



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/09244/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12 September 2019

Decision & Reasons Promulgated  
On 20 September 2019

Before

UPPER TRIBUNAL JUDGE KEITH

Between

POKHARAM THAPA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Mr D Shrestha, Counsel, instructed by Courtney Smith Solicitors  
LLP

For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. These are the approved record of the decision and written reasons which were given ex tempore at the end of the hearing on 12 September 2019.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge A M Black (the 'FtT'), promulgated on 21 March 2019. The FtT dismissed the

appellant's appeal against the respondent's refusal, on 2 March 2018, of his application on 7 December 2017 for entry clearance to settle in the UK, as the adult dependant of his father, a former Gurkha sergeant, under Annex K of the Immigration Rules.

3. In essence, the core points taken against the appellant by the respondent related to the appellant's suitability and the existence of family life between him and his parents. Specifically, the appellant had submitted a letter with his application issued by the local municipal authority in which he lived, indicating that the appellant declared himself to have been unemployed 'till [sic] 11 September 2017' (the date of the declaration). The respondent inferred that the appellant claimed to have never been in employment up to that date, whereas open-source material on the Nepalese government's Ministry of Labour website indicated that the appellant had been issued an employment visa for Malaysia on 9 July 2006, just over 10 years prior to the appellant's application. The appellant also provided a letter from his father, asserting that he had provided financial and emotional support for the whole of the appellant's life. The respondent asserted that the appellant had provided false representations and so his application fell for refusal on suitability grounds. In addition, while there was evidence of money transfers, the respondent was not satisfied that the appellant was wholly financially dependent on his father; or emotionally dependent, given the lack of detail of family contact, when the appellant's parents had moved to the UK in December 2014, nearly 3 years prior to the appellant application. The respondent did not accept that the appellant had established family life with his parents, as an adult dependant.

### **The FtT's decision**

4. The FtT made a careful analysis of the evidence, making findings running from [12] to [36]. The FtT was not impressed by various aspects of the evidence, finding there to be inconsistencies and a lack of evidence as to the contact between the appellant and his parents since their emigration to the UK. Crucially, the FtT found that that false information was given by the appellant to the local municipal authority in Nepal ([27]); and that he and his father had attempted to deceive the respondent in failing to mention the appellant's period of work in Malaysia between 2006 and 2007, which the FtT did not accept was explained by their belief that they only thought that the respondent was seeking details of any employment in the ten years prior to the appellant's application for entry clearance ([27]).
5. Having considered the evidence as a whole, the FtT found that, having been emotionally and financially independent from his parents for a period between 2006 and 2007, it was unlikely that he reverted to being dependent on his return to Nepal. The FtT found it likely that, on return to Nepal, he had worked as farmer, his profession as described in his passport, which would have been sufficient for independent financial living. The FtT found that there was not a family life between the appellant and his parents, so as to engage article 8 of the ECHR. The FtT further found that the appellant had been dishonest in his dealings with the respondent.

## The grounds of appeal and grant of permission

6. The appellant lodged grounds of appeal which are essentially that the FtT had erred in finding that the appellant had engaged in deception, without proper scrutiny of the evidence before her. The appellant, while having travelled to Malaysia for work, had never in fact worked there. Instead, he had been supported by friends and returned to Nepal after eight months in April 2007 because of the lack of work. That erroneous finding of deception had gone to the core of the FtT's assessment and rejection of appellant's claim that he was dependent on his father. The ground of appeal is essentially one of irrationality or perversity.
7. The appellant's father had attended the FtT hearing to give evidence as to the claimed dependency and his oral evidence had not been challenged in the absence of a representative of the respondent at the FtT hearing. It was an error of law for the appellant's father not to have been challenged on the claimed deception.
8. In addition, it had been unchallenged evidence that the appellant had lived with his parents on his return from Malaysia. Whilst the FtT had found that the appellant had lived an independent life in 2006 to 2007, this was not the position taken by the respondent, so that the FtT's conclusion was not open to her.
9. First-tier Tribunal Judge L Murray initially refused permission to appeal to the Upper Tribunal, but on a renewed application, permission to appeal was granted by Upper Tribunal Judge S Smith on 2 August 2019. He regarded it as arguable that the FtT had made irrational findings concerning the respondent's allegations of dishonesty. Whilst the FtT had regarded as significant the appellant's omission of details regarding his brief period of work in Malaysia, which was more than 10 years before the application for entry clearance, it was arguably irrational to take into account that omission which was outside the timeframe within which the respondent specifically asked for details of prior travel. Arguably, the appellant's brief period of work in Malaysia in 2007 was of no relevance to the existence of article 8 family life in the period leading up to the appellant's father's departure from Nepal, to settle in the UK, in 2014. The remaining grounds of appeal concerned findings of fact which arguably were infected by the FtT's erroneous findings concerning deception.
10. The grant of permission was not limited in its scope.

## The hearing before me

### *The appellant's submissions*

11. Mr Shrestha, on behalf of the appellant, re-emphasised again the failure by the First-tier Tribunal Judge to comply with the guidelines set out in **\*MNM (Surendran guidelines for Adjudicators) (Kenya) [2000] UKIAT 00005**, (the 'Surendran' guidelines) which state, in the Annex to that judgement, as follows:

*"4. Where matters of credibility are raised in the letter of refusal, the Special Adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his*

*submissions. Whether or not these matters are addressed by the representative, and whether or not the Special Adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him."*

The Surendran guidelines continue:

*"6. It is our view that it is not the function of a Special Adjudicator to adopt an inquisitorial role in cases of this nature ... Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the Special Adjudicator. It is not the function of the Special Adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case they should be drawn to the attention of the appellant's representative"*

12. In essence, the appellant contended that the question of deception was only raised in the context of Annex K. The FtT's wider concerns about deception, for example, the appellant having been described in his passport as a farmer, amounted to the FtT expanding on the basis of the respondent's original decision. In reality, whilst the issue of deception had been taken in the context of Annex K, the application was not under Annex K, but was on article 8 grounds. The FtT should have specifically asked the representative in the hearing before her, to address her on the allegation of deception, but did not do so. The FtT was not impartial, but had 'entered the arena' on the respondent's behalf.
13. The respondent's application form for entry clearance only asked about details of travel in the last ten years, not work. The appellant remained dependent on his father even where there had been a brief period spent in Malaysia of no more than seven and a half months. The appellant's father had reiterated the appellant's dependency in his letter to the respondent supporting the appellant's application, a copy of which was at page [167] of the appellant's bundle.
14. The FtT had allowed her assessment of deception to infect her findings on the establishment of family life, where there was powerful evidence of such family life including the evidence of money transfers and cohabitation, which had been unchallenged.

*The respondent's submissions*

15. Mr Clarke on behalf of the respondent pointed out that the appellant's travel to Malaysia was not disputed. The issue was whether his working there had resulted in him establishing an independent life, which broke that period of claimed dependency; and that was something that was proper for the FtT to consider. The grounds fell into three areas:
  - a. the FtT's approach on finding that the appellant and his father had engaged deception,
  - b. the FtT's alleged failure to take into account relevant evidence;

- c. the FtT's impugning of the sponsor's credibility and integrity.
16. In terms of the first issue around deception, it was simply incorrect to say that this issue had not been raised by the respondent. It was raised specifically in the refusal letter, which referred to it not only in the context of Annex K, but also when considering the question of the appellant's claimed dependency. Dealing directly with the question of the Surendran guidelines, as noted in the guidelines already outlined, the FtT was entitled to form her own view of the evidence presented to her. The refusal letter had set out clearly the areas of concern, including the covering letter from the appellant's father as well as the letter from the local municipal authority in Nepal, which clearly suggested that the appellant had never been in employment, whereas this was in fact not correct. The issue had been identified both in the refusal letter and by the FtT at the beginning of the hearing. This was not a case where the FtT had expanded on the scope of refusal.
  17. I was also invited to consider that in a challenge as to irrationality or perversity, this was a very high threshold test. The FtT had considered in detail the evidence presented to her. Whilst I do not recite all of Mr Clarke's submissions, he referred me to various paragraphs in the FtT's decision, considering the questions of money transfers as well as evidence of family life in the context of a real, committed and effective relationship, where the question of a break in dependent family life was clearly relevant. The FtT had considered that period of absence at paragraph [24]. The FtT had also specifically considered whether in the entry clearance application form there had been any question about employment. The FtT had grappled with the nuances and distinctions of the application form, in contrast to what was said in the covering letters from the appellant's father and the local municipal authority in Nepal.
  18. The FtT was unarguably entitled to conclude that the assertion by the appellant and his father that there had been dependency throughout the appellant's life was deliberately misleading. In his own witness statement, the appellant referred to having worked in Malaysia and when he got into difficulties, he had relied upon the assistance of friends, rather than his father. The FtT had further referred at paragraph [36] to discrepancies in the appellant's father's supporting letter and at paragraph [27] to the municipal authority letter. This was not a question of a single word being misunderstood, but a misrepresentation by the appellant to the local municipal authority in Nepal as to whether he had ever worked. The FtT was entitled, when considering the evidence as a whole, to take into account the fact that the appellant had described his occupation as a farmer in his passport, in an overall assessment of the appellant's credibility.
  19. The FtT's decision was very comprehensive and consistent with the Surendran guidelines. It was unsustainable to claim that the respondent had never suggested the appellant had lived independently and the FtT had expanded on the scope of the respondent's refusal. The second page of the refusal letter had stated expressly that the appellant was not dependent on his parents and unless he were dependent on

another third party, it was impossible to accept that there was anything other than a clear implication that he was in fact independent.

### **Discussion and conclusions**

20. I considered the Surendran guidelines and whether the FtT had expanded upon the scope of the appeal before her, to become wider than the issues identified in the respondent's refusal. It is important that I refer to both the issues identified in the refusal letter and their context. In the refusal letter of 2 March 2018, the respondent had referred to the letter which the appellant had provided with his application issued by the Nepalese local municipal authority, which had referred to the appellant being 'found unemployed til 11 September 2017.' The decision records:

*"This document appears to state that you have never been in employment up until 11 September 2017. You have also provided a letter from your sponsor which states that you have no assets, income or resources on your own and you have remained his responsibility both emotionally and financially out of necessity. However, open source checks show that you were issued an employment visa for Malaysia on 9 July 2006. I am therefore satisfied that you have not always been unemployed to date as stated. I am satisfied that you have provided a false document in an attempt to make it appear that you are eligible for settlement under the Home Secretary's policy. Given these facts, I am satisfied that you have made false representations in support of your application and the following therefore applies to you"*

The letter then referred to the provisions of Annex K about the appellant falling to be refused on grounds of grounds of suitability.

21. However, I do not accept the submission that the above conclusion on suitability can be taken out of context of the later analysis of dependency, which is in the remainder of the refusal decision. On the same page as the conclusion around suitability is a further statement:

*"You state that you are financially and emotionally dependent on your parents. As evidence of this you provided a letter from Vyas Municipality which states that you were found to be unemployed until 11 September 2017; however, for the reasons outlined above I am satisfied that you have been previously employed. Whilst I note that you have provided money transfers from your sponsor, in light of the aforementioned concerns I am not satisfied that you are wholly financially dependent on your sponsor."*

In other words, the conclusion by the respondent as to whether the appellant was genuinely dependent on his father included express references to concerns around deception. The respondent clearly stated that the claim of dependency was undermined because of those concerns.

22. I then turn to the question of whether the appellant would have been aware that these issues were at the forefront of the FtT's mind and whether the appellant's representative had the chance to address any concerns.

23. The FtT stated at [5] of her decision:

*"The following is a summary of the grounds of appeal and Mr Wilford's skeleton argument and oral submissions",*

which included at [5(1)]:

*"The respondent averred the appellant relied on a false document, the letter from Vyas, which stated he was unemployed till 11 September 2107. The appellant and his father explained the brief unsustainable nature of his son's employment in Malaysia (over a decade before) and the inadvertent failure to mention this."*

24. The FtT went on to state at [7] to [8]:

*"7. The respondent did not provide anyone to present his case and did not request an adjournment. I told the sponsor that the lack of representation was not an indication that the respondent had made any concession with regard to the appeal; nor was it my role to promote or support the position of the respondent. My role was to be independent and impartial. I told him I would have regard to the reasons for refusal.*

*8. I identified with the appellant's representative the issues to be decided and these are noted in the record of proceedings. The sponsor adopted his witness statement. I asked him some questions to clarify his evidence. His oral evidence is noted in the Record of Proceedings. Mr Wilford confirmed he had no concerns arising from my questions. He did not re-examine the sponsor."*

25. The FtT then went on to make detailed findings in relation to both the appellant's credibility and also in that context the claimed family life between the appellant and the sponsor.

26. I do not accept the submission that the FtT erred in law in going beyond the **Surendran** guidelines and 'stepping into the arena,' without inviting the appellant's representative to address those issues. The FtT had clearly identified what the grounds of appeal were, which including the allegation of relying on a false document. That in turn was not an issue that went beyond the scope of the respondent's original decision – the issue of deception went beyond compliance with Annex K to the issue of whether the appellant was truly dependent on his father. The 'impugning' of the honesty of the appellant and his father, as referred to by Mr Shrestha, was a consequence of the FtT needing to consider whether the respondent's conclusions on deception were made out.

27. The FtT was therefore faced with the allegation of deception, which she had identified in the issues at the beginning of the hearing, and which she considered in detail. In doing so, she referred to the appellant's father's evidence and the documentation in the appellant's bundle. The appellant asserts that the FtT's findings on deception were irrational and not arguably open to her to make. That is an assertion which is not sustainable. I accept Mr Clarke's submission that the FtT had carefully considered the distinction between the entry clearance application form, which had referred to a period of travel; and the covering letter provided by the appellant's father and from the local municipal authority, which the FtT found had implied that the appellant had never worked and had remained wholly

dependent on his father. The FtT made a detailed analysis, which did not contain any error of law.

28. The appellant suggested that whether the appellant had worked more than ten years prior to his application was irrelevant to family life continuing at the date of the appellant's application. However, it is also clear from the FtT's decision that she went through in detail the different pieces of evidence in the round, including the period which the appellant spent in Malaysia, but also what she regarded as to the absence of contact between the appellant and his parents; as well as the lack of the evidence supporting the appellant's father's claim to have been saving to fund the appellant's application for clearance. The FtT did consider all of the evidence before and I do not accept the submission to the contrary. In light of concerns about the appellant's credibility, the FtT was entitled to attach more limited weight to the documents relating to money transfers. The FtT did not err in law in doing so.
29. In the circumstances, I conclude that the FtT was entitled to reach the findings and conclusion she did, on the evidence before her. There was no error of law in her decision.

### **Notice of Decision**

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

**The decision of the First-tier Tribunal stands and the appellant's appeal is dismissed.**

Signed *J Keith*

Date: 17 September 2019

Upper Tribunal Judge Keith

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

The appeal has been dismissed, so there can be no fee award.

Signed *J Keith*

Date: 17 September 2019

Upper Tribunal Judge Keith