Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20603/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Teams **Decision & Reasons Promulgated**
On the 26th October 2021 **On the 16th November 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

DIPENDRA RAI
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr R Jesurum, of Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr J McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal born on 27th April 1981. He applied for entry clearance to join his parents in the UK as the son of a Gurkha veteran, and the application was refused on 15th October 2019. His

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appeal against the decision was dismissed by First-tier Tribunal Judge Burnett in a determination promulgated on the 29th April 2021.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Nightingale on 24th June 2021 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider relevant evidence, including medical evidence and evidence contained in the witness statements; had put things in dispute when they were not disputed by the respondent and without putting the appellant on notice; and arguably set a threshold for the establishing of family life which was too high.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision should be set aside. The hearing took place via Teams, a format to which no party raised any objection. There were no issues of connectivity or audibility in the hearing.

Submissions – Error of Law

4. The appellant argues in the grounds of appeal, in summary, as follows. It is firstly argued that the appeal was not conducted fairly because the respondent had accepted in the refusal notice that the appellant received financial assistance from his father and was in contact with him and had made a visit; but it was not accepted that there was family life as it was not accepted that what was taking place was real, effective or committed support from his parents. The First-tier Tribunal accepted at paragraph 65 of the decision that “there had been no real challenge to the core facts in this case”, but then found that the appellant had not evidenced his personal circumstances or his financial support at paragraphs 55 and 56 of the decision, and then finds that he was not satisfied that the appellant’s true living circumstances had been provided at paragraph 57 of the decision. The sponsors were not given an opportunity to provide evidence on these issues so the proceedings were not fair as it was not and could not have been understood by the appellant and those acting for him that they were factually in dispute.

5. Secondly, it is argued, that the First-tier Tribunal erred in law in failing to consider the witness evidence with respect to the lack of visits in 2017 -2019 which was said to be due to the appellant’s father’s ill health which was in turn supported by a medical report in the bundle, when finding that this was a factor in showing a lack of family life at paragraph 58 of the decision. There is, it is argued, also a failure to consider the witness statement evidence with respect to accommodation; money transfers prior to 2019; the appellant’s lack of/ sporadic work for which he received very low pay; the difficulties for the appellant and his father communicating by phone; the appellant’s continued presence in the family home; his having not created a family of his own; and the distress at the separation. There was ultimately a

failure to consider all this evidence in the round and instead there was just a focus on single issues such as the lack of visits; the appellant being single; and the Viber messages as being insufficient to show family life.

6. Thirdly, it is argued that the wrong test is applied for family life. At paragraphs 64 and 74 the appellant is required to show that he is "alone and isolated" rather than simply "something more than normal emotional ties" as per the correct test set out in Kugathas v SSHD [2003] EWCA Civ 31.

7. There was no Rule 24 notice filed by the respondent. Mr McGirr conceded the errors of law argued for in the grounds were made out. Both parties agreed that the proper cause given the acceptance that the hearing had not been fair was that the matter should be remitted to the First-tier Tribunal with the decision and all findings set aside. I agreed that this was the proper course to follow in this case.

8. Mr Jesurum said that the application for a wasted costs order detailed in email correspondence in relation to counsel's fees would be made directly to the respondent by the appellant's solicitors and that I did not need to hear oral argument on this issue at the current time.

Conclusions – Error of Law

9. It is found by consent that the First-tier Tribunal erred in law by acting unfairly in departing from the accepted facts in the refusal decision without giving the appellant notice of this fact.

10. I find that it is also ultimately unclear what level of financial support is accepted by the First-tier Tribunal as having been provided by the sponsors to the appellant given the respondent's acceptance that the appellant had received some level of financial support in the reasons for refusal letter, and the acceptance that there had been "no real challenge to the core facts in this case" as stated at paragraph 65 of the decision. This, I find, is an error of reasoning as this ought to have been clear on the face of the decision as a key factual matter in determining the case

11. The First-tier Tribunal sets out very long extracts from the various case law with respect to the issues of historic injustice and family life at paragraphs 46 to 55 of the decision. The conclusion is that the issue on which this appeal turns is whether there is family life which will be shown by "real", "committed" or effective support provided by the sponsoring parents to the appellant, which is, I find, the correct test to apply. However, I find, as argued by the appellant, that a secondary test of whether the appellant is "alone and isolated" appears to have also been applied, as at paragraphs 64 and 74 it is concluded that the appellant has not shown he is "alone and isolated" when considering

whether there is emotional dependency above normal ties between parents. I find that this was a misdirection of law.

12. I find that the First-tier Tribunal also erred by either failing to reason why the evidence of the appellant and sponsors was not to be seen as credible or in failing to reason why it otherwise needed supporting documentary evidence. The only issue raised as being inconsistent is that of the appellant's work which is said to be discrepant between the appellant and his mother. The father, in his 2019 letter says the appellant has never worked or earned money; the applicant says that he is unemployed and has always been so in his 2019 statement but clarifies that whilst he has not received a salary he has done some seasonal farming work for which he has received a share of produce in his statement of 19th January 2021 ; mother's oral evidence is he did some very sporadic farm work a long time ago for which he was paid in the order of 30p. I find that there needed to be greater reasoning to find that this was a discrepancy that warrant finding that the witness evidence should be doubted, and thus that the decision errs for want of reasoning for finding that documentary evidence was required in addition to the witness evidence at paragraphs 60, 62 and 63 of the decision.

13. I also find that when considering the issue of additional emotional support the First-tier Tribunal fell into error as there was a failure to consider the witness evidence of telephone calls every 2 to 3 days, as well as the visit and the evidence of upset at their separation set out at paragraph 14 of the appellant's witness statement. I also find that living in the family home paid for by his parents was found to weigh against the appellant having a family life relationship with his parents at paragraph 64 of the decision, rather than in his favour, which I find to be an irrational or at least an unreasoned approach.

Decision:

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

2. I set aside the decision of the First-tier Tribunal and all of the findings.

3. I remit the re-making hearing to the First-tier Tribunal de novo.

Signed: Fiona Lindsley Date: 26th October 2021
Upper Tribunal Judge Lindsley