



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
HU/07398/2020

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 25 January 2022**

**Decision & Reasons  
Promulgated  
On 8 February 2022**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**GYANDENDRA RAI**

Appellant

**and**

**ENTRY CLEARANCE OFFICER (SHEFFIELD)**

Respondent

**Representation:**

For the appellant: Mr R. Jesurum, instructed by Everest Law Solicitors  
For the respondent: Ms S. Cunha, Senior Home Office Presenting  
Officer

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision dated 06 March 2020 to refuse a human rights claim in the context of an application for entry clearance to join his mother in the UK, who is the widow of a former Gurkha soldier. The respondent refused the application on the ground that there was insufficient evidence to show that there was the necessary real, committed or effective support to show family life between a parent and an adult child.

2. First-tier Tribunal Judge K. Swinnerton ('the judge') dismissed the appeal in a decision promulgated on 26 May 2021. The judge noted that the respondent was not represented at the hearing. The sponsor adopted her witness statement. The judge heard evidence from the sponsor and asked her some questions himself.
3. The sponsor's witness statement explained the family history in some detail. She explained their living circumstances and why her children had not previously needed to find work. She also explained why it was hard for them to do so and what efforts the appellant had made to find work after his father died. The sponsor also explained what happened after she entered the UK and what funds were remitted to her adult children in Nepal (both by transfer and through others travelling there). She explained that she was illiterate and innumerate. This was one reason why she did not keep all the receipts for money transfers, but also she did not realise their importance. The sponsor said that she had given permission for her son to access her bank account in Nepal and there was a letter from the bank to support this. Her statement also made clear that the appellant was living in the family home.
4. The judge summarised the main pieces of evidence contained in the appellant's bundle. He stated that the key test was whether there was real, effective or committed support and cited the case of *Rai v ECO (New Delhi)* [2017] EWCA Civ 320. He went on to note that the appellant was 46 years old at the date of the application and had lived apart from his mother for just over 2 years. He accepted that the sponsor kept in regular contact with her children in Nepal. He turned to consider the evidence of financial support and conducted an analysis of the documentary evidence produced by the sponsor. He found that the documentary evidence did not show that the sponsor had been providing financial support since she left Nepal. The earliest evidence began shortly before the application for entry clearance was made.
5. The judge found that there was no explanation as to why the appellant would not have looked for work at any time after leaving school and before his father died. He found it difficult to accept that the appellant had spent almost 30 years since leaving school without looking for work. He concluded that there was insufficient evidence to show 'real, effective or committed' support. The judge went on to find that there was insufficient evidence to show that there were emotional ties that went beyond the usual ties between an adult son and his mother in order to show that Article 8 was engaged.
6. The appellant appealed the First-tier Tribunal decision on the following grounds:
  - (i) The decision was procedurally unfair. The sponsor had given an explanation as to why she did not keep earlier remittance receipts. In the absence of the respondent the evidence was unchallenged. It

was not open to the judge to reject that evidence because it was not challenged in cross-examination, and if was going to be rejected, it should have been put to the witness.

- (ii) The second ground refers to the same evidence, but argued in the alternative that the judge failed to give reasons for rejecting the sponsor's evidence as to why she did not keep earlier evidence of remittances.
- (iii) The third ground refers to the same evidence, but argued that the judge failed to take into account the sponsor's explanation relating to illiteracy and innumeracy.
- (iv) The fourth ground argued that the judge failed to 'apply the correct test to unchallenged evidence' by unduly relying on documentary evidence of remittances and failing to take into account other relevant considerations. The judge failed to take into account the fact that the appellant still lives in the sponsor's home. The judge placed too much weight on the issue of whether the sponsor had ever worked when dependency did not need to be of necessity.
- (v) The fifth ground argued that the judge failed to have regard to the reciprocal support between the appellant and the sponsor in circumstances where she made clear that she finds their separation difficult and talks to her children about the 'loneliness and misery' she feels.

### **Decision and reasons**

7. It is not necessary to set out my reasons for finding an error of law in the First-tier Tribunal decision in any detail because there was a level of agreement between the parties that the judge failed to take into account or make findings on relevant considerations and that these omissions were sufficient to amount to a material error of law.
8. Whilst the general propositions about procedural fairness contained in the first ground are made with reference to relevant case law, I disagree with the assertion that a judge is obliged to accept evidence given by a witness simply because it is unchallenged by cross-examination by the respondent. The burden of proof in a human rights appeal is on the appellant to show that the evidence produced is reliable. It is for the tribunal to evaluate the evidence, to make findings on what weight can be placed on the evidence, and then to consider whether the evidence is sufficient to meet the requirements of the relevant legal framework. It is correct to say that if a judge has any doubts about aspects of the evidence then those should be put, as a matter of fairness, to a witness to answer. However, in my assessment the difficulty with the First-tier Tribunal decision is not one relating to procedural fairness, but the absence of findings relating to relevant considerations.

9. It was open to the judge to consider the documentary evidence relating to remittances but that was not the totality of the evidence relating to the support provided by his mother. If the judge was going to rely on an absence of documentary evidence of earlier remittances it was necessary to consider whether the sponsor's various explanations as to why she did not keep earlier receipts adequately explained the lacuna in that evidence. Given that it was the sponsor's evidence that she did send earlier remittances, albeit she did not have documentary evidence as proof, it was also necessary for the judge to make findings as to whether he accepted her oral evidence or not.
10. I find that there is also some force in the argument that the judge placed undue emphasis on documentary evidence of financial dependency and failed to take into account other relevant considerations. The key legal issue was not solely financial dependency, but whether in all the circumstances of the case it was shown that there was family life between the sponsor and her adult son that might engage the operation of Article 8 of the European Convention. Financial dependency is only one aspect of a broader assessment.
11. The fact that the appellant had not worked was not necessarily a relevant consideration, and even if it was, the judge failed to engage with the detailed explanation given in the appellant's witness statement. The fact that the appellant lived with his mother throughout his life before he came to the UK and was still living in the family home now owned by her was also a relevant consideration. The fact that his mother expressed distress at being separated from her adult children and feels isolated in the UK was also a relevant factor that should have been taken into account in assessing whether there was family life that went beyond the normal emotional ties between adult relatives. The fact that they had been separated for several years as a result of his mother's decision to take up her right of residence in the UK should also have been considered in light of the sponsor's explanation that she could not afford to apply for her and her children at the same time. The need to consider family life within the proper context of the historic injustice towards Gurkhas was emphasised in *Rai* and was absent from the First-tier Tribunal's assessment.
12. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law.
13. Paragraph 7 of the Practice Statements states that remaking in the Upper Tribunal is the normal course of action even if further findings of fact need to be made, but it is at the discretion of the tribunal to decide whether it is appropriate to remit the case for a fresh hearing in the First-tier Tribunal in all the circumstances of the case.
14. There was some ambivalence from the parties as to what the appropriate course of action should be in this case. Mr Jesurum said that no findings

should be preserved but also suggested that remitting the case would give the respondent a 'second bite of the cherry'. He also suggested that the decision could be remade without hearing further evidence from the sponsor. These arguments appeared to be premised on an assumption that all the evidence should be accepted at its highest, but if the decision of the First-tier Tribunal is set aside a new process of assessment will need to take place. The fact that the respondent might be represented at a fresh hearing and could ask questions of the sponsor does not create any unfairness. It is the normal course of events in an adversarial appeal system. Even if the sponsor's evidence were to be accepted, it would be important for a judge to hear from her in order to evaluate the strength of her familial ties with the appellant. The decision on disposal is a finely balanced one. Given that the case will need to be heard by way of a fresh hearing, and the sponsor will need to give evidence, and there is further evidence that may need to be considered by the respondent, I conclude that it is suitable for remittal on this occasion.

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed M. Canavan                      Date 26 January 2022  
Upper Tribunal Judge Canavan

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### **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**