



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

Appeal Number: HU/02134/2021
UI-2022-001219

THE IMMIGRATION ACTS

**Heard at Field House (Hybrid)
On 23 August 2022**

**Decision & Reasons Promulgated
On 4 October 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR ARJUN RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Jaisri, counsel instructed by Sam Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Rothwell, promulgated on 3 December 2021. Permission to appeal was granted by Upper Tribunal Judge Pickup on 13 June 2022.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. On 16 December 2020, the appellant applied for leave to enter the United Kingdom as the dependent son of his father, a former Gurkha soldier. In that application he stated that he was aged 42 and residing in the sponsor's property in Nepal.
4. In refusing that application, in a decision dated 1 March 2021, the Entry Clearance Officer (ECO), considered EC-DR 1.1 of Appendix FM but noted that the appellant had not declared any medical conditions or disability and was able to care for himself. The respondent decided that the appellant did not come within several aspects of the respondent's policy (as outlined in Annex K of the Immigration Directorate Instructions Chapter 15, section 2A). The ECO also considered there to be no exceptional compassionate circumstances which would result in a grant of leave outside the Immigration Rules. Consideration was given to Article 8 of the ECHR and relevant case law however the refusal of the application was justified and proportionate.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, it was accepted that the appellant could not meet the requirements of the Rules or Annex K. Owing to confusing evidence which led the judge to conclude that she was not being told the truth about the appellant's situation, the judge found that the appellant did not enjoy a family life with the sponsor. The decision of the ECO was found not to breach the appellant's Article 8 rights.

The grounds of appeal

6. The brief grounds of appeal contended, firstly, that the First-tier Tribunal judge misdirected herself in her assessment of the appeal in that she failed to adequately apply the principles in *Kugathas* [2003] EWCA Civ 31 and *Rai* [2017] EWCA Civ 320 and there was said to be a failure by the judge to assess the position at the date of the sponsor's departure. In addition, it was argued that there was a failure by the judge to consider that the appellant continued to reside in the family home.
7. Permission to appeal was granted on the following basis.
 4. At [31] of the decision the judge found there was family life, but that it did not go beyond normal emotional ties between a father and his adult son. I am satisfied that on the facts of this case it is at least arguable that inadequate consideration was given to the case law relevant to the existence and subsistence of family life in former Gurkha soldier cases.
 5. The second ground is unsustainable. It is not arguable that the fact of residence in the family home was by itself sufficient to

demonstrate support. However, that fact is undoubtedly relevant to the overall assessment.

8. The respondent filed a Rule 24 response on 6 July 2022, in which the appeal was opposed. In short, it was argued that owing to the deficiencies in the evidence it was open to the judge to find that the appellant had failed to demonstrate dependency on the sponsor.

The error of law hearing

9. Mr Jaisri argued that the primary error was in relation to *Rai*, in that there should be a twofold process which considers whether there was family life at the date of departure as well as a subsequent assessment to see if it continued to subsist at the time of the hearing. The grant of permission was in relation to that error. If the judge made no assessment of Article 8 at the date of the appellant's departure, the position thereafter could not be assessed against it. Noting that permission was granted on this ground, he declined to make any further submissions and urged me to set aside the decision for a rehearing to take place.
10. Ms Cunha agreed that the judge made no findings on any previous dependency between the appellant and the sponsor. The judge was aware that the Article 8 assessment was concerned with current dependency and whether the relationship was now going beyond normal emotional ties. The judge took into consideration the respondent's submissions regarding the gaps in the evidence and addressed it in her reasons. The respondent's position was that the sponsor came to the UK in 2007 and there were no visits to Nepal until 2014. In addition, there was a lack of documents. The Viber records did not show who was called, there was no evidence of remittances. The judge's findings addressed the absence of evidence as well as emotional dependency. While the judge did not refer to *Gurung* or *Rai*, she applied the case law, and the decision was sustainable.
11. Mr Jaisri wished to make no further submissions.
12. At the end of the hearing, I concluded that the First-tier Tribunal judge made no material error of law and upheld her decision and reasons. I give my reasons below.

Decision on error of law

13. In the grounds it is contended that the judge failed to apply the principles in *Kugathas* and *Rai* as well as that there was a failure by the judge to assess the position as at the date of the sponsor's departure.
14. In *Rai*, the heart of the matter was described as follows:

'the question whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still

subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1).'

15. At [2-6] the judge summarises the appellant's case, including that he lived with his parents in the family home until they came to the UK and that his parents joined him there when they were visiting Nepal. She also set out the claims that the appellant was receiving financial support from the sponsor and that they stayed in contact.
16. At [21], the judge records the submissions on behalf of the appellant which included a request to assess the case at the date of departure. Regrettably the judge did not demonstrate that she made that assessment, preferring to concentrate her assessment on the position at the date of the hearing. Nonetheless, it is plain from a cursory reading of the decision that the judge was aware of the appellant's claim to have enjoyed a family life with the sponsor until 2007 and nowhere in the decision and reasons is this claim rejected. It can therefore be inferred that the judge accepted the claim to a family life at the point of departure. While the judge did not refer directly to *Rai* or *Kugathas*, I find that she applied those cases in her assessment of the appellant's article 8 claim.
17. In *Rai*, the test is described as whether '*real committed and effective support*' is shown to exist. The judge considered the evidence of emotional and financial support and found it to be lacking and inconsistent. At [27], the judge noted that the sponsor's evidence was confused as to whether his Nepalese pension, equivalent to £434 per annum, was used for the benefit of the appellant and his sister in Nepal or the sponsor in the United Kingdom. No criticism has been made of the judge's conclusion at [28] that the sponsor would not 'be able to support the appellant, his sister and himself and his wife' on that pension and that the judge was 'not being told the truth about the situation with the appellant in Nepal.'
18. At [29], the judge notes that no statements from Standard Chartered Bank had been produced, the HSBC accounts showed only opening and closing balances (one of which was £0.01) and nor was there evidence of any money transfers to the appellant. Furthermore, in his witness statement, the sponsor said his UK pension had been stopped. In view of these uncontested findings, it is hard to see how the judge could have accepted that the appellant was being financially supported by the sponsor from his Nepalese pension or at all.
19. As for emotional support, at [31], the judge accepted that the appellant and sponsor were in contact. Nonetheless, she did not accept that the international calling cards and Viber logs amounted to evidence showing that the ties between the appellant and sponsor went beyond normal emotional ties between father and an adult son. In view, of the fact that the sponsor's wife and daughter were in Nepal and the documentary evidence did not provide any indication of the recipient of the Viber calls, the judge made no error in reaching this conclusion.

20. The relevant question was whether there existed a degree of dependency over and above that which would be expected in a normal family. The judge considered all the relevant evidence before concluding that, at the time of the hearing, there was no dependency and therefore there was no family life between the sponsor and the appellant.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

No application for anonymity was made and I saw no reason to make such a direction.

Signed T Kamara

Date: 24 August 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent" is that appearing on the covering letter or covering email**