IAC-FH-CK-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/09962/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House by UK Court Skype** | **Decision & Reasons Promulgated** |
|---|---|
| **On 6 October 2020** | **On 14 October 2020** |

**Before**

**UPPER TRIBUNAL JUDGE OWENS**

**Between**

**MR GAIRE SUBASH**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr R Rai, Counsel instructed by Sam Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

The hearing was held remotely. Neither party objected to the hearing being held by video. Both parties participated by UK court Skype. I am satisfied that a face-to-face hearing could not be held because it was not practicable because of the current Covid-19 restrictions and that all of the issues could be determined in a remote hearing. Neither representative complained of any unfairness during the hearing and both representatives confirmed at the end of the hearing that the hearing had been conducted fairly.

The appellant is national of Nepal born on 7 July 1989. He appeals against the decision of First-tier Tribunal Judge Housego sent on 10 February 2020 dismissing the appellant's appeal against the decision dated 9 May 2019 to refuse him entry clearance to the United Kingdom as an adult dependent child of a former Gurkha soldier. Permission to appeal was granted by First-tier Tribunal Judge Lever on 15 March 2020.

## Background

The appellant applied for settlement on 21 February 2019 to join his mother in the United Kingdom. She in turn had been granted settlement in the United Kingdom in 2011 as the widow of a former Gurkha soldier. The application was refused on 9 May 2019 and the refusal was upheld on review by the Entry Clearance Manager on 18 November 2019. The basis of refusal was that the appellant did not meet Annex K of the immigration rules in respect of adult dependent children of former Gurkha soldiers, that the appellant did not meet the requirements of the immigration rules in respect of family life in accordance with Appendix FM and there was no breach of Article 8 ECHR outside of the immigration rules.

## Decision of the First-tier Tribunal

The judge heard oral evidence from the sponsor. The judge found that Article 8(1) ECHR in respect of family life was not engaged between the appellant and the sponsor. The judge did not accept that the appellant had been unemployed for the last ten years nor that the appellant was emotionally dependent on the sponsor in a situation where the sponsor and appellant had been living apart since 2011.

## The Grounds of Appeal

It is asserted that the appeal was procedurally unfair and that the judge misapplied the law in respect of 'family life'. At the outset of the hearing Mr Diwnycz for the respondent agreed that the decision was vitiated by material errors of law.

## Discussion and Analysis

## Ground 1 – Procedural Unfairness

It was asserted by Mr Rai that there was procedural unfairness during the appeal in that the judge introduced evidence in relation to the rates of unemployment in Nepal without providing the source of that evidence or giving the appellant any opportunity to counter the evidence. The judge went on to use that evidence to make a material negative factual finding against the appellant. This procedural unfairness has infected the decision.

In respect of this error, Mr Diwnycz agreed that the judge had introduced evidence during the hearing for which no source had been provided and that this was procedurally unfair.

At [39] the judge states:

> "The unemployment rate in Nepal is about 11%. This is a statistic well-publicised, as I discussed with Counsel in the hearing. That means that nearly 90% of people have jobs. The appellant was, I was told, keen to work in the UK at anything he could find to do. His mother was asked, but not able to give any indication at all of what efforts the appellant had made to find work, what sort of work he had tried to get, whether he had any interviews, where he had looked for opportunity and so on. It is simply not credible that he could find nothing to do in ten years. On the balance of probabilities I find that he has been working."

In the 'Note of Proceedings' prepared by the judge, it is said:

> "I have judicial note from past case that Himalayan Times April 2019 said 89% employment, nine of ten have jobs."

The appellant is recorded as saying;

> "I do not know".

Mr Diwnycz clarified that having researched the issue of rates of unemployment in Nepal,there is a reference on the internet to https://kathmandupost.com.money/2019/04/27-nepal-employmentrate. Mr Rai, who was the Counsel at the hearing, stated that he had asked the judge to provide the source of this evidence and the judge had failed both to provide the source or provide a copy of the evidence. Mr Diwnycz conceded that the source of the evidence provided by the judge (which appears to be a different source quoted by the judge in his Record of Proceedings) was not provided at the hearing. Mr Diwnycz also confirmed that during his internet search he found several other statistics in relation to rates of employment in Nepal which suggested that the rate of employment was much lower than that suggested by the judge. He also indicated that it is not possible to state the reliability of the figures in the Kathmandu Post evidence. He pointed to the fact that in the latest CPIN on Nepal there is no information about the employment rate.

I am satisfied that it was procedurally unfair of the judge to introduce to these proceedings evidence that he had come across in a previous appeal that had not been referred to by the respondent in the reasons for refusal nor introduced by either party to the proceedings. It was also procedurally unfair of the judge to rely on this evidence without providing the source of the evidence and without providing the appellant an opportunity to provide evidence to contradict it. The allegation of procedural unfairness is made out.

I am also satisfied that the error was material because the judge relied on this unfairly introduced evidence to make the finding that the appellant had not been unemployed since 2011 which went to the issue of dependency. Had the judge found that the appellant had not been working, he may have come to a different decision.

## Ground 2 – Misapplication of the Law

Mr Rai's submitted that at [40], when considering whether family life exists between the sponsor and the appellant, the judge places too much emphasis on the fact that the sponsor and appellant have been separated since 2011.

At [40] the judge says:

> "The appellant has lived in Nepal with his brother and without his mother since she came to the UK in 2011. It is not possible now to regard this as an extant family life. He is now 30 and they have lived in separate continents for about eight years. She visits him every couple of years for a couple of months. They doubtless speak often on the telephone and through Viber or WhatsApp or something similar, but that is no more than many parents and adult children do. It is not indicative of family life. There is no evidence other than a bald assertion of emotional dependency of the appellant upon his mother. Insofar as emotional support is needed the appellant and his brother doubtless provide this for each other."

Mr Rai relies on Rai v ECO [2017] EWCA Civ 320 for the proposition that family life can exist even if the family live separately. At [17] it is said:

> "She added that '[such] ties might exist if the appellant were dependent on his family or vice versa', but it was 'not … essential that the members of the family should be in the same country'. In **Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17**, Sedley LJ said (in paragraph 14 of his judgment, with which Longmore and Aikens LJJ agreed) that
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> > 'what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstances but by long-delayed right'."

Mr Rai pointed to the fact that the sponsor was granted a settlement visa to the United Kingdom on 28 April 2011 on the basis of being a widow of a former Gurkha soldier following a change of policy by the government in 2009. She entered the UK in September 2011. The policy then changed again in January 2015 in relation to adult dependent children of Gurkhas. The sponsor had given an explanation in that there had been a delay between the change of policy and making the application because firstly she was not immediately aware of the change of policy and secondly it took time to gather together the finances to apply for her son to come to the United Kingdom. It was an error by the judge to place too much emphasis on the separation in circumstances where there had been a separation as a result of a long-delayed right. The appellant's father was discharged from the British Army on 31 March 1994. Had he been given the right to enter the United Kingdom at that time, he would have done so with his dependents including the appellant.

Mr Diwnycz conceded that the judge had also erred in this respect and had misapplied the principles set out in Rai.

I agree with both of the representatives that there has been an error in this respect. The judge placed too much emphasis on the separation in the context of the long-delayed right. I also note that the existence of 'family life' is entirely fact-sensitive and that 'family life' can continue between family members even where there has been a separation depending on the individual circumstances of the case.

The judge also failed to properly evaluate whether there was 'real, effective and committed support' between the sponsor and the appellant. There was evidence of the appellant's long-term financial dependency on the sponsor as well as regular communication and visits. It was incumbent on the judge to give reasons for stating why he did not accept the mother's evidence of her son's dependency in the context of Nepali culture, applying the principles in Rai. On this basis, I find that there was a second material error of law. Had the judge applied the law correctly, the judge may have come to a different conclusion.

I therefore set aside the decision in its entirety.

**Disposal**

There was a discussion between the parties as to the most appropriate way of disposing this appeal. Mr Rai submitted that since the appellant had not had a fair hearing at first instance because of the procedural unfairness and because there was further fact-finding to made in respect of dependency that it would be appropriate to remit this appeal to be reheard de novo in the First-tier Tribunal. Mr Diwnycz was in agreement and I am also of the view that as a result of the procedural unfairness aspect in particular, that the correct approach is for the appeal to be remitted to the First-tier Tribunal for a complete re-hearing.

**Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**The decision of the First-tier Tribunal is set aside in its entirety.**

**The appeal is remitted to the First-tier Tribunal to be reheard de novo by a judge other than Judge Housego.**

**No anonymity direction is made.**

Signed R J Owens
Date 8 October 2020
Upper Tribunal Judge Owens