Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18937/2018

THE IMMIGRATION ACTS

Heard at Bradford
On 13 January 2020

Decision & Reasons Promulgated
On 24 January 2020

Before

UPPER TRIBUNAL JUDGE LANE

Between

SUJAN LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Caswell, instructed by Everest Law
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a male citizen of Nepal who was born on 7 June 1987. He appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer dated 10 August 2018 refusing his application for settlement in the United Kingdom as the adult dependent relative of Mrs Jai Limbu, the widow of a former Gurkha soldier (hereafter referred to as the sponsor). The First-tier Tribunal, in a decision promulgated in July 2019, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. I find that the decision of the First-tier Tribunal is flawed by legal error such that it falls to be set aside. My reasons for reaching a conclusion are

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as follows. First, I agree with Mr Caswell, who appeared for the appellant before the Upper Tribunal, the judge has addressed the wrong test in determining the appeal on Article 8 ECHR grounds. At [26], the judge writes that, ‘the appellant would … need to show that he has exceptional compassionate circumstances warranting his application/appeal being allowed.’ This observation, in turn, led the judge to find at [30] that there was no ‘evidence of contact between the appellant and his mother in the United Kingdom’ which could be described as ‘exceptional or beyond the norm.’ The judge does not elaborate; he has not attempted to define the ‘norm’ as regards contact in these circumstances or what he considers may constitute exceptional. Secondly, and more seriously, the judge has overlooked the basis upon which he should have considered whether family life existed between the appellant and the United Kingdom sponsor. At [36], judge concluded that such family life as required protection by Article 8 not been established in this case. However, in doing so he ignored the guidance provided by the Court of Appeal in *Rai* [2017] EWCA Civ 320 at [36]:

> “As Ms Patry submitted, it was clearly open to the Upper Tribunal judge to have regard to the appellant's dependence, both financial and emotional, on his parents. This was, plainly, a relevant and necessary consideration in his assessment (see the judgment of the court in Gurung, at paragraph 50). If, however, the concept to which the decision-maker will generally need to pay attention is "support" – which means, as Sedley L.J. put it in Kugathas, "support" which is "real" or "committed" or "effective" – there was, it seems to me, ample and undisputed evidence on which the Upper Tribunal judge could have based a finding that such "support" was present in the appellant's case. He found, however, that the appellant had a "reliance upon his parents for income that does not place him in any particular unusual category either within this country or internationally" (paragraph 23 of the determination), and no "indication on balance of a dependency beyond the normal family ties and the financial dependency" (paragraph 26). These findings, Mr Jesurum submitted, suggest that he was looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them. Mr Jesurum submitted that this approach was too exacting, and inappropriate. It seems to reflect the earlier reference, in paragraph 18 of the determination, to the requirement for "some compelling or exceptional circumstances inherent within [an applicant's] own case". In any event, Mr Jesurum submitted, it elevated the threshold of "support" that is "real" or "committed" or "effective" too high. It cannot be reconciled with the jurisprudence – including the Court of Appeal's decision in Kugathas – as reviewed by the Upper Tribunal in Ghising (family life – adults – Gurkha policy) (in paragraphs 50 to 62 of its determination), with the endorsement of this court in Gurung (in paragraph 46 of the judgment of the court). It represents, Mr Jesurum contended, a misdirection which vitiates the Upper Tribunal judge's decision.”

3. The Court of Appeal did not go on to state in terms that it agreed with the submission of the appellant's counsel though it did note that the submission had 'force.' I agree with Mr Caswell that the judge, instead of trying to find circumstances which he considered might be exceptional, should instead have examined whether the degree of support provided for the appellant by the sponsor was real or effective or committed. For example, the judge appears to give little, if any, weight to the fact that the appellant continues to live in the sponsor's home in Nepal. Such an arrangement plainly can constitute support in the proper sense but the extent to which the arrangement in this instance was a factor in the judge's analysis is not clear.

4. I agree also with Mr Caswell that the judge has played down excessively the role of possible historic injustice in the assessment of proportionality. The judge was aware (as had been the Upper Tribunal in *Rai*) that the sponsor mother had travelled without the appellant to the United Kingdom but he has not dealt with the fact that she may only have done so because the Immigration Rules prevented the appellant joining her at that time.

5. I find that the judge's analysis is flawed by legal error with the result that his conclusion, that family life does not exist in this instance, cannot stand. An analysis having regard to all relevant features of the case may lead to a different outcome as regarding the existence of family life and, if a Tribunal concludes that family life does exist, then it seems possible that the outcome of the appeal might be different.

6. I am aware that the judge at [10] made the observation (which has not been challenged) that witness statements on the same day before the same judge prepared in another appeal by the same solicitors had paragraphs in common with the statement filed by the sponsor and appellant. Having made that observation, the judge accordingly attached no weight to the statements. At [32], judge refers again to the statements and found that the sponsor's claim that her husband frequently expressed a desire to settle in the United Kingdom upon retirement was not reliable. It is not entirely clear, however, what impact that finding had in the overall assessment. In any event, the judge's misgivings regarding the evidence do not correct his error in assessing on the incorrect basis whether family life may or may not exist.

7. In the light of what I say above, I set aside the decision. None of the findings of factual stand. There will need to be a new fact-finding exercise which is better conducted in the First-tier Tribunal to which this appeal is returned for that Tribunal to remake the decision.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of factual stand. The appeal is returned to the First-tier Tribunal for that Tribunal to rehear the appeal *de novo* and to remake the decision.

Signed
Upper Tribunal Judge Lane

Date 20 January 2020