Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number**: **UI-2021-001095**
HU/06586/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 12 May 2022	**On the 18 July 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

HEM CHANDRA TAMANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Balroop of counsel, instructed by Everest Law Solicitors
For the Respondent: Ms Aboni, Senior Presenting Officer

DECISION AND REASONS

1. This decision is in short form because the outcome was ultimately agreed between the parties.

2. The appellant is a Nepalese national who was born on 7 April 1989. He was therefore 33 years old at the date of the hearing before me. On 14 January 2020, he applied for entry clearance as the adult dependent relative of a former Gurkha soldier. He stated that he was single and that he lived in Lamjung, Nepal. He wished to join his father in the United Kingdom. His father was named as Aita Sing Tamang, a Nepalese national who was born on 1 January 1940. Mr Tamang was said to have been granted Indefinite Leave to Remain on 14 January 2020. The appellant also stated that he had spent just under five years

working in the United Arab Emirates between April 2014 and October 2019.

3. The respondent did not accept that the appellant met the requirements for entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules. Whilst she accepted that the appellant received some money from his father in the UK, she did not accept that he was financially and emotionally dependent upon him, or that there was a relationship which extended beyond normal emotional ties. She did not accept that there was a family life between the appellant and the sponsor, therefore, and she concluded that the refusal of entry clearance was not in breach of Article 8 ECHR.

4. The appellant appealed and his appeal was heard by the judge, sitting at Taylor House, on 25 May 2021. The appellant and the respondent were represented by counsel. The judge heard oral evidence from the sponsor and submissions from counsel before reserving his decision.

5. In his reserved decision, the judge attached significance to the fact that the appellant had spent five years in the United Arab Emirates and that there had been no earlier application for entry clearance. The judge concluded that the appellant was living independently from his father between 2014 and 2019. That, he noted, was a period 'in excess of two years'. The judge found that the appellant was not dependent on the sponsor during that time and that he was 'living an independent life'.

6. At [40], the judge noted that it was 'accepted that there is a family life between the appellant and his father' but he noted that the relationship 'does not amount to dependence'. He accepted that the sponsor had been sending remittances to the appellant but noted that this did not 'mean that the appellant had been or is unable to lead an independent life in Nepal or elsewhere'. The judge found that life could continue as it had and that there were no exceptional circumstances. So it was that the appeal was dismissed.

7. There are two grounds of appeal. The first is that the judge was bound by authority to allow the appeal as a result of his finding that there was a family life between the appellant and the sponsor. The second was that the judge had substituted a test of dependency rather than considering whether there was real, committed or effective support flowing from the sponsor to the appellant.

8. Upper Tribunal Judge Macleman considered both of these grounds to 'raise a debate' in his decision of 1 February 2022.

9. In her response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent submitted that the Tribunal had directed itself appropriately and that the grounds of appeal represented nothing more than a disagreement with findings of fact which were properly open to the judge.

10. Given the respondent's stated intention to defend the appeal, I heard briefly from Mr Balroop before turning to Ms Aboni. She accepted that it was not clear from the judge's decision what test he had been

seeking to apply to his assessment under Article 8 but submitted, at first, that this error was not capable of making a difference to the outcome. The appellant and the sponsor had lived apart for many years, she submitted, and the only sensible outcome was for the appeal to be dismissed. She accepted that the decision was 'poorly worded' and that the judge had not undertaken a clear analysis of Article 8 ECHR. On balance, she accepted when pressed that the decision was simply inadequate and that it could not stand. She invited me to allow the appeal and to remit it to the FtT, which was also the relief sought by Mr Balroop.

Analysis

11. I am sorry to say that I simply do not understand the basis upon which the judge reached the decision under appeal. The determinative question in this human rights appeal was whether there was a family life between the appellant and the sponsor. In order to answer that question, the judge had to consider whether the relationship was one which was characterised by more than normal emotional ties between the adult appellant and his aged father or whether there was real, committed or effective support flowing from one to the other. In the event that that question was resolved in the appellant's favour, the effect of the historic injustice perpetrated against the Brigade of Gurkhas is such that the appeal fell to be allowed on Article 8 ECHR grounds. That this was the correct approach is clear from two decisions of the Court of Appeal: Jitendra Rai v ECO [2017] EWCA Civ 320 and Gurung & Ors v SSHD [2012] EWCA Civ 8; [2013] 1 WLR 2546.

12. The judge accepted that there was a family life between the appellant and the sponsor. I do not understand the basis upon which he reached that conclusion. He certainly did not direct himself in accordance with the approach I have mentioned above. As contended in the second ground, there was certainly no consideration of whether there was real, committed or effective support between the appellant and the sponsor.

13. Instead, the judge seemingly treated this as a case in which the appellant was required to establish that he was dependent on the sponsor and that he was not leading an independent life from him. These requirements obviously appear in other immigration fields (regulation 8 of the EEA Regulations and paragraph 297 of the Immigration Rules spring immediately to mind) but they form no part of what was needed in a case such as the present. The judge was also aware that the appellant and the sponsor had lived apart from each other for nearly five years and he attached significance to the fact that this was a period 'in excess of two years'. Again, I simply do not understand why it was thought to be significant that the period of separation had passed the two-year mark. It seems, again, that the judge had some other provision in mind, rather than applying the approach required by the authorities cited above.

14. The judge might, of course, have concluded that the appellant had formed an independent and self-sufficient life in the UAE and had not (contrary to what was claimed) rekindled his close family relationship with his father before they had both applied for entry clearance in 2019. But I am unable to read the decision in that way. Nor was I

asked to do so by Ms Aboni. It is unclear what test the judge sought to apply to his consideration of whether Article 8(1) was engaged in its family life aspect. With respect to the judge, it is not clear whether he realised that that was the only relevant question in the appeal.

15. Nor is it clear why the judge thought that the appellant was required to demonstrate something 'exceptional' in order to succeed in his appeal. The structure of the decision actually suggests that the judge considered that the appellant was unable to meet some unspecified provision in the Immigration Rules and that he was therefore required to demonstrate exceptional circumstances in order to succeed on Article 8 ECHR grounds. That was wrong in law from start to finish when set against the proper approach in the jurisprudence. The decision was certainly erroneous in law and cannot stand. I accept the submission made jointly by Ms Aboni and Mr Balroop that the decision must be set aside and the appeal remitted to the FtT to be heard afresh by a judge other than Judge Lucas.

16. In so ordering, I should make it clear (as I did to Mr Balroop at the hearing) that the appellant plainly has a very difficult case. The fact that he lived in the United Arab Emirates for nearly five years is plainly material to the proper evaluation of Article 8(1) and it might well be that a judge who directs herself according to the authorities cited above comes to the conclusion that there is no family life between him and his father at the present time. Be that as it may, both parties are entitled to a clear and lawful resolution of that key issue.

Notice of Decision

The appellant's appeal is allowed. The decision of the FtT is set aside in full. The appeal is remitted to the FtT to be heard de novo by a judge other than Judge Lucas.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 June 2022