Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-004615
HU/54929/2021; IA/12270/2021

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2023

Decision & Reasons Promulgated
On 6 April 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

MR KISAN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Ellis Wilford, Counsel, instructed by Bond Adams LLP Solicitors
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision dated 22 July 2022, First-tier Tribunal Judge Rothwell ("the judge") dismissed the appeal brought by the appellant, a citizen of Nepal born on 26 July 1975, against a decision of the respondent dated 16 July 2021 to refuse his human rights claim made under an application for entry clearance. The appeal had been brought under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The

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appellant now appeals to this tribunal against the judge's decision with the permission of Upper Tribunal Judge Lindsley.

Factual background

2. The appellant's father was a former Gurkha soldier. He died in 2009 having served in the Army for 15 years until discharge in 1976. His widow, the appellant's mother and sponsor, Maya Gurung, left Nepal in January 2016 to come to the UK exercising her right to do so as the widow of a Gurkha. She continues to live in the UK with indefinite leave to remain here. She was born on 14 March 1950.

3. The appellant previously applied for entry clearance to join his mother together with his brother on 21 September 2018. That application was refused and his appeal of the refusal was dismissed by Judge Bonavero in a decision promulgated on 10 October 2019. Judge Bonavero found that the appellant had established an independent life by the time his mother had settled in the UK, having moved to Saudi Arabia in the period 2014-2017. Judge Bonavero went on to conclude that there was no family life within the meaning of Article 8 between the appellant and his mother at the time she settled in the UK.

4. By an application dated 20 April 2021, the appellant applied for leave to enter the United Kingdom as his mother's dependent. The basis of the appellant's application to the respondent, and his case before the judge, was that he is dependent upon his mother for emotional and financial support. He does not work, and no work is available to him in Nepal.

5. The application was refused under the adult dependent relatives' rules contained in Appendix FM of the Immigration Rules. The respondent did not accept that the emotional ties between the appellant and the sponsor went beyond those that would be expected between a parent and adult child. There was no "real", "committed", or "effective" support provided by the sponsor for the appellant.

The decision of the First-tier Tribunal

6. The hearing before the judge took place on 12 July 2022 at Hatton Cross. The sponsor attended. The appellant was represented by Mr Wilford, of counsel. The respondent was not represented.

7. The judge recognised that her starting point was the decision of Judge Bonavero applying the principles in *Devaseelan*. The judge said that Judge Bonavero did not accept that there was family life between the appellant and the sponsor and as that decision had not been the subject of an appeal it was not for her to revisit Judge Bonavero's decision, although she recognised that the previous finding was not determinative of the issues before her.

8. The judge then referred to the fact that the appellant went to work in Saudi Arabia in 2013, returning to Nepal six months later until he found

work in Saudi Arabia in 2014 where he remained until 2017. Given these facts and the fact that the sponsor left Nepal in January 2016 to take up a right to relocate to the UK, the judge concluded that the relationship between the appellant and his sponsor did not go beyond normal emotional ties and from 2013 he was leading an independent life (at [20]).

9. The judge (at [22]) said that she did not find that there was family life between the sponsor and the appellant at the time of the hearing. She did not find that the relationship went beyond normal emotional ties or that there was real, committed or effective support; and she then proceeded to set out reasons for this conclusion:

   a. while the judge accepted that the sponsor’s widow’s pension was drawn in Nepal she stated that there was no indication as to who exactly withdrew the money. However, she accepted that it was more likely than not that the pension went to assist the sponsor’s adult children in Nepal (of whom there are six);

   b. the appellant and his siblings raise chickens which they sell to raise monies to support themselves. Money from the pension is used to pay off loans and interest, so not all of it is used to support the appellant. The sponsor sends additional money to her other son and it was accepted that this money was shared with the appellant. However, the judge considered that remittances of this sort from overseas frequently took place amongst families and do not equate to family life. She noted that the family history of the appellant travelling to Saudi Arabia was a relevant consideration in this context;

   c. further evidence of dependency was needed. While the judge noted what the sponsor said in her Witness Statement about speaking to the appellant the judge concluded that the sponsor did not know whose telephone records had been provided in the bundle. The judge commented that there was no content detail for messages provided, some of the records showed missed calls and some had zero minutes for the calls. Furthermore, the sponsor was in contact with all six children. Therefore the records did not assist the appellant;

   d. there was evidence that it was the sponsor who required the appellant to come to the UK to take care of her.

Grounds of appeal

10. The appellant advances four grounds of appeal:

   a. the judge failed correctly to apply *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 in light of *Rai* [2017] EWCA Civ 320, concerning the existence of Article 8 “family life” between adult relatives;

   b. the judge erred by giving weight to irrelevant considerations:

i. in her comparison to other migrants;

ii. by reference to the fact that the appellant does not use the whole of his mother’s pension;

iii. by reference to the appellant’s employment history;

c. the judge erred by failing to address relevant evidence; in particular, that contained in the sponsor’s unchallenged witness statement, especially regarding financial support and accommodation;

d. the judge acted unfairly in rejecting the evidence of the sponsor without putting her concerns to the sponsor.

The grant of permission to appeal

11. Upper Tribunal Judge Lindsley granted permission to appeal on all grounds noting that it was arguable that the wrong test for family life was applied in the context of an appeal where all that was required was current “real, effective or committed support” and where it appears that evidence of financial support and the provision of accommodation, as well as the emotional dependency of the sponsor on the appellant, was accepted.

Submissions

For the Appellant

12. Mr Wilford submitted that the judge applied too high a threshold in deciding whether family life existed between the sponsor and the appellant given the principle stated in *Rai* of the need to determine whether there was “real, committed or effective support”. The fact that accommodation and financial support are provided by the sponsor should satisfy that test as there is no reason beyond the relationship of mother and son to explain them.

13. He submitted that the judge had incorrectly applied the findings of Judge Bonavero. The judge took the findings of Judge Bonavero as a starting point but that judge had made findings regarding the lack of family life in 2016. Judge Rothwell needed to address the existence of family life at the time of the hearing. Reference by the judge to Lord Justice Lindblom’s comments in *Rai* about consideration of the existence of family life when the parent left Nepal failed to take into account that those comments were *obiter dicta*. No change to the fundamental principles of the application of Article 8 had been made by Lindblom LJ thereby.

14. A comparison to other migrants in the context of financial support was inappropriate, particularly given paragraph 38 in *Rai* which expressly addresses the realities of applications in cases involving Gurkha families.

15. The judge had queried the evidence regarding communication between the appellant and the sponsor without reference to the sponsor's Witness Statement in which she describes the communications in some detail. Similarly, in relation to evidence of financial support, in the unchallenged Witness Statement the sponsor said that her children would be "derelict" in Nepal without the monies she sends; but the judge took no account of this evidence. Instead, the judge had focused on a reference to the family keeping chickens but without reference to the explanation of the limited monies obtained in doing so. No account was taken of the evidence of the sponsor's travel to Nepal and limitations on further travel to Nepal.

16. Furthermore, the judge's approach in rejecting unchallenged evidence-in-chief in the sponsor's Witness Statement breached the principles of fairness which were articulated in the case of *Browne v Dunn* (1893) 6 R. 67 (HL). If the evidence of a witness was to be rejected then fairness required that the witness be made aware of the implication that their evidence was untrue.

17. Mr Wilford submitted that the respondent had not identified concerns regarding credibility in the refusal letter. There was no presenting officer at the hearing before the judge and given the lack of credibility challenge identified in the refusal letter there was no duty (applying the *Surendran* guidelines) for the appellant's representative to put points to the appellant.

<u>For the Respondent</u>

18. There was no rule 24 response. Ms Ahmed submitted that in *Rai* Lord Justice Lindblom specifically referred to the need to consider the existence of family life when the parent left Nepal as well as at the time at the hearing and therefore the judge was correct to make reference to, and rely upon, Judge Bonavero's decision. However, the judge's decision showed that she then proceeded to focus on the position at the time of the hearing.

19. Ms Ahmed referred to statements in the refusal letter which she submitted indicated that the respondent did not believe what had been claimed by the appellant. The appellant knew the case resulting from the respondent's letter. The judge had given reasons for not accepting evidence about communication. The *Surendran* guidelines are just that and make clear that it is not for the tribunal judge to be inquisitorial. Clarification may be appropriate, but it is not the judge's function to raise matters which should properly be addressed in cross-examination. She referred to the cases of *WN DRC* [2004] UKAIT 00213, *SW (Adjudicator's questions)* [2005] UKAIT and *XS (Kosovo- Adjudicator's conduct – psychiatric report) Serbia and Montenegro [2005] UKIAT 00093* [2005] UKAIT 00093.

20. Ms Ahmed submitted that the judge's comment about other migrants sending money to their families was no more than an observation, but in any event, was not material to the decision.

Discussion

21. The first ground of appeal challenges the judge's application of *Kugathas*. In *Rai*, Lindblom LJ, with whom the other members of the Court agreed, summarised the authorities on the issue of family life in a case such as this in these terms, at [17 and 19]:

> "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…
>
> …Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* [*R. (on the application of Gurung and others) v Secretary of State for the Home Department* [2013] 1 WLR 2546] (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'."

22. Similarly, in *Uddin v Secretary of State* [2020] EWCA Civ 338 the Senior President of the Tribunals echoed the reference to "real, or committed or effective support" when reviewing the principles applicable to deciding whether family life between adult family members exists (at [28]).

23. It was accepted by Ms Ahmed that circumstances can exist where family life within Article 8 ceases between family members but then re-forms at a later stage. I see no basis to conclude that Lindblom LJ in *Rai* was denying this possibility to Gurkha family members. Indeed, such a conclusion would effectively narrow the approach to be taken to cases involving Gurkha dependants and run contrary to the whole tenor of the approach taken in *Ghising*, *Gurung* and indeed *Rai* itself.

24. I am satisfied that the judge correctly referred to the test of “real, or committed or effective support”; the need to identify something more than normal emotional ties; and the need to consider the existence of family life at the time of the hearing (at [22]).

25. However, reference to the test is insufficient if the decision is inconsistent with its application. The decision is unclear about the extent of dependency found by the judge. In relation to finance, the judge finds that the sponsor sends money to the appellant to support him (albeit, that as I explain later the extent of the findings on this element of support are affected by an error in the approach to the evidence). In relation to the appellant’s accommodation, the sponsor and the appellant state in their Witness Statements that the appellant is living in her house. The judge refers to the fact that the appellant says so, but it is not clear to the reader of the decision whether she goes on to find that as a fact. If the evidence regarding accommodation is accepted this would beg the question as to why that together with the financial support identified by the judge does not constitute “real, committed or effective support”. If the evidence regarding the provision of accommodation is rejected, reasons for doing so have been omitted.

26. Indeed, bound up in considering the application of the family life test by the judge are the grounds which challenge the judge’s approach to the evidence.

27. In considering that approach account is taken by me of the fact that the sponsor attended the hearing before the judge and adopted her Witness Statement as evidence-in-chief. There was no presenting officer representing the respondent at the hearing and therefore no cross-examination. The judge asked a few questions about communications and both Ms Ahmed and Mr Wilford accept that she appropriately noted those questions and answers in her decision. Otherwise, there was no clarification of the sponsor’s evidence in her Witness Statement.

28. Such circumstances raise the application of the *Surendran* guidelines. As Ms Ahmed submitted, those are guidelines and not black letter law. Furthermore, breach of those guidelines will not necessarily give rise to an error of law (see *XS* and *WN (DC)).* In this case it is not being asserted that the judge asked too many questions but that too few were asked in the context of, what Mr Wilford submits was effectively rejection of the sponsor’s evidence-in-chief.

29. The application of the *Surendran* guidelines is itself an element of rules of fairness as explained in the case of *WN (DC)*. In particular, at 39-40 of that decision it is stated:

> "39. There is a tension, reflected in the guidelines, between fairness in enabling a party to know the points on which an Adjudicator may be minded to reach conclusions adverse to him where they have not directly otherwise been raised, and fairness in the Adjudicator not appearing to be partisan, asking questions that no-one else has thought it necessary to ask. This has proved troublesome on a number of occasions.
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> 40. The tension should be resolved, so far as practicable, by recognising the following: (1) It is not necessary for obvious points on credibility to be put, where credibility is generally at issue in the light of the refusal letter or obviously at issue as a result of later evidence. (2) Where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material, or where an Appellant is unrepresented, it is generally better for the Adjudicator to raise the point if it is not otherwise raised. He can do so by direct questioning of a witness in an appropriate manner."

30. Ms Ahmed submitted that credibility was generally at issue in the light of the refusal letter, but I do not agree. In the refusal letter it is said that:

> "You have stated that you are unemployed and that your mother supports you. However, you have provided limited details as to your financial commitments in Nepal... Even if I accept that you do receive financial assistance from your mother, I am satisfied that you are a fit and capable adult who is able to look after yourself."

31. I agree with Mr Wilford that those sentences (relied upon by Ms Ahmed) do not result in a conclusion that credibility was generally at issue. Furthermore, in considering the approach of the judge in this case the question is whether the sponsor's credibility was at large, not whether the appellant's credibility was.

32. Tuning to the specifics of how the judge approached the sponsor's evidence, I agree with Mr Wilford that on various occasions in the judge's decision it is difficult to see that the sponsor's evidence in her Witness Statement has been taken into account, or on what basis that evidence has been given reduced weight. In particular:

    a. the sponsor states that she has given access to her pension in Nepal to the appellant, yet this does not appear to been taken into account by the judge when she states that although the evidence shows that the pensioner is drawn out in Nepal "there is no indication as to exactly who draws out the money";

    b. the judge says that she accepts it is more likely than not that the sponsor's widow's pension goes to assist her adult children in Nepal

and that a portion of the money supports the appellant because it is used to pay off loans owed by him. She says that she accepts the sponsor's evidence that additional monies sent to her other son are shared with the appellant. The judge refers to the sponsor describing the appellant and his siblings raising chickens which are sold. However, the judge does not refer to the sponsor's evidence that the income from the chickens is about enough to buy some food; and without her support the appellant would be "derelict". The reference to selling the chickens indicates that some reference has been made to the sponsor's Witness Statement but the judge does not explain why she rejects the sponsor's description of the value received thereby and the importance of other funding provided to the appellant;

c. the judge says that "it is relevant that in mid-2013 the appellant went to work in Saudi Arabia" (at [20]). The "relevance" of this fact is not made clear. Moreover, the judge does not address the evidence in the sponsor's Witness Statement that this was an attempt at becoming independent which failed;

d. the judge identifies issues with the evidence of communication with the appellant. This is a matter about which she asked questions at the hearing. Those questions and the answers thereto are recorded in the decision. On the basis of what are said to be contradictory explanations, the phone records showing entries of zero minutes and the fact that the sponsor calls all of her children, the judge says that the records do not assist her in relation to findings about communication. Again, there is no reference to the sponsor's description in her Witness Statement.

33. Given that the sponsor's evidence in her Witness Statement was not challenged and the judge has not identified reasons which lead her to reduce the weight of that evidence, the conclusion I reach is that the judge failed to take into account relevant and highly material evidence. That is a material error of law. Having regard to the fact that the error of law in the approach to the evidence affects all of the fact finding relating to the existence of family life at the time of the hearing, I have concluded that there should be a hearing de novo.

34. I have taken into account the latest guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) as to whether the case should be remitted or retained at the Upper Tribunal. The approach of the judge, by reaching conclusions without reference to the sponsor's unchallenged Witness Statement raises fairness issues, but as *Begum* makes clear this form of unfairness does not automatically cause the appeal to be one which should be remitted. However, having regard to the fact that the failure to have regard to the Witness Statement has an impact on the judge's decision which is far wider than the impact on the discreet issue in *Begum*, such that the appellant would effectively lose the benefits of a two stage appeal if his case was retained in this tribunal, I

have decided that it should be remitted to be held de novo in the First-Tier Tribunal.

35. The appellant should be aware that this means that his case will be heard afresh and may be allowed or dismissed by the First-Tier Tribunal.

Notice of Decision

DECISION

36. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

37. The appeal is remitted to the First-tier Tribunal to be heard before any judge aside from Judge Rothwell.

No anonymity direction is made.

Signed Date 2 March 2023

T.Bowler
Deputy Upper Tribunal Judge Bowler