



IAC-AH-SC-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/08299/2019
HU/08297/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On 22 September 2021**

**Decision & Reasons Promulgated
On the 28th October 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**BAL KUMARI MAGAR (FIRST APPELLANT)
JAGAT BAHADUR MAGAR (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Wilford, instructed by Everest Law Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Mulholland promulgated on 29 January 2021.
2. The appeal was heard remotely via Teams. Although there did not appear to be problems or difficulties during the hearing, it later transpired (and after this decision had been drafted) that Mr Wilford's closing submissions had not been heard. Given that I have decided that the decision of the

First-tier Tribunal involved the making of an error of law, and should be remitted to the First-tier Tribunal, I am not satisfied that any material unfairness occurred.

3. The first appellant, Mr Magar, was born in 1988 and is the brother of the second appellant born in 1992. Their father served in the Brigade of Gurkhas for over seven years but, along with other Gurkhas was denied the opportunity to settle in the United Kingdom. He was, however, belatedly granted settlement in 2010.
4. The appellants had previously applied to enter the United Kingdom in 2015 but those applications were, for the reasons set out in notices of decision dated 17 February 2016 refused. Their appeals against that decision were dismissed by the First-tier Tribunal for the reasons given in a decision dated 21 July 2017. In that decision she has recorded that the appellants' mother died in 2014 but her application to join the father had been refused on 10 January 2012 as she had made false declarations in her application to her children in effect passing off as a grandchild as their own child. Judge Kelly accepted that a family life existed between the appellants and their father [14]. But he found the refusal to be proportionate having found that the father had been complicit in the deception. On appeal to the Upper Tribunal, Deputy Upper Tribunal Judge Froom found that the judge had been entitled to take into account the deception, at least to the extent that it diluted the strength of the historic injustice but found that there was no error of law.
5. The appellants' father died in September 2018.
6. The appellants then sought entry clearance to the United Kingdom on the basis that they are the family members of Sher Bahadur Ale ("the sponsor") who describes himself as the uncle of the appellants. His wife and the appellants' mother share the same paternal grandmother and they are all from the same village in Nepal. The sponsor is also a former Gurkha and, it is said, he and his wife have supported the appellants financially and emotionally and that thus a family life exists between them.
7. The respondent refused the application on the basis that they failed to meet the requirements of the Immigration Rules as dependent relatives concluding also that, having had regard to Gurung and others [2013] EWCA Civ 8, Kugathas v SSHD [2003] EWCA Civ 31 and Ghising and others [2013] UKUT 00567. It is not satisfied that the appellant had established a family life with the sponsor and his wife or that they demonstrated real, committed and effective support from them and that accordingly, Article 8 was not engaged.
8. The appellants were represented at the hearing. The judge heard evidence from the sponsor and his wife; he also heard submissions from Mr Jesurum of Counsel who represented the appellant. In addition to a bundle of material put before him the judge also had a skeleton argument produced by Mr Jesurum. In her decision the judge noted [6] that Mr

Jesurum had conceded that the appellants are not solely dependent on the sponsor and his wife and have siblings in Nepal whom they remain in touch; and, [29] that the appellants do not meet the requirements of the Immigration Rules and do not fall within the current policy as they are not the son and daughter of the sponsor and have never lived with him. The judge addressed first whether or not a family life existed between the sponsor and the appellants, directing herself in line with Kugathas, Ghising and Lama [2017] UKUT 0016 at paragraphs [32] to [37].

9. The judge adopted also the approach taken in Devaseelan [2002] UKIAT 00702 noting [41] the finding that the appellants are the youngest in the family and have eight siblings. She also accepted [46] the finding by Judge Kelly that the appellants live together and have not formed a separate family of their own but observed [47] that the appellants' witness statement provide a paucity of information about their siblings, lives and the support they provide, noting that Counsel had conceded "that they provide support but he has not explained the extent of it. He argues that it does not matter as the question before me is whether family life exists between the appellants and Mr Ale".
10. The judge found that:
 - (i) in the absence of details the extent of emotional, financial or other support provided by siblings or the reasons for the lack of it was difficult to assess credibility where the appellants are now members of the sponsor's family;
 - (ii) applying Kugathas at [24] and [25] the appellants had failed to provide any details as to why they did not have a close relationship with any of their eight siblings [50], they count for the appellants going against the information obtained in "the brief note on the Ghurkha family" in the appellants' bundle and had failed to explain why the siblings would not follow Ghurkha traditions [52], why the relations became different and why the siblings did not support them when they claimed to be living on the streets without the sponsor's support, this statement contradicted by Mr Jesurum "concession that support was given by the siblings, a concession made during cross-examination which resulted in the respondent not pursuing this line of further enquiry, undermining their credibility;
 - (iii) the second appellant claimed not to have been in employment, to have had skills to make a living on his own was contradicted by the sponsor's evidence that he works during harvest time [54] and also fails to add information about his relationship with his sister with whom he lives and the support they provide to each other; that the appellants are a family and that their account of having little to do with each other is an attempt to distance themselves from another for purposes of her application [55];
 - (iv) the appellants said they had received some support from the sponsor during their childhood, they were living in difficult circumstances [58]; that the sponsor's children are like siblings to

them as they grew up together in Nepal, that the appellant and sponsor speak together regularly and he sends them money to pay for food, look after the house and pay bills and no-one else lives in the house but them;

- (v) the sponsor confirmed he used to support the family after he was discharged from the army and supported the father who had asked him to step into his shoes in respect of the appellants and that he had brought them to live in his house in Nepal as no-one else had been living there; that no-one else can support them.

11. The judge did not accept that the sponsor, who has five children was always part of the appellants' family, that they had lived together; and, found a significant discrepancy which arose during cross-examination as the sponsor had said that the house where the appellants now lived had been occupied some time by somebody who had rented it. He said that they went to live with that person who paid the fuel bills and rent [64], contrary to what the appellants and the sponsor had said in their witness statements.

12. The judge found that these inconsistencies seriously undermined the credibility of the account, the level of support and claimed dependency on the sponsor. The judge stated:

“Having considered all the evidence individually in the round, I find that the appellants are single, unmarried, live together as a family and have not founded a separate family of their own. I find that Mr Ale has visited the appellants' sponsor with their father and once after his death he regularly sends the money as the money transfer slips show and that he helped their family financially and paid for his funeral. I am satisfied that Mr Ale and his wife keep in regular contact with them as evidenced by the phone log. “

13. The judge however found that the appellants and the witnesses lacked credibility because of the serious discrepancy that went to the core of the account, placing great weight on the fact the appellants had never lived with the appellant and his family and they were still part of their father's family at the time of his death. He was not satisfied they have access to money through the sponsor's wife's father-in-law as the only evidence that came from the sponsor whose credibility had been damaged because of the inconsistent statements about the appellants' living arrangements. He also found that in light of the discrepancies he was not satisfied that they lived in the sponsor's home in Nepal finding no reason why he would not of moved the appellants out of the wooden hut they were renting in difficult circumstances, with no running water or electricity and this property had been lying empty for more than seven years and they are as close as claimed. This undermining the core account and the general credibility. The judge did not accept that all the relationship between the appellant and siblings had broken down, evidence on that point being tenuous.

14. In summary, the judge rejected the appellants' claim on the basis of credibility findings.
15. The appellant sought permission to appeal on the grounds that the judge had erred:
 - (i) In unfairly reaching conclusions that the appellants live other than in the sponsor's house who have supported him; or, that the relationship with the siblings are anything as described, these not being points made in submissions the judge erring also in characterising occasional day labouring with being in employment.
 - (ii) In mischaracterising the concession made by the appellants' Counsel who had not conceded that the appellants provide support; and, in doing so undermined the appellants' credibility improperly.
 - (iii) In failing to take into account the character reference for the sponsor who is described by his former commanding officer as "utterly trustworthy" when finding him to be untruthful on matters not put to him.
 - (iv) In failing properly to take account of the sponsor's wife's evidence, her testimony not having been subjected to cross-examination.
 - (v) In failing properly to apply the law in respect of the findings that family life had not been shown. In properly considering that any support provided must be one of necessity.

Discussion

16. Viewing the determination as a whole it is evident that the judge dismissed the appeal on the basis that she did not believe what she had been told by the appellants, or for that matter the sponsor. I bear in mind that an appellate tribunal which has not heard and observed witnesses giving evidence should be very hesitant before overturning or finding a flaw in an assessment of credibility reached by a lower Tribunal.
17. Having considered carefully the witness statement from Mr Jesurum and the extract from his note of proceedings, I consider that the judge did misunderstand his concession. It is correctly stated at the beginning of the decision [6] but unfortunately it is later elided into a concession that support comes from siblings. I accept Mr Jesurum was silent on that point and whilst it might be inferred that support comes from them that is not the nature of the concession; if the judge was concerned that that was the concession then she ought to have clarified that with Mr Jesurum, which she did not. What she was not entitled to do was to proceed on the basis that a fact had been conceded when it had not.
18. I do not consider that the nature of the concession made by Mr Jesurum in cross-examination is as characterised by the judge. The concession was no concession of financial dependency. It cannot therefore be said that the respondent failed to adopt a line of cross-examination as a result of

that and it would have been a remarkable concession given the appellants' testimony as set out in their witness statements.

19. It is, I consider, dangerous to infer from the fact that somebody has said that they are not in employment, which is indicative of an ongoing relationship as being inconsistent with the statement that they do occasional day labouring as being one which is capable of bearing weight in damaging credibility.
20. That said, there is clearly an inconsistency in the evidence as to when the appellants moved into the house owned by the sponsor and who was there. The judge has also identified points, such as why they had not moved in earlier if the property was available, but it is unclear whether these were put to any of the witnesses in order for them to answer. Equally, as is evident from Mr Jesurum's skeleton argument, a submission was made that the sponsor's evidence ought to be given weight in light of the character reference stating him to be of "utmost trustworthiness". That is a point of which the judge should have turned her mind in assessing credibility and whilst it may well have been open to her to find that, notwithstanding that reference, bearing in mind that in the earlier appeal similar character reference and submission had been made in respect of the appellants' father who was yet found to have been complicit in a deception, the judge should have at least turned her mind to this issue. I am conscious that this may well be seen as coming close to the improper submission that somebody should be put on notice of a clear and obvious discrepancy in their evidence but, nonetheless, the good character reference ought to have been taken into account.
21. The judge made no findings about the sponsor's wife's evidence which, in all material respects confirms that of the sponsor. She was, as is clear, not cross-examined.
22. Taking these factors into account I do consider that notwithstanding the respondent's submissions, viewed cumulatively these errors undermine the findings as to credibility reached by the judge. On that basis, the findings as to credibility, which undermined the whole of the decision are unsustainable and accordingly so is the entire decision.
23. For these reasons I am satisfied the decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
24. Given that it will be necessary to reach findings of fact on nearly all of the relevant factors including an assessment of the credibility of witnesses I consider that it is appropriate to remit this case to the First-tier Tribunal for a fresh decision on all matters.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues; none of the findings of fact are preserved.
3. No anonymity direction is made.

Signed

Date 29 September 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul