Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08431/2019

THE IMMIGRATION ACTS

Heard at Field House (via Skype)	**Decision & Reasons Promulgated**
On 1 December 2020	**On 17 December 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MIN BAHADUR KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Ms K McCarthy, instructed by Makka Solicitors
For the Respondent: Mr Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a 37 year old Nepalese national who appeals, with permission granted by Upper Tribunal Judge Owens, against a decision which was issued by First-tier Tribunal Judge Gibbs ("the judge") on 26 February 2020. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his application to join his mother ("the sponsor") in the United Kingdom.

2. The sponsor is a Nepalese national who was born on 26 September 1945. In May 2016, she settled in the United Kingdom as the widow of the late Nin Bahadur, who served in the Brigade of Gurkhas between 1958 and 1975. The appellant's parents had five other children, now adults, all of whom remain in Nepal.

3. The appellant applied for entry clearance on 27 January 2019. He gave his details, and those of his parents, and he stated that he was a single man who remained financially dependent upon his mother.

4. In her decision, the respondent found that the appellant was unable to meet the requirements of the Immigration Rules or the relevant policy (Annex K of the Immigration Directorate Instructions). The correctness of neither conclusion is at issue in these proceedings. The respondent went on to conclude, however, that the appellant's ongoing exclusion from the United Kingdom was not unlawful under section 6 of the Human Rights Act 1998 and, in particular, that any such decision was in compliance with Article 8 ECHR. The correctness of that conclusion was very much at issue before the FtT, just as the FtT's resolution of that question adversely to the appellant is at issue in the Upper Tribunal.

The Appeal to the First-tier Tribunal

5. The judge received bundles from the appellant and the respondent and a skeleton argument from Ms McCarthy, who continued to represent the appellant before me. It was contended, in broad outline, that the appellant is a single man with no regular employment who remains close to his mother and who is financially dependent upon her. He was said to live alone in the family home in Nepal and to have access to his late father's pension via an account in the sponsor's name. Amongst other documents, witness statements made by the appellant and the sponsor and financial documents were adduced before the judge in support of these assertions. In Ms McCarthy's skeleton argument, it was submitted that the appellant and the sponsor continued to enjoy a protected family life and that the historic injustice perpetrated against the Gurkhas was determinative of the proportionality assessment which necessarily followed. The latter submission – based as it was on settled authority – was uncontroversial. The former submission was accordingly the judge's focus.

6. The judge reminded herself of relevant authority before she set out her findings of fact. At [8], she noted that there had been no intention for the appellant to join the sponsor when she left Nepal in 2016. That intention had only come about when the sponsor encountered difficulties with health and language after arrival in the UK. She attached significance, in those circumstances, to the fact that the appellant and the sponsor had chosen to live apart on a permanent basis. The judge was concerned, at [9] by the suggestion that the appellant had "no one in Nepal". That contrasted, she found, with the evidence given by the sponsor, which was that she and the appellant had seen her other children when she visited Nepal. The judge considered that the appellant and the sponsor had exaggerated the extent of his isolation in order to boost his chances of success on appeal. She also considered the suggestion that the appellant had lost contact with his married siblings to be contrary to a document adduced by the appellant entitled "A brief note on the Gurkha family": [10]. The judge considered this exaggeration on the appellant's part to cast doubt over other aspects of the evidence before her: [11]. She was satisfied that the appellant had available to him his father's pension but she thought it likely that this sum, which had previously supported a family of eight, was shared between the appellant and his siblings. She considered it unlikely that the appellant required the full amount to support himself.

7. At [13], the judge noted that the sponsor had stated in evidence that the appellant had worked in Nepal. That had not been disclosed in his witness statement. She had also changed her evidence to state, on the one hand, that the appellant had looked after the family's cattle, only then to state that there was only a single cow. The judge did not accept that the appellant had no contact with his siblings: [14]. She did accept that he remained close to his mother but she had chosen to leave Nepal in 2016 and had not intended for him

to join her. The relationship which continued to exist was not one which amounted to more than normal emotional ties and the money which was sent did not amount to real, effective or committed support: [15]-[16]. So it was that the appeal was dismissed.

8. Permission to appeal was initially refused by Upper Tribunal Judge Martin, sitting as a judge of the FtT. The appellant renewed both grounds of appeal to the Upper Tribunal. It was submitted, in summary, that there were errors of approach in the assessment of whether Article 8 was engaged in its family life aspect and that the judge had erred in failing to consider Article 8(2). UTJ Owens considered both grounds to be arguable, although it was only to the first that she referred in granting permission.

Submissions

9. In development of the grounds of appeal, Ms MCarthy submitted as follows. As regards the conclusion at [9] of the judge's decision, the appellant had never claimed to be totally isolated from his siblings and there was no proper evidential foundation for her conclusion that there was a discrepancy between the written and oral evidence. It was clear from [11] that this concern had caused the judge to view the remaining evidence with doubt. Secondly, the judge had seemingly been concerned that the sponsor had changed her evidence about how many cattle they had but the point had not been taken by the respondent and might easily have been a problem with interpretation. Thirdly, the judge had been concerned that the appellant was sharing his late father's pension with his siblings but the point had not been explored in oral evidence and, in any event, it did not alter the fact that committed support was being provided to him. Fourthly, the judge had misdirected herself insofar as she attached weight to the sponsor having 'chosen' to come to the UK; such a conclusion was contrary to what had been said in Jitendra Rai [2017] EWCA Civ 320. There had been no decision not to bring the appellant to the UK. Fifthly, the judge had conducted an assessment of Article 8(1) which left out of account the sponsor's dependence upon the appellant. These errors in the judge's rejection of the account were material, individually or cumulatively, since the case advanced by the appellant necessarily disclosed the existence of a family life.

10. Mr Whitwell submitted that the judge had not erred as contended by Ms McCarthy. It was necessary to set her findings in context. The appellant was thirty six at the date of the hearing before the FtT. He had not cohabited with his mother for three years or more, having decided that he did not wish to come to the UK. He had found casual work in Nepal when such work was available. All of these matters pointed away from the existence of a family life. The judge had directed herself in accordance with authority and her decision was to be read as a whole. She was aware of the facts, including the appellant and sponsor's cohabitation before she left Nepal. She had been entitled to consider it significant that the sponsor had chosen to leave the appellant. The record showed that the sponsor had stated that the appellant did not intend to come to the UK at first. It was accepted by the judge that the appellant was close to his mother but she had had concerns about the evidence given. Her assessment of whether he was alone, at [9] of the decision was open to her, as was the decision to attach weight to the change of in the sponsor's evidence over the number of cows owned by the family. Overall, the findings were open to the judge and this was mere disagreement on the part of the appellant.

11. Ms McCarthy responded briefly to draw to my attention page A10 of the appellant's bundle, in which the sponsor had said that it was not feasible to bring the appellant to the UK at the time she came.

12. I reserved my decision at the end of the submissions. It was agreed between the parties that the appropriate relief, in the event that I found there to be an error of law in the decision of the FtT, was for there to be a further hearing, either in the FtT or the Upper Tribunal. I reserved my decision on that also.

Analysis

13. Mr Whitwell's submissions about the context in which the judge made her decision were well made. It is perhaps unsurprising that the judge came to the conclusion that there was no family life between the healthy 36 year old appellant and his mother, with whom he has not lived for a number of years. Recalling that there is no presumption[1] for or against family life existing in circumstances such as this, however, it is to the reasons that the judge gave for her decision on Article 8(1) which I must turn in order to consider whether she erred in law.

14. Upper Tribunal Judge Martin refused permission to appeal in the First-tier Tribunal. In doing so, she concluded that the grounds were unarguable because they amounted to nothing more than a sustained disagreement with the judge's findings of fact. My provisional view of the grounds was, frankly, in accordance with Judge Martin's assessment; the judge had made findings of fact which appeared to be properly open to her on the evidence available.

15. Ms McCarthy invited me to consider the oral and documentary evidence before the judge, however, before reaching a concluded view. I have done so with the dicta from cases such as AH (Sudan) [2007] UKHL 49; [2008] 1 AC 678 and Fage v Chobani [2014] EWCA Civ 5 firmly in mind. I recall that the FtT is an expert Tribunal and that its decisions are to be respected unless it is clear that it erred in law. I also recall that the FtT was immersed in the sea of the evidence and that it is impermissible for counsel to engage in 'island-hopping', suggesting that certain items of the evidence should have received greater scrutiny or weight in the judge's written decision.

16. With those principles in mind, I turn to the first part of Ms McCarthy's first ground, which concerns the judge's conclusion that there was a discrepancy between what was said to be the appellant's evidence that 'there is no longer any contact' between the appellant and his siblings and the sponsor's evidence that she and the appellant saw his siblings when she last visited Nepal. Ms McCarthy's point is straightforwardly that the appellant did not say that he had no contact with his siblings and that there was, in the circumstances, no discrepancy.

17. I have examined the appellant's witness statement in considering this submission. It is a carefully drafted document which runs to four pages. Much of it is focused, as one would expect, on the relationship between the appellant and the sponsor. There are references to the appellant's siblings at various points in the statement. At [3], he states that they are married and live separately in Nepal and that they are 'too busy to care for me or support me'. He says that he feels like he has no other relationship with any other family members in Nepal as his siblings have independent lives and that he is extremely lonely. Similar

[1] Singh v SSHD [2015] EWCA Civ 630; [2016] Imm AR 1 refers

remarks appear in [5], in which the appellant also states that he receives no support from his siblings. At [6], he states that his siblings 'have abandoned our family life after they got married'. Then, at [7], he states that he has spent the last three years without any family members; that it has been extremely difficult; and that he has 'no family to interact with in Nepal'. At [10], he states again that his siblings have 'started their own lives'.

18. The picture painted by the appellant in these passages is as summarised in [10] of the statement: the appellant's siblings have married, settled down and started their own lives. The focus of those lives is now on their own nuclear families and not on the wider family, including the appellant and his mother. What is not said is that the appellant has no contact whatsoever with his siblings. No such assertion is made directly in the statement. Nor can it be inferred from what the appellant does say. The statement admits of the possibility that the appellant remains in contact with his siblings but that such contact is only sporadic, as a result of which he no longer considers his siblings to be a meaningful part of his family.

19. In the circumstances, I am bound to accept Ms McCarthy's submission that this experienced judge fell into error in concluding that there was a discrepancy between the account given by the appellant in his statement and that given by the sponsor in oral evidence. There was, in truth, no contradiction between the appellant's statement and the sponsor's evidence that she and the appellant had seen his siblings when she visited Nepal. In concluding as she did, I am satisfied that the judge fell into the type of error considered by Brooke LJ at [11] of R (Iran) & Ors v SSHD [205] INLR 633, in that she made a finding of fact which was wholly unsupported by the evidence.

20. I do not accept that the remaining submissions in ground one are made out. It is said at various points in the grounds that matters of concern were not put to the sponsor for comment, or that points were taken by the judge which had not featured in the submissions made by counsel for the respondent. But I do not consider, in light of Maheshwaran [2002] EWCA Civ 173, that it was incumbent upon the judge to ensure that all points potentially adverse to the appellant had been put expressly to the sponsor. Nor do I consider that she was required to confine her factual findings on the case to the points upon which she had been explicitly addressed. And I consider the judge to have given adequate and sustainable reasons for concluding that the financial support provided by the sponsor to the appellant was insufficient in itself to cross the rather modest threshold in Jitendra Rai of real, committed or effective support.

21. Ms McCarthy's third submission in ground one is that the judge erred in law in relying on the 'voluntary' separation of sponsor from appellant in 2016. She relies, in that context, on what was said by Lindblom LJ at [38]-[39] of Jitendra Rai. In doing so, I consider her to have misunderstood the focus of the judge's observations. The judge did not fall into the same trap as the judge at first instance in Jitendra Rai. The judge relied not merely on the fact that the sponsor had chosen to leave Nepal in 2016; her observation rested principally on the sponsor's oral evidence that she and the appellant had not intended in 2016 that he would follow his mother to the UK. There is a clear Record of Proceedings from the hearing in the FtT and it is clear that the sponsor did give evidence that they had both intended in 2016 that the appellant would not come to the UK. The judge was entitled, as a matter of law, to attach significance to that decision, which clearly shed a great deal of light on the relationship which existed at the point of the sponsor's departure (that being the proper focus, as per Jitendra Rai).

22. Ms McCarthy also contends that the judge erred in conducting what she aptly labelled a 'one-directional' assessment of family life. The judge had focused, she submitted, on the appellant's need for his mother and had not really considered the evidence that the sponsor's need for her son was potentially more acute. This was a case, she submits, in which the sponsor had struggled with her health and her English, and in which she required the support of her son. Recalling what was said in Beoku-Betts [2008] UKHL 39; [2009] 1 AC 115, Ms McCarthy submitted that the judge had erred in excluding the latter factors from her analysis. In fairness to the judge, however, the case was not really advanced on that basis – the focus of the statements and the oral evidence was plainly on the appellant's dependence upon his mother, not vice versa. There was no medical evidence to show that the sponsor was frail and there was very little to show that she was struggling due to her limited English. The judge's decision might properly be said to be 'one-directional', therefore, but it was justifiably so, given the focus of the case before her.

23. The final submission in ground one is that the judge failed to conduct a holistic assessment of whether a family life continued between the appellant and the sponsor. That submission is not made out. The judge plainly had the constituent parts of the relationship (financial support, emotional dependence and provision of accommodation) in mind, and her reasons for finding against the appellant were articulated with sufficient clarity to justify the ultimate conclusion.

24. Nor am I persuaded by ground two, the basis of which is simply that the judge should have considered Article 8(2) even if she was not satisfied that there was a protected family life in existence. With reference to Jitendra Rai and the authorities which preceded it, however, the judge's focus on family life was entirely correct. In the absence of a finding that Article 8 was engaged in its family life aspect, the judge was quite right to conclude that the appeal could not succeed: Pun v SSHD [2017] EWCA Civ 2106; [2018] 4 WLR 80 refers.

25. Having rejected all of the appellant's complaints apart from the first, therefore, I return to the question of whether the error of law I have found to exist requires me to set aside the decision of the FtT. Given the cogency of the remainder of the decision, it is with reluctance that I have come to the conclusion that I must set aside the judge's decision. I am not able to conclude that the error was immaterial to the outcome of the appeal as a result of what was said by the judge at [11] of her decision. It is quite clear that she not only attached significance to what she thought to be a discrepancy in the evidence; she stated that the discrepancy had coloured her view of the remaining evidence. Had she not erred as she did, therefore, she might have been less circumspect about accepting the evidence that the appellant (and only the appellant) was the recipient of his late father's pension, for example. I therefore set aside the decision in full.

26. Given the scope of the enquiry which is required, the just and proper course is for this appeal to be remitted to be heard de novo by a different judge.

27. On remittal, the FtT will be entitled to see further evidence in relation to matters which justifiably concerned Judge Gibbs. The sponsor gave evidence before her that she had set up a second bank account in Nepal, into which the appellant paid some of his late father's pension. There was no evidence of that bank account, however, and the judge did not have the full financial picture as a result. It is not for me to direct the provision of such evidence but the next judge in the FtT will be entitled to see the statements for that account and to draw an inference if they are not produced. The other point on which there should, in my

judgment, be further evidence is in relation to the appellant's siblings. Although the judge made an error in her evaluation of their relationship with the appellant, she was perfectly entitled to consider the extent of the support network available to the appellant in Nepal. There was only a partial picture painted by the evidence before the FtT, however, and the next judge should expect to see evidence (not assertion) of the location of those siblings, their family composition, and their occupations in Nepal.

Notice of Decision

The decision of the First-tier Tribunal was vitiated by legal error and is set aside in full. The appeal is remitted to the FtT to be heard de novo by a judge other than Judge Gibbs.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 December 2020