IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003865
UI-2023-003866

First-tier Tribunal No:
HU/60478/2022
HU/60484/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

17th January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

BUDDHI RAJ GURUNG
YUDDHA RAJ GURUNG
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Rajiv Sharma of Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr Chris Avery, a Senior Home Office Presenting Officer

Heard at Field House on 7 December 2023

DECISION AND REASONS

Introduction

1. The appellants challenge the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision on 26 November 2022 to refuse them entry clearance as the children of a former member of the

Gurkha regiment who was discharged before 1 July 1997. They are citizens of Nepal.

2. **Mode of hearing.** The hearing today took place as a blended face to face and Microsoft Teams hearing. There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

3. For the reasons set out in this decision, I have come to the conclusion that the appellants' appeals must be allowed and the appeals reheard in the First-tier Tribunal.

Background

4. The appellants' father was discharged from the Gurkha regiment in 1982. The appellants, who are brothers, were born in Nepal in 1982 and 1986 respectively. Their sponsor father and their mother settled in the UK in 2019. Their sister is also here, with her husband. The first appellant is a qualified doctor, with a postgraduate degree in orthopaedics. He has in the past worked in farming sometimes, growing vegetables.

5. The second appellant is a University dropout, having studied for 18 months (or two years) in the Humanities and Social Sciences Department at Tribhuvan University, Kathmandu. Both are said to be unemployed at present. They are single, and their father supports them by sending money, albeit not often, and allowing them to live in the family home in Nepal. Communication between the parents and these appellants is by Viber call.

First-tier Tribunal

6. The First-tier Judge dismissed the appeal because she did not believe that the first appellant is not working in medicine. She did not accept that family life existed between the appellants and their Gurkha father. Her reasoning at [38]-[40] is relatively brief:

> "38. I do not find it credible that after the earthquake in Nepal in 2015 when doctors were required to treat the many people who were injured, that he was unable to obtain employment despite being a qualified surgeon in orthopaedics. I find that the first appellant and has also worked. I do not find credible the sponsor's evidence that he has never worked. The sponsor also gave evidence that the first appellant worked on the farm growing vegetables and was able to support himself from that produce.
>
> 39. In evidence the sponsor said that he has spent money on educating his children and that he is aware that "everyone's children are coming to the United Kingdom so he wishes that he could bring his too". I find that the sponsor's intention is to bring his sons to the United Kingdom for a better future and not because they are financially and emotionally dependent upon him. I accept that as the father he has a good relationship with them and would like them to settle abroad.
>
> 40. In taking the evidence as a whole, I find that any interference in the appellants' Article 8 rights will be proportionate and will not result in unjustifiably harsh consequences. I find that the appellants' personal

> circumstances and the historic injustice do not outweigh the public interest consideration in this case in maintaining effective immigration control."

7. The appellants appealed to the Upper Tribunal.

Permission to appeal

8. The grounds of appeal asserted that the First-tier Judge had found the appellants not to be dependent by equating financial support with dependency, which was an error of law: see *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 which held that family life can exist in the absence of 'dependency'.

9. The appellants also contended that they had been subjected only to limited cross-examination, and that at no stage was it put to them that they were not being truthful about the first appellant not working, nor that there was 'well documented' evidence of the need for large numbers of doctors following the earthquake.

10. Applying *Deepak Fertilizers &Anor v Davy McKee (UK) London Ltd* [2002] EWCA Civ 1396, a party 'should not be able to impugn the evidence of another party's witness if he has not asked appropriate questions enabling the witness to deal with the criticisms that are being made' (per Lord Justice Latham at [49], with whom Lord Justice Brooke and Mr Justice Hart agreed). Applying *Deepak,* a witness' account could be disbelieved without more only where such account was of 'an incredible or romancing character' and devoid of any plausibility.

11. Permission to appeal to the Upper Tribunal was granted on the following basis:

> "The Appellant are brothers and the sons of a former member of the Brigade of Gurkhas. They were born in 1982 and 1986 respectively and are highly educated. Their prospects of showing that refusing them entry clearance interferes disproportionately with any "private and family life" they have with their relatives in the United Kingdom do not seem great.
>
> However they are entitled to a lawful decision and counsel's grounds supporting the contention that this decision is not lawful are, I find, arguable.
>
> I give permission on each grounds but I find that paragraph 21 of the grounds goes to nub of the matter. It is arguable that the Judge was overly concerned with financial dependency and it is arguable that the Judge made finding that were not open to her because they rejected assertions that were not challenged by the Respondent.
>
> The Appellants must show that their sponsor's evidence was not in dispute. It may be that this can be done by agreement but if it cannot then evidence will be needed. …"

12. There was no Rule 24 Reply by the respondent.

13. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

14. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

15. Mr Avery for the respondent accepted that in the refusal letters, the respondent had accepted that the claimants were receiving financial support from the sponsor and that there was contact between them and their sponsor father. These concessions had not been withdrawn.

16. Mr Avery further accepted that the Judge's finding that a medical doctor would have been able to find employment because of the earthquake was not put to the first appellant. The evidence of financial and emotional support was very limited and it had been open to the Judge to reach the conclusions she did on the evidence. The sponsor's evidence was at odds with that of the appellants, and the correct case law had been applied.

17. For the appellants, Mr Sharma said that the finding of independence was based on inconsistencies which were not put and the wrong test had been applied. The appellants were living in the family home in Nepal, which was a form of financial support, and he reminded me of the partial concessions on other financial and emotional support in the refusal letters. It was difficult to understand the relevance of the Judge's finding that the sponsor wanted a better future for his sons: that was not his primary intention, and again, this had not been put to the sponsor. In any event, it did not form part of the relevant legal test for financial and/or emotional dependency. The decision should be set aside and the appeals reheard.

Conclusions

18. The decision in this appeal is unsafe. It relies on important matters which were not put to the witnesses in cross-examination, and imports assertions about post-earthquake employment for doctors which are unsourced and on which no argument was invited in the First-tier Tribunal.

19. There is no alternative but to set aside this decision for remaking afresh in the First-tier Tribunal.

Notice of Decision

20. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.
    I set aside the previous decision. The decision in these appeals will be remade in the First-tier Tribunal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 2024