



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/08604/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 July 2019**

**Decision & Reasons Promulgated  
On 5 August 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MR SURENDRA GURUNG  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Miss Revill, of Counsel

For the Respondent: Mr Bramble, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by Mr Surendra Gurung against the decision of First-tier Tribunal Judge Widdup to dismiss his appeal against the respondent's decision to dismiss the application under Article 8.

**Background**

2. The appellant's parents first came to the UK in 2005. The appellant's father was a distinguished soldier in the Gurkha regiment and had an exemplary service record. The sponsor was given indefinite leave to remain in 2006 but returned to Nepal in 2007 and stayed with the

appellant until 2010. According to the documents produced before the First-tier Tribunal, money began to be transferred from father to son in Nepal in about 2017. On 15 November 2017 an application for entry clearance was made as a dependent adult of the father (the sponsor). The son having been born on 10 June 1979 is now 40 years of age. However, the application was rejected by the Entry Clearance Officer. On a subsequent review by the Entry Clearance Manager, on 30 December 2018, the ECM upheld the decision of the Entry Clearance Officer to refuse entry clearance. The subsequent appeal to the First-tier Tribunal came before Judge Widdup on 12 March 2019. Judge Widdup decided that the appellant had failed to meet the requirement for dependency in the Immigration Rules. Furthermore, there was insufficient emotional or financial support to amount to family life within Article 8 of the European Convention on Human Rights. However, the appellant appealed that decision and it came before First-tier Tribunal Judge Ford. Judge Ford decided it was arguable that Judge Widdup had approached the issue of dependency incorrectly and had considered proportionality, when in fact proportionality under article 8 of the ECHR did not arise. The judge appeared to look for necessity or dependency when he was required to ask whether there was a real and effective level of support. It was arguable that Judge Ford ought to have had regard to the decision of the Court of Appeal in **Rai v The Entry Clearance Officer - New Delhi [2017] EWCA Civ 320**. The issues before the Upper Tribunal therefore related to the extent to which Judge Widdup adequately dealt with the issue of dependency. If he did not, would he have reached the same decision or was that error likely to have been material? Was Judge Widdup right to consider the issue of proportionality when considering the requirements of Article 8?

### **The hearing**

3. Miss Revill referred to the background summarised above and submitted that in Gurkha cases the focus of the Tribunal's enquiry is whether or not family life had been established, rather than whether it is necessary and proportionate for the respondent to remove the appellant. As a result of the Court of Appeal's decision in **Rai** the burden on the appellant was to show a real effective and committed support. Judge Widdup had therefore erred in approaching the appeal like any other human rights appeal. Secondly, she said, the judge had taken account of irrelevant matters by looking at the question of dependency. There clearly had been financial payments over the years from the sponsor to the appellant in Nepal. She said that paragraph 40(ix) of the decision amounted to an acceptance that financial assistance had occurred but 41 of the same decision found that the evidence was insufficient to allow Judge Widdup to make a finding of family life. Miss Revill argued that that Judge Widdup had been wrong in law. She drew attention to paragraph 43 of the decision, where Judge Widdup gave a number of examples of contact between the appellant and the sponsor. She said that the appellant could undertake an MBA and

there was a prospect he might be able to obtain employment in Nepal, although the appellant was at the time of the hearing unemployed.

## **Discussion**

4. As I pointed out, at paragraph 44 of his decision Judge Widdup found that the relationship between the parents and their adult son changed significantly when the former came to the UK. Judge Widdup found that it could be inferred that the appellant was old enough to live without them. Such emotional dependency as then existed was likely to have declined in the years since the appellant's parents have left Nepal, the judge thought. There was, however, an acceptance by the judge that the appellant and his parents continued to enjoy a close relationship, which involved assisting the appellant financially and providing him with encouragement. However, Judge Widdup concluded that those features were not unusual in themselves. A parent whose adult son is in a poor financial position may well receive support but having regard to all the facts and having applied the test in **Rai**, the judge concluded there was not sufficient to amount to family life.
5. Mr Bramble for the respondent said that the judge clearly had regard to the test in **Rai**. He had referred to it in detail at paragraphs 35 to 38. He made more than adequate findings at paragraphs 40 onwards in his decision. The decision was not irrational or perverse and it was not for the Upper Tribunal, to gainsay findings of fact made by a First-tier fact-finding tribunal. Bearing in mind the case law, the decision was fully in line with **Rai** and it should be held.
6. Miss Revill, in reply, accepted that the decision was not perverse. She accepted that the fact-findings of the First-tier could stand but she did say that the judge had confused dependency with the test of financial support. Financial support had to be real and effective support. Bearing in mind that test, I needed to set aside the decision and remake the decision leaving the fact-findings in place.

## **Conclusions**

7. Despite Miss Revill's cogent submissions, I am not satisfied that Judge Widdup's decision contained an error of law. The case was fully argued before him by experienced representatives and he had in mind the case of **Rai** making clear reference to it. It is true, as Mr Bramble says, that other judges might have reached a different decision in this case, but it was probably finely balanced. The circumstances before the First-tier Tribunal were unusual (an adult son living in Nepal with parents living in the UK). Judge Widdup found emotional dependency but the lack of evidence of material financial support caused him to decide against the appellant. I am not satisfied, that as Miss Revill has suggested, the judge confused dependency with real and effective and committed financial support.

8. These were no more than the actions of a parent who simply sends money to a child abroad to help them from time to time and they do not amount to real effective and committed support. In any event, it is not for the Upper Tribunal to substitute its assessment of the facts for that of the First-Tier Tribunal, which heard the evidence. Judge Widdup reached a decision which he was entitled to reach in all the circumstances.

### **Decision**

9. The appeal to the Upper Tribunal against the decision of the First-tier Tribunal to dismiss the appeal is dismissed. The decision to refuse the appeal against the refusal of entry clearance therefore remains.
10. No anonymity direction is made.

Signed

Date 23<sup>rd</sup> July 2019

Deputy Upper Tribunal Judge Hanbury

### **TO THE RESPONDENT FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 23<sup>rd</sup> July 2019

Deputy Upper Tribunal Judge Hanbury