



Upper Tribunal

**(Immigration and Asylum Chamber)
HU/07500/2019 (P)**

Appeal Number:

THE IMMIGRATION ACTS

Decided under rule 34 (P)

**Decision & Reasons
Promulgated**

On 29 July 2020

On 6 August 2020

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

DEVENDRA RAI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

For the ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

Representation (by way of written submissions)

**For the appellant: Mr M Moriarty of Counsel instructed by Everest
Law Solicitors**

For the respondent: Mr A Tan, Senior Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by First-tier Tribunal Judge Davidge on 8 April 2020 against the determination of First-tier Tribunal Judge Wylie, promulgated on 13 December 2019 following a hearing at Hatton Cross on 5 December 2019.
2. The appellant is a Nepalese national born on 13 November 1976. On 12 December 2018, he sought entry clearance as an adult dependent child to join his father, a former Gurkha, present and settled in the UK. His application was refused by the ECO on 25 February 2019 and the decision was upheld following a review by the Entry Clearance Manager on 10 September 2019. The appellant lives with two of his brothers in the family home. An older brother is married and lives apart. The sponsor and his wife came to the UK in July 2016 in order to obtain medical treatment for the latter's heart condition and with the belief that they would be able to sponsor their adult children at a later date. They visited Nepal in July 2018. Although the sponsor then returned here four weeks later, his wife stayed behind but her health deteriorated and she passed away in February 2019. The sponsor managed to reach Nepal a few days earlier and stayed for about a month. Since his initial arrival in the UK, he has been sending funds to the appellant.
3. The judge heard oral evidence from the sponsor. It was conceded by Counsel at the hearing that the appellant could not come within the policy as he was well over 30 when the application was made (at 26) and the appeal was pursued on article 8 grounds only. The judge found that there was no family life such as to engage article 8 (at 43). Accordingly, she dismissed the appeal.
4. The grounds of appeal put forward by the appellant argue that the judge took irrelevant considerations into account and that she failed to properly apply the correct test. Reliance is placed on Rai [2017] EWCA Civ 320, and Uddin [2020] EWCA 338 for the correct approach to be applied. Permission was granted on both grounds.

Covid-19 crisis: preliminary matters

5. The matter was due to be listed for a hearing at Field House but due to the Covid-19 pandemic and the need to take precautions against its spread, the hearing was adjourned and directions were sent to the parties on 15 May 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.
6. The Tribunal has received written submissions from both parties. I now consider the matter.
7. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).
8. I have had careful regard to the submissions made and to all the evidence before me before deciding how to proceed. The respondent raises no objection to the matter being considered on the papers but the appellant seeks a remote hearing to present his arguments.
9. A full account of the facts are set out in those papers and that the issue to be decided is straightforward; more so, given the respondent's position (which I shall address below). There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. The objections put forward by the appellant are on general grounds only and there is nothing specific put forward to suggest that he would be disadvantaged by the lack of an oral hearing particularly as he is overseas and his sponsor's evidence was unchallenged. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in his best interests, particularly as the sponsor is unwell and requires the appellant's help as soon as possible. I am satisfied that I am

able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

10. The appellant's submissions are dated 26 May 2020. The respondent's are dated 8 June 2020. To date nothing appears to have been received in reply from the appellant.
11. The appellant relies on the grounds for permission in their entirety. It is pointed out that there was no challenge from the respondent as to the veracity of the sponsor's written and oral evidence and no suggestion in the determination that the evidence relied on in support of the appeal was anything other than entirely credible. It is submitted that the judge's conclusions in relation to whether the undisputed facts were sufficient to engage with the correct test of "*real, effective or committed support*" (as per Rai) under article 8 were at best unclear and/or inconsistent. It is submitted that the issue of whether or not the sponsor has bonds with his other children, who have not sought entry clearance, is irrelevant as the ultimate question for the purposes of this appeal is whether there is support between the sponsor and the appellant sufficient to engage with article 8. It is submitted that there does not need to be anything different, unusual or exceptional about the appellant's relationship with his father compared to relationship his siblings have and that it is entirely possible for the sponsor to have family life with more than one of his adult children.
12. It is submitted that the only basis on which the appeal was dismissed was the finding that article 8 was not engaged and that in reaching this finding the judge had treated the sponsor's bonds with his other children as material to the assessment and had erroneously taken those bonds into consideration when applying the test.
13. It is submitted that the fact that the appellant and two of his brothers continue to reside in the family home and that they cared for their mother in Nepal during the last eight months of her life was relevant to the extent that it served to demonstrate they were not living independent lives and that the family unit continued to subsist following their parents' settlement in the UK.
14. It is submitted that the sponsor's unchallenged evidence was that he had to borrow money to apply for his own settlement and that he is of limited means. Given his circumstances, the respondent quite properly did not take issue with the fact that he had not sponsored entry clearance applications for his

other sons to join him in the UK. Notably, he was not given any opportunity to address the judge's apparent concerns as to whether he had any future intention to do so, this being a matter which only came to light upon receipt of the determination.

15. It is submitted that the factual findings that the appellant was unmarried, accommodated by and financially dependent on his father who was in poor health, and with whom he maintained a close relationship, were more than capable of engaging with article 8 with reference to Rai if the test of support had been properly applied. It is submitted that the judge failed to provide any reasons for concluding to the contrary and that the determination suggests (at paragraph 40) that a heightened test of particular emotional dependency was erroneously applied in dismissing the appeal. It is submitted that the judge's errors were plainly material to the outcome because they were the only reasons given for the dismissal of the appeal. The Tribunal is urged to set aside the determination.
16. In his submissions for the respondent, Mr Tan concedes that the judge materially erred in considering whether article 8 family life was engaged for the reasons put forward in the grounds for permission to appeal and the submissions of 27 May 2020. It is accepted that having found that the appellant had lived with the sponsor until his departure from Nepal, that he continued to live in the sponsor's family home thereafter, that the sponsor had visited and stayed with him on two occasions since 2016, that the appellant was financially dependent on the sponsor and that they remained in regular and close contact, the judge erred in taking into account the relationship between the sponsor and his other sons when considering a family life was engaged between himself and the appellant. The respondent further accepts that inadequate reasons were given for the finding that article 8 was not engaged in light of the above findings and that the conclusion of the judge appeared at odds with the guidance set out in Rai (op cit), Ghising and others (Ghurkhas/BOC: historic wrong; weight) [2013] UKUT 567 (IAC) and Uddin (op cit).
17. The Tribunal is invited to set aside the decision of the judge and re-make it without the need for a further hearing given the sole issue was whether article 8 was engaged and that the judge stated that he would have allowed the appeal if family life had been found to exist.

Error of Law

18. I have considered all the evidence, the grounds for permission and the submissions made by both parties. I am grateful to the parties for their helpful submissions and to Mr Tan for fairly conceding the errors in the judge's determination which, I agree, makes the decision unsustainable.
19. The judge, for reasons which are entirely unclear in her short determination, appears to consider that any family life the sponsor has with his two other non appellants somehow detracts from the family life he has with the appellant. In doing so, she considered an irrelevant matter and strayed away from the correct test which was whether there was family life between the sponsor and the appellant. As pointed out by Mr Moriarty, the sponsor is not barred from having family life with others and that certainly does not make the family life with the appellant any less effective. This having been a matter of such concern that it was used to dismiss the appeal, fairness dictates that the judge should have put it to the sponsor at the hearing. It is certainly not an obvious point and so unsurprising that the appellant's representatives has not thought to cover it.
20. On this basis I set aside the decision of the First-tier Tribunal.

Re-making the decision

21. This is an appeal where the facts and evidence are undisputed and all that remains is for the law to be applied to them. Having regard to the respondent's position as set out in her submissions of 8 June 2020 and assuming that the appellant would have no objections to the matter being disposed of in his favour I proceed to re-make the decision and allow the appeal. In doing so I have had regard to the burden on the appellant to make out his case on the balance of probabilities and to all the evidence and submissions before me. My reasons are as follow.
22. There is no challenge to the sponsor's oral and written evidence and no challenge to the evidence from the appellant. It is accepted that the appellant lived with his parents until the sponsor and his wife came to the UK in 2016, largely due to the appellant's mother's ill health and believing that their children could join them at a later date. The appellant continued, as before, to live in the family home in Nepal with two of his brothers and continued to rely on his father for support as he had done prior to the sponsor's departure from Nepal. It is accepted that the appellant is single and does not work. The sponsor is of limited means and it is accepted that he could not afford to travel more frequently to Nepal but the evidence is still that he made visits in 2018 and 2019 and that

his wife who travelled with him in 2018 remained there and died the following year. It is accepted that the appellant cared for his mother in the last months of his life assisted by his two brothers. It is accepted that the appellant and the sponsor speak almost daily and have maintained a close bond. I make no findings on when the sponsor also shares the same closeness with his two other sons as that is not relevant for the purposes of this appeal.

23. I am satisfied on the unchallenged evidence that the appellant has shown that he has family life capable of engaging article 8(1). The support between the appellant and his father is real, effective and committed and the correct test is met.
24. The respondent does not rely on any poor immigration history, deception or criminality to argue that interference in that family life would be proportionate. In the circumstances, the historic injustice to Gurkhas and their families requires a decision in the appellant's favour.

Decision

25. The decision of the First-tier Tribunal is set aside as it contains errors of law. I have re-made the decision and allow the appeal.

Anonymity

26. There has been no request for an anonymity order at any stage and I see no reason to make one.

Signed

R. Kekić

Upper Tribunal Judge

Date: 29 July 2020