Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19902/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th December 2019	**On 21 January 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE KEITH

Between

NABIN THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Moriarty instructed by Everest Law Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nepalese national born on 30th December 1977, and he appeals against the decision of First-tier Tribunal Judge Seelhoff dismissing his appeal and promulgated on 1st August 2019. The appellant's father served in the Gurkha Regiment between 1948 and 1963. The family lived together until 2006 when the father died. The mother was granted settlement in the United Kingdom but did not travel to the United Kingdom until 2011. The appellant's five siblings were all married and lived in Nepal.

2. The grounds of appeal were as follows:

> Ground (i) the judge failed to apply the correct test for family life between adults and made errors in the treatment of the evidence, particularly that of the mother's evidence.
>
> Ground (ii) the judge having erred in his approach to the test for family life failed to proceed to consider Article 8(2) and the proportionality assessment.

3. **Ground (i)** On the judge's own findings, at paragraph 10, he accepted that there were seven money transfer receipts addressed to the appellant from his mother over a period of approximately eighteen months and accepted the money transfer receipts to the appellant totalled approximately £550. As held in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 311** the test for Article 8 family life between adults was whether "something more exists than normal emotional ties". "Dependence" is one way such ties could exist and it meant "real support", "effective support" or "committed support". It was submitted that in **Ghising (family life – adults – Ghurkha policy) [2012] UKUT 160** that **Kugathas** had been interpreted too restrictively in the past and that what may constitute an extant family life could fall well short of dependency: see **Patel and Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17**.

4. Further, even voluntary separation did not end family life: **Sen v Netherlands [2003]**.

5. The judge erred in finding that the test was not met by failing to have regard to the relevant evidence and stated:

> *"The money transfer receipts I have do not corroborate the claimed level of support. The Appellant's evidence was that she sent money to her son every 1 to 2 months and it would be about £100 a time. I have seven receipts for transfers to the Appellant in an 18 month period and some of the transfers are for as little as £50"* (paragraph 16).

It was submitted that the record of the proceedings showed that the judge had not had regard to the mother's oral evidence on the point and that she had indeed confirmed that sometimes £50 was sent and that sometimes she could not send it regularly every month. Thus, the mother's evidence, even on the judge's own record, was consistent.

6. Further, the judge criticised the evidence on the basis he could not evaluate the mother's financial circumstances. He recorded he had been provided with no UK bank statements for the sponsor and no way to properly evaluate how much money she had or was actually sent to the appellant, [paragraph 16]. However, the judge did not consider paragraphs 23 to 24 of the mother's witness statement in the appellant's bundle which she adopted as evidence (having confirmed that it had been translated back to her in Nepali) that she received pension credit of:

> *"£108.32 per week, housing benefit of £168.54 fortnightly. I spend money only for my basic needs. I save the money for my son's maintenance. My son is totally financially dependent on me. I have been sending money via IME. I receive widow pension of*

around NRs 30,000 which is directly deposited into Everest Bank Limited. I used to withdraw the pension funds during my visits to Nepal. I handed over the money to my son. I did not authorise him to withdraw the pension funds as he may misuse it".

The judge had not had regard to any of this evidence.

7. Further, the judge had regard to irrelevant matters including the issue of whether payments were sent to the married brothers. The question in this case was the relationship between the appellant and his mother and it was irrelevant that he sent money to the married brothers.

8. Additionally, the judge erred in failing to give regard to the document from the Jaimini Municipality. The English translation was imperfect ("he was no involved in any government and non-government organisation is certified") but it was tolerably clear that the meaning was that as at the date of the certificate, the appellant was not in employment in any government job or in any non-government job. The document was signed, dated and had given the address of the authority and it was a type that had been accepted by the Tribunal in many other Ghurkha appeals.

9. Further, the judge found at paragraphs 19, 20 and 22 that he could not accept the evidence on addresses owing to the discrepancies in the name, but the mother gave evidence under re-examination that the names of the regions had been changed and this was not considered.

10. At paragraph 23 the judge found "on the evidence before me the appellant himself is some sort of subsistence farmer at the very least". This was, however, inconsistent with and did not consider the appellant's mother's evidence that the appellant lived in the former family home which had a modest garden attached where the family grew beans and cucumbers and she specifically explained that he could not survive by growing vegetables alone and needed the additional resources sent by his mother. The sponsor confirmed that he could not manage to live on the food he grew.

11. Taken cumulatively, the evidence pointed to the family life under the test in **Kugathas** being satisfied.

12. The appellant had lived with his parents and then his mother following the death of his father in 2006, until his mother travelled to the UK without him in 2011 and they had maintained regular contact through telephone calls and visits and this evidence had been shown in the bundle. Secondly, there was financial dependence of the appellant on the mother who provided all of his income as confirmed by the witness statement and the remittance receipts and the statement of Everest Bank. Thirdly, there was dependence for the roof over his head in Bara, Nepal as confirmed in the mother's statement. Fourthly, there were the emotional ties, the appellant was the only child who was not married and had not founded a family of his own.

13. The judge had erred in failing to apply the correct approach to Article 8(1) of the ECHR: **Rai v Entry Clearance Officer [2017] EWCA Civ 320**.

14. **Ground (ii)** – the judge did not go on to apply Article 8(2) because he concluded Article 8(1) was not engaged but the key point was that the appellant's father would have settled in the UK, if permitted, when he was discharged from the Ghurkha Regiment after his exemplary service. He thus suffered the historic injustice, which, had it not happened, the appellant would have been born in the UK. The injustice to Ghurkhas was corrected partially in 2009 but by then the appellant was an adult aged 31 years. No provisions were made in the 2009 policy for Ghurkha children aged over 18. The injustice of excluding children aged over 18 was not addressed until the policy in Annex K permitted applications for those aged 18 to 30 years but by then the appellant was aged 37. At every point in 1963, 1977, 2009, 2015 and now in 2019 his family had been directly affected by the continuing historic injustice and the appellant was marooned in Nepal seeking settlement that he should never have needed to request. A bad immigration history or criminal behaviour may tip the balance in the respondent's favour but all that is relied on is the public interest side of the balance. Against the interests of immigration control "the weight to be given to the historic injustice will normally require a decision in the appellant's favour": **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567**. All the matters set out in Section 117B are "the interests of immigration control" and there were no countervailing considerations in this matter.

Analysis

15. We have set out above the relevant components required to be established in order to found family life and particularly note that **Ghising (family life – adults – Ghurkha policy)** held that the judgments in **Kugathas** had been "interpreted too restrictively in the past and ought to be read in the light of the subsequent decisions of the domestic and Strasbourg courts".

16. As set out at paragraph 19 of **Rai**, to which we have referred above, which emphasised the point made by Lord Dyson in **Gurung v Secretary of State [2013] EWCA Civ** "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". Each case is highly fact-sensitive and as held in **Singh v Secretary of State for the Home Department [2015] EWCA Civ 630** "there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8".

17. It has not been challenged that this is the adult child of the sponsor and that one of the factors when considering family life is whether the adult child has founded a family life of his own, which in this case the appellant has not. In this case Ms Cunha argued before us that the judge disbelieved the evidence that was put before him finding that he had not received a truthful or complete picture of the appellant's circumstances in Nepal, for example stating that there was a severe lack of information and that he had been provided with "*no UK bank statements for the sponsor and no way to properly evaluate how much money she has or how much is actually sent to the appellant. The money transfer receipts I have do not corroborate the claimed level of support*".

18. We find force in the grounds that the judge overlooked, misconstrued or failed to factor in all the relevant evidence.

19. The judge at paragraph 12 indeed recorded that the sponsor said that she sends £50 to £100 to her son every two months and all the money was sent through a money transfer service. The judge erred therefore in proceeding at paragraph 16 to criticise the evidence because the mother said she sent "£100 a time" but he found that some of the transfers were for as little as £50. That, however, contradicted his own record of the evidence and thus his reasoning. As such, it would appear that the judge had no regard to that aspect of the mother's oral evidence. Her evidence appeared consistent.

20. Further, there was a bank statement in relation to the Everest Bank account in Nepal and whether or not there was a bank statement in the UK did not undermine the fact that transfer receipts were present in the bundle showing transfers to the appellant in the sum of £550. That was indeed a finding made specifically on the documents in relation to the transfer receipts to the appellant and recorded at paragraph 10. That was a finding made on the documents and independently of whether the mother had disclosed her bank statement in the UK. The money that she received allowed her to send remittances. The mother did set out in her witness statement the pension credit and housing benefit she received in the UK. She also disclosed an Everest Bank statement detailing the pension she received each month in Nepal during 2017, being approximately 29,024 naira.

21. The judge noted at paragraph 4 that it was stated that the appellant studied up until class 10 but was not good at school and had never worked in Nepal but "does occasional seasonal agricultural work for land owners to earn some money according to his mother's statement". This noted that the work was seasonal but did not reflect in the findings regarding 'support' that the work was only seasonal as opposed to regular and nor did it acknowledge the statement of the mother that without the funds given to him he would be unable to subsist.

22. At paragraph 17 the judge took issue with the fact that the sponsor changed her answer as to whether money was sent only to the appellant but it is quite clear in the documentary evidence provided that money was sent to the family as a whole and also separately to the appellant. Ms Cunha advanced that the judge's criticism was well-founded but as observed by the grounds of appeal the concentration by the judge on passing money to the siblings was not wholly relevant to whether money transfers were made to the appellant himself. The judge asserted that there had been a change of evidence, but it is clear from the documents what the position was as to the transfers and this was what was indeed confirmed by the sponsor in re-examination. The judge did not appear to take this into account. The mother stated that she thought she might have sent money to the brother when the appellant was ill but the judge resisted this explanation on the basis that money was sent three different times and sent to the appellant himself independently only four days after sending the money to the brother because the appellant was said to be ill. That does not necessarily undermine the explanation but moreover does not counter the

documentary evidence which clearly shows that money was sent to the appellant individually.

23. Further, the amount sent to the brothers is not wholly relevant. The critical question as set out at paragraph 40 of **Rai** is whether "the appellant himself still enjoyed a family life with his parents". That consideration must be whether or not there is still a family life with the siblings, which in this case there is not because the siblings have clearly set up their own independent lives because they are married. Thus, we consider that the judge concentrated overly on the position with regards the siblings. It is irrelevant that the appellant is or is not the only child she sends money.

24. The judge also made criticism of the credibility of the evidence on the basis of the address, such that the appellant's own address was listed as something quite different on the application form.

25. At paragraph 22 the judge asserts:

> *"Another issues (sic) is that the Appellant is said to have lived with his mother prior to her departure from Nepal. The difficulty I have with that is that on documents from Nepal his mother is listed as 'permanent residents of Jaiminie municipality Ward number nine (former: Paiyunthanthap VDC Ward No 2' whereas the Appellant's address is listed quite clearly as Ward number 14 in any area which I also note is called neither Bara nor Baglung on the application. There is no explanation for this discrepancy".*

26. However, the judge does not appear to acknowledge the explanation of the mother that the place names had changed. We note that at paragraphs 11 and 13 of her witness statement, the sponsor refers to both Baglung and then to Bara as being their property and where the appellant is said to live. The application form in fact records the appellant's address as Ward 14 and being in Bara [question 22 of the entry clearance application form].

27. Again, as the grounds contest, the mother's evidence was not properly considered by the judge.

28. At paragraph 20, the judge stated that the appellant's brother Tika was listed in the money transfer receipts as living in Samara which is incorrect. The address on the remittances to the brother is Simara and wholly different from either Baglung (the address on the appellant's remittances) or Bara. Further, whether or not the appellant's brothers were involved in arranging money transfers to him when he is ill does not necessarily have bearing on whether those siblings wish to see their mother on her visits to Nepal.

29. Turning to the consideration of the appellant working and the requirement for support, it was not the appellant's evidence nor the sponsor's evidence that he had never been employed in Nepal but that he had been working seasonally. The phrase "he was no involved in any government and non-government organisation is certified" involved two different tenses and suggest difficulty in the translation but

the document suggests that he is not currently involved in government or non-government work, although owing to the poor translation only limited weight can be accorded to this document.

30. At paragraph 23 the judge acknowledges that the appellant is some sort of subsistence farmer and that assessing the evidence in the round he was not satisfied the account had been accurate or truthful.

31. We find on analysis the grounds are made out, because the judge failed to take into account all of the relevant evidence and failed to undertake the requisite careful consideration of all the relevant facts of the appellant's case in the light of the principles and guidance to be derived from the authorities. He left out of account important and relevant evidence as to the family life. There were also contradictions in the approach to the evidence which we have highlighted. We consider those deficiencies in the treatment of the evidence to be material. As a result of the flawed approach to the evidence the finding on family life is not safe and consequently the failure to determine Article 8(2) was also a material legal error.

32. We therefore set aside the determination and re-make the decision.

33. It is clear that the appellant is the son of the sponsor and that she appeared to be living with him prior to her departure from Nepal for the UK. There are documents including the certificate of relationship apparently dated 2009 which record the appellant and sponsor as having lived at the same address. The Police character verification dated March 2018 records the appellant living at Ward No 2. We note that the verification of being unmarried and the recommendation in relation to work from the Jaiminie Municipality record the appellant as being a "permanent resident of Ward number nine (former Paiyunthanthap VCD Ward No 2". There is no indication of how the various authorities delineate the districts. The mother gave evidence that Baglung had changed its name and was now Bara. All that said, even if the appellant did not still live in the family home it does not mean that family life does not pertain for the reasons given below. Overall the documentation led us to conclude that there was family life when the sponsor departed for the United Kingdom from Nepal.

34. We accept that there was sufficient information on the sponsor's income. The financial documentation, including the Everest Bank statements showed the pension that the mother received, and her witness statement confirmed the housing benefit and pension credit she received in the United Kingdom. With regard the remittances to the appellant, there were a series of money transfer receipts to the appellant via RIA Financial Services Limited and those transfers commenced on 27th August 2017 with a transfer of approximately £100 and continued to 24th December 2018. We accept the sponsor's evidence that she visited Nepal, indeed her visits have been set out below, and would give money to the appellant when there. The appellant's mother confirmed that he did occasional seasonal agricultural work and earned pocket money and grew some vegetables but that she was principally responsible for his welfare and maintenance. Her pension is paid into her account in Nepal and she

was frank that she did not wish to give him power over her account there lest he misuse it and it seems natural that she would, as a mother give money to her intermittently employed son when visiting him.

35. On the basis of the evidence overall, we accept that the appellant is financially supported by his mother even if he is not entirely financially dependent upon her.

36. We take into account the witness statement of the sponsor who explained that her husband died in 2006, that there was no settlement provision for her husband until his death and that she could not make settlement applications straight away owing to her financial difficulties. She entered the United Kingdom on 1st July 2011 some months after the expiry of her settlement visa, but she could not include her son, the appellant, because he was over the age of 18. She identified the visits which had taken place to Nepal in February to May 2013, November to January 2014 to 2015, May 2015 to June 2015, January 2017 to February 2017, November 2017 to December 2017, and January 2019 to March 2019. She confirmed that she provided emotional and moral support to her son and organised his basic needs during her visits to Nepal. She explained she could no longer travel to Nepal owing to her age and the flights were too expensive. She confirmed at paragraph 24 of her statement that her son was totally financially dependent on her and that when she goes to Nepal she would draw pension funds and give him money whilst there but did not authorise him to withdraw the pension funds for fear that he may misuse them.

37. In our analysis of the evidence which includes the photographs of the visits of the mother to the appellant in Nepal and the phone records from 2017 onwards, we accept that there has been and remains a close relationship between the appellant and the sponsor and from the documentation that the appellant remains unmarried.

38. We find that family life remains engaged. The test does not deman some extraordinary or exceptional feature but a sufficient degree of financial support and emotional dependence which we find is present and that constitutes family life. We find the support from the Sponsor to the appellant 'committed' and 'real'.

39. Turning to proportionality in relation to Article 8(2), significant weight must be attached to the historic injustice which will normally be enough to cause the proportionality balance to fall in the appellant's favour: see **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight)** at paragraphs 59 to 60. Exceptional circumstances are not required, and it is for the Secretary of State to justify a decision to refuse leave to enter or remain in the United Kingdom when the only countervailing consideration is the public interest in maintaining a firm immigration policy. The requirement to take into account historic injustice is entailed in striking a fair balance as held in **Rai.** In relation to the Section 117A and B of the Nationality, Immigration and Asylum Act 2002 the provisions do not affect the outcome of the appeal because in view of the historic injustice underlying the case such considerations would make no difference to the outcome.

40. The question said to be pertinent in **Rai** is whether family life existed when the sponsor departed from Nepal and whether it endured. We find that both requirements are fulfilled. As held in **Rai** at paragraph 42

'the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1)'.

41. On the proportionality assessment we find no countervailing considerations to displace the weight attached to the historic injustice. As such, we therefore find the decision to refuse entry clearance was disproportionate.

42. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007. Mr Thapa's appeal is allowed.

Appeal Allowed.

Signed *Helen Rimington* Date 3rd January 2020

Upper Tribunal Judge Rimington