Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04334/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2018	**On 23 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

PARBAT RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Miss R Dulay, of Counsel instructed by Sam Solicitors
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Widdup who, in a determination promulgated on 19 July 2017, dismissed the appellant's appeal against a decision of the Entry Clearance Officer, New Delhi to refuse him entry clearance to join his parents in Britain as their dependant.

2. The appellant is a citizen of Nepal born on 13 April 1989. His father was a former Gurkha soldier who obtained leave to settle in Britain with his wife in April 2012. They have lived in Britain since May that year. On entry they were accompanied by their youngest son, who it was accepted by the judge lives with them. They also have an older son who lives in Britain and a daughter who remained in Nepal.

3. The appellant's application for entry clearance was refused on 18 January 2016. In the refusal the Entry Clearance Officer stated:-

> "You state that you are unemployed and emotionally and financially dependent on your parents. You were 26 years and eight months at the date of application. Your parents had migrated to the UK by choice over 3 years and 8 months before the date of application. There is no evidence of any care arrangements put in place by your sponsors before they migrated to the United Kingdom. That your parents were content to leave for the United Kingdom without you and without making any obvious care arrangements are factors I have considered. Your parents have stated that you are not leading an independent life as you are unmarried and receive financial support from your father. The fact that you are unmarried does not automatically mean that you are emotionally dependent on your parents, your parents stated that it is customary in Nepal for adults to remain with their parents until they marry. However your parents decided to go against tradition by moving to the UK without you and I am satisfied that your parents decided to split the family as they were satisfied that you could look after yourself. In view of the circumstances presented I am minded that the decision was made by your parents that as an adult you were able to care for yourself.
>
> You are in good health, educated to senior secondary standard and have spent the majority of your life in Nepal. You state that you are unemployed yet there are no obvious factors preventing you from working in Nepal. There is no suggestion that your living conditions are anything but adequate. There is no obvious reason why your father is unable to continue to support you financially if you are to remain in Nepal.
>
> You have not declared any care arrangements or requirements in Nepal. You have not mentioned any personal incapacity and you have not declared any medical conditions or disability. For the above reasons I am not satisfied that you are wholly financially and/or emotionally dependent on your UK sponsor as required under Annex K, Paragraph 9(5) of the IDI Chapter 15 Section 2A 13.2."

4. At the hearing the appellant's mother stated that he was dependent on his parents financially and emotionally. Neither she nor her husband could now return to Nepal although she had visited twice in January 2015 and February 2016 and during those visits she had stayed with the appellant. She stated that they were in contact two or three times a day. She asserted that the appellant had only applied to enter Britain in 2016 because until that time those who were 30 or under could not apply. She said

that her son was dependent on her and her husband because he was their son and that they wanted to live together instead of living apart. They sent him £100 per month.

5. She said that the appellant lived in Belbari in a rented property – there was no family home. She and her husband had lived in the Belbari property but only one room was now rented. She confirmed that the appellant had studied up to grade 10 at school but she could not remember what age he was when he left school.

6. The appellant's brother said that in 2009 his father had a pension and they had a small amount of land where the appellant's younger brother had worked and he had also worked on someone else's land. He said that his brother could not work on the family land because it had been sold before his parents came to Britain.

7. In paragraphs 33 onwards the judge set out his conclusions and findings of fact. He stated that it was uncontroversial that the appellant's father had served in the British Army for seven years until December 1964, that the appellant's father and his wife had arrived in Britain on 14 May 2012 and that they had four children – two in Britain and two in Nepal or India. The appellant had been aged 26 at the date of application.

8. The judge accepted that the appellant's younger brother was a credible witness and it is clear from the determination that he made considerable allowances for discrepancies in the appellant's mother's evidence and indeed the small discrepancy in the evidence of his younger brother.

9. In paragraph 40 he posed two questions – did family life continue to exist between the appellant and his parents notwithstanding the age of the appellant and their separation, and if so, could the respondent show that her decision was proportionate. He then went on to say that he would consider whether or not there was interference with the right to respect for the family or private life, and if so, whether such interference have consequences of such gravity as potentially to engage the operation of Article 8. If so, was it in accordance with the law and did that interference have a legitimate aim, and if so, was the interference proportionate to the legitimate aim sought to be achieved.

10. He emphasised that he had taken into account the terms of the judgment of the Court of Appeal in **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**. Although he pointed that that case was fact-sensitive.

11. In paragraph 43 he noted that Lindblom LJ had identified the real issue in that case which was whether, as a matter of fact, family life existed when the parents left Nepal and whether it had endured notwithstanding their having left Nepal.

12. He referred to the judgement of Sedley LJ in **Kugathas** where Sedley LJ had referred to the need for evidence of "further elements of dependency involving more than the normal emotional ties" when assessing a relationship between an adult and his parents. In that judgment Sedley LJ stated: "If dependency is read down as meaning

"support" in the personal sense and if one adds "real" or "committed" or "effective" to the word "support" then it represents the irreducible minimum of what family life implies".

13. The judge referred to the evidence of financial dependency in the witness statements and evidence of remittances sent to the appellant in Nepal and said that that was not challenged by the Entry Clearance Officer or by the Presenting Officer at the hearing and he therefore accepted that the appellant was financially dependent on his father. I would comment that there is no evidence before me that the issue of financial dependency was conceded either by the Entry Clearance Officer or by the Presenting Officer at the hearing.

14. The judge went on at paragraph 50 to state that emotional dependency was more difficult to assess, pointing out that the dependency had to be that of the appellant upon his parents rather than the other way round. He pointed out that the evidence related to the understandable wish of the parents to be re-united with their son. It is said that their separation had occurred in 2012. The evidence in the bundle was that it was asserted that the appellant's parents depended on the appellant emotionally. The judge however took the view that the child on which they depended was their son Niram, who lives with them. He stated therefore that the case that the appellant should also undertake that role was much less strong than it would otherwise be and he did not accept therefore that the evidence supported the case that an emotional dependency arose in this case either of the appellant on the parents or of the parents on the appellant. He therefore found that Article 8 was not engaged and he did not need to go on to consider proportionality or the issue relating to the historic injustice.

15. The grounds of appeal argued that the judge had erred in concluding that Article 8 was not engaged. There was evidence that family life existed with the appellant and his parents as they had all lived together in Nepal and there was evidence of continuing family life since they have arrived in Britain, and therefore the judge had failed to engage with the relevant question of whether or not such family life existed. Reference was made to the decision of the Tribunal in **Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC)** and the Court of Appeal judgment in **Rai**. It was suggested the judge had applied a test of "exceptionality" in order to determine the level of dependency between the appellant and his parents. It was stated that the judge had considered the issue of dependency in the context of the appellant's dependency on his parents rather than the inter-dependency between his parents and him and vice versa. It was stated that the judge had failed to take into account the impact on the appellant's brother if he continued solely to continue in the role as carer of his parents. It was stated the judge had erred by making no findings on whether or not the appellant was still an integral part of the family unit and had not formed his own independent unit; the appellant does not have any other close family members for support in Nepal, the regular contact between the appellant and his parents in Britain, and the reason why his father was unable to visit him. It is argued that it is an error of law for there to be no clear findings of fact on those issues.

16. Judge of the First-tier Tribunal Hollingworth granted permission to appeal stating:-

> "It is arguable that the Judge has set out an insufficient analysis at paragraph 57 of the decision, leading to the conclusion that there were no ties beyond normal emotional ties giving rise to a dependency. It is arguable that the Judge has taken an over-restrictive approach to the breadth of the relevant considerations to a finding of whether Article 8 was engaged. It is arguable the Judge should have set out a fuller analysis as to the existence of family life when the Appellant and his parents lived together in Nepal and the question of whether a continuum existed following the arrival of the Appellant's parents in the United Kingdom and in the alternative findings as to the cessation of such a continuum. It is arguable that sufficient evidence existed to conclude that Article 8 was engaged and that the Judge should have embarked upon a proportionality exercise."

17. A Rule 24 notice was submitted by the Specialist Appeals Team on 17 November 2017. The notice stated:-

> "3. The FTTJ has essentially found that the appellant's parents seek to be dependent on him (although the carer role is carried out by their other son Niram Rai) and that he is not emotionally dependent upon them, therefore family life does not exist and this is consistent with *Kugathas*. It is therefore asserted that the FTTJ properly came to this conclusion and no material error is disclosed."

18. At the hearing to the appeal before me Miss Dulay relied on the grounds of appeal stating that the judge had erred in not taking into account the issue of the appellant's life at the time of departure and whether or not that had continued to endure.

19. She asserted that the judge had failed to grapple with those issues and emphasised there was nothing regarding family life at the time of departure. Moreover the judge had not considered if there was effective support at the time of separation and had erred therefore in not making any Article 8 assessment.

20. She stated that in paragraph 57 the judge had erred in his consideration of whether or not there were more than normal emotional ties. She stated that the judge should have looked at the Article 8 rights of both the appellant's parents and the appellant in the round.

21. With regard to the issue of whether or not there is evidence that the appellant was not leading an independent life she referred to a certificate showing that the appellant was unmarried and stated there is evidence from the appellant's parents about the difficulties in obtaining work in Nepal.

22. In reply Ms Pal stated the judge had set out the Article 8 provisions regarding family life and had properly referred to the judgment in **Rai** and that of Sedley LJ in **Kugathas**.

23. She had noted the assertion that there had been emotional dependence and said that the judge had taken this into account. There was nothing before him sufficient to show that there was family life in existence. In reply Miss Dulay stated there was no challenge to the finding that there was financial dependency and referred to the letters from the local community relating to the dependency of the appellant on his parents. The fact that the test as set out in **Rai** – that as to whether or not the appellant had been dependent on his parents when they had left Nepal and now had not been properly considered by the judge.

Discussion

24. This is a detailed determination in which the judge gives clear reasons for his decision. However, I consider that, although the judge set out the relevant test in Kugathas he did not properly apply the test in **Rai** in that there were insufficient findings regarding whether or not the appellant was exercising family life with both his parents and was dependent on his parents before they left for Britain and secondly after their departure until the date of application. While he found that the appellant was financially dependent on his parents and considered the issue of emotional dependence I consider that he had not properly considered the issues of whether or not the appellant was living an independent life from his parents both before and after his parents came to Britain. He did not engage with the assertions of the appellant's mother that she spoke to the appellant several times a day and with the documentary evidence from his village regarding his circumstances there. I consider that the judge should have considered that evidence in detail, no doubt after the application of the principles in **Tanveeer Ahmed** to the documentary evidence and then made findings of fact with regard to the exercise of family life before and after the appellant's parents came to Britain. I consider that it was an error of law not to carry out that exercise and make findings thereon.

25. I therefore set aside the determination of the First-tier judge and direct that the appeal proceed to a hearing afresh. The issues to which I have referred above should be addressed and I would add that a finding on financial dependency should also be made as I cannot find that that was an issue which was conceded by the ECO or the Presenting Officer – there should be a finding on why the appellant cannot support himself.

Notice of Decision

The appeal is remitted to the First-tier tribunal for a hearing afresh on all issues.

Signed  Date 18 February 2018

Deputy Upper Tribunal Judge McGeachy