Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07357/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th September 2018	**On 18 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR INDRA KUMAR GURUNG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C E Moll (Counsel)
For the Respondent: Mr I Jarvis (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against refusal of his human rights claim, following refusal of entry clearance for settlement as the dependent son of his sponsor in the United Kingdom, was dismissed by First-tier Tribunal Judge Pedro ("the judge") in a decision promulgated on 25th April 2018. The appellant accepted that he could not meet the requirements of the Immigration Rules ("the rules") and relied on Article 8 of the Human Rights Convention. He is the son of a former Gurkha soldier. His parents arrived in the United Kingdom for settlement on 6th July 2010, leaving the

appellant in Nepal. In dismissing the appeal, the judge took into account two earlier, unsuccessful, appeals against refusal of entry clearance, found that Article 8 was not engaged and concluded that refusal of entry clearance did not breach the appellant's human rights (or those of anyone else).

2. Permission to appeal was granted by a First-tier Tribunal Judge, who found that it was arguable that the judge may have erred in not taking into account Rai [2017] EWCA Civ 320 and any impact that judgment might have on findings regarding the appellant's circumstances and the extent to which he was or remains dependent on his sponsor. There was no Rule 24 response from the respondent.

Submissions on Error of Law

3. Mr Moll said that the judge made no mention of Rai and any impact that case might have. The Court of Appeal held that it was not an adverse factor that a claimant had lived apart from his or her sponsor parents following their settlement in the United Kingdom. He adopted grounds settled by Counsel instructed at an earlier stage. In those grounds, it was contended that insofar as the judge concluded that any dependency was limited to the sponsor providing financial assistance, as opposed to the appellant being wholly or mainly financially dependent, this was a legally erroneous approach. The judge expressly relied upon a finding made in a decision in 2014, that finding being contradicted by a Deputy Upper Tribunal Judge in 2015, who found that the appellant's father was paying everything for his upkeep. Moreover, the proper test was not applied, in the light of guidance given in Rai. The judge in the present appeal relied upon conclusions reached in earlier decisions, in 2010 and 2014, made before the Court of Appeal gave judgment in Rai. The extent of the appellant's financial dependence on his father, as accepted by the Deputy Upper Tribunal Judge, was sufficient to engage Article 8, applying the "effective support" test confirmed in Rai.

4. In addition, the judge put emphasis on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, as had the judge in the Upper Tribunal in Rai. The Court of Appeal concluded that this did not engage with the real issue which was whether, as a matter of fact, the appellant had demonstrated a family life with his parents, which existed at the time of their departure to settle in the United Kingdom and endured beyond it, notwithstanding the absence of the parents from Nepal. The appellant's case was that his parents' decision to settle in 2010 should not be held against him.

5. It was clear in the decision under challenge, for example in paragraph 8, that the judge put emphasis on a finding made in the first appeal, in 2010, that the parents chose to come to the United Kingdom. Again, Rai showed that this was not the correct approach.

6. In the present appeal, the appellant asserted that he had a family life at the time his parents left. He remained single and supported by them and his parents continued to visit Nepal each year. He applied for entry clearance in 2010, when he was 27 years old, and if the current rules were in place, he might well have qualified. In 2014, when another application was made, he was over the age of 30. The Tribunal in the appeal heard in that year concluded that he had not shown family life. The appellant's sponsor had served in the British Army for 26 years, reaching the rank of captain. The appellant was born in 1983 and the sponsor was discharged from military service in 1986.

7. Mr Jarvis said that although the judge made no mention of Rai, he referred in paragraph 9 of the decision to Gurung, a judgment from the Court of Appeal that was still good law. In the light of Rai, an appellant is not to be condemned merely by separation from his parents. The written grounds in support of the application for permission to appeal highlighted this point at paragraph 11(c). The key question was this: had the judge considered by his own means, on the evidence, whether family life was shown. He took into account the two earlier decisions. The 2010 decision was made when the case law was not fully developed but the specific findings with regard to the evidence before the Tribunal were open to the judge on that occasion and they fell to be taken into account in the present appeal. They went to the heart of the case concerning Article 8 family life.

8. In terms of assessing the materiality of any error, there was a thread which could be followed through all three decisions. Paragraph 8 of the 2010 decision showed that the judge doubted the reliability of evidence regarding the appellant's personal circumstances, including accommodation. In the 2014 decision, mentioned by the judge at paragraph 9, there was plainly still doubt regarding where the appellant lived. The Deputy Upper Tribunal Judge's decision in 2015 was not a remaking of the decision.

9. The judge in the present appeal properly began with the earlier findings, including those made in 2014, and took into account the concerns shown regarding accommodation, dependency and the appellant's personal circumstances. At paragraph 11 of the decision in the present appeal, the judge pointed to particular difficulties in the evidence before him. He accepted some of what he was told but disbelieved the claim that the appellant was "sofa surfing". The appellant gave the same address as the permanent residence identified in the 2010 decision but evidence from his mother was rather different. This was to the effect that the property was sold three or four years ago. The judge came to a conclusion that the appellant has, in fact, a permanent address, given much earlier. All of this was important in assessing the materiality of any failure to refer to Rai. If the appellant failed to show what his personal circumstances were, then no material error would be shown and the judge would then be entitled to find that Article 8 was not engaged.

10. In a brief response, Mr Moll said that it was clear from the decision that the judge put weight on the earlier decisions. At paragraph 13, his analysis was clearly based on the passage of time, giving rise to his finding that the appellant's independence in life away from his parents had grown. Moreover, the relevance of any claim that the appellant was "sofa surfing" was unclear. Family life might still be shown, even if he were still living in the family home, or a temporary premises elsewhere.

11. The judge found that it was material that in the two earlier decisions, the judges had not found family life and he built on that to include the passage of time, suggesting that the appellant might not be as close to his parents as he was. All of that was contrary to the approach found to be correct in Rai.

Conclusion on Error of Law

12. Notwithstanding the precision of Mr Jarvis's submissions that any error is not material, I conclude that the decision must be set aside on the basis that it does, on close reading, contain a material error of law. There is no mention of the judgment in Rai but that, of itself, is not an error of law, let alone a material one. However, it is clear from the judgment of the Court of Appeal in that case that a critical question is whether family life exists at the time a claimant's parents leave Nepal to settle in the United Kingdom, in addition to the question whether family life endures after that. It is also clear that family life may be shown between adult children and their parents, without evidence of "exceptional dependence" (see paragraph 18 of the judgment in Rai).

13. The judge reminded himself more than once that he was required to consider the position "at the present time". Although that is so, in that the date of assessment was the date of the hearing, he was required to look back to the position in 2010 and to make a clear finding that family life was either shown or not shown at that time. The decision shows that he approached this task by relying upon findings made in the 2010 and 2014 decisions. However, it is not clear from the parts of the earlier decisions that he set out in paragraphs 8 to 10 of the decision that he isolated findings of fact made on earlier occasions that answer the question precisely and it is not clear that the parts of those decisions that he drew on themselves indicate that the correct approach, as described in Rai, has been followed.

14. For example, the judge took from the 2010 determination a finding that the appellant had not shown that he was "wholly dependent financially" on his father. This is a rather different test from deciding whether real, committed or effective support is shown, as identified in Kugathas [2003] EWCA Civ 31 and noted at paragraph 17 of the judgment in Rai. The judge also drew on a conclusion made in the 2010 decision that the appellant's circumstances fell well short of "evoking compassion to an exceptional or most exceptional degree". Again, that particular threshold is difficult to

reconcile with the law as it developed in Ghising [2012] UKUT 160 and Gurung [2013] 1 WLR 2546. Where the judge in 2010 went on to find that the relationship between the appellant and his parents amounted to nothing other than "normal emotional ties", that finding appears in the present decision in paragraphs based upon a flawed approach.

15. So far as the 2014 decision is concerned, the judge took from it a similar finding that the appellant had not shown that he was "wholly dependent financially upon his parents" and although there are findings that the appellant has established an independent life, it is difficult to see an answer to the question whether family life was shown notwithstanding the absence of evidence of exceptional dependence. In addition, as submitted by Mr Moll, although the decision from the Upper Tribunal in 2015 was not a remaking of the decision under appeal, the judge on that occasion made a finding the appellant's father was paying everything for his upkeep. Although the judge noted this and other findings made in the Upper Tribunal in paragraph 10 of his decision, there is no resolution of the apparent conflict with findings made in the First-tier Tribunal.

16. Having drawn on the earlier decisions, it is at paragraphs 11 to 14 that the judge makes his own assessment. He properly took into account evidence of events since the 2014 decision but directed himself that the correct question is this:

> "If such facts lead me to the conclusion that at the present time and on the material before me the appellant has shown that there is family life for the purposes of Article 8 then so be it. However, I find that I am not led to such a conclusion by any developments since (the) previous determination."

What is missing is any engagement with family life in 2010, in the light of Rai. The judge went on to find that the relationship between the appellant and his parents continued in substantially the same form as it did at the time of the 2014 decision, that the appellant's father continued to provide financial assistance to him and that his parents continued to visit Nepal to see him, usually on an annual basis. There was, as Mr Jarvis said, evidence from the appellant's mother which was inconsistent with the provision by the appellant of an address but, nonetheless, as Mr Moll submitted, that inconsistency does not, of itself, show that family life is not present.

17. At paragraph 13, the judge reminded himself that he had to consider the position "at the present time" and that family life was not found in the 2010 and 2014 decisions. He did not at that point engage with guidance given in Rai, to assess the evidence before him (properly taking into account the earlier decisions, of course) to assess whether family life existed at the time the appellant's parents left Nepal and whether it endured, taking into account that an absence of "exceptional dependence" was not fatal to the appellant's case.

18. The decision of the First-tier Tribunal contains a material error of law and must be set aside and remade. In a brief discussion about the appropriate venue, Mr Moll said that the First-tier Tribunal should remake the decision. Mr Jarvis thought that remaking the decision might only require submissions and so the Upper Tribunal could keep it. That is an attractive suggestion but, on careful reflection, in the light of my conclusion that there has been an absence of precise findings in the present appeal, the decision should be remade in the First-tier Tribunal, at Hatton Cross, before a judge other than First-tier Tribunal Judge Pedro.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside. It will be remade in the First-tier Tribunal, at Hatton Cross, not before First-tier Tribunal Judge Pedro. The findings of fact made in the First-tier Tribunal in this appeal are not preserved and the appeal will be de novo.

Signed Date 18 December 2018

Deputy Upper Tribunal Judge R C Campbell

Anonymity

The First-tier Tribunal made no anonymity order. I make an order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or any member of his family. This direction will continue in force until varied or discharged by another Tribunal or court and it applies to both parties. Failure to comply with it may amount to a contempt of court.

Signed Date

Deputy Upper Tribunal Judge R C Campbell