Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08265/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21st November 2017

Decision & Reasons Promulgated
On 27th November 2017

Before

UPPER TRIBUNAL JUDGE COKER

Between

OM BHAKTA BANTAWA

Appellant

And

ENTRY CLEARANCE OFFICER (New Delhi)

Respondent

Representation:

For the Appellant: Mr D Balroop, instructed by Everest Law Solicitors (19-20 Chambers)
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a Nepalese national born 17th May 1988 applied for entry clearance to settle in the UK as the dependant adult son of Tej Bahadur Bantawa, a former Gurkha soldier. The application, which was made on 14th February 2016 when the appellant was aged 27, was refused on 22nd February 2016.

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2. The appellant's father and mother were issued with settlement entry clearance on 3rd January 2013 and arrived in the UK on 3rd April 2013. They are both present and settled in the UK. The appellant's application for entry clearance was refused on the grounds that the money transfer receipts covered the period 02/09/2015 to 14/01/2016 with no evidence of funds sent prior to September 2015 and that there was no evidence to show a continuing and dependant relationship on his mother/father. The ECO also considered, and refused, entry clearance on a discretionary basis and on Article 8 grounds.

3. First-tier Tribunal judge Khawar heard the appeal on 26th June 2017 and dismissed it for reasons set out in his decision promulgated on 18th July 2017. Permission to appeal was granted on the grounds that it was

> "…arguable that the foundations for the conclusions set out by the judge in the context of financial dependency before reaching a consideration of whether there would be a breach of Article 8 outside the Rules has led to error in construing the fact of dependency in the financial context regardless of cause.
> …arguable that the judge's findings in this context should have been taken into account in embarking upon a proportionality exercise which was not embarked upon because at paragraph 36 of the decision the judge took the view that the appellant failed at the very first hurdle under **Razgar.**
> …arguable that at paragraph 35 of the decision the judge has taken into account factors which are extraneous to the central issue of dependency given factors referred to by the judge at paragraph 35 of the decision.
> ..arguable that the judge's construction of the available evidence in relation to financial support has had other ramifications and consequences in relation to findings in respect of where the appellant lived and the timing and collection of money."

4. Before me Mr Balroop identified the three critical matters the appellant relied upon. Firstly, that the First-tier Tribunal's adverse decision regarding the money transfers as determinative that the appellant was not living at the family home in Itahari but with one or other of his sisters in Pokhara or Kathmandu was based upon an error of fact. The judge in paragraph 25 refers to the receipts being in the name of the appellant and not his sisters, thus the appellant's evidence that his sisters collected the money on his behalf and he collected it from them was not sustainable. Mr Balroop drew my attention to 5 receipts that were in the name of a sister.

5. All the other receipts name the appellant as beneficiary. His sisters lived, according to the oral evidence, some 14 to 15 hours journey away from Itahari. None of the receipts relied upon by the appellant whether naming him as beneficiary or not were to his address in Itahari. Although Mr Balroop also submitted that the judge had failed to have regard to the whole of the evidence in reaching that conclusion –which his third matter addressed – the judge did consider all the evidence including the letter from the Itahari sub Metropolitan City Office in reaching his conclusion. The finding by the judge that the appellant was not living at the family home was a finding that is not dislodged by the judge mistakenly referring to all the receipts being in his name. It was plainly open to the First-tier Tribunal judge to draw the conclusion, having considered all the evidence and not merely the money transfer receipts, that the appellant was not living in the family home.

6. Secondly Mr Balroop submitted that although the finding that the appellant was unemployed by choice when the consideration was under Annex K policy, that finding cannot simply be transferred to the consideration under Article 8. There had to be an answer to the question of whether, for dependency to be established and, in effect, that Article 8 was engaged, there was real, committed and effective support to the appellant from his family. Whether he was not working through choice was only one element of that assessment and the judge had failed to make the correct assessment; the judge had restricted his consideration to the finding that he was not living in the family home and he was not working through choice.

7. Thirdly, Mr Balroop submitted (and this links with the conclusion by the First-tier Tribunal judge that the appellant fell at the first hurdle of *Razgar* and thus there was no need to consider proportionality), the judge failed to assess the evidence relied upon by the appellant that he travelled to his sisters to collect the money but merely reached a conclusion that the appellant was not living in the family home. Mr Balroop submitted that the case was put that the appellant was in the family home and the evidence to that effect should have been considered. As I have referred to above, that finding was open to the judge.

8. Mr Balroop also submitted that the particular circumstances of Gurkha adult dependants, the historic injustice and the inability to successfully apply for entry clearance were all matters that should be considered when assessing whether there was family life such as to engage Article 8. He submitted that the judge had failed, in concluding that Article 8 was not engaged, to assess the evidence correctly. He submitted that even if the appellant were living with his sisters that did not mean that there was not real, effective and committed support in the particular circumstances for this appellant.

9. The issues of historic injustice, inability to apply previously for entry clearance are not matters that are relevant to assessing whether there is, in Article 8 terms, family life such that it is necessary to then go on to consider the other Razgar questions and in particular the proportionality of the decision. It is at that stage that the inability to apply, historic injustice and the fragmentation of the family come into play. The question of whether there is real effective and committed family life such as to engage article 8 is to be determined on the evidence before the First-tier Tribunal judge. In this case, there were money receipts commencing two years after the mother and father had moved to the UK. Although there was oral evidence that money had been sent through relatives in the previous two years, there were no witness statements to support that contention. The judge was entitled to reach a decision that there had been no such money transfers. There were no witness statements from the sisters. There was no documentary evidence of travel between the family home and Pokhara or Kathmandu. The judge considered the evidence and reached a conclusion based on the oral and documentary evidence that the appellant was not living at the family home, that he was not working through choice and that he was not dependant. An adult may of course move in and out of

dependency for example if a person was independent and then had a serious accident requiring greater help and support. But in this case, there was no evidence of any mental of physical disabilities suffered by the appellant, very little evidence of detailed contact with his mother/father and what such contact as there was consisted of, no documentary evidence of financial support for the first couple of years the family was separated and the initial evidence from his mother was that he chose not to work.

10. In paragraph 35 the judge considered the evidence before him, not just the financial dependency. He considered issues of where he lived, contact, work, financial dependency, educational qualifications, and reached the sustainable decision that the appellant did not have a protected family life with his mother/father for the purposes of Article 8.

11. There is no perversity in the decision by the judge. He reached rational sustainable and reasoned conclusions on the evidence before him. There is no error of law.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The decision of the First-tier Tribunal judge dismissing the appeal stands.

Date 23rd November 2017

Upper Tribunal Judge Coker