



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

Appeal Number: HU/01156/2020

THE IMMIGRATION ACTS

**Heard at Field House via MS Decision & Reasons Promulgated
Teams**

On: 12 November 2021

On 22 November 2021

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MISS LAXMI RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M West, counsel instructed by Everest Law Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Reid, promulgated on 10 February 2021. Permission to appeal was granted by Upper Tribunal Judge Gleeson on 11 June 2021.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. On 22 April 2019, the appellant, who was born in 1981, made an application for entry clearance to settle in the United Kingdom as the dependant adult daughter of a former Gurkha soldier. That application was refused on 17 July 2019 and that decision is the subject of this appeal.
4. The Entry Clearance Officer (ECO) considered the application under the discretionary policy for Gurkhas discharged before 1 July 1997, as amended on 1 July 1997. While the ECO was satisfied that the appellant's parents were present and settled in the United Kingdom, it was noted that the appellant was aged over 30 and the family unit had been based in the UK for more than 2 years prior to the date of application. The appellant's claim of financial and emotional dependence on the sponsors was rejected on the basis that she was able to care for herself and it was noted that she was in good health, able bodied, educated and had adult siblings in Nepal who had not applied to settle in the UK. The ECO also considered the appellant's claim under the Rules for adult dependent relatives but rejected it owing to a lack of evidence of any personal incapacity. The application was also refused on human rights grounds as it was considered that the appellant had not established a family life over and above that between an adult child and parents and the reasons for refusal outweighed the consideration of historic injustice.
5. An Entry Clearance Manager reviewed decision to refuse on 8 April 2020 but was satisfied that the policy was considered correctly, and that Article 8(1) was not engaged.

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the appellant's parents gave evidence on her behalf. The judge found that the appellant was living independently at the time of the decision and that her relationship with the sponsors did not go beyond the normal emotional ties between an adult child and their parents.

The grounds of appeal

7. The grounds of appeal are twofold. Firstly, that the judge failed to permit the witnesses an opportunity to address issues which were held against the appellant and secondly, that the judge's finding that Article 8 was not engaged was arguably perverse given her findings that the sponsors regularly sent funds, telephoned, and visited the appellant in Nepal.
8. Permission to appeal was granted on the basis sought.

9. The respondent did not file a Rule 24 response.

The hearing

10. At the outset, Ms Isherwood stated that the respondent opposed the application.

11. The points made by Mr West can be summarised as follows. Both grounds were relied upon. In relation to the first ground, there were a number of issues considered by the judge which were not the subject of challenge in evidence at the hearing. There were four areas of concern, as set out in the renewed grounds. It was not for the Tribunal to adopt an inquisitorial role. Those issues ought to have been put to the witness in the proceedings. The presenting officer took no issue with any of these issues, and it was not appropriate for judge to go away and conduct own investigation. As for the second ground, the judge found there was financial support, regular visits, regular phone contact, that the appellant was unmarried and without children and that she was supported by living on the family land. Considering those findings, the tribunal had to be satisfied that there was some support which was effective, committed, or real. It was irrational for the tribunal to find there to be no family life.

12. Ms Isherwood argued that there was no material error of law in the Judge's decision. She added the following remarks. The issue of finances was raised at the hearing and the appellant's submissions were set out including that the sponsors are pensioners. It was clearly highlighted that finances and transactions were relevant and the amount of the transactions was mentioned on behalf of the appellant. The issue of rent was also referred to in the appellant's submissions. The judge questioned why money was being sent to Kathmandu for years when the appellant's case was that she was not living there until 2020. The sponsor's explanation was considered however owing to this inconsistency, the judge found that the appellant was living an independent life. The judge acknowledged the oral evidence regarding the appellant's circumstances in Kathmandu and noted that there was no documentary evidence. This was a submission point. The degree of financial support was not ascertainable on the evidence. The judge commented on what was said in the witness statements and documents and the appellant's representative had an opportunity to re-examine a witness or make submissions. It is for the appellants to clarify the evidence submitted. The judge noted that the appellant's witness statement was confused as to whether she was paying rent or not. Judge looked at the claim that the appellant started renting in May and noted that there were no larger payments after that date from the sponsor. Part of the appellant's case was that she moved to Kathmandu in 2020, the judge did not accept that and found that the appellant lived independently. This finding has not been challenged. As for the second ground, the judge found that the appellant was dependent upon the sponsor at one point, but she had moved away. The adverse findings had not been challenged and there was no material error of law.

13. In response to Ms Isherwood's submissions, Mr West accepted there was a joint responsibility on the parties to address issues and that the burden was on the appellant to show that Article 8(1) was engaged. He added that it was not for the appellant to anticipate every issue. As for the rent issue, it could not be envisaged that the judge would take a point on this.
14. As for materiality, the judge was not saying that financial support was not being sent to the appellant. It was irrelevant whether she moved away in 2017. The test was whether the support was committed, effective or real. It was not enough that to say she is living independently.
15. At the end of the hearing, I reserved my decision as to whether there was a material error of law.

Decision on error of law

16. The first ground contended that there were "numerous" occasions when the First-tier Tribunal judge failed to give the appellant or her witnesses an opportunity to respond to issues ultimately held against the appellant. Those issues are addressed below.
17. In the renewed grounds, criticism is made of the judge for finding at [26] that the rate and frequency of the money remittances did not accord with the evidence of the appellant and her witnesses. Also, at [29] of the decision where the judge noted that the financial support had not materially increased since the appellant's claimed move to Kathmandu in 2020. The evidence of the appellant, at paragraph 4 of her witness statement, was that her father used to send 40,000 NPR every three or four months but had sent 15,000 per month since she relocated to Kathmandu in 2020. The judge noted that the usual amount of the transfers had "*not noticeably gone up in 2020*" to cover the appellant's rent; that there were no larger payments to compensate for this later and that the payments for 2020 were lower than for 2018. The judge's findings were based on the documentary evidence produced in advance of the hearing and it would have been obvious that there were inconsistencies to anyone looking at these documents. It was open to the appellant's representative to address these matters, had there been ready explanations. This did not occur. Consequently, there was no need for the judge to put these points to the sponsor.
18. In the grounds, it was argued that the judge was wrong to make an adverse finding based on the absence of documents to show the rental arrangements for the appellant's accommodation in Kathmandu. The judge is also criticised for noting that there was no evidence that the rent was capable of being met by the sponsor. The grounds are wrong to suggest the judge raised these issues of his own motion. The first point had been put in issue by the content of paragraph 4 of the appellant's witness statement, in which she said both said that she paid rent of 5000 NPR to the owner of the house who was from her village and that she was living rent free. The appellant made no mention of living with anyone else

in her statement. The oral evidence of the appellant's parents on this point was referred to during the submissions on behalf of the appellant [7]. That evidence was that the appellant was renting a property with a friend. Therefore, given the varying accounts, the judge was entitled to note the absence of supporting evidence which could assist in addressing an obvious inconsistency in the evidence.

19. The findings made by the judge arose from matters put in evidence on the appellant's behalf. There was no challenge in the grounds or submissions made before me, to any of the adverse findings he made. Had there been innocent explanations to be put forward, and I was not referred to any during the hearing before me, the outcome of the appeal represents a failure of the appellant's representative to address relevant matters rather than owing to a material error of law.
20. The second ground takes issue with the judge's conclusion at [31] that Article 8(1) was not engaged, arguing that it was perverse. The difficulty with this argument is that the case put forward on behalf of appellant was not accepted by judge, in that adverse credibility findings were made in respect of appellant's circumstances, none of which were challenged in the grounds. In particular, the judge found that the appellant had been living independently in Kathmandu, with her friend, since 2017. He rejected the claim that the appellant moved to Kathmandu as recently as February 2020 as she and her parents claimed. The judge took into consideration the inconsistencies between the account put forward on behalf of the appellant and the documents. There was no evidence before the judge as to what to what the appellant's financial needs were or whether the financial remittances went any way to meeting them. The judge correctly directed himself, in that he made his decision having in mind the considerations in *Rai* [2017] EWCA Civ 1109. The judge took into account that the sponsor continued to send funds and that there was contact between the appellant and her parents, but he did not accept that dependency had been shown. In these circumstances, the judge's finding that the appellant's family life with her parents did not endure after their departure from Nepal in 2012 was one that was open to him.
21. The decision of the First-tier Tribunal contains no material error of law and is upheld in its entirety.

Decision

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

The decision of the First-tier Tribunal is upheld.

No anonymity direction is made.

Signed:

Date 16 November 2021

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is **“sent”** is that appearing on the covering letter or covering email