Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18611/2018

THE IMMIGRATION ACTS

At: Civil Justice Centre (remote hearing)
Heard on: 10th September 2020

Decision & Reasons Promulgated
On 14 September 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Dipendra Bahadur Thapa
(no anonymity direction made)

Appellant

and

Entry Clearance Officer, Sheffield

Respondent

For the Appellant: **Mr Jesuram, Counsel instructed by Everest Law Solicitors**
For the Respondent: **Mr Diwnycz, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Nepal. His father was a Gurkha who was eventually permitted to settle in the United Kingdom after the government's recognition of the historical injustice perpetrated against members of that regiment. The Appellant seeks leave to join his father here.

2. The operative law in respect of such applications is summarised by the Court of Appeal in its decision in Jitendra Rai v Entry Clearance Officer [2017] EWCA Civ 320.

It is with the principles in Rai in mind that that I assess the decision of the First-tier Tribunal

3. In this Article 8 appeal the first question that had to be decided was whether there was between the Sponsor and the adult Appellant a family life capable of engaging the Convention. In Rai the Court of Appeal set out the authorities relevant to this matter:

> 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".
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> 18. In Ghising (family life – adults – Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in Kugathas had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):
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> > "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".
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> The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in Gurung (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy), including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. 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. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

4. From theses authorities the Court drew two conclusions relevant to my enquiry. That Kugathas has been restrictively read and in fact there exists no requirement of 'exceptionality' when considering the family life shared between adult children and their parents. Second that the language of 'dependency' is unnecessary. What matters is whether the adult child derives real, committed or effective *support* from his parents. This could be in the form of financial, or emotional support.

5. In the instant case the First-tier Tribunal does not appear to have been satisfied that a family life existed between the Appellant and his father. I say this because although no actual conclusion is reached on that primary question, the reasoning set out at

paragraphs 6 & 7 of the decision is as follows. The Appellant might be financially supported by monthly remittances from his father but the Respondent was right to characterise this as a dependency of choice. The Appellant had previously left the family home and worked in Saudi Arabia and this suggests that he was not dependent upon his parents. There was no reason why he couldn't work to support himself. He was not disabled and had worked in the past. He had chosen not to apply to come to the United Kingdom at the same time as his parents and this suggested a lack of dependency.

6. I agree with Mr Jesuram that this reasoning is wholly inadequate and contrary to the guidance in Rai. The Appellant did not need to establish a dependency of necessity in order to demonstrate that he continued to share a family life with his parents. As a matter of fact, financial support was, and had for many years been, given. There was powerful evidence before the Tribunal – not addressed in the decision – of the strong emotional bond between parents and son which, consistent with Nepalese culture, persisted despite the Appellant being an adult. The reference to a lack of disability is highly suggestive of the test of exceptionality, held in Rai to be erroneous. The reference to 'choices' made by the parties overlooked the extremely difficult financial circumstances faced by Gurkha families like this one. On the facts – as I understand it uncontested by the HOPO on the day, and not put in issue by Mr Diwnycz – the relationship between the Appellant and his parents was certainly capable of meeting the tests in Rai. He had lived in the family home at the date that his parents left Nepal and continues to do so today. He is supported financially by his father with regular remittances being sent. He and his parents maintain their strong emotional bond by daily communication via telephone and social media, and on at least one occasions, his father returning home to see him. The decision of the First-tier Tribunal is therefore flawed in its approach to whether Article 8 is engaged.

7. The only real argument against the Appellant being recognised as an integral part of this family is that for a period in his youth he travelled away from home to try and earn money in Saudi Arabia as a migrant worker. It was his uncontested evidence that this attempt ended in failure when the agent who arranged his travel 'recouped' all his 'travel expenses' and he returned to Nepal penniless where he resumed living with his parents. It was further his evidence that this period away from his family was emotionally difficult for all of them, a situation which persists today: it was his mother's evidence that she cries herself to sleep at night worrying about her sons.

8. On the facts before me I am therefore satisfied that the relatively low threshold for engagement of Article 8 is met. Applying Rai there is certainly a family life in this case and having regard to the family history I am satisfied that the continued lack of respect for that family life amounts is of sufficient significance to engage the Article. As Mr Diwnycz accepted on behalf of the Respondent, the only realistic outcome from there is for the appeal to be allowed, given the very substantial weight that is to be attached to the historic injustices perpetrated against the Gurkhas. As Mr Jesuram points out in his customarily eloquent grounds, the simple consequence for this family of that injustice is that the Appellant and his siblings were not born

British, as they would have been had their father been permitted to settle here upon his discharge:

> "The appeal, ultimately, does not concern whether the Appellant ought to be entitled to join his parents (it must be accepted nothing untoward will befall him if he does not).
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> It concerns whether a man who served the Crown in conflict and had to wait decades for the settlement he was owed should have the continued support and company of the son he had to leave behind. It is about whether the consequences of an injustice should be rectified".

Decision and Directions

9. The decision of the First-tier Tribunal is flawed for material error of law and it is set aside.

10. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.

11. There is no order for anonymity.

Upper Tribunal Judge Bruce
10th September 2020