



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

Appeal Number: HU/17902/2019

THE IMMIGRATION ACTS

**Heard at Field House, London
On Wednesday 25 August 2021**

**Decision & Reasons
Promulgated
On Tuesday 12 October
2021**

Before

**UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

Between

MR SUSHIL THAPA

Appellant

-and-

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Dr D R T Chhetri, Solicitor, Lincoln's Chambers Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant is a citizen of Nepal. He was born on 20 June 1989. His father served as a soldier in the Brigade of Gurkhas for almost 16 years and was discharged in 1961. The Appellant's father passed away in 1995. In 2014 the Appellant's mother was granted settlement in the UK under the Respondent's discretionary arrangements for widows of Gurkhas discharged prior to 1 July 1997. She has lived in the UK ever since (although she has

visited Nepal during this time). The Appellant has remained and continues to live in Nepal.

2. The Appellant first applied for entry clearance as an adult dependent child of his mother on 15 December 2016. That application was refused on 21 December 2016. In a determination of First-tier Tribunal Judge Lawrence promulgated on 14 November 2017, the Appellant's appeal against that decision was dismissed. Judge Lawrence found that there was insufficient dependency to establish family life within the meaning of Article 8 ECHR between adult relatives. The Appellant appealed that decision to the Upper Tribunal, but, by a decision of Deputy Upper Tribunal Judge Woodcraft promulgated on 5 September 2018, that appeal was also dismissed.
3. On 4 July 2019 the Appellant made a further application for entry clearance as an adult dependent relative. That application was refused by the Entry Clearance Officer on 26 September 2019 and the refusal was upheld by the Entry Clearance Manager on 9 January 2020.
4. The Appellant appealed again to the First-tier Tribunal, which appeal came before First-tier Tribunal Judge Aldridge ("the Judge") for hearing on 18 February 2021. By a determination promulgated on 26 February 2021 ("the Decision"), the Judge dismissed the appeal on the basis that the Appellant had not shown that there was family life within the meaning of Article 8. It is against the Decision that the Appellant now appeals once more to this Tribunal.

THE DECISION UNDER APPEAL

5. As the Appellant challenges the Judge's approach to the finding of facts and as the task of this Tribunal is to determine whether there is an error of law in the Decision, it is necessary to set out the Decision in a little detail, focusing on the parts that are of significance in light of the criticisms made by the Appellant of it.
 - a. After summarising the factual background and the Entry Clearance Officer's decision, the Judge noted the Appellant's counsel's concession that the Appellant did not meet the requirements of the Immigration Rules and that the appeal was pursued solely on Article 8 grounds outside of the Rules.
 - b. At [6] of the Decision, the Judge then noted that he had heard evidence from the Appellant's mother, which he had taken into account, together with the documents filed by the parties and the closing submissions. The Judge further noted that he had received paginated bundles from both parties and a skeleton argument from the Appellant's counsel. He then explained that, in writing his determination, he would only set out the evidence and submissions he considered necessary to explain his decision.

- c. The Judge then reminded himself of the burden and standard of proof and of the general approach to Article 8 cases (no criticism of which is made before this Tribunal). At [10], the Judge noted the previous determinations of the First-tier and Upper Tribunals which he stated that he had considered with care, noting that the previous claim for entry clearance was on essentially the same grounds as that before him.
- d. The Judge then set out the Devaseelan guidance as to the proper approach to be adopted by the First-tier Tribunal where there is an earlier determination of the Tribunal involving the same appellant, including, the Judge noted, that where facts personal to an Appellant which were not brought to the attention of the first judge, but which could have been and were relevant “*should be treated by the second Adjudicator with the greatest circumspection*” and generally should not lead to a different conclusion.
- e. The Judge then recorded the Appellant’s argument that there was additional evidence before the Tribunal than in the first appeal, said to detail his position and express how he is both emotionally and financially dependent on his mother and not an independent man. The Judge noted the Appellant’s submissions that since the determination by the First-tier Tribunal of 14 November 2017 the caselaw has developed and evolved. The Appellant relied in particular on the Court of Appeal’s decision in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 and this Tribunal’s decision in Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351 (IAC).
- f. At [16]-[19], the Judge set out in detail the proper approach to claims that family life exists between adult relatives, including the Rai case mentioned above. No challenge is made to the correctness of this summary of the law.
- g. At [21] the Judge identified his starting point as the earlier determination that there was no family life engaging Article 8 between the Appellant and his mother and briefly summarised the reasons given in those determinations.
- h. At [22] the Judge noted the Appellant’s witness statement of 9 February 2021 detailing the chronology of the family dynamics, explaining his claimed family life with his mother and addressing his work prospects and finances. The Judge noted that this was said by the Appellant to be new evidence providing cause to depart from the findings in the previous determinations. The Judge then reminded himself of the need, pursuant to Devaseelan principles, to treat such evidence with the greatest circumspection. At [24] the Judge stated that he could see no reason why the Appellant could not have brought this information and provided a statement to the first judge in 2017. The statement, the Judge notes, contains information that could all, save in relation to

Covid, have been presented earlier. There is no challenge to that finding.

- i. The Judge then made the following findings of fact: (i) the Appellant is unmarried and has never been married; (ii) he completed limited education and has no higher qualifications; (iii) he lived with his mother until she left to come to the UK and continues to live in rented accommodation in Kathmandu since she left; (iv) he and his mother speak over the telephone and other social media; (v) his mother visited Nepal in 2019 and saw the Appellant; and (vi) his mother sends money to the Appellant in Nepal. There is no challenge before us to these findings.
- j. At [26] the Judge considered in detail the question of the Appellant's financial dependence on his mother. In particular, the Judge noted that there was no evidence of the Appellant's outgoings beyond his costs of rent, nor was evidence provided to demonstrate how much money he needs per week or month to survive. It was therefore not possible to equate the claimed payments to him with his claimed living costs. While it was claimed that all his income was from his mother, this, the Judge found, had not been shown to the Tribunal. The Judge accepted that there was evidence that monies were given to the Appellant by his mother, but he did not accept that a dependency has been proved and he was not satisfied that he had been provided with adequate evidence to depart from the previous determination. The Judge did not find it credible that the Appellant had resided for over six and a half years at the same address in Kathmandu but had made no friends, contacts or found any gainful employment. He noted that Judge Lawrence had previously rejected the suggestion that there were no jobs in Nepal and considered that there was no evidence to persuade him to depart from that earlier decision in that respect.
- k. At [27] the Judge considered the submission that the Appellant was emotionally dependent on his mother. He recorded that the evidence adduced by the Appellant was that, despite being 31, the Appellant continued to look to his mother for love and guidance and in effect remained part of his mother's household, was regarded as her responsibility and had not made an independent life for himself. The Judge rejected this evidence, finding that he had lived an independent life for over six years. Whilst accepting that there was now evidence of the purchase of phonecards, the Judge considered that he was unable to find from these that they had been bought by the Appellant's mother or used to speak to the Appellant, noting that the Appellant's mother had numerous other close family members in Nepal. Little weight was accordingly attached to this evidence. The Judge then considered printouts of records of phone calls, but considered that there was insufficient in them to enable him to accept that the contacts or attempted contacts were as claimed. He noted that this evidence must, on Devaseelan principles, be treated with caution.

- I. At [28] the Judge drew the various threads together. He concluded that the evidence did not satisfy him that the Appellant would be living with his mother but for the fact that she was unable to bring him with her to the UK and did not accept that, during the period since the Appellant's mother came to the UK, there was continuing real, committed and effective support, nor were there family ties going beyond the normal ties of love and affection between adult children and their parents. Accordingly, the Judge found, Article 8 was not engaged in its family life aspect. The historic injustice point therefore did not apply and he did not consider that there were any compelling circumstances. He did not therefore depart from the previous decision.

DISCUSSION

6. The Appellant criticises the Judge's approach to whether family life, within the meaning of Article 8 ECHR, existed between the Appellant and his mother. We can discern four criticisms of the Decision from the Grounds, as elaborated orally by Dr Chhetri on behalf of the Appellant.
7. It is convenient to address the first two criticisms of the Decision together, by reference to the Appellant's claimed financial and emotional dependence in turn. The two criticisms are, first, that relevant evidence was not taken into account or given due weight, and second, that the Judge's findings were not open to him on the evidence.
8. In relation to the issue of *financial dependence* we were taken by Dr Chhetri to the Appellant's mother's bank statements with Standard Chartered, which indicated that large sums were withdrawn on a regular basis, and to her witness statement paragraph 39 of which states that whenever she goes to Nepal she withdraws money to give to the Appellant. We were likewise taken to the payment order forms with Ria Financial Services Ltd, which appear to indicate that the Appellant's mother makes regular electronic transfers to the Appellant. We do not accept that this evidence was left out of account by the Judge. As noted above, he accepted that there was evidence of money given to the Appellant by his mother. This can only have been by reference to this evidence. We were also taken to the Appellant's rental agreement, to which the Judge also referred and which therefore must have been taken into account. In our judgement, the Appellant's submission that insufficient weight was given to this evidence does not begin to get off the ground. The Judge's rejection of financial dependency was based on the lack of evidence of the Appellant's outgoings other than his rent, and of how much money he needs to live on. We were not taken to any such evidence. In our judgement the Judge was entitled therefore to find on the evidence that was before him that the Appellant had not proved that the payments to him equated to his living costs, or that all his income was from his mother. The weight given to the evidence by the Judge was well within the bounds of what he was entitled to give it.

9. In relation to the question of *emotional dependence*, we were taken to evidence of the Appellant's mother's trips to Nepal (itineraries and passport stamps), to copies of a number of calling cards and to printouts of call logs said to be between the Appellant and his mother. However, the Judge found as a fact that the Appellant's mother had visited him in Nepal and he referred in [27] to both the phone cards and the printouts of records of telephone calls. We therefore reject the suggestion that the Judge left these out of account. We also consider that the Judge was entitled to reach the conclusion that given the large number of other family members in Nepal he could not find that the call cards had been used to speak to the Appellant. Likewise, the Judge was entitled to find that the printouts of phone calls were insufficient to satisfy him that the contacts between the Appellant and his mother were as claimed. No telephone number is shown, so it is difficult even to be confident from these records that they are calls between the Appellant and his mother. Even if they are, they are ambiguous as to whether the number on various entries relates to the number of calls made in a particular day or the duration of them. The Judge was entitled to give these documents the limited weight that he did, particularly given the strictures of the Devaseelan guidance, the Judge's approach to which is not challenged in this appeal.
10. The Appellant's third criticism of the Decision is that certain of the Judge's findings are inconsistent with each other. The Appellant relied in this respect on the observation by First-tier Tribunal Judge Scott Baker in granting permission to appeal as follows:
- "At [25(a)] the judge recorded that the appellant was unmarried and had never been married and at [25(c)] that he had lived with his mother until she came to the UK. At [27] he makes a finding that the appellant has lived an independent life in Kathmandu for over six years but such finding is inconsistent with the evidence before the judge that the UK sponsor was providing financial support to him as accepted at [26]."
11. In our judgement, having regard to the totality of the Decision, there is no such contradiction. In the present context, independence and dependence are not absolute or binary concepts. Family life within the meaning of Article 8 ECHR may be established by "elements of dependency involving more than normal emotional ties" (as the Court of Appeal described it in Kugathas [2003] EWCA Civ 31 at [17] (emphasis added)). That does not preclude a degree of independence by someone who enjoys family life with another adult family member. Conversely, the fact that someone has some support from family members, as here, does not mean of itself that there is sufficient dependence to give rise to 'family life' between them.
12. The Appellant's fourth criticism of the Decision is that it elevates the question of dependency into the test for the existence of family life, instead of making a finding as to whether the support provided to the Appellant by his mother was real, committed or effective. We are satisfied that on a proper reading of the Decision as a whole it does not commit the error suggested. Although in [26] of the Decision the Judge explains why he did

not accept that the Appellant had demonstrated that he was “*wholly dependent*” upon his mother financially, it is clear from the words “*as claimed*” in the first sentence of that paragraph that this is responding to the Appellant’s claim that he was wholly dependent on his mother, not applying the test for whether there is family life. The Judge performs that exercise in [28] of the Decision, stating that he does not accept that there is “*real, committed and effective support*”, which is the correct test.

13. In the circumstances, none of the Appellant’s criticisms of the Decision are made out and the appeal must be dismissed.

14. By way of post-script, we think it appropriate to make certain observations about the way in which this appeal was conducted. At the hearing we were handed up a decision of the First-tier Tribunal in another case involving an adult son of a widow of a Gurkha now settled in the UK, in which it appears (the copy provided is difficult to read) that Dr Chhetri appeared for the appellant. Notwithstanding the failure by the Appellant to apply for or obtain permission to rely on this unreported decision in accordance with Practice Direction 11, we have considered it, but we did not find it helpful. Indeed, it seems to us to be wholly irrelevant to the task that we are required to undertake on an error of law appeal. Determinations of the First-tier Tribunal are not binding or persuasive precedent in this Tribunal either as to the facts found or the law. Dr Chhetri disavowed reliance on this decision, save to the extent that it set out the background to the relevant policy and caselaw in relation to Gurkhas and their family members. There was however no issue as to the background policy or legal principles applicable to Gurkha cases. In reality, this case seemed to be being relied on to suggest that because the First-tier Tribunal had found that there was family life and that an interference with that family life was disproportionate in another case involving the same relationship (i.e. son of a widow of a Gurkha soldier), we ought to find likewise here. That is not a proper use of decided cases, particularly where the question of whether family life exists between two adult relatives “*all depends on the facts*” (Rai at [61] per Beatson LJ).

CONCLUSION

15. For the foregoing reasons, we are satisfied that there is no error of law in the Decision.

DECISION

The Decision of First-tier Tribunal Judge Aldridge promulgated on 26 February 2021 does not involve the making of an error on a point of law. We therefore uphold the Decision with the consequence that the Appellant’s appeal is dismissed.

Signed: P.R. Skinner

Deputy Upper Tribunal Judge Skinner

Dated: 13 September 2021