



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08703/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 July 2019

Decision & Reasons Promulgated
On 07 August 2019

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

PURNA BAHADUR RANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:

For the Appellant: Mr. D. Balroop, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr. S. Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Burnett ('the Judge') issued on 1 November 2018 by which the appellant's appeal against the decision of the respondent to refuse to grant entry clearance was dismissed.

2. The appellant appeals with permission of Deputy Judge of the Upper Tribunal Maller by way of a decision sent to the parties on 19 June 2019.

Anonymity

3. No anonymity direction was issued by the Judge and no application for such direction was made before me.

Background

4. The appellant is a national of Nepal and is presently aged 31. His sponsor is his mother. His father, now deceased, joined the Gurkha regiment in 1961 and was discharged in 1970 after over eight years of service. He served in Brunei and Borneo. After his retirement he remained in Nepal and was a farmer, working both on his own land and that of neighbours. He died in 2011. Meanwhile one of his sons, Khem, secured entry clearance to this country as a student. The sponsor applied for settlement as the dependent widow of a Gurkha soldier and was granted indefinite leave to enter in March 2013. At the date of the appellant's application for entry clearance she resided with Khem in this country. This remained the position as of 11 June 2018 when Khem signed his witness statement, prepared for this appeal. However, by the date of the hearing in August 2018, Khem had relocated to the USA. The appellant's six other siblings reside in Nepal.
5. The appellant applied for entry clearance to settle in the United Kingdom as the adult dependent relative of his mother and the application was considered by the respondent in light of the Home Office's policy as outlined in Annex K, IDI Chapter 15 section 2A 13.2 as amended on 5 January 2015. The application was refused by way of a decision dated 27 July 2017. The respondent observed that there was no provision for entry clearance under the rules for an adult dependent relative supported by the widow of an ex-Gurkha soldier. As to the consideration of the application under the policy, it was observed, *inter alia*:

'You are 28 years old. Your mother has been in the UK since 2013 when she was issued an entry clearance visa. You have not mentioned any personal incapacity. You have no medical conditions or disability. You state that you are unemployed. I note that you state that you have been in education. It is noted that you are a healthy educated adult and therefore it is reasonable to expect you to find gainful employment in your country of residence. You have submitted no evidence to demonstrate that you have maintained a family unit with your mother since she has been living in the UK for over 4 years and that you are reliant on her for emotional and financial support.'

For all of the reasons stated above, I am not satisfied that you are wholly financially or emotionally dependent on your sponsor, as required under Annex K, Paragraph 9(5) of IDI Chapter 15, section 2A 13.2'

Hearing before the First-tier Tribunal

6. The appeal was heard on 17 August 2018. The sponsor was briefly examined by Mr. Balroop and then cross-examined.
7. The appellant did not advance an argument that the decision to refuse him entry clearance was unlawful under the Immigration Rules. The ambit of the appeal was limited to article 8 grounds.
8. The Judge refused the appeal by way of a decision sent to the parties on 1 November 2018. At paragraph 36 of the decision, the Judge reasoned:

'It is necessary to assess whether the support is 'real', 'committed' or 'effective' support. There is little in this case to actually show that the appellant is truly financially reliant upon his mother and that the support she provides is real, committed or effective. Although there are some money transfer receipts in the bundle there are no bank statements which show a transfer to the appellant's account. The bank statements from Nepal of the sponsor show that her deposits accumulated between 2016 and 2017. It was not until around June 2017 that there were some withdrawals from her accounts. After that date the deposits once again accumulated until March 2018. The bank statements from Barclays show that the sponsor only receives around £109 per week which is just enough for her to survive and little else. There is no evidence of the financial situation of the appellant, i.e. his bank statements. The evidence was also not clear at all as to when exactly his mother started to send any money to the appellant. The sponsor stated that the appellant received money from his siblings although stated he had to pay it back. I conclude from the evidence produced that the appellant does receive some support from his other family members when he needs it. I conclude that there is little evidence that he has a 'real', 'committed' or 'effective' support provided by the sponsor.'

9. This paragraph was subjected to detailed forensic analysis by Mr. Balroop before me.
10. The Judge further reasoned at paragraphs 37 to 39:

'I do not consider that there is a real emotional dependence over and above the usual ties one would expect between mother and son. The appellant lives in the family home, a place where he has lived all of his life. He is not alone and is in regular contact with his other family members (siblings and other family members). It is stated that the appellant farms and this activity/employment

used to provide an income for the entire family (the appellant, his father, mother and other siblings). The appellant's mother has a number of family members in Nepal including her other children and grandchildren (these are the appellant siblings and their children). The appellant's mother travels back to Nepal every year and spends about a month there. It is clear that the appellant's mother keeps in touch with her family in Nepal including the appellant. I conclude that the visits are not solely for the appellant. The evidence does not show a real emotional dependency between the appellant and his mother as opposed to the usual emotional ties that one would expect. The appellant's brother Khem was living in the UK with his mother but it is stated that he has now left and gone to the USA. The appellant's mother left Nepal in 2013. An application was not made for the appellant to come to the UK until 2017, some four years later. The appellant was aged 25 in 2013 and was 29 years of age in 2017. He is now 30.

I find that although the appellant has not formed an independent family unit of his own in the sense that he has a partner or any children, he lives independently on a farm. I acknowledge that there has been no real challenge to the core facts in this case apart from the appellant's claimed dependency and the lack of proper evidence to support such claimed dependency.

I do not find that article 8 is engaged in the family life sense. The relationship between the appellant and his mother is part of his private life.'

Appeal

11. The grounds complain firstly as to an error of fact that establishes an error of law, namely that the Judge erred in adversely relying upon the lack of bank statements produced when assessing the receipt of money transfers because the means of transfer required no payment into a bank account, contrary to the finding of the Judge.
12. Secondly, it is asserted that the Judge failed to take material evidence into consideration when observing a withdrawal from the Sponsor's account in Nepal by failing to assess her evidence on this issue as addressed by her witness statement.
13. The third ground is a complaint that the Judge erred in determining that if the appellant receives support from other family members, he cannot also be financially dependent upon his mother. It is asserted that real, committed and/or effective support does not mean exclusive support.
14. A fourth ground asserts that family life for the purposes of article 8 can be engaged through either emotional or financial dependency and both are not required to exist in unison.

15. In granting permission to appeal DJUT Mailer observed:

'It is arguable that article 8 may have been engaged on the basis of financial dependency. There was no finding that the appellant currently earn money from farming. It is also arguable that the Judge may have erred in assessing financial dependency by assuming at [36] that the appellant needed to have a bank account to receive money from his sponsor.'

Decision on an error of law

16. Upon inspecting the money transfer receipts filed with the Tribunal Mr. Walker accepted that the Judge had erred in fact as to the available means by which the appellant could secure the remitted funds. Several of the receipts clearly state that payment to the recipient in Nepal was in cash, rather than by way of bank transfer. He further accepted that such an error adversely affected the Judge's consideration at [36] of his decision in respect of the issue of financial dependency. The transfers evidenced by the money transfer receipts cover the period of February 2015 to March 2018 and the sums remitted amount to some £2200 over a three-year period. Upon careful consideration I accept that such error of fact cannot be separated from the rest of the Judge's reasoning in the relevant paragraph and that the mistake as to a material fact was perverse and so amounts to a material error of law: R (Iran) v. Secretary of State for the Home Department [2005] EWCA Civ 982.
17. Having so found in relation to the first ground of appeal, I am not required to consider the remaining grounds.
18. Both representatives confirmed that if I were to find a material error of law and so allowed the appeal against the decision of JFtT Burnett, I could proceed to remake the decision on the evidence presently before me without the need for a further hearing.

Remaking the decision

19. The appellant, an adult male, is required to establish for the purposes of this appeal that he is a dependent relative and so he is therefore required to establish that he enjoys a family life with his sponsor, his mother. This can be by way of financial dependency, emotional dependency or both.
20. As accepted by Mr. Balroop before me, the appellant is required to establish the existence of a family life before proportionality is to be considered, and so any consideration of 'historic injustice' can only be assessed and weighed once the initial hurdle has been crossed.

21. Firstly, considering financial dependency, I observe the appellant's evidence that he works for others on farms in Nepal without remuneration. His explanation is: *'I spend my time working in the fields. It is not for gain. It just keeps me away from other things while my focus remains on my life with my mother in the UK.'* It is the appellant's case that he is unable to financially survive without the aid of his mother and his siblings. I further observe the sponsor's evidence that the family farm is a small piece of land on which crops are grown and that it was insufficient to feed a family of two adults and eight children. The appellant's father was able to find paid employment working in fields belonging to other people in order to supplement the family income. I note that the family resided in the family home throughout the lifetime of the appellant and members of the family have over such time left the property. As the sponsor confirms in her witness statement, *'one after the other the elder (children) started to stand up on their own feet and as soon as they did that, they would leave our house to live on their own. My daughters were married off and they started living with their own families.'* By the time the sponsor travelled to this country she was living only with the appellant, and he now lives in the family home on his own. The land owned by the family is therefore only required to sustain the appellant and not a family of 10. Being mindful that the burden rests upon the appellant to establish his case I do not accept that in the straitened circumstances as presented to me by the appellant he would work for free, simply to pass time. The sponsor asserted before JfT Burnett that the appellant is expected to repay his siblings for the money they have loaned to him. The appellant has failed to provide any explanation as to why, if he requires support from a number of family members, he would not seek paid employment but simply work for free to keep himself occupied. I find that the appellant is untruthful on this issue. He is seeking to create an illusion that he is financially dependent upon the sponsor and his siblings. I find to the requisite standard that he has access to family-owned land upon which he can grow crops for his own consumption and that he works on the land of others, like his father, for remuneration, just as his father did. Such remuneration is sufficient to permit the appellant to meet his day-to-day needs, in addition to the produce he receives from his own land.
22. I accept that some money is being sent from the United Kingdom to the appellant in Nepal. However, the fact that an appellant is dependent upon a sponsor for subsistence is highly material but is not determinative as to the existence of family life. As several authorities confirm, a bare financial dependency between one adult party and another will not suffice: *Patel v. Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, at [28]
23. The appellant baldly contends in his witness statement that *'without [the sponsor's] support, I cannot live in Nepal'* and *'I will not be able to afford food, or place to live without my mother's support.'* He provides no further evidence as to the nature of his financial dependency, his statement primarily addressing emotional

dependency. It is not explained as to why he cannot afford a place to live without the financial support of his mother when he is residing at the long-standing family home. By way of her statement the sponsor confirms that she regularly sends about £100 a month to the appellant in Nepal via a local jeweller, who does not provide her with a record of the transaction. I note at this instance that the money transfer receipts filed with the Tribunal do not evidence monthly remittances and that the receipts detail the means of remitting money as being via the Post Office, MoneyGram and RIA. I observe that the Post Office used by the sponsor is local to her in Plumstead and she has been willing to use its services for a small fee. Being mindful of the relevant standard of proof I accept that the sponsor has sent in the region of £2200 to the appellant over a period of three years, but I do not accept that further remittances are also sent through a local jeweller who does not provide a receipt of such transactions, in circumstances where the sponsor avails herself of several other means of sending remittances to her son.

24. The sponsor further states that when she visits the appellant every year, she withdraws money from her pension account and that such money is spent 'together' with the appellant. A striking aspect of this appeal is that Khem confirms by way of his witness statement that at the relevant time his mother lived with him and he was employed earning approximately £2100 net a month. The Barclays bank statement in relation to the sponsor's bank account confirms that she receives a pension in the region of £109 per week. Her outgoings are very limited. Her bank statements evidence that she was spending between £12- £20 a week at Tesco and some £50 a month for her mobile phone bill. I observed to Mr. Balroop at the hearing that the evidence, when considered as a whole, is such as to strongly establish that the sponsor was in reality financially reliant upon her son Khem throughout the relevant period when remittances were being sent to the appellant in Nepal. I observe the appellant's own evidence in his witness statement that Khem supports his mother. She was receiving a little over £5000 a year by way of her pension in this country. All other needs, such as her accommodation, were being met by Khem. I find that the sponsor's ability to remit money to the appellant and give him money from her Nepalese pension was solely predicated upon the fact that she herself was financially supported by a son present in this country.
25. In such circumstances, and being mindful of the requisite standard, I do not accept that the appellant is truthful as to his financial situation and I do not accept that he is financially dependent upon the sponsor.
26. As to emotional dependency, the Court of Appeal accepted in *Secretary of State for the Home Department v. Onuorah* [2017] EWCA Civ 1757 the guidance given by the European Court of Human Rights in *S v. United Kingdom* (application no. 10375/83) (unreported) that the protection of family life under article 8 generally involves cohabiting dependents, such as parents and their dependent, minor

children. Relationships between adults will not necessarily acquire the protection of article 8 without evidence of further elements of dependency, involving more than the normal emotional ties. The Court has regularly adopted this position: *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31; [2003] INLR 170, *R (on the application of Britcits) v. Secretary of State for the Home Department* [2017] EWCA Civ 368; [2017] 1 WLR 3345 and *Entry Clearance Officer, Sierra Leone v. Kopol* [2017] EWCA Civ 1511; [2018] Imm AR 330.

27. The litmus test remains whether the relationship displays more than normal emotional ties. Lindblom LJ (with whom Beatson and Henderson LJJs agreed) emphasised the importance of establishing whether there was 'real, committed or effective support' passing from sponsor to appellant: *Jitendra Rai v. Entry Clearance Officer (New Delhi)* [2017] EWCA Civ 320, at [36].
28. I observe that the grounds of appeal did not specifically challenge JFtT Burnett's findings as to there being no emotional dependency of the nature required to establish a family life for the purposes of article 8. However, I have considered the evidence relied upon before me. The appellant lives in the family home and continues to have regular contact with all of his family members, not just the sponsor. As I have found above the appellant is able to farm his own land and work for financial reward on the land of others. He has a number of family members living near him. Further, when his mother returns to Nepal it is not only to see him but also to see other members of her family. The appellant is now a man aged 30 who leads an independent life. The circumstances arising in this appeal come nowhere near establishing the level of dependency required to establish family life between adult family members.

Conclusion

29. Having found that the appellant is neither financially nor emotionally dependent upon the sponsor I find to the required standard that the sponsor does not provide the appellant with real or committed or effective support and that no family life exists in this matter giving rise to the existence of protected rights under article 8. I am therefore not required to proceed to consider whether the respondent's decision is a proportionate one for the purposes of article 8. I therefore find that the respondent's decision is a lawful one.

Notice of decision

30. The Judge erred materially in law for the reasons identified. I set aside the Judge's decision promulgated on 1 November 2018 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

31. I remake the decision by dismissing the appellant's appeal.
32. Having dismissed the appeal, I make no fee award.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 2 August 2019