IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-003905
& UI-2022-003910
First-tier Tribunal Nos: HU/56382/2021
& HU/56383/2021

IA/15227/2021 & IA/15233/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 8 March 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

(1) Lalit Bahadur Thapa	First appellant
(2) Gyan Bahadur Thapa	Second appellant

(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer	Respondent

Representation:
For the Appellants: Mr R Layne, of Counsel, instructed by, ARKAS Law
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 19 December 2022

DECISION

1. The appellants are brothers and nationals of Nepal, born (respectively) on 25 February 1977 and 23 December 1982. They have been granted permission to appeal against a decision of Judge of the First-tier Tribunal Parkes (hereafter the

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"judge") who, in a decision promulgated on 16 June 2022 following a hearing on 6 June 2022, dismissed their appeals on human rights grounds (Article 8) against decisions of the respondent of 23 September 2021 to refuse their applications of 17 July 2021 for entry clearance as dependent children of a Gurkha veteran, Mr Santa Bahadur Thapa (the "sponsor"), who has been settled in the United Kingdom with his wife since 3 March 2015.

2. The applications of 17 July 2021 were the second time that the appellants had made applications for entry clearance as dependent children of the sponsor. They first applied for entry clearance on the same basis on 23 November 2017. Their applications were refused on 16 February 2018 and their appeals dismissed by Judge of the First-tier Tribunal Monson in a decision promulgated on 22 July 2019. Permission to appeal was refused by the First-tier Tribunal and the Upper Tribunal.

3. Unfortunately, neither party provided the judge with a copy of Judge Monson's decision. On 13 December 2022, Mr Melvin submitted to the Upper Tribunal a copy of the decision of Judge Monson.

4. At the commencement of the hearing before me, Mr Layne accepted that the decision of Judge Monson was admissible because it did not constitute evidence that post-dated the hearing before the judge. It was a judicial decision that directly related to the appellants and of which they could reasonably be expected to have had notice of. Indeed, it was incumbent upon the parties to have adduced a copy of Judge Monson's decision at the hearing before the judge so as to enable him to consider the application of the principles in Devaseelan v Secretary of State for the Home Department * [2002] UKIAT 702.

5. In any event, it is evident that the judge correctly inferred (at [19]) that *"(t)he previous appeal[s] would have been dismissed on the basis that the Appellants had not shown that they enjoyed family life with the Sponsor and those in the UK"*. This aspect of para 19 of the judge's decision was not challenged in the grounds, nor was any issue taken in this regard at the hearing before me.

6. At para 19 of his decision, the judge proceeded to find that the evidence before him did not show that family life had continued as claimed or that it had been re-established.

7. Although I summarise the written grounds in the next paragraph, it is appropriate to point out at this stage that, in relation to ground 1, it was clear from Mr Layne's submissions, that ground 1 was based on a misconstruction of the judge's decision. Furthermore, in relation to ground 2, although the written grounds advance *"four parts",* summarised by me at para 8(2)(a)-(c) below, Mr Layne informed me that the essential point was that the appellants had established that they were receiving regular remittances from the sponsor which, in his submission, was sufficient to establish family life.

8. The written grounds contend, in summary, that the judge erred in law as follows:

(1) Ground 1: In deciding whether family life continued, the judge applied the wrong threshold, in that, he considered at para 22 (according to para 7 of the grounds) that the appropriate test as to whether Article 8(1) was engaged was whether

there was "… *some exceptional circumstance*", whereas (the grounds contend) it is clear from paras 36-37 of the Court of Appeal's judgment in Rai [2017] EWCA Civ 320 that there is no need for some extraordinary or exceptional feature in the appellants' dependence and that the correct test is whether there exists "*real or effective or committed support*" between the appellants and the sponsor.

(2) Ground 2: This ground is expressed as being advanced in four parts under the heading "*The FtT failed to properly assess the evidence*". However, it is clear that the main points that emerge are as follows:

(a) The fact that the appellants were financially supported by the sponsor before the sponsor left Nepal and that the sponsor has since then been sending the appellants remittances for their financial support means that the sponsor has regularly and consistently sent money to the appellants for over seven years *"surely means"* (the grounds contend) that the evidence before the judge was sufficient to satisfy the low threshold for engagement of Article 8(1) on the basis of family life because it shows that there was real, committed or effective support. It is possible for there to be real, committed or effective support even if dependency is not established.

(b) The judge accepted that there were regular money transfers but was of the view that there is no evidence of home or family circumstances. However, the witness statements indicated that the purpose of the money transfers were for the appellants to pay for rent, food, travel, medical, shopping, and any other expenses. The judge erred by focusing solely or speculating on the income from farming and/or driving but ignoring the evidence that such income was not sufficient to meet the appellants' expenses.

(c) The judge erred in attaching little weight to the documentary evidence that the appellants are receiving regular remittances from the sponsor and are unskilled labourers. Given that it is difficult to prove a negative other than by an assertion, there was no evidence put forward by the respondent that the appellants were employed or that the appellants or the sponsor were not credible. There was no basis for the judge to find that the appellants are in gainful employment or did not require the funds provided by the sponsor.

Assessment

Ground 1

9. Although para 7 (ground 1) states that the judge applied the wrong test of *"… some exceptional circumstance"* at para 22 of his decision, Mr Layne informed me that para 7 of the grounds concerned para 4 of the judge's decision (not para 22) where the judge said:

> "4. Recent cases such as Hesham Ali, a deportation case, have suggested the use of a balance sheet approach to an assessment under article 8. The Immigration Rules are relevant to the assessment of the public interest, the fact that an

> appellant may meet the rules is a weighty but not determinative factor. **Where the rules are not met compelling circumstances would be needed** to justify a grant under article 8 and there is a clear distinction between being simply unable to meet the Immigration Rules rather than circumstances that the rules have not contemplated. It has been repeatedly stated that the number of cases expected to succeed outside the rules is likely to be small, **hence the need for compelling circumstances."**

(My emphasis)

10. Mr Layne accepted not only that the judge had not used the word *"exceptional"* but that he had not done so in the context of an assessment of dependency or whether family life was being enjoyed. Instead, he had used the term "*compelling circumstances*" in the context of an assessment of proportionality. He accepted that the judge's description of the reasons for the need for compelling circumstances to be shown for a decision to be disproportionate was in line with the Supreme Court's judgment in R (Agyarko) v SSHD [2017] UKSC 11, amongst other cases.

11. It is therefore clear that the appellants' written ground begins by reading into para 4 of the judge's decision a phrase, i.e. "… *some exceptional circumstance*", which is simply not there, and then misconstruing para 4 and advancing it as a paragraph that dealt with an assessment of the existence of family life whereas para 4 of the judge's decision concerned the proportionality balancing exercise.

12. When pressed to explain what error of law was relied upon in ground 1, Mr Layne submitted that the judge had erred by looking for exceptional circumstances in deciding whether the appellants enjoyed family life with the sponsor, contrary to his earlier submission. However, he admitted that he could not find anything in the judge's decision which showed that he had looked for exceptional circumstances in deciding whether the appellants enjoyed family life with the sponsor. At that point, Mr Layne informed me that he could not pursue ground 1 any further.

13. There is therefore no merit at all in ground 1.

Ground 2

14. Paras 15-19 of the judge's decision read:

> "15. Although there has been a previous decision and so Devaseelan applies the decision has not been provided and the only information available is in the Sponsor's witness statement at paragraphs 6 and 7. From the witness statement it appears that there have been periods when the Appellants have not lived with the Sponsor but the information is confused.
>
> 16. The First Appellant and Sponsor refer to having trained as a garage mechanic but being unable to complete the course but only the Sponsor made a reference to having worked as a driver. It is not clear when, or for how long, that continued and I cannot rule out the First Appellant still working, even if only from time to time in that capacity.
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> 17. The Second Appellant's circumstances are also subject to some concern. Clearly there was a time when he was not resident with the family and it appears that he too was away for economic reasons and that may have coincided with his

brother's absence. If the Second Appellant did not make it as far as Singapore it is not clear why his not getting further than India would have featured in the account being given to whoever made the statement and it appears that the Sponsor did not check it. Show *[sic]* It is stated that the absence of both of them from the family home coincided with the Sponsor's coming to the UK but there is no supporting evidence for the duration of time that they were living elsewhere.

18. From the Sponsor's evidence it appears that the Appellants are still working in farming and his concern, expressed in re-examination, was that if he did not send money to them they might not have sufficient. That implies that the resources available to them in Nepal are more generous than the written evidence would suggest and highlights the inconsistencies and failure to mention relevant details such as the First Appellant's work driving.

19. The previous appeal would have been dismissed on the basis that the Appellants had not shown that they enjoyed family life with the Sponsor and those in the UK. From what the Sponsor said his evidence then was that the Appellants were no longer in the family home and the family unit had disbanded with his coming to the UK. The evidence does not show that family life has continued as claimed or that it has been re-established. There are no circumstances that would justify a grant of leave outside the Immigration Rules."

15. It is clear from the judge's reasoning that he found the evidence before him was lacking in material respects, including that the information in the witness statements was confused as to the periods when the appellants had not lived with the sponsor; that it was only the sponsor who had referred to the first appellant having worked as a driver; that it was not clear when he had worked as a driver and for how long; and that the evidence in relation to the second appellant was unclear.

16. The appellants must have received the decision of Judge Monson. It was argued before Judge Monson that the appellants had not established independent lives and that they remained financially and emotionally dependent upon the sponsor (para 23). Judge Monson dealt with these issues at paras 24-26 of his decision which read:

"24. It is not disputed by the sponsor that he represented in his application for indefinite leave to enter, made in February 2015, that the first appellant (Lalit Thapa) was habitually resident in another part of Nepal, and that the second appellant (Gyan Thapa) was living in Singapore. Thus, he represented that they were both leading independent lives.

25. It is very difficult to reconcile this clear representation with the evidence put forward by way of appeal. Taken at its face value, the sponsor's evidence about Lalit Thapa contradicts, rather than clarifies, the information given about him in the ILE application. If the first appellant was not habitually residing in Butwal pursuing a career as a car mechanic, but remained based at the family home, there was no good reason not to say so in the application form. The sponsor blames the representation that the second appellant was living in Singapore on a mistake made by the agent who filled in the form on his behalf. But the agent would have received his instructions from the sponsor. In any event, the fact that the second appellant left the country with a view to settling in Singapore is an indication of him striding out on his own; and the fact that his father apparently did not know at the time of application that the second appellant had not reached Singapore is a powerful indication that the second appellant was at that time

leading an independent life, an aspect of which was that he did not keep his father informed about significant developments in his situation.

26. Accordingly, I am not satisfied that the appellants were not leading independent lives at the time that their father applied for indefinite leave to enter. But I accept that it does not follow that they are leading independent lives now. However, it is clear that they are not sitting around doing nothing. There are two family farms to be run. The fact that they have to hire labour to assist them in working the land tends to undermine the proposition that they are merely subsistence farmers who are only able to grow enough to feed themselves and other members of the family. But even if I am wrong about that, the fact that they are farmers means that they are not wholly dependent on income from their father for their survival."

17. At para 35, Judge Monson said:

"35. It is not satisfactorily established that the appellants enjoyed family life with their parents at the time of their departure to the UK, as they appear to have been leading independent lives at that juncture. But even if family life could be said to have subsisted at the time of the parents' departure to the UK, the evidence does not satisfactorily establish that family life continues to subsist. The two return visits to Nepal are not indicative of the subsistence of family life, having regard to their relatively short duration. Also, the parents would not just have been visiting the appellants but they would also have been visiting at the same time numerous other family members, including some of their grandchildren. The fact that the appellants have been keeping in contact with their father by modern forms of communication is not indicative of them having a relationship of support or dependency going beyond normal emotional ties. Accordingly, Article 8(1) is not engaged."

18. The appellants therefore ought reasonably to have known understood why they lost their appeals before Judge Monson. It was open to them to have adduced evidence to address those issues in a way that would have assisted the judge. Instead, their evidence was lacking and, it appears, confused.

19. The submission in the written grounds (my para 8(2)(c) above), that it is difficult to prove a negative, is misconceived and it ignores the fact that the burden of proof was upon the appellants to establish a positive fact, i.e. that they enjoyed family life with the sponsor. It was for them to submit evidence which clearly established their circumstances. They failed to do so.

20. The remainder of ground 2 reads as if the mere fact that the appellants were receiving financial support from the sponsor and had been receiving such remittances for seven years is sufficient to show that they enjoyed family life with him. This was also the crux of Mr Layne's submissions on ground 2. Whilst the existence of financial support is relevant in showing whether or not there is real or effective or committed support, the fact is that it is not sufficient in itself. In reality, ground 2 amounts to no more than a disagreement with the judge's decision and an attempt to re-argue the evidence as to remittances.

21. Mr Layne also submitted that the judge erred by failing to consider the evidence of remittances adequately and by failing to attach sufficient weight to the evidence of remittances. There is no substance in these submissions which amount to no more than a disagreement with the judge's decision.

22. For all of the reasons given above, I have concluded that the judge did not err in law. The appellant's appeals to the Upper Tribunal are therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

Accordingly, the decision of the First-tier Tribunal to dismiss the appellants' appeals against the respondent decisions on human rights grounds stands.

Signed

Upper Tribunal Judge Gill Date: 9 January 2023

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**