



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

Appeal Number: UI-2023-003761

First-tier Number: HU/56423/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

8th December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**PITTAM BAHADUR SEN
(Anonymity order not made)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms K McCarthy, counsel

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

DECISION AND REASONS

Heard at Field House on 1 December 2023

The Appellant

1. The appellant is a citizen of Nepal born on 18 December 1985. He appeals against a decision of Judge of the First-tier Tribunal Moffat dated 13 June 2023 in which the judge dismissed the appellant's appeal against a decision of the respondent dated 4 August 2022. That decision was to refuse the appellant's application for entry clearance on article 8 grounds.

In his appeal the appellant argued that the respondent's decision breached this country's obligations under the Human Rights Act 1998. The appellant wishes to join his widowed mother Ram Kumari Sen ("the sponsor") who has indefinite leave to remain in the United Kingdom as the widow of a former Gurkha soldier.

The Appellant's Case

2. The appellant argues that he has suffered from an historic injustice in that his father was not allowed to settle in the United Kingdom upon discharge from the Gurkha Regiment. Had his father been allowed to settle here at that time, the appellant would have travelled to the United Kingdom. The appellant lived with his mother and siblings in Nepal and after completing his education he became a freelance photographer and web designer. However this was not sufficient to cover his essential needs and he is financially dependent upon his mother the sponsor for food housing and other practical necessities. He is unmarried and states he has no regular employment.

The Decision at First Instance

3. At [25] to [27] the judge reviewed the financial evidence in the case in particular payments made into the appellant's bank account. She noted that some of the appellant's freelance work earned far more money than the appellant received from the sponsor's pension and would cover the expenses that the appellant had set out in the witness statement for many months at a time. Originally the appellant had lived in the family home but moved out to another property then returned in 2015 following an earthquake in that year. He then left the family home again to the address where he currently lives.
4. The judge noted that the appellant had not provided any supporting documentary evidence to demonstrate that the appellant was solely responsible for and paid the rent on the property where he was living. The respondent had taken issue with the absence of call logs between 2017 and 2021 to show communications between the appellant and the sponsor. This was a long gap of four years in the evidence relating to contact. The judge concluded that the appellant had not demonstrated that he had a family life with his sponsor. There was evidence that he drew on his sponsor's pension money but the appellant was in receipt of much larger sums from his own income. Although there was some support it was not effective because the appellant had not demonstrated that he had any financial liabilities and had not accounted for how he spent his freelance income. The judge dismissed the appeal.

The Onward Appeal

5. The appellant appealed against this decision on two main grounds. The test to be applied in dependency cases, it was submitted, was whether there was real, effective or committed support. The judge had failed to

consider the committed nature of the support from the sponsor even though there was evidence of regular withdrawals by the appellant from the sponsor's pension going back nearly 6 years. The second ground argued that there was evidence of significant support provided by the appellant to his sponsor to meet her medical needs. The appellant took loans from friends to pay for his mother's medical expenses in India. The trip to India itself had not been referred to in the determination. Support for the purposes of establishing family life could be provided by an adult child to a parent. The appellant travelled with his mother to India in 2019 and this evidence showed support which went beyond the normal emotional ties expected.

6. Initially permission to appeal was refused by the First-tier Tribunal on the basis that the judge had found that the appellant's claimed freelance income did not accord with the documentary evidence. Some of the appellant's freelance work earned more money than the appellant received from the sponsor's pension. The absence of evidence of the appellant's accommodation costs was not disputed in the grounds.
7. The appellant renewed his application for permission to appeal to the Upper Tribunal arguing that in refusing permission the First-tier had not dealt with all relevant matters. The First-tier judge was wrong to find that the support which the sponsor provided to the appellant was not real for the purposes of the test of dependency. The appellant had never denied that he undertook regular freelance work but the income from that did not cover his essential needs. The First-tier had not considered the significant support provided by the appellant to his mother during the trip to India. Whilst it was accepted the appellant had not provided documentary evidence of living expenses he only needed to show that his sponsor was providing support that was real or effective or committed. Upper Tribunal Judge Rintoul granted permission to appeal on 30 October 2023 finding it arguable that the judge erred in not taking into account relevant evidence put forward in ground 2, see [5] above.

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
9. In oral submissions counsel for the appellant argued that there were two main grounds the first under article 8 was that family life existed between the appellant's widowed mother, the sponsor, and himself but the judge had found family life did not exist. At [36] the determination the judge had applied the law incorrectly. The judge accepted that monies were made available to the appellant by the sponsor from her pension and that statements went back six years but the judge did not consider the wider nexus in this case that payments by the sponsor demonstrated real

support. The judge had wrongly added an additional test as to how the sponsor was spending her money.

10. In relation to the second ground the judge had failed to take into account material evidence. The appellant did obtain work as a freelance photographer but it was not enough to cover essential needs. He could not support himself without the money he received from the sponsor. Some larger payments the appellant had received were a loan he had taken on to pay for the sponsor's medical expenses. The judge had assumed that those were earnings but the evidence was that they were a loan. The judge also failed to have regard to the sponsor's needs particularly her medical needs which the appellant helped her to meet. Support could flow in both directions from sponsor to appellant and from appellant to sponsor. It was not a test of dependency as it would be under the immigration rules, it was a test of whether family life was engaged. Financial dependency was one way but it was not necessary.
11. What had to be shown was real effective or committed support. This was different to the test which might apply say where a sponsor was bringing in an adult dependent relative. The six months of care the sponsor had received in India went beyond normal ties between an adult son and his mother. The judge had not had regard to that in the determination.
12. In reply the presenting officer submitted that there was no material error of law in the determination and that the appellant was simply seeking to re-argue the appeal. The grounds had focused on the financial aspects of the case. The judge had set out the respondent's position and noted the relevant evidence. At [12] the judge considered the witness statement and the lack of evidence of contact between appellant and sponsor. The authority of **Rai [2017] EWCA Civ 320** dealt with real support. In making the pension available to the appellant, the appellant was trying to get round the entry clearance requirements. The appellant received more income from earnings than from the pension of the sponsor. The appellant's evidence was that he did freelance work. The evidence did not show that his earnings could not meet his essential needs. There had been no challenge by the appellant to the points made by the judge on lack of contact. The appellant had not provided any evidence regarding his accommodation and how it was paid for. The judge was entitled to dismiss the appeal.
13. In conclusion counsel stated that whilst the judge was entitled to weigh the evidence and did not have to mention each and every piece of evidence, if there was material evidence that was not considered or misunderstood that would amount to a material error of law. There was a low threshold to establish family life and weight had to be given to it in the proportionality assessment. What needed to be shown in a case such as this was real support. The appellant could not pay for his rent. There had been a failure by the judge to consider that support could go in both directions, from appellant to the sponsor and from the sponsor to the appellant. As to the lack of contact, the sponsor had explained that she

was progressively losing her hearing and as a result did not have as much contact with the appellant as she needed or would have liked. When she went to Nepal she stayed with the appellant who was unmarried. The determination should be set aside.

Discussion and Findings

14. The appellant's argument in this case is that he has a family life with his mother the sponsor with which the respondent's decision to refuse entry clearance interferes. He further argues that in assessing the proportionality of that interference one has to take into account the historic injustice that his father was not able to settle in the United Kingdom upon discharge from the Gurkha Regiment. The effect of the historic injustice is that the interference caused by the respondent's decision will be deemed to be disproportionate and accordingly the appellant's appeal should succeed under article 8.
15. The appellant acknowledges that he cannot succeed under the immigration rules and that this appeal is therefore under the provisions of article 8, the right to respect for private and family life. The burden of proof of establishing the existence of family life rests upon the appellant who must demonstrate that it is more likely than not that family life beyond normal affection exists.
16. Both sides in this case have relied on the Court of Appeal decision of **Rai**. In that case the Upper Tribunal had held that there was no family life between the adult child of a former Gurkha and their sponsor. The Court of Appeal overturned the decision, finding in that case that there was family life. In the instant case before me the judge held at [37] that the appellant had not demonstrated there was family life between him and his sponsor. The judge was concerned about a number of matters but particularly that the appellant could not be said to be dependent upon the sponsor. He appeared from the evidence to be in a better financial position than the sponsor receiving large sums of money which the judge found the appellant had not accounted for. At [36] the judge held that support, in the form of payments from the sponsor, was not effective because the appellant had not demonstrated what if any his financial liabilities were. Further he had not accounted for how he spent the earnings he received from his freelance work. The judge stressed that the burden of proof rested on the appellant to show financial dependency but he had evidently not discharged that burden.
17. The judge noted that the sponsor was herself dependent on her daughter (who gave evidence at the hearing) which would also limit the question of whether the appellant was dependent on the sponsor as opposed to being dependent on his sister who was the person on whom in turn the sponsor was dependent. The appellant's argument is that this is a novel and incorrect legal argument but the judge's point has to be seen in the

context of the factual matrix. The judge was indicating that support from the sponsor was not real, in effect the sponsor was acting as a facilitator for money to be advanced by the appellant's sister to the appellant. It was not however the appellant's case that family life over and above normal emotional ties existed between the appellant and his sister.

18. The appellant argues that support establishing the existence of family life can be either from the sponsor to the appellant or vice versa. Further that in her determination the judge failed to consider the evidence pointing to support which the appellant has provided to the sponsor for example help her with medical bills. In **Rai** the Court of Appeal considered whether on the facts of that case there was a family life between the adult child and parents which went beyond normal emotional ties. The court quoted with approval from the case of **Singh [2015] EWCA Civ 630**: "The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more." Although the judge in the instant case before me found at [36] that there was some support, she did not find that it was real committed or effective. This was because, on the evidence, there was only intermittent communication between the appellant and the sponsor and the appellant's financial position was such that he could cover his essential needs without resort to monies from the sponsor. She was not able to support the appellant because she was herself dependent upon her daughter.
19. Those were findings of fact open to the judge on the evidence before her. The appellant disagrees with those findings but a mere disagreement cannot demonstrate a material error of law. In the onward appeal against the judge's decision the issue of the support which the appellant gives to the sponsor has been highlighted to a greater extent than it was put to the judge at first instance. The judge acknowledged that there was some support and at [19] recorded the submission by the appellant's representative that there was some co-dependency between the appellant and the sponsor. At [21] the judge noted the appellant's claim that the sponsor was dependent on emotional support from the appellant because she was dependent on the appellant to telephone her. The judge noted that the evidence before her on the issue of emotional support was very similar to the evidence before the previous judge in the determination in 2017 which had found that there was no family life between the appellant and the sponsor.
20. For the appellant therefore to submit that the judge has overlooked the question of whether there was support from the appellant to the sponsor is incorrect. The appellant's complaint is that the judge did not refer in terms to the support given by the appellant to his mother when she needed to travel to India for medical attention. It is not the case that a judge must of necessity set out each and every piece of evidence, to do so would make determinations unduly long. The judge herself acknowledged that she had not set out each and every piece of evidence but had nevertheless considered it, see [24].

21. What was material was the appellant's claim that the sponsor was dependent on him and the judge dealt with that. In the case of the telephone calls the claim of dependency was undermined by the gaps in the communication, gaps which were acknowledged by counsel at the hearing before me. The submission was that the sponsor would like to speak to the appellant over the telephone more often but that does not show support from the appellant. Ultimately it was a matter for the judge to decide whether the support which the appellant was giving to the sponsor was real committed or effective and the judge found that it was not. That was a matter for the judge and to the extent that the appellant appeals that finding it does indeed amount to no more than an attempt to re-litigate the appeal.
22. The appellant could not show on the evidence that he was dependent on the sponsor. On the evidence he was in a much stronger financial position than the sponsor and according to the findings of the judge was not dependent on the sponsor to meet his essential needs. The argument was made that this was an historic injustice case and therefore one does not look at matters as if this was a an appeal under the immigration rules by an adult dependent relative. Nevertheless, it is still essential for an appellant to show that a family life exists which would be disproportionately interfered with by the respondent's decision. The judge found that that was not the case both because the appellant was not financially dependent on the sponsor and because the appellant's support for the sponsor was not real effective or committed.
23. Whilst the judge could perhaps have written a longer determination than the one actually written, it is still clear from the judge's determination to the losing party why they have lost. The judge did not find there was a family life that was interfered with by the respondent's decision because there was no real effective or committed support either way. I do not find therefore though that there was any material error of law in the determination of the judge and accordingly I dismiss the onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

Deputy Upper Tribunal Judge Woodcraft