IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
HU/19004/2019(V)

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THE IMMIGRATION ACTS

Heard at Field House via Teams	**Decision & Reasons Promulgated**
On the 16th September 2021	**On the 08th November 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR NIRMAL KUMAR RAI
MR BIJAY KUMAR RAI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER
UKVI Sheffield

Respondent

Representation:
For the Appellants: Ms E Lagunji, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

The appellants appeal, with permission, against the decision of First-tier Tribunal Judge Karbani promulgated on 4th February 2021 and which dismissed their appeals heard on 19th January 2021.

The appellants are nationals of Nepal born on 18th August 1989 and 20th February 1986 and at the date of the hearing were aged 31 and 35 years respectively. They made applications for entry clearance on 2nd June 2019 to join their mother, who is the widow of a former Gurkha, Dil Prasad Rai. The sponsor is presently settled in the UK and attended the hearing to give evidence.

The appellants had appealed the decision of the Secretary of State dated 14th August 2019 on human rights grounds on the basis that the appellants did not qualify for entry clearance within the Immigration Rules as there was no provision for Gurkha widows to sponsor their children. The respondent did not accept that there was family life or that there were exceptional circumstances rendering the refusal a breach of the appellants' or their sponsor's right to family and private life under Article 8.

The grounds of challenge are as follows.

(i) Failure to consider all aspects of family life.

The judge at paragraph 27 of the determination appeared to positively find that the sponsor and appellants resided together as a family unit before the sponsor left. However, in line with paragraph 17 of **Rai v ECO [2017] EWCA Civ 320** the judge failed to consider this relevant fact when assessing whether or not family life was ongoing despite separation. Following **Rai** it is not essential that members of the family should be in the same country. Thus the judge failed to consider all aspects of family life.

(ii) Overemphasis on the absence of witness statements from the appellant

The judge throughout the determination suggested that the absence of witness statements from the appellants had affected her consideration of much of the evidence and thus had an impact on her findings. This was flawed reasoning regarding the absence of witness statements and amounted to a material error of law.

The judge referred throughout to the absence of witness statements in various instances.

(1) At paragraph 28 of the determination she stated she had attached limited weight to the sponsor's evidence because the appellants had failed to provide witness statements for the appeal. The judge had failed to state why one would impact the other.

The judge was required to have regard and attach appropriate weight to the evidence of any witness to the appeal and the judge on the one hand stated she attached no weight to the

sponsor's evidence and yet on the other she stated at paragraph 32 that she found an aspect of the sponsor's evidence credible.

The judge failed to consider what practical weight could be attached to witness statements in the absence of the live witnesses as the evidence could not be tested and it was submitted that the judge placed too great an emphasis on the absence of any witness statements.

(2) At paragraph 34 the judge found the appellants did not share more than normal emotional ties with the sponsor because of the absence of witness statements but the judge had entirely disregarded the sponsor's evidence without reason and again placed overemphasis on the absence of witness statements. This amounted to an irrelevant consideration.

(3) The judge's overemphasis on the absence of witness statements had also tainted her consideration of the money transfer receipt evidence, finding they were limited but the sponsor explained that the appellants accessed her bank account in Nepal.

The judge acknowledged at paragraph 29 that withdrawals were made from the sponsor's account in Nepal in the sponsor's absence, but she found in the absence of witness statements from the appellants she could not be satisfied that funds were accessed and used by the appellants despite the sponsor's evidence confirming this.

It was submitted that the judge had again entirely disregarded the sponsor's evidence and failed to state what weight she attached to the sponsor's evidence regarding the use of funds in Nepal.

(iii) Failure to give reasons for findings

At paragraphs 31 and 33 it is said the appellants are likely working and it is likely they had lived apart, but the judge had failed to state why she reached those findings.

The above, it was submitted, were arguable errors of law.

The Hearing

At the hearing Ms Lagunji submitted in relation to ground 2 that the challenge was that the judge's reasoning placed an overemphasis on the absence of the appellants' witness statements. In an entry clearance appeal the absence was not unusual. The judge entirely disregarded the live evidence by not making an assessment or according to any weight to the sponsor's live evidence. At paragraph 28 she found owing to a lack of the witness statements that she attached only limited weight to the sponsor's evidence and did not explain why

it should affect the assessment. There was no assessment of the live evidence at paragraph 29 where the sponsor stated that she had given her children the cards to withdraw money.

In relation to ground 3, at paragraph 31 she made a finding that the appellants were not working but reached her conclusions without a proper basis.

At paragraph 32 the judge found the sponsor's evidence credible but that was the only assessment of the live evidence and again at paragraph 33 the judge did not accept the appellants had lived throughout their lives with the sponsor but there was no reasoning.

Ms Lagunji did accept that the judge had applied the correct tests set out in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31** in relation to family life and **Rai**.

In addition, she submitted ground 1 was flawed on the basis of the judge's approach at paragraph 27.

Mr Clarke's overarching submissions were that the grounds of appeal had mischaracterised the findings of the judge and that the judge had complied with the binding precedent principles regarding corroborative evidence.

Ground 1 displayed a misunderstanding of case law. **Rai** at 39 held that the central consideration would be whether family life was established prior to the sponsor's departure and continued, but there was no *presumption* that family life continued. That was clear from 17 and 20 of **Rai**.

The burden was on the appellants to demonstrate family life and a degree of dependence. There was no presumption that it would continue.

In relation to ground 2 of the appellants' appeal it was open to the judge to draw adverse inferences and he referred the Tribunal to **ST (Corroboration - Kasolo) Ethiopia [2004] UKIAT 00119**. This recognised that corroboration was not necessarily needed in an asylum claim but referred to evidence which could have been produced. Under **TK (Burundi) v Secretary of State for the Home Department [2009] EWCA Civ 40** paragraphs 15 and 20 the judge was plainly entitled to take into account the failure to provide evidence. Family life and the continuation of the same was a live issue. There was no explanation at all as to the absence of the witness statements. **TK (Burundi)** at paragraph 20 emphasised the importance of evidence and the importance of independent evidence.

To assert that the judge attached no weight to the sponsor's evidence was simply wrong and I was referred to paragraph 28. At paragraph 32 the judge considered what aspects of the sponsor's evidence were credible and it was open to the judge to find that she would like the appellants to join her. However, the sponsor's evidence regarding the appellants was simply hearsay. The fact that they spoke on a daily basis was supported by Viber evidence but how the appellants view their emotional dependence was not set out in any witness statement and the judge was entitled to give limited weight to the

sponsor's evidence and indeed she was giving generous in the weight she did give.

In relation to the second point of ground 2 it was clear that the judge had not entirely disregarded the sponsor's evidence or placed an overemphasis on the absence of witness statements.

In relation to point 3 of the second ground, which impugned the approach to the remittance evidence disregarding of the sponsor's evidence, that was not evidenced by paragraph 28 where the judge specifically stated that she attached "limited weight to the sponsor's evidence" and at paragraph 29 there was the consideration of the position on the remittances. For example, there were only three remittances and the judge notes critically that the sponsor's own evidence was that she had debts. There was no evidence from the appellants as to what they used the money for. When looking at dependence this was an important consideration. Additionally, there was no supporting documentation as to who withdrew the money. The decision overall was well-reasoned, and it had been the sponsor's position that she had debts which she was paying off.

Ground 3 had also mischaracterised what the judge had found. The judge had actually found that the appellants had not discharged the burden that they had not lived apart and had not worked. At paragraph 27 the judge had looked at employment and the evidence of the sponsor was that the appellants did work ten years ago in farming, and they were not successful. The judge reasoned that the appellants had good school qualifications and could speak English and owing to the passage of time over ten years that it was unlikely they had not worked. There was nothing wrong with that.

Turning to paragraph 33, the judge found that there was no evidence from the appellants confirming their current abode or places where they had lived before and there was no evidence as to the impact of the separation on the appellants as a result of the refusal. Emotional dependence was an important element of family life.

Ms Lagunji responded that there was a failure by the judge to make relevant findings but that had not been pleaded. I do not accept that the grounds can be altered. She submitted that paragraph 28 where it appeared the judge had made reference to the sponsor's statement was not capable of attaching to the whole of the sponsor's evidence.

Analysis

Gurung v Secretary of State [2013] EWCA Civ 8 held in relation to family life

> *'The critical issue was whether there was sufficient dependence, and in particular sufficient emotional dependence, by the appellants on their parents [my underlining] to justify the conclusion that they enjoyed family life. That was a question of fact for the FTT to determine. In our*

> *view, the FTT was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent'.*

Ms Lagunji rightly accepted that the judge had, when considering whether family life under Article 8 was engaged, applied the right test at paragraph 34, when she considered whether there was evidence of "real, effective or committed support". That test is approved in **Jitendra Rai v ECO [2017] EWCA Civ 320**.

It should be underlined that the Entry Clearance Officer's refusal specifically identified that he was not satisfied that the appellants had established family life with their mother 'over and above that between an adult child and parent' or that Article 8 was engaged. The appellants were thus on notice that this issue was flagged as the basis of refusal.

In relation to ground 1, I agree that the grounds have mischaracterised the findings of the judge, at paragraph 27 and fail to appreciate the requirement under **Rai** that family life must be continuing. The judge does not positively find that the sponsor and the appellants were living together in Nepal, and I restricted Ms Lagunji from expanding the grounds to include that the judge had failed to make relevant findings. As pointed out by Mr Clarke, there is no *presumption* that family life continues but it is important to consider whether that family life was continuing. At paragraph 27 the judge records that the sponsor '*claims* that her sons were living with her' but at paragraph 33 the judge stated that she was not satisfied as to their living arrangements because there was no signed statement from the appellants setting out "their current abode or places where they had lived before". It was entirely open to the judge to make the findings she did on the living arrangements. At paragraph 33 the judge added she was not satisfied they had never lived apart from their mother, '*even when she was residing in Nepal because they have not provided a signed statement'*. The judge was entitled to make that finding and did not fail to consider a relevant fact. Her approach was not a misdirection in law. In essence the judge for sustainable reasons was not satisfied that the evidence on living arrangements supported the existence of a family life.

Turning to ground 2, both **ST (Corroboration - Kasolo) Ethiopia** and **TK (Burundi)** are cases in relation to asylum and the standard of proof differs from that in an immigration appeal as in this instance. Nonetheless, in both appeals the burden of proof is on the appellant. Although corroboration is not necessarily required, even in asylum cases where evidence is reasonably available and not obtained, it is very likely that there will be criticism and at paragraph 16 **TK (Burundi)** Thomas LJ, stated this:

> *"16. Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons. …"*

Further, at paragraph 20 **TK (Burundi)** he added:

> *"20. The importance of the evidence that emerged in this Court is to demonstrate how important it is in cases of this kind for independent supporting evidence to be provided where it would ordinarily be available; that where there is no credible explanation for the failure to produce that supporting evidence it can be a very strong pointer that the account being given is not credible. …"*

The appellants are legally represented and apparently in daily contact with their mother and, as Mr Clarke rightly pointed out, there was no explanation proffered as to why there were no witness statements. I find that Mr Clarke's submissions were well-made.

Ground 2 criticised the judge for an overemphasis on the absence of witness statements from the appellants but omits any consideration or reflection upon **TK (Burundi)** or **ST (Kasolo)**. On a careful reading of the decision it is quite evident that the judge has made reference to the sponsor's evidence and weighed that evidence. Indeed, at paragraph 27 the judge specifically states that she had "considered the sponsor's evidence in her statement and in evidence before me" That is a clear statement that the judge has taken into account the sponsor's evidence in total.

Self-evidently statements from the appellants themselves are axiomatic and the judge is entitled to consider the evidence overall. At paragraph 28 it was apparent that the judge did not dismiss the sponsor's evidence out of hand but attached "limited weight to the sponsor's evidence". The judge specifically recorded that the witness statements from the appellants could have been reasonably obtained, given that the appellants were legally represented and had submitted other documents from Nepal. The judge was entitled to reduce the weight given to the sponsor's evidence in the light of this. Further, the judge was entitled at paragraph 32 to find that the aspect of the sponsor's evidence, such that the sponsor would like for the appellants to join her in the UK to work and to provide her with support, was credible. There is nothing controversial in that.

The grounds also state that the judge failed to consider what practical weight could be attached to witness statements in the absence of the live witness but that seems to ignore the fact that witness statements without live witnesses are regularly placed before the Tribunal and considered in evidence. Once again, I refer to the authorities of **ST (Kasolo)** and **TK (Burundi)**.

It was entirely open to the judge at paragraph 34 to find that the absence of the witness statements from the appellants undermined the claim of a family life or of it continuing. It is, as the judge states, for the appellants to demonstrate that they have a family life on the balance of probabilities. The judge stated that "I am not satisfied that on the balance of probabilities, the appellants have demonstrated that they share family life with their mother which engaged Article 8". The evidence of the sponsor was not ignored but the

existence of family life was obviously undermined by the absence of confirmation of the same from the appellants themselves.

In relation to the third point of ground 2, the contention that the approach to the absence of witness statements tainted the consideration of the money transfer receipts, is not made out. It was entirely open to the judge to require an explanation as to the use of the funds from the appellants. Indeed, the sponsor's evidence was specifically taken into account to the effect that she had debts in Nepal. The judge identified that there were only three remittances from the UK and the judge recorded the sponsor's evidence that she sent money to the appellants to pay for travel and visas but that she had debts in the UK and in Nepal which she was repaying. The judge specifically stated:

> *"The remittances from the UK are limited and there is no explanation as from the appellants as to how these remitted funds were used. There are clearly withdrawals being made from two bank accounts in Nepal in 2019 and 2020, whilst the sponsor has been living in the UK. However, there is no supporting evidence from the appellants as to who is withdrawing these funds or what they are being used for."*

The absence of witness statements in that regard is critical because there was no evidence as to where the funds were going and what they were being used for and the judge has also shown that she had taken the sponsor's evidence into account to the effect that the judge carefully worded "I am not satisfied that these withdrawals were not being used for that purpose", i.e. repayment of debt.

Again, at paragraph 29 it is entirely open to the judge to find in the absence of witness statements from the appellants that she cannot be satisfied that funds are accessed and used by the appellants. These were salient issues that needed to be clarified by the appellants and indeed could only be addressed by them.

It is clear that the judge did actually take into account the sponsor's evidence because in the first line of paragraph 29, she states: "The sponsor said that she supports the appellants with the pension received in Nepal and supplements this with income from the UK." That said, without the corroborative evidence which was reasonably available the findings by the judge were sustainable.

Overall, it is crystal-clear that the judge did not omit consideration of the sponsor's evidence nor did the judge place overemphasis on the lack of the appellants' witness statements. It is the appellants' appeal and the burden rests with them to demonstrate on the evidence that they had a continuing family life with their mother.

In relation to ground 3, again, the judge made carefully worded findings at paragraphs 31 and 33 and these are made reasoned findings. The judge did not say "it is likely the appellants are working" or, "it is likely that they have

lived apart from the sponsor at some stage whilst in Nepal". The judge actually stated: "Overall, I am not satisfied that the appellants are not working, have not worked for the past ten years or that they need access to the sponsor's funds in Nepal to meet their daily expenses." The judge had recorded at paragraph 27 that, "I find it unlikely that they have unsuccessfully been looking for work for this period of time, even though they have good school qualifications and can speak English", and indeed, the judge also found that from the sponsor's evidence at paragraph 27 that the appellants had indeed worked farming the family land, albeit ten years ago.

The decision is well-reasoned. The judge was plainly entitled to take into account the failure to provide critical evidence that should be readily available and was entitled to cast that as a factor with considerable weight in relation to the assessment of the appeal specifically in relation to family life.

I am guided by **UT (Sri Lanka) [2019] EWCA Civ 1095** which confirmed that 'judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined'. I so exercise restraint here. There is no arguable error in the decision of the First-tier Tribunal.

Notice of Decision

I find no error of law in the decision and the decision of the First-tier Tribunal Judge will stand. The appellants' appeals remain dismissed.

No anonymity direction is made.

Signed H Rimington Date 6th October 2021

Upper Tribunal Judge Rimington