Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/02358/2015**
HU/02360/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2017	**On 7 December 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR MITHUN GURUNG
MR MITRAN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms N Nnamani, Counsel instructed by Howe & Company Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Nepal and brothers. Mithun Gurung's date of birth is 30 September 1987 and his brother, Mitran Gurung's date of birth is 29 May 1990. They made applications for entry clearance to join their father, the Sponsor, Mr Manbahadur Gurung (an ex-Gurkha soldier in the British army) and their mother, Mrs Ransuea Gurung. The Sponsor has been here since 2010 and was granted settlement under the relevant policy in 2009. The Appellants' applications were made in June 2015 and

refused by the ECO on 3 July 2015. The applications were made under the policy relevant at that time. The Appellants appealed and their appeals were and dismissed by Judge of the First-tier Tribunal Colvin in a decision that was promulgated on 14 February 2017. The Appellants were granted permission to appeal on 4 September 2017 by First-tier Tribunal Judge McGinty. The matter came before me on 20 November 2017.

2. The judge recorded there was an earlier determination from then Immigration Judge Kebede which was promulgated in October 2010 dismissing the appeals of the youngest Appellant and his sister. That appeal was determined on the papers because there was no appearance on behalf of the Appellants. No documentary evidence was submitted in support and the judge concluded that there was no evidence to support the claims that the Appellants were financially dependent upon their father or that he had been funding their studies.

3. Judge Colvin heard evidence from the Sponsor and his wife. He dismissed the appeal under the relevant policy and Article 8. The judge found that the Appellants met the age requirement under Appendix K at the time of the application and that they had not formed independent lives. They were single, unmarried and living in rented accommodation. The judge accepted that they were unable to make an application to settle with their parents when they were minors because of the Home Office policy then in place. However, the judge concluded that the Appellants had lived apart from their parents for more than two years and therefore their appeal could not succeed under the policy. There is not challenge to this finding.

4. The judge went on to consider financial and emotional dependency and made the following findings. The judge concluded that there was some discrepancy as to what the Appellants had been doing. The judge made salient findings at paragraphs 25, 26, 27, 28 and 29 as follows:-

> "25. There is documentary evidence submitted showing that both appellants completed the Higher Secondary education in Nepal. There was then some discrepancy as to what they have done since or are doing currently. It is said that the first appellant spent some time working in the Gulf in 2009 but this ended when the company he was working for became bankrupt. It is said initially by his father in oral evidence that he is now learning computers at college for 2 years but this was later changed to agree with his wife that he is studying a language course. In terms of the second appellant, it was said initially by his father that he had done some training as a cook and is now studying language but this was also changed to the extent that he is studying computer and it was his brother, the first appellant who had done a cookery training. The sponsor's wife in her evidence said that the first appellant is studying languages and has no other type of training; whereas the second appellant is studying computer and was trained as a cook about a year ago but was refused a job.

26. It is not clear from this evidence which of the appellants is a trained cook. However, in any event, there are no documents before me showing this and no documents confirming that they are both studying full-time as claimed. When their mother was asked in oral evidence why the appellants had not managed to gain employment as porters in a tourist location like Pokhara, she said that she was not quite sure but that being a porter is not a prestigious job.

27. Due to the lack of evidence before me relating to the appellants' circumstances now and since they left secondary school, I am unable to be satisfied that they have shown to a balance of probabilities that they are both in full-time education and unable to find work or that their financial dependency on their sponsor is out of necessity. Whilst I accept that they are sent money by the sponsor and may access his bank account in Nepal, this could be due to the generosity of their father to allow them to live a relatively privileged lifestyle in Nepal particularly as I find that no coherent reason has been given why they cannot find work albeit as a cook or even a porter.

28. In terms of emotional dependency it would seem that the respondent has imposed a higher threshold than that required under the Annex K policy and that it has to be noted that this is not an application as an adult dependent relative of a settled person under the Immigration Rules where the higher threshold may be appropriate. I consider that this is a relevant point that needs to be taken into account when assessing the evidence. As mentioned before, there is no evidence before me from the appellants themselves saying why they wish to come to the UK to be with their parents and why they consider themselves to still be emotionally dependent upon them. The evidence that is before me is that they are living together in rented accommodation in Pokhara and that the family home in a remote village has been destroyed by the earthquake. I have no reason to doubt the evidence of the sponsor and his wife said that they have regular telephone contact with the appellants and there is some documentary evidence in the bundle to confirm this. It is said that they have lived all their life with their parents in Nepal until they left in 2010 – although this does not take into account that there was a period when the first appellant was independent and working in the Gulf. They have spent at least one significant period of time together from December 2014 to March 2015 which seems to have coincided with the marriage in Nepal of their sister. The previous application made by the second appellant and his sister shows that it was the intention that these family members would accompany the parents to the UK – although it has to be noted that the appeal against the refusal decision was not actively pursued. The appellants are unmarried

and have not formed independent family units. In this context I accept that in Nepalese culture children are the parents' responsibility until they got married – a matter that appears not to have been considered by the respondent.

29. On the basis of this evidence I accept that there is a degree of emotional dependency of the appellants on their parents even if this is mainly as a result of the cultural context of children remaining the responsibility of the parents. However, as I have found above that there is not a financial dependency arising out of necessity, it means that I cannot be satisfied that the appellants fulfil paragraph 9(5) of Annex K."

5. The judge went on to consider Article 8 outside of the Immigration Rules and directed himself at paragraph 32:

"32. It was accepted in the case of *Ghising [2012] UKUT 160* at paragraph 56 that the case of *Kugathas v SSHD [2003] EWCA Civ 31* '*has been interpreted too restrictively in the past*' and needs to be read in the light of subsequent decisions of the domestic and Strasbourg courts. For example, family life can exist without dependence: *Patel & Others v ECO (Mumbai) [2010] EWCA Civ 17* when Sedley LJ held at paragraph 14 that '*what may constitute an extant family life falls well short of dependency*'. Neither voluntary separation of the family (*Sen v Netherlands [2003] EHRR 7*) nor the attainment of the age of majority are of themselves sufficient to displace the presumption that there is a family life. This approach has been followed in several domestic authorities. In *AA v UK [2011] ECHR 8000* at paragraph 49 it was said that the critical features in assessing the existence of family life are continued presence in the family home and whether the dependant has established a family of their own."

The judge made the following findings;

"33. The factors in this case to be taken into account in showing family life continues are the following:

- The appellants remain unmarried and have not established families of their own;

- There is a degree of emotional dependency even if this is mainly in the cultural context of children remaining the responsibility of their parents until being married and the sponsor and his wife wishing to have the help of their children as they become elderly;

- The appellants remain living in rented accommodation that had previously been the family home;

- The second appellant has shown a previous intention to join his parents by making an application at the time that they are settled in the UK – although no proper explanation has been given as to why the appeal was not actively pursued by the sponsor and submission of documentary evidence;

- There is regular telephone contact between the sponsor, his wife and the appellants and the sponsor and his wife have visited Nepal on at least one occasion for 3 months.

34. On the other hand I have found that the appellants have not shown on the evidence before me that they have a financial dependency out of necessity on the sponsor and that there is a significant lack of evidence to show their circumstances in Nepal as regards studying and work. The appellants have four married sisters in Nepal and, yet again, there is no evidence as to their relationship with them particularly with their sister, Sabina, with whom they lived for several years after their parents came to the UK. Without any evidence from the appellants themselves, it is difficult to say, for example, to what extent the appellants and their parents value and depend on each other for mutual support or the appellants rely on their parents for guidance. And for all these reasons I am unable to find that it has been shown that this is in fact a close knit family relationship."

6. The grounds argue that the judge erred in respect of Article 8(1). It is asserted that the judge erred at paragraph 34 in concluding that the Appellants did not enjoy family life on the basis that they had failed to demonstrate dependency out of necessity. It is asserted that it is unclear how the relationship with the Appellants' sisters would be more substantial than their relationship with their parents and it is submitted that it was an irrelevant consideration. In respect of the absence of witness statements from the Appellants it is argued that their intention to come to the UK was patently demonstrated by the service of their applications and the absence of witness statements was a further irrelevant consideration.

7. It was argued, and this was the main thrust of Ms Nnamani's submissions, that the assessment of financial dependency was flawed (the grounds cite part of paragraph 24 of *Pun & Others (Gurkhas: policy: Article 8) Nepal* [2011] UKUT 00377). It is submitted that the judge erred when concluding that the Appellants had failed to demonstrate necessary dependency. At paragraph 27 of the determination the judge concluded that there was no coherent reason given to explain the Appellants' inability to work. The Sponsor and his wife made it clear that their sons had not found work and that they were undertaking courses to enhance their skills. It is argued that the judge's conclusions in respect of family life are unsustainable having regard to the factors as set out by the judge at paragraph 33.

8. Reference is made in the grounds to paragraph 24 in the case of *Pun.* The grounds do not set out the complete paragraph, it is necessary to do so to understand what was said by the UT. Paragraph 24 reads as follows:

> "The need for an evaluation of the facts of each particular case seems to us to provide the answer to Mr Blundell's submission that when assessing Article 8 any financial dependence should be of necessity, not choice by analogy with a similar requirement to the assessment of dependency under the Rules. Even if such an approach is required under the Rules, and it does seem to us that this may be an oversimplification of what the court was saying in Bibi, it would be wrong to impose such a limitation when assessing dependency within Article 8. Each case must be looked at on its own facts. We certainly accept that a contrived dependency will carry little, if any, weight within Article 8 either when deciding whether family life exists or when assessing proportionality, but if financial dependency is a choice to be extent that an applicant is dependent so that he or she can pursue further studies, this should not, without more mean that such dependency cannot properly be taken into account."

9. In *Kugathas* [2003] EWCA Civ 31 the Appellant resisted removal to Sri Lanka on the basis of his continuing family life with his mother, his brother and his married sister who all lived in Germany. He had lived with them for many years in Germany before coming to this country about three years prior to the decision under appeal. The leading judgment was given by Sedley LJ. At paragraph 14 of his judgment he quoted the statement of the Commission in *S v United Kingdom* that:

> "Generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent, minor children. Whether it extends to other relationships depend on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily require protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

10. Sedley LJ described that as setting out "a proper approach". As regards the meaning of dependency in that passage, in paragraph 17 of his judgment he said:

> "Mr Gill QC says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense but 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 in my view the irreducible minimum of what family life implies."

11. It was held that the Appellant's relationship with his family did not at the time of the decision constitute family life for the purpose of Article 8

whatever might have been the position while they were still in Germany. Sedley LJ said at paragraph 19:

> "Returning to the present case, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8."

12. In *Ghising v Secretary of State for the Home Department* [2012] UKUT 00160 the Upper Tribunal (Lang J and Upper Tribunal Judge Jordan) was critical of the manner in which *Kugathas* had been interpreted by courts. It observed at paragraph 56 of its determination that:

> "The judgment in Kugathas has been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts."

It continued at paragraph 57 to point out that several authorities had recognised that family life may continue between parent and child even after the child has reached the age of majority. The Tribunal concluded at paragraph 62:

> "The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact sensitive. In our judgment, rather than applying the blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings: 'we do not think that Advic is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life that is sought to establish is that between adult siblings living together. In our judgment, the recognition in Advic that, whilst some generalisations are possible, each case is fact sensitive and places an obligation on both adjudicators and the AIT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case'. (Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950."

13. The approach of the Upper Tribunal in *Ghising* was approved in *R (Gurung) v Secretary of State for the Home Department* [2013] EWCA Civ 8. In *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 Sir Stanley Burton with whom Richards and Christopher Clarke LJJ agreed concluded at paragraph 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 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."

14. Sedley LJ's statement of the applicable principles in *Kugathas* has not been in any sense disproved. In *ECO & Kopoi* [2017] EWCA Civ 1511 at paragraph 19 Sales LJ said that *Kugathas* remains good law (see *Secretary of State for the Home Department v Onuroah* [2017] EWCA Civ 1757).

Conclusions

15. It is clear from paragraph 32 of the decision of the First-tier Tribunal that the judge properly directed himself on the relevant law. There is no criticism of his self-direction. The judge engaged with the Appellants' particular circumstances. When the full decision in *Pun* is considered, rather than a section of 24, it does not support an argument that dependency from choice is not a material consideration. What the court emphasised was that what is needed is a fact sensitive assessment and that is what the judge in this case did. He found that there was inconsistent and unreliable evidence about what the Appellants were doing at the relevant date. There was no coherent evidence about their circumstances as found by the judge. The judge found that the evidence relating to what they had been doing since leaving school until the date of the hearing was lacking. The grounds in my view disagree with the conclusion but do not properly engage with the findings of the judge made in respect of the evidence of the Sponsor and his wife. The judge accepted that the Appellants' father sent money to them. He did not conclude that they were studying or genuinely unemployed. This finding was open to the judge on the evidence. The judge conducted a fact sensitive assessment and was entitled on the evidence before him to find that dependency was out of choice not necessity when considering family life.

16. There was no evidence from the Appellants about their relationship with their parents. This was surprising because the nature of this relationship was core to the assessment of the appeal under article 8. The judge found a degree of emotional dependency and considered Nepalese culture (see paragraphs 28 and 29). There was no evidence from the Appellants or their adult siblings in Nepal. The judge was entitled to take this into

account. There were three adult siblings in Nepal, one of whom had lived with the Appellants for several years after their parents' departure. The Appellants were not isolated in Nepal without their parents. They had each other and other adult siblings. There was no evidence from the Appellants or their adult siblings and it the judge to drew reasonable inferences from this.

17. The judge properly factored into the assessment that there was regular telephone contact and that the Appellants had not established their own families. The judge attached weight to emotional dependency but on the evidence before him and following on from his the lawful and sustainable findings, it was unarguable that this was more than usually expected between adult siblings and their parents, namely involving more than the normal emotional ties. It was open to the judge to conclude that there was no family life for the purposes of Article 8(1). The decision was open to the judge and complies with the relevant case law. It is not irrational or perverse. I conclude that the judge did not make an error of law and the decision is maintained.

Notice of Decision

The appeal is dismissed.

Signed Joanna McWilliam Date 6 December 2017

Upper Tribunal Judge McWilliam