Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25011/2018 (V)
HU/25015/2018 (V)
HU/25019/2018 (V)
HU/25022/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 November 2020	**On 11 December 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MISS RANKUMARI LIMBU
MISS AMRITA LIMBU
MISS PAWATIDEVI LIMBU
MR MADANKUMAR LIMBU
(ANONYMITY DIRECTION NOTE MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation
For the Appellants: Ms A Jaja, Counsel instructed by Everest Law Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

This has been a remote hearing to which the parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties and neither party expressed any concern with the process.

DECISION AND REASONS

Background

1. The appellants are citizens of Nepal born on 16 May 1979, 28 June 1981, 1 July 1986 and 21 July 1987. Their father ("the sponsor") is a former Gurkha soldier who settled in the UK in 2014. The appellants' mother and five of their siblings live in the UK, having been granted entry clearance because of their relationship with the sponsor.

2. The appellants are appealing against a decision of Judge of the First-tier Tribunal Barrowclough ("the judge") promulgated on 20 September 2019 dismissing their appeal against the respondent's decision to refuse to grant them entry clearance.

Decision of the First-tier Tribunal

3. The judge dismissed the appeal because he was not satisfied that the family life between the appellants and sponsor engaged Article 8(1) ECHR.

4. In paragraph 28 of the decision, the judge summarised the legal principles relevant to the assessment of whether Article 8(1) ECHR is engaged, with reference to *Rai v Entry Clearance, New Delhi* [2017] EWCA Civ 320. He stated:

> "The critical question is whether Article 8(1) ECHR is engaged, and that depends on whether [the sponsor] provides the appellants with real, committed or effective support, or vice versa. To determine that issue, the Court of Appeal's judgment in *Rai*, and in particular paragraph 39, is germane: have the appellants proved that they enjoyed family life with their parents before they left Nepal, and has that family life continued notwithstanding [the sponsor] and his wife leaving Nepal and coming to the UK? If both limbs of that question have been satisfied, Article 8 is engaged …"

5. In paragraph 29 of the decision the judge stated that he accepted family life existed between the appellants and their parents before the appellants' parents left Nepal in 2014, but not that it continued thereafter. The judge stated that he reached this conclusion for "essentially the reasons [ ] set out at paragraphs 26 and 27." It is therefore necessary to consider paragraphs 26 and 27 of the decision to understand the reasons the judge found that family life did not continue after 2014.

6. Paragraph 26 contains a detailed assessment of the evidence of, and adduced on behalf of, the appellants. The judge stated that he did not accept that one of the appellants lives in the family home purchased by the sponsor, or that the appellants are not working. He found that the sponsor's money transfers were used to pay off his debts rather than maintain the appellants. The judge made clear that he did not find the appellants' evidence credible. He stated:

> "It is difficult if not impossible to say with any degree of certainty, or even probability, what the appellants' true situation is. That is because of the manifest shortcomings in the evidence provided by or on behalf of the appellants. …

> Overall, the very most that could be said on the appellants' behalf is that the position is unclear."

7. In paragraph 27 the judge found that:
   (a) The appellants were over 30 years old when they applied for entry clearance.
   (b) They were able to care for themselves.
   (c) They were not wholly dependent, whether emotionally or financially, on the sponsor.
   (d) Money transfers were made for paying off the sponsor's loans, rather than for the appellants' maintenance.
   (e) The appellants do not suffer from medical conditions or disability.
   (f) The appellants are capable of and have been working.
   (g) The emotional relationship between the appellants and sponsor does not go beyond those normally expected or arising between parents and adult child or children.

Grounds of Appeal

8. The grounds of appeal submit that the judge "failed to apply the law" in respect of whether Article 8(1) was engaged and include six reasons. These are:
   (a) The judge failed to consider the appellants' dependence on the sponsor for accommodation as proof of family life.
   (b) The judge failed to consider that the provision of accommodation to the appellants by the sponsor was "effective support" and therefore proof of family life.
   (c) The judge failed to consider the appellants' continued residence in the family home after 2014 as proof of continuing family life.
   (d) The judge failed to take into consideration the undisputed evidence that the appellants were unmarried and financially and emotionally dependent on their parents.
   (e) The judge failed to take into consideration unchallenged evidence of continuing financial support by the sponsor through his service pension.
   (f) The judge failed to consider the sponsor's loans, which were taken out in order to fund the purchase of a home for the use of the appellants, as evidence of continuing financial support.

Permission to Appeal

9. Permission to appeal was granted by Upper Tribunal Judge Finch for a reason unrelated to the grounds of appeal. Upper Tribunal Judge Finch stated:

> "In paragraph 27 of his decision First-tier Tribunal Judge Barrowclough concluded that the appellants had failed to demonstrate that they were wholly dependent on the sponsor, whether emotionally or financially. This was not the test adopted in *Rai v Entry Clearance, New Delhi* [2017] EWCA Civ 320. Rather, as stated in paragraphs 42 and 43 of that decision, the test is whether the appellants' family life with the sponsor is still subsisting and this is a question of fact in the context of the circumstances of the particular case."

Submissions

10. Ms Jaja elaborated on the six points raised in the grounds, which she described as instances of the judge failing to apply the law as set out in *Rai v Entry Clearance, New Delhi* [2017] EWCA Civ 320. She also stated that she relied on the grant of permission.

11. Mr Jarvis submitted that Ms Jaja's submissions mischaracterise the authorities on Article 8(1). He submitted that none of the authorities (including *Rai*) state that provision of accommodation and/or being unmarried is, of itself, sufficient to establish family life under Article 8(1). He argued that the question of whether family life is engaged is intensely fact-specific and the judge conducted a proper assessment of the facts.

12. With respect to the grant of permission, Mr Jarvis acknowledged that "wholly dependent" is not the correct test, but argued that this phrase was used not because the wrong test was applied but because it was the appellants' case, which the judge was responding to, that they were wholly dependent on the sponsor. Mr Jarvis also noted that there had been no challenge to the judge's finding that there was not an emotional relationship that would engage Article 8(1).

Analysis

13. Given that the judge, at paragraph 28 of the decision, correctly identified the applicable legal principles and that, in paragraph 26, gave several sustainable reasons for finding the appellants' account unreliable, I am sympathetic to Mr Jarvis's argument that the use of the term "wholly dependent" in paragraph 27 of the decision may be no more than a reflection of how the appellants' case was advanced in the First-tier Tribunal. However, from the way paragraph 27 is drafted (and from a consideration the decision as a whole) I cannot escape the conclusion that one of the primary reasons the judge found that Article 8(1) was not engaged was that the appellants had not established that they were "wholly dependent" on the sponsor. This is a material error because what constitutes family life may fall significantly short of what constitutes dependency: see *Rai* at paragraph 17 citing Sedley LJ in paragraph 14 of *Patel and Others v ECO, Mumbai* [2010] EWCA Civ 17, stating:

> "What may constitute an extant family life falls well short of what constitutes dependency."

14. I also find that there is merit to Ms Jaja's argument that the judge fell into error by failing to make a finding about the appellants' claim to receive financial support from the sponsor through his service pension. The judge discussed the money transfers made by the sponsor (which the judge found were not for the appellants' maintenance), but did not address the appellants' argument that in addition to money transfers they were provided with access to the sponsor's service pension.

15. I also accept Ms Jaja's argument that the judge, in finding that the sponsor's money transfers to the appellants were used to pay off his loans rather than for the appellants' maintenance, appears to have failed to address the appellants' argument that the loans were taken out solely for their benefit and therefore by paying off the loans the sponsor was in fact providing them with support.

16. For these reasons, I am satisfied that the decision is undermined by a material error of law and should be set aside.

17. I have carefully considered whether the findings of fact can, either in part or in whole, be preserved. I have reached the conclusion that they cannot. In paragraph 26, the judge found that the evidence of the appellants lacked reliability and had "manifest shortcomings". Despite this, the judge accepted a large part of their evidence. For example, at paragraph 27 he accepted that some of the appellants live in rent-free accommodation provided by the sponsor and that they all enjoyed family life with him before he left Nepal in 2014. It is unclear how the judge was able to reach the conclusion that the appellants had discharged the burden of establishing these important parts of their claim when he found at paragraph 26 that it was impossible to say what the true situation was and little if any reliance could be placed on their evidence. In the light of this, I have formed the view that it is not appropriate in this case to preserve any findings of fact.

18. Given the extent of further fact-finding necessary, I find that the appeal should be remitted to the First-tier Tribunal to be heard afresh.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

20. The appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge. No findings of fact are preserved.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan 30 November 2020