
>
> [48] Taking all of these factors into account, I am unable to find that there are elements of dependency going beyond the normal emotional ties that would usually exist between adult children and their parents. I therefore find that there is no family life and so Article 8 is not engaged."

15. It was for those reasons that the judge dismissed the appeals.

The Appeals to the Upper Tribunal

16. Ms Jaja sought and was granted permission to appeal on two grounds.

17. By the first, Ms Jaja submits that the judge misdirected herself in law in her consideration of whether Article 8 ECHR was engaged in its family life aspect. This was particularly apparent at [44], [45] and [48], she submitted, in which the judge appeared to have substituted a test of dependency in place of the test in *Rai*.

18. By the second ground, Ms Jaja submits that the judge made two mistakes of fact which amount to errors of law. Both relate to the supposed inconsistences which the judge found to exist in the evidence. Ms Jaja submits that there was no inconsistency in the evidence as to the number of times the sponsor had visited Nepal. She said that she had visited five times and that was the number of visits shown in the sponsor's passport, contrary to the judge's analysis at [22]. The judge also misread the sponsor's witness statement in relation to Dharan. The sponsor's statement made reference to the family's life in the village and then to their relocation to Dharan. She had never suggested that Dharan was the village and the judge had simply misunderstood what was said. Whilst there were other aspects of the judge's reasoning which stood unchallenged, these errors were sufficient in Ms Jaja's submission to necessitate the judge's decision being set aside and the decision on the appeal being remade afresh.

19. In her response to the grounds and her oral submissions, the respondent does not accept that the judge erred in her approach to the engagement of Article 8 ECHR. She had cited and applied relevant authority and it was unrealistic to suggest that the judge had not applied the law she had cited. Insofar as the judge had erred in her conclusions about the number of visits to Nepal and the description of Dharan, these errors were not material to the outcome of the appeal. Mr Bates noted, on behalf of the respondent, that the judge's mathematical analysis of the sponsor ability to support the appellants to the extent claimed was unchallenged and cogent.

20. I reserved my decision at the end of the submissions.

Analysis

21. The test for establishing whether Article 8 ECHR is engaged in its family life aspect between a parent and their adult child has been established for at least 37 years. In *Odawey v ECO* [2011] EWCA Civ 840, Rix LJ summarised the position, and some of the learning from which it derived, as follows:

> "[35] As for the position of parents and adult children, it is established that family life will not normally exist between them within the meaning of article 8 at all in the absence of further elements of dependency which go beyond normal emotional ties: see *S v. United Kingdom (1984)* 40 DR 196 , *Abdulaziz, Cabales and Balkandali v. United Kingdom* [1985] 7 EHRR 471 , *Advic v. United Kingdom* [1995] EHRR 57 , *Kugathas v. SSHD* [2003] EWCA Civ 31 , and *JB (India) v. ECO* [2009] EWCA Civ 234 . That is not to say that reliance on the further element of financial dependency will bring a breach of article 8: no case in which it has in the present context has been discovered."

22. Nothing said by Lindblom LJ (with whom Henderson and Beatson LJJ agreed) in *Jitendra Rai* marked a departure from that line of authority. The principal error into which the Deputy Upper Tribunal judge had fallen into that case was to require the appellant to demonstrate some form of exceptional feature in the appellant's dependency upon his parents as a necessary determinant of the existence of his family life with them. So much is clear from what was said by Lindblom LJ and Beatson LJ at [36] and [61] respectively.

23. There was no such error on the part of the judge in this case. She was plainly well aware of the test to be applied. She cited *Kugathas* at [17] of her decision and she set out what was said by Sedley LJ at [17] of his judgment in that case, about reading down the concept of dependency so as to mean support and considering whether such support was real, committed or effective. The judge went on to cite what had been said by Arden LJ (as she then was) at [24]-[25] of *Kugathas*. She was aware of the holding in *Ghising* [2012] UKUT 567 (IAC), that *Kugathas* had been interpreted too restrictively in the past: [19] of her decision refers. And she then set out relevant sections of *Rai* at [20] of her decision. With respect to the judge, it is not easy to see

how she could have given herself a clearer or more comprehensive self-direction.

24. Ms Jaja seizes in her submissions on the fact that the judge used the term 'dependency' on more than one occasion in her decision. This, she submits, is evidence that the wrong test was being applied; what the judge should have been searching for was whether there was real or committed or effective support.

25. I am unable to accept this submission, which loses sight of the substantive analysis undertaken by the judge. She began that analysis by demonstrating the clearest possible understanding of the law and of the highly fact-sensitive nature of the necessary analysis. She was presented with a case in which the appellants stated that they were wholly financially dependent upon their mother and in which it was said that there was a higher degree of emotional dependency between mother and children than would ordinarily be expected. Over the course of several paragraphs, the judge made reasoned findings on those assertions. In drawing together those conclusions on the penultimate page of her decision, she certainly made reference (as has the Court of Appeal, the ECHR and the Upper Tribunal) to dependency. But she also made repeated reference to 'support', at [45] and [47] in particular.

26. It would be to read the decision inaccurately to suggest that the judge proceeded on the basis that nothing short of dependency would suffice to establish a family life in these circumstances. She considered the emotional and financial support which flowed from the sponsor to the appellants and she concluded that the evidence did not show anything more than the normal emotional ties that would usually exist between adult children and their parents. The judge's application of the law which she had set out in the earlier stages of her decision cannot properly be faulted, in my judgment.

27. I am bound to say that I am wholly unimpressed with the point taken by Ms Jaja in relation to the sponsor's passport. It is clear – as is accepted by Mr Bates in his realistic submissions – that the judge erred in thinking that the passport only showed the sponsor to have visited Nepal on four occasions. There is evidence of five visits and the judge erred in thinking otherwise. At [22], however, the judge stated that she was proceeding on the basis that the sponsor had made a simple mistake and that the point was immaterial to her decision. There is no reason to think that the judge somehow held the point against the appellants even though she said she had not. And I am not prepared to accept that this was evidence of a general lack of care in the judge's analysis. The decision is generally cogent and well-reasoned. Insofar as ground two is premised on the judge's slip at [22], it cannot prosper.

28. I am much more concerned about the other half of ground two and it is perhaps only fair that to record that I have changed my mind about the point more than once since reserving my decision.

29. It is clear that the judge made a mistake when she concluded that there was an inconsistency in the evidence. The sponsor spoke about 'the village' in her witness statement. She described a basic and rural lifestyle in the village. She then moved on, in the same part of the witness statement, to speak about the family's life in Dharan. The judge clearly formed the impression that the sponsor was describing one and the same location in this part of her witness statement. In doing so, the judge seems to have overlooked the first sentence of [10] of the witness statement, in which the sponsor said that her husband decided to move the family to Dharan after he was discharged from the British Army. The judge also appears to have overlooked the fact that the appellants' applications forms chime with this description, in that they both gave their places of birth as Khotang but their address in Nepal as Dharan.

30. The judge therefore erred when she concluded that the sponsor's oral evidence about the size of Dharan had changed. She had not described Dharan as a village in her witness statement and her oral evidence that it was a city did not represent a departure from the account which bore her signature.

31. The difficulty with this ground lies not in whether or not the judge erred. It is clear that she did, as I have explained above. The difficulty is, instead, as to whether or not the error was material to the outcome of the appeal. Mr Tan, who wrote the respondent's response to the grounds of appeal, and Mr Bates, who appeared before me, both argued persuasively that the error was not a material one. Mr Tan emphasised the fact that the judge clearly proceeded on the basis that Dharan is a city. He submits, therefore, that the error did not distract the judge from considering the real facts. For his part, Mr Bates drew my attention to the fact that there were other parts of the decision which were beyond challenge and submitted that the judge would necessarily have reached the same conclusion even if she had not erred in this respect.

32. With some hesitation, I have ultimately come to the conclusion that the judge's error about the sponsor's evidence vitiated her assessment of the relationship between the appellants and the sponsor. I am unable to accept Mr Tan's submission that the judge ultimately proceeded on the correct footing about the size of Dharan and that the error made no difference as a result. The difficulty with that submission is clear from [31] of the judge's decision, which starts with the following sentence:

> "Whilst I recognise that the employment situation in Nepal is difficult, there is an inconsistency in the sponsor's evidence in relation to whether Dharan is a village or a city."

33. As Ms Jaja submitted, therefore, the judge's error about the consistency of the sponsor's evidence went on to colour her view of the evidence she had heard. Had the judge been correct about the discrepancy, it is not difficult to see why. If she considered that the sponsor had attempted in her witness statement to portray the appellants as living a basic, rural lifestyle in the hills of Nepal, only to admit in her oral testimony that they in fact lived in a city, that would necessarily lead her to view what else was said with some circumspection. The judge was told that the appellants had not worked, for example, and she was unable to accept that there were 'absolutely no job opportunities' for the appellants in Nepal. She did not make that finding purely because the appellants lived in the city; the concern she had expressed over the preceding three paragraphs about the sponsor's inconsistent evidence must have been factored in to her refusal to accept what she had been told in this respect. As Judge Gumsley put it in granting permission: "this was a factor which would have featured in the Judge's ultimate assessment of the truth of the case the sponsor advanced."

34. Mr Bates' submission that the judge would have reached the same conclusion in any event fails for the same reason. The judge clearly thought that she was evaluating the evidence of a witness (the sponsor) who had attempted to change her account about the place in which the appellants live. It was through that prism that she went on to consider other aspects of what the sponsor said. The judge scrutinised the sponsor's finances very carefully and concluded that she was unable to accept that she had been sending £400 or so, eight times a year, since 2012.

35. The important point, for present purposes, is that the evidence showed that such payments had been made since 2017 and the judge was not prepared to draw an inference that these payments had been made for the preceding five years. One factor in that conclusion was the persuasive mathematical analysis she undertook at [35]-[37]. Another was undoubtedly the circumspection with which she viewed the sponsor's evidence as a result of the mistake the judge had made about Dharan. Despite Mr Bates' determined submissions that the error over Dharan can simply be severed from the rest of the decision, I have come reluctantly to the conclusion that it cannot. The judge's analysis of the sponsor's account got off on the wrong foot and I cannot know where it would have ended if she had not erred as she did.

36. I will therefore set aside the decision of the FtT and direct that the appeal is to be reheard by the FtT. In doing so, I should make it quite clear that the points made by the judge at [35]-[44] of her decision were cogent and that the appellants have been on notice of those points since October 2020. They

are on notice, in other words, of the concern expressed by the judge that the sponsor could not afford have afforded to remit in the region of £3200 per annum to the appellants since 2012. They are on notice of the likelihood that the respondent will take that point in the future and of the need, therefore, to attempt to meet it with financial evidence, failing which inferences might properly be drawn. And they are on notice of the perfectly proper concern expressed by the judge about the absence of a witness statement from either of the appellants dealing, in particular, with their need, in their thirties, to rely on their mother's pension whilst living rent-free in the family home.

37. For the avoidance of doubt, however, the rehearing of this appeal will be *de novo*.

Notice of Decision

The First-tier Tribunal's decision involved the making of an error on a point of law. I set that decision aside and direct that the appeal be remitted to the First-tier Tribunal for a *de novo* hearing.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 July 2021