Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03887/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd November 2017	**On 20th December 2017**

Before

THE HONOURABLE LORD MATTHEWS
and
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR ANUP RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER (DEHLI)

Respondent

Representation:
For the Appellant: Mr E Wilford, Counsel instructed by Everest Law Solicitors
For the Respondent: Mr Chris Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Mr Anup Rai against the decision of First-tier Tribunal Judge Brewer, promulgated on the 18th July 2017, to dismiss his appeal against refusal of his application for entry clearance (hereafter, "the decision") as the son of Bhim Rai (hereafter, "the sponsor").

2. The appellant is a citizen of Nepal, who was born on the 15th July 1988, and the sponsor is a person with settled status in the United Kingdom that was

granted in recognition of his military service with the Brigade of Gurkas in the British Army.

3. The grounds upon which the appellant purported to appeal against the decision were recited by Judge Brewer at paragraph 14 of his decision, namely, that:

    (i) The decision was not in accordance with Chapter 15, section 2A of the applicable Immigration Directorate Instructions [IDIs];
    (ii) The decision was incompatible with the right of the appellant to respect for family life under Article 8 of 1951 Human Rights Convention;
    (iii) The decision was "otherwise not in accordance with the law"; and
    (iv) "Discretion should have been exercised differently".

4. We note from the outset that the only ground of appeal against the decision that was in fact available to the appellant was that which we have summarised at paragraph (ii) above [see sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014 with effect from the 5th April 2015]. Whilst it may well be, as Mr Wilford suggested, that section 2A of Chapter 15 of the IDI's is intended by the Secretary of State to reflect Article 8 jurisprudence that does not alter its essential character as a discretionary policy exercisable outside the Immigration Rules. The Tribunal did not therefore have power to review the respondent's exercise of that discretion. This was so even before the right of appeal was further restricted by section 15 of the Immigration Act 2014 (see Patel and others [2013] UKSC 72, at paragraph 57) and it was certainly the case as at the date of decision (the 15th January 2016) and the date of the hearing of the appeal (the 23rd June 2017). We do not therefore consider it either necessary or helpful to consider those grounds wherein it is argued that the judge misapplied the IDIs to the facts of this appeal. We shall accordingly concentrate solely upon the question of whether the judge undertook a materially flawed analysis of the single ground of appeal that was open to the appellant, namely, that the decision was unlawful under section 6 of the Human Rights Act 1998 as being incompatible with his rights under Article 8 of the 1951 Human Rights Convention.

5. The appellant's history can be summarised as follows. The sponsor moved from Nepal to Hong Kong in 1994 or 1995, taking his wife and the appellant with him. The appellant, however returned to Nepal with his mother a few months later. The appellant was at this time some 6 or 7 years of age. In 2001, when he was aged about 13 years, his mother rejoined his father in Hong Kong leaving the appellant at a boarding school in Nepal. At the age of 18 years, he began to study at an engineering college in Kathmandu. From that day to this he has lived together with his paternal cousin, and his paternal cousin's close family members, in a house in Nepal that is owned by the sponsor. That was the situation when, in 2014, his parents relocated from Hong Kong to the United Kingdom. At the date of the hearing before the First-tier Tribunal, he was studying for

an MBA which he was due to complete some 15 months hence. He planned thereafter to undertake a PhD. His parents have visited the appellant regularly in Nepal throughout the period of their physical separation and have continued to support him financially.

6. Judge Brewer concluded that the appellant had failed to establish the existence of family life as between himself and the sponsor. In reaching that conclusion, he had regard to the fact that the appellant had lived apart from his father (the sponsor) since the mid-1990s and from his mother for the last 13 years. He also took account of the fact that the appellant had made all the key decisions in his life from the age of 18 years. He accepted that there was what he termed "a cultural notion" that Nepalese children were not considered to be truly independent of their parents until such time as they are married [paragraph 44]. However, he found that there was "no compelling evidence" that the appellant was emotionally dependent upon the sponsor. He also found that the appellant was essentially living in a family unit with his paternal cousin, and his paternal cousin's close family members, with whom he shared "bills and food" [paragraph 36] Finally, he concluded that "an element of [financial] dependency" did not suffice, on the particular facts of this appeal, to justify a finding of family life as between the appellant and his parents and younger sibling who now reside in the United Kingdom [paragraph 44].

7. Mr Wilford submitted that the judge had (a) perversely implied that family life between the appellant and his parents had been eroded by their decision to send him to a boarding school in Nepal whilst they were residing in Hong Kong, (b) been unduly dismissive of his parents' visits to him in Nepal, (c) had perversely concluded that his emotional connection to his parents had been displaced by the fact that he was (i) now living with his paternal cousin and his family, and (ii) had chosen to pursue a course of further education in Nepal, (d) failed to place weight upon the fact that the appellant was under the age of 30 years, had yet to establish his professional life, was unmarried, and did not have children of his own, and (e) repeated the errors of approach that had caused the Court of Appeal to set aside the decision of the Deputy Upper Tribunal Judge to dismiss the appeal in **Jitendra Rai** [2017] EWCA Civ 320.

8. We take Mr Wilford's final criticism of the judge's decision first. The errors of law that were identified by Lindblom LJ in **Jitendra Rai** can be summarised as (i) failing to make a distinct and definite conclusion as to the existence of 'family life' between the appellant and his parents [paragraph 30], (ii) looking for some extraordinary or exceptional feature in the appellant's dependence on his parents as a necessary determinant of the existence of his family life with them [paragraphs 36 and 37], and (iii) placing weight upon the fact that the appellant's parents had voluntarily chosen to relocate to the United Kingdom leaving the appellant in the family home in Nepal._We do not think that the judge in this appeal committed any of these errors. Firstly, his conclusion that family life between the appellant and his parents was not established on the evidence before him is clearly stated at paragraph 40 of his decision.

Secondly, we cannot see that the judge at any stage applied a test of 'exceptionality' when considering the possibility that an adult child might continue to enjoy family life with his parents after his age of majority. On the contrary, the judge repeatedly stressed the fact-sensitive nature of the task he was required to undertake and of the necessity to consider all matters in the round [paragraphs 42 to 45]. In support of his submission to the contrary, Mr Wilford drew our attention to the judge's use of the word "compelling" in paragraph 36 of his decision. However, that was a reference to the strength of the evidence rather than by way of a suggestion that there would need to be some compelling or exceptional level of dependency in order to support a claim of family life between parents and their adult child. Thirdly, we cannot see anything in the terms of the judge's decision to suggest that he considered the voluntary nature of a separation between parents and their adult child as relevant to the purely factual question of whether family life had continued to exist thereafter. It is true that the judge dwelt to some extent upon the sponsor's decision to send the appellant to a boarding school in Nepal rather than to one in Hong Kong in 2001. However, this was within the context of deciding whether the appellant met the requirements for the favourable exercise of discretion outside the Immigration Rules rather than it being relevant to the question of whether there was family life between them.

9. Turning to Mr Wilford's other submissions, we are satisfied that the judge was entitled to take account of all the matters to which he referred in support of his conclusion that family life had not been established and that he did not overlook anything that was legally critical to that decision. The concept of 'family life' is an elusive one that is incapable of precise definition. It is perhaps for this reason that the authorities tend to concentrate on what does not constitute family life rather than upon what does. We do not understand the judge to be saying that the fact that the appellant was sent to a boarding school at the age of 13 years necessarily eroded his family life with his parents at that time. Nevertheless, we are satisfied that the judge was entitled to take it into account when deciding the extent to which the appellant is currently emotionally dependent upon his parents in the United Kingdom. We do not accept that the judge was unduly dismissive of the relevance of the sponsor's visits to the appellant in Nepal. Visits between adult family members who do not reside together are commonplace, and the judge was thus entitled to conclude that they were not of themselves indicative of family life. The appellant's current residence in a family unit comprising of himself, his paternal cousin, and his paternal cousin's immediate family members, was an established fact to which the judge was also entitled to have regard in assessing the extent to which the appellant continued to be dependent upon his parents for emotional support and advice. The same is true of the appellant's independent decision-making in relation to his further education. Finally, the judge was not bound to treat either his parents' contribution to his financial maintenance or the cultural perception that unmarried adult

children remain part of their parents' family until marriage as being decisive of the question as to the existence of family life between them.

10. We therefore conclude that the First-tier Tribunal did not legally err in finding that family life had not been established between the appellant and his parents.

Notice of Decision

11. The appeal is dismissed.

No anonymity direction is made.

Judge Kelly Date: 20th December 2017

Deputy Judge of the Upper Tribunal