Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/22424/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th December 2019	**On 20th December 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

KIRAN RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D Balroop instructed by Arkas Law
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of First-tier Tribunal Judge Lucas promulgated on 30th July 2019 whereupon he dismissed the appellant's appeal against the decision of the Entry Clearance Officer made on 14th September 2018 to refuse to grant the appellant entry clearance as the adult dependent child of his mother - the widow of a Ghurkha soldier.

2. It was recorded at paragraph 10 the appellant had shown that the mother came to the UK in 2015 but did not apply to enter between 2009 and 2015

as all of her children had turned 18 years. Once the policy had been amended, she and her daughters made a successful application to come to the UK in 2015 and they entered on 12th September 2015.

3. The relevant findings of the judge ranged from paragraph 17 to 23 and particularly at paragraph 20, she found that arrangements must have been in place to look after the appellant and that he was in good health and a 35-year-old adult. The judge found that the relationship with the appellant and his mother was not unusual and did not go beyond the normal bond between a mother and son, and at paragraph 22 the judge found the appellant was clearly resourceful and able to relocate from Nepal to seek employment as he did in the UAE if that was his choice. The judge recorded "To suggest that he continues to be dependent upon his mother despite taking the choice to move and work in the UAE is neither plausible nor credible".

4. At paragraph 23 the judge recorded:

> *"It is accepted that there is family life between the Appellant and sponsor. That is to be expected between a mother and her adult child. However, she chose to relocate to the UK in 2015 and that choice was made in the knowledge that the Appellant had no automatic right to join her here. It is not accepted that the relationship between this adult Appellant in his mid-thirties and his mother goes above or beyond the normal relationship between a mother and son. There is no reason why the present arrangements cannot continue".*

5. The grounds of appeal at ground (i) stated that the judge focused on irrelevant matters in assessing Article 8 such that:

(a) the sponsor chose to leave her son in Nepal;
(b) that the mother chose to relocate in 2015 but it was accepted that there was family life but;
(c) that the sponsor in choosing to come to the UK was a material matter. *Rai v Entry Clearance Officer [2017] EWCA Civ 320* stated at paragraphs 38 and 39 that to concentrate on the appellant's parents' decision to leave the UK and that the decision had been freely made and voluntarily undertaken "having made the choice to come to the United Kingdom" was not to confront the real issue under Article 8(1), which was:

> *"Whether as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did".*

2. It was clear that in the light of *Rai* the issue was not the sponsor's willingness to leave the appellant or whether the sponsor voluntarily left the appellant in Nepal. The focus on the sponsor's choice was unlawful and a material error of law.

3. Ground (ii) advanced that the findings at paragraphs 20, 21 and 22 were also contrary to *Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320*:

> *"17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that 'if dependency is read down as meaning 'support', in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support' then it represents ... the irreducible minimum of what family life implies'. Arden L.J. said (in paragraph 24 of her judgment) that the 'relevant factors ... include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life'. She acknowledged (at paragraph 25) that 'there is no presumption of family life'. Thus 'a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties'. She added that '[such] ties might exist if the appellant were dependent on his family or vice versa', but it was 'not ... essential that the members of the family should be in the same country'. In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that 'what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right'".*

4. It was held that there was no need for exceptional circumstances as to what may constitute an extant family life. The judge needed to establish whether the sponsor provided support to the appellant. The judge did not dispute that the sponsor provided financial support but did not properly address the test established in *Rai.* The sponsor currently supports the appellant and the appellant was in the UAE working but returned to Nepal, where he continued with family life and where he was presently unemployed; the judge failed to consider or properly consider the appellant was currently unemployed and needed the financial support from the sponsor.

5. If Article 8 was engaged in the light of *Ghising and others (Gurkhas/BOCs – historic wrong – weight) [2013] UKUT 567 (IAC)* the appellant and family would have come to the UK but for the injustice that prevented them from settling here earlier and these matters should be given appropriate weight.

6. I find there is an error of law in this decision. There was clear reference to the choice of the sponsor to leave the UK contrary to *Rai* and the

approach to the family life was contradictory, finding that family life existed on the one hand but that he could be independent on the other and there was an over emphasis on the mother's choice of leaving Nepal. That was an error of law.

7. It was made clear that the appellant had left for the UAE but returned to the family home *prior* to the departure of the remainder of his family for the United Kingdom and until that time he remained with the family. The statements of the appellant and his mother confirmed that he remains dependent upon his mother. In fact, the judge, at paragraph 21, stated that it was accepted that the sponsor supported and communicated with the appellant on a regular basis but thought that this arrangement could continue. Family life between the appellant and the sponsor was accepted by the judge at paragraphs 23 and that finding I preserve.

8. As indicated, it would appear that the judge understood that the seeking of employment in the UAE was post- rather than pre-departure of the family to the UK which it was not. The appellant had resumed living with the sponsor prior to her departure and had remained unmarried (although it appears that it had had a girlfriend previously). The documentation supported the witness statement of the sponsor, which appeared to be consistent, confirmed that she had visited her son in Nepal since her departure, and that she supported him financially. There were Western Union and other financial remittances from the sponsor to the appellant as acknowledged by the Entry Clearance Officer from 2016 onwards. There was documentation demonstrating electronic and phone communication between the appellant and sponsor. The document from the Lilitpur Metropolitan City Office dated 29th October 2017 confirmed that the appellant was unemployed at that time and the sponsor confirmed he remained so. She was his one source of financial income and he had no one else in Nepal. His mother and siblings had married and relocated abroad. Family life thus continued to the date the mother left Nepal

9. *Jitendra Rai* confirms the weight to be attached to the historic injustice in these matters, there would appear to be no other countervailing factors. There was no bad immigration history or criminal behaviour such that the public interest would outweigh the historic injustice and I find that the decision of the First-tier Tribunal should be set aside (with the preserved finding of family life in the first sentence of paragraph 23), and re-made and, in the light of family life and the weight to be accorded to the historic injustice, I allow the appeal.

Order

Appeal Allowed.

Signed Helen Rimington Date 17th December 2019

Upper Tribunal Judge Rimington

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