IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18800/2019
HU/18797/2019
HU/18794/2019

THE IMMIGRATION ACTS

Heard at Field House
by UK Court Skype
On the 28th May 2021

Decision & Reasons Promulgated
On the 22nd June 2021

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MISS SARITA RAI
MISS BINDRA RAI
MR MANI PRASAD JIMEE RAI
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants Ms Nnamani, Counsel instructed by Howe and Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Nepal born on 31 August 1975, 18 May 1977 and 22 June 1981 respectively. They appeal against the decision of First-tier Tribunal Judge

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Oliver sent on 26 January 2021 dismissing the appellants' appeals against the decisions dated 16 September 2019 to refuse them entry clearance to the United Kingdom as adult dependent children of a former Gurkha soldier. Permission to appeal was granted by First-tier Tribunal Judge Scott Baker on 9 March 2021 on the basis that it was arguable that the judge has failed to analyse the evidence and failed to give adequate reasons for his findings. In particular, First-tier Tribunal Judge Scott Baker was concerned that there was no finding as to whether family life is enjoyed between the sponsor and the appellants.

2. The hearing was held remotely and neither party objected to the manner of the hearing. Both parties participated by Skype for Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable because of the current Covid- 19 restrictions and that all of the issues could be determined in a remote hearing. Neither representative complained of any unfairness during the hearing and both representatives confirmed at the end of the hearing that the hearing had been conducted fairly.

Background

3. The appellants applied for settlement on 3 June 2019 to join their mother in the United Kingdom. She in turn had been granted settlement in the United Kingdom in 2015 as the widow of a former Gurkha soldier. The application was refused on 16 September 2019 and the refusal was upheld on review by the Entry Clearance Manager on 28 November 2020. The basis of refusal was that the appellants did not meet Annex K of the immigration rules in respect of adult dependent children of former Gurkha soldiers, that the appellants did not meet the requirements of the immigration rules in respect of family life in accordance with Appendix FM and there was no breach of Article 8 ECHR because family life does not exist between the appellants and the sponsor.

Decision of the First-tier Tribunal

4. The judge heard oral evidence from the sponsor. The judge found that the appellants' reliance on their mother's pension was "in part" contrived and commented that the appellants all claimed that they had not been able to find work in respective periods of 27,25 and 21 years. The judge did not accept that the appellants were not living independently. The judge found that there was no greater emotional dependence between the appellants and their mother than that of the normal emotional bonds between adult relatives. The appeals were dismissed.

The Grounds of Appeal

5. It is asserted that the judge misapplied the law by failing to apply the relevant legal principles to the facts of the case. The judge failed to apply the correct test to consider whether there was evidence of "real, committed or effective" support being provided by the sponsor to the appellants. The judge failed to adequately explain why he reached the conclusion that the appellant's reliance on their mother's pension was

"in part" contrived. The judge dealt inadequately with the fact that the appellants lived with their mother enjoying family life with her until she left Nepal. The judge did not consider whether family life existed prior to the sponsor's departure and ignored the fact that continued cohabitation was demonstrative of "real, effective or committed support". The judge failed to take into account the frequency of contact between the parties and the sponsor's visit to Nepal as well as the fact that there was a stronger emotional connection after the death of the appellants' father. The judge did not make findings on whether there was "real, effective or committed" support and required some compelling or exceptional factor thereby elevating the relevant threshold.

Rule 24 response

6. It is submitted that the judge directed himself appropriately and that the grounds amount to no more than a disagreement with the judge.

Discussion and Analysis

Ground 1 – Misdirection in law

7. It is asserted by the appellants that they lived with their widowed mother in Nepal prior to her departure for the UK in 2015. They continue to live in the family home. They continue to be maintained by the sponsor and have access to her Gurkha widow Service Pension. The appellants are all unmarried and unemployed. Their sponsor provides for their living expenses and gives them emotional support through daily phone calls. Had the appellant's father been able to apply for settlement he would have applied for it and the appellants would have been born in the UK. Ms Nnamani's submission is that although the judge was clearly aware of the appropriate tests, the judge failed to apply the principles to the facts of the case thereby misdirecting himself in law.

8. Ms Nnamani submits that the judge fails to refer to the correct test of "real, effective or committed" support at all when making his findings on family life. The judge misapplied the law by failing to apply the principles in respect of family life, particularly in the context of Gurkha families. The judge failed to give weight to the authorities that suggest that where a child has not set up an independent household this will be evidence of the existence of family life, that the family members all lived together in a family unit and that in 2009 the appellants father died leaving the sponsor a widow as a sole parent living with her children. Ms Nnamani points to the principles in Uddin that continued cohabitation is indicative of the existence of family life. Had the judge applied the principles correctly, he would have found that family life was engaged.

9. Mr Lindsay resisted the appeal. His submission is that the judge has set out all of the relevant caselaw and on that basis it is difficult to argue that the judge has misdirected himself. It would only be where the judge manifestly failed to follow the authorities that there would be an error of law. He further submitted that the judge

was entitled to find that family life did not exist between the sponsor and the appellants. The decision was rational and adequately reasoned.

10. I am satisfied that the judge did set out the relevant authorities from [10] to [16]. Indeed, much of his decision is a recitation of the relevant caselaw. He refers to Rai v ECO, New Delhi [2017] EWCA Civ 320, Uddin v SSHD [2020] EWCA Civ 338 and Kugathas [2003] EWCA Civ 31.

11. At [10] the judge explicitly states;

> "in the case of adult Gurkha dependents it has recently been emphasised in Rai v ECO, New Delhi [2017] EWCA Civ 320 that there is no need for a test of exceptionality and the irreducible minimum to show family life is that there be real, committed or effective support. In Uddin v SSHD [2020] EWCA Civ 338 it was held that "the test for the establishment of Article 8 family life in the Kugathas sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency".

12. Having recited the caselaw at length the judge's conclusions are in three short paragraphs at [18], [19] and [20]. The judge was clearly aware of the relevant test of "real, committed and effective" support. The judge accepts that there is financial dependency although finds that this is "in part" contrived and then focuses primarily on emotional dependency finding that the situation of the appellants is akin to adult children in the UK who live with their parents principally for economic reasons. The judge states at [19] and [20];

> "At the respective ages of 45, 43 and 39 and living together, the appellants no doubt have a close bond with each other, but I do not accept that they are not living independently, but rather that they live together as a matter of convenience."
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> "The most important question to be answered is whether they are in a state of emotional dependence on their surviving parent. Under the strict terms of Annex K, they cannot now be said to be in such a state with their father, since he died 11 years ago. I transfer that question to their mother. They were living with both parents until their father died in 2009. At that time, they were respectively aged 34, 32 and 28. I find no reason to suggest that their situation is substantially different from that of many young people, including in the United Kingdom, who continue to live with their parents principally for economic reasons. At the time of their father's death, I find that they were not in a state of emotional dependence on him beyond that normally to be found between adult children and their parents. I find no reason to think that they have since then developed a greater emotional dependence on their mother".
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> "no reason to think they have since [the death of their father] developed a greater emotional dependence on their mother".

13. It is an established principle that in general a judge from a specialist Tribunal can be expected to have applied the correct legal test. Nevertheless, although I am satisfied that the judge was aware of the test and set it out earlier in the decision, my view is that the judge has failed to properly apply the test in line with the caselaw and failed

properly to apply to the particular circumstances of the case the principles bearing on the concept of family life in Ghising (Family life -adults- Gurkha policy) [2012] UKUT 160 (IAC) which was endorsed in R (on the application o f Gurung and others v SSHD) [2013] 1 WLR 2546.

14. The judge leaps from finding that there is no emotional dependency at [20], stating that no exceptional circumstances were argued at [21], to finding at [22];

> "in these circumstances, I find that their family life right [sic] are insufficient to outweigh the public interest in the maintenance of immigration control".

15. Firstly, the judge does not explicitly explain why the support provided by the sponsor does not amount to "real, effective or committed" support. Indeed, the test is not explicitly referred to in these concluding paragraphs. The judge focuses primarily on emotional dependency.

16. Secondly the judge makes no distinct and definite conclusion as to whether family life does or does not exist between the sponsor and the appellants. The judge's analysis is confused because at [22] as quoted above, the judge appears to accept that there was family life but that the decision was proportionate.

17. Thirdly, in my view the judge has erred by failing to grapple with those factors which pointed to the existence of family life including the fact that the appellants lived with the sponsor in the same household until the sponsor left for the UK in August 2015, some six years after her husband died, the sponsor's status as a widow, the regular communication and visit and the continued provision of financial support, in the context of Nepalese culture.

18. I am satisfied that the judge erred by failing to properly apply to the particular circumstances of the case the principles bearing on the concept of family life.

19. I am satisfied that this is an error of law and that had the judge applied the authorities correctly and made a lawful finding on whether family life existed, there may have been a different outcome in this appeal. I am satisfied that this is a material error.

Ground 2

20. Ms Nnamani's second argument is that the judge has not adequately explained why the appellants' reliance on the sponsor is "in part" contrived and that the judge has not explained why he does not accept that there is no emotional dependency between the appellants and the sponsor when there was evidence before the judge that the sponsor, who is a widow, had travelled to Nepal to visit the appellants, sends them money from her pension in the UK as well as giving them access to the pension in Nepal and contacts them very regularly. The appellants continue to live in the family home where they lived with the sponsor prior to her coming to the UK.

21. Mr Lindsay's argument is that the judge's reasoning was sufficiently clear and adequately reasoned and the judge's findings were open to him.

22. In relation to financial dependence, his submission is that the judge was entitled to find that the financial dependency was "in part" contrived since the sponsor's other children had been able to find work and set up their own households, and because so many years had passed since the appellants reached their majority. No reason was advanced why the appellants were unable to find work in the last two decades since they reached their majority. The sponsor has not explained why the appellants cannot find work and the judge was entitled to find that this is a dependence of choice.

23. I am in agreement that the judge's findings on financial support are inadequately reasoned. The uncontested evidence before the judge was that the three appellants do not work and are reliant on their mother the sponsor for financial support through the Gurkha pension and remittances from the UK. The sponsor gave evidence that the appellants live in a remote area where it is difficult to grow crops and it is difficult to find work. It was also accepted that the three appellants are single, unmarried and remain in the family home. The judge's view that the financial support was "in part" contrived does not explain why he rejected the sponsor's evidence that it is difficult to find work.

24. In any event, implicit in his finding that the financial dependency was "in part" contrived is an acceptance that there exists financial dependency The fact that the appellants' siblings are married and have work does not mean that the appellants are not supported by the sponsor and does not disentitle the appellants from having family life with the sponsor. The other adult children manifestly are living independently, and it is not asserted that they continue to have family life with their mother.

25. Mr Lindsay's submission is that the challenge to the judge's findings on emotional support only amounts to a disagreement.

26. He further submits that just because there is some financial support does not mean that family life exists between the appellants and the sponsor. His argument is that the judge heard the evidence, that there was a range of rational responses, and it was not perverse of the judge to find that family life did not exist between the sponsor and the appellants.

27. I am also satisfied that the judge's findings on the existence of family life are inadequately reasoned in view of the level of communication between the appellants and the sponsor, the existence of long term and ongoing financial support, the fact that the adult children still live in the same family home and the sponsor's own evidence that she relies even more on her children since her husband died.

28. I am satisfied that had the judge applied the current legal test to the facts of the appeal, in that the appellants lived with the sponsor who was a widow prior to her

leaving the UK, continue to live in the family home, have relied on the sponsor for regular financial support since their father died, have not formed independent family units of their own and have regular communication with the sponsor, the judge may have come to a different conclusion on whether there is "real effective and committed" support. On this basis I am satisfied that there is a material error of law.

29. I therefore set aside the decision and preserve the following facts.

    a) The appellants are three single children of the late Purna Bahadur Rai a Nepalese Gurkha who died on 4 October 2009.

    b) He was discharged on 6 August 1967 after exemplary service.

    c) The appellant's mother entered the UK on 12 August 2015 issued under discretionary arrangements for Gurkhas discharged prior to 1 July 1997. She did not apply for her children to come to the UK earlier because of lack of funds.

    d) The three appellants were born on 1975, 1977 and 1981. Had their father been allowed to settle in the UK following his discharge (which he would have done according to the sponsor), they would all have been born in the UK.

    e) The appellants lived with their parents in Sankhuwasabha until their father died. Thereafter they lived with their mother until she left Nepal. They remain living in the family home which is rented.

    f) The sponsor has only returned once to Nepal to visit because of limited funds. She calls her children on a daily basis using calling cards. The sponsor is very close to her adult children.

    g) The children are supported by her through the Gurkha pension which one of her children collects every month. It is a journey of 3 hours to collect the pension. They also grow some vegetables but need financial support for essentials.

    h) The appellants are not employed.

    i) The sponsor also sends additional money to the appellants from her UK pension.

    j) The sponsor has three additional children who are all married and live independently with their own families.

Disposal

30. There was a discussion between the parties as to the most appropriate way of disposing this appeal, were I to set the decision aside. Ms Nnamani was content for me to re-make the appeal or alternatively wanted it to be remitted to the First-tier Tribunal. Mr Lindsay's submission was that any re-making would be subject to what findings I preserved.

31. I am satisfied that there are sufficient findings preserved for me to re-make the decision.

Re-making

32. At the outset of the appeal, Mr Lindsay confirmed that were it to be accepted that Article 8 (1) is engaged because there is family life between the sponsor and the appellants, the denial of entry to the appellants would be disproportionate absent any countervailing factors such as criminality because of the historic injustice in accordance with the authority of Rai.

33. I turn to the jurisprudence on family life as set out by Lord Justice Lindblom at [17] to [20] of Rai.

> 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. …".

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."

34. Having taken into account the preserved findings, I have considered on an individual fact sensitive basis whether family life exists between the sponsor and the appellants. I am satisfied on the balance of probabilities for the reasons below that there is real, effective and committed support between the sponsor and the appellants notwithstanding that the appellants are all adults well over the age of 18

and have been living apart from their mother since 2015. I give great weight to the fact that the appellants have never left the family home and have not established their own family units or independent households. The appellants have always been financially dependent on their parents and since their father died, they have remained financially dependent on their mother. They are reliant on this financial support to meet their essential living needs and indeed require additional remittances from their mother from the UK. They remain in the same home that they lived in with their mother prior to her leaving Nepal. I take into account the cultural context of the situation of unmarried children in Nepal. I take into account the length and quality of the financial support as well as the ongoing close love and affection between the sponsor and the appellants as indicated by the daily phone calls which have continued over a number of years, the visit to Nepal and the sponsor's status as a widow as well as the sponsor's evidence that she misses her children.

35. Having found that that Article 8 (1) is engaged, in view of Mr Lindsay's concession, I allow these appeals.

36. **Decision**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeals are re-made. The appeals are allowed on human rights grounds.

No anonymity direction is made.

Signed *R J Owens* Date 10 June 2021

Upper Tribunal Judge Owens