



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/06521/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 4th July 2017

**Decision &
Promulgated
On 13th July 2017**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**MISS GITA SUNAM DAMAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER NEW DELHI

Respondent

Representation:

For the Appellant: Mr G Lee, instructed by Everest Law Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nepal, appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer dated 19th August 2015 to refuse her application for entry clearance for settlement to join her father, a former Gurkha soldier who was granted settlement in the UK in April 2010. First-tier Tribunal Judge Walters determined the appeal on the papers and dismissed the appeal on human rights grounds. The Appellant sought permission to appeal which was refused by the First-tier Tribunal in a decision dated 12th April 2017. The Appellant's renewed application for permission to appeal was granted by Upper Tribunal Judge Finch on 8th

May 2017. Upper Tribunal Judge Finch considered it arguable that the First-tier Tribunal Judge did not fully apply the principles contained in **Ghising (family life - adults - Gurkha policy) [2013] UKUT 00160 (IAC)** and **Gurung & Others (R on the application of) v Secretary of State for the Home Department [2013] EWCA Civ 8** when reaching his decision.

2. In considering family life the First-tier Tribunal Judge noted that the Appellant was 31 years old at the date of decision. He noted that the Appellant had been living in Nepal without her parents for about five years and appeared to have been living independently as asserted by the ECO. The judge noted at paragraph 9:

“There was little evidence before me as to the Appellant’s circumstances in Nepal. For example, there was no evidence as to where she lives or who pays for it. Nor was there any evidence as to her educational level which would influence her ability to gain employment. Nor was I given any evidence as to what attempts she has made to find employment.”

3. The judge noted at paragraph 10 that there was evidence of remittances to the Appellant from her father and evidence of visits made by the Appellant's parents to Nepal since coming to the UK in 2010. He noted that the main argument put forward by the Appellant in her Notice of Appeal was that her parents need her to care for them but the judge noted that the Entry Clearance Officer pointed out that there would be nothing to prevent the Appellant’s parents returning to Nepal and to the Appellant caring for them there. The judge found that the Appellant had not proved that she has family life with her parents noting that she is an adult child and must prove more than “normal emotional dependence”. The judge concluded that because of the lack of evidence as to her circumstances in Nepal and any reasons why she cannot get employment there he did not find that she had produced the necessary evidence that she is dependent on her parents [12]. Whilst he accepted that the Appellant’s parents send remittances to her, as no budget was produced he could not ascertain whether these were for necessities or luxuries.

Submissions

4. The Appellant contends that there are two errors in the First-tier Tribunal Judge’s decision. It is firstly contended that the judge erred in concluding that the Appellant has not established that she has a family life with her parents in the UK. The First-tier Tribunal Judge went on to consider proportionality in the event that he was wrong in relation to his assessment of family life and it is contended that the judge erred in relation to his assessment of proportionality as well.
5. Mr Lee relied on the recent decision by the Court of Appeal in the case of **Jitendra Rai v ECO New Delhi [2017] EWCA Civ 320**. In that case Lindblom LJ gave guidance on determining whether Article 8 was engaged. The Court set out the legal principles relevant to determining whether

there is family life in a case such as this from paragraphs 17 onwards. The Court noted that in the case of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**, Sedley LJ referred to dependency as meaning “real” “committed” or “effective” “support”. The Court of Appeal noted that the Upper Tribunal accepted in the case of **Ghising (family life - adults - Gurkha policy)** that the judgment in **Kugathas** had been “interpreted too restrictively in the past”. The Upper Tribunal went on to say a significant factor in assessing whether or not there is family life is 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” [61]. Lindblom LJ made reference to the case of **Gurung** where it was stated that 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 and that it all depends on the facts.

6. Lord Justice Lindblom discussed the decision of the Upper Tribunal in the case of **Rai** and noted that the single factor which seemed to have weighed most heavily in the conclusion of the Upper Tribunal Judge in that case was the Appellant’s parents’ willingness to leave Nepal to settle in the UK when they did. The court accepted that it was open to the Upper Tribunal Judge to have regard to the Appellant’s dependence, both financial and emotional, on his parents which was a relevant and necessary consideration in his assessment but the judge also had to have regard to whether there was real, committed or effective support in the Appellant’s case [36]. The Court accepted the submission made on behalf of the Appellant that the judge should not look for some extraordinary or exceptional feature in the Appellant’s dependence on his parents as a necessary determinant of the existence of his family life with them. The Court of Appeal found that the judge erred in concentrating on the Appellant’s parents’ decision to leave Nepal and settle in the UK without “focusing on the practical and financial realities entailed in that decision” [38]. Lindblom LJ said that the critical question under Article 8(1) was whether, even though the Appellant’s parents had chosen to leave Nepal to settle in the UK when they did, the Appellant’s family life with them subsisted then and was still subsisting at the time of the decision [42]. The issue was identified as being whether the judge gives careful consideration of all of the relevant facts on which the answer to this question depends.
7. Mr Lee highlighted that the First-tier Tribunal Judge in this case accepted that there was evidence of remittances by the Appellant’s father and visits to Nepal since 2010 and he submitted that this was on its face evidence of real, committed or effective support. He submitted that at paragraphs 12 and 13 the judge fell into the same errors identified by the Court of Appeal in **Rai** in that he seemed to look for something more. He submitted that the judge in this case applied too high of a threshold. He submitted that the judge was wrong to highlight the fact that no budget had been produced, doing so demonstrated that the judge was looking for a subsistent dependence which was different from the test put forward by the Court of Appeal in the case of **Rai**.

8. Mr Tufan accepted that this appeal turns on whether the judge was correct to find that there was no family life in this case. He accepted that the judge had failed to consider the historic injustice in sufficient detail in his assessment of proportionality. In terms of family life Mr Tufan submitted that Judge Walters did determine the issue of family life as a question of fact. He took into account the fact that there had been a voluntary separation for six years and that the evidence was sparse in relation to financial remittances and visits. He submitted that there was nothing in this case to show that the First-tier Tribunal Judge had elevated the threshold. Mr Tufan referred to the case of **AAO v Entry Clearance Officer [2011] EWCA Civ 840** where at paragraph 35 the court said that:

“Family life will not normally exist between parents and adult children in the absence of further elements of dependency which go beyond the normal emotional ties and that reliance on the further element of financial dependency will not normally breach Article 8.”

He submitted that it was open to the judge to attach little weight to the evidence in relation to visits by the parents because they would not have only been visiting this Appellant.

9. Mr Lee submitted that this appeal mirrors that in the case of **Rai** as there the Tribunal was wrestling with the assessment of evidence of continuing financial dependence. He submitted that the judge asked himself the wrong question here. He should have asked whether there is real, effective and committed support in the context of this type of case.

Discussion

10. A difficulty in this appeal is that the case was determined on the papers and there was limited direct evidence from the Appellant and the Sponsor. The Grounds of Appeal to the First-tier Tribunal raised a number of issues including the assertion that the Appellant is the only child not married yet, that the parents only moved to the UK when they were permitted to do so, that she is their sole dependent daughter, that the parents are depressed in the absence of their family members and require her support, that the parents keep in touch with the Appellant by telephone, that they have visited her, and that they send money to her and provide regular financial support. There was apparent evidence of financial remittances. There was a statement from the Sponsor indicating that the Appellant is dependent on her parents but is compelled to live in Nepal and that is supported by regular remittances. The letter refers to emotional and financial support. There was evidence of visits in the form of passport stamps on the parents' passports.
11. However the First-tier Tribunal Judge found at paragraph 9 that there was little evidence before him as to the Appellant's circumstances in Nepal, for example in relation to where she lives or who pays for it nor in relation to her ability to gain employment. The judge accepted that there were remittances to the Appellant and visits by the parents to Nepal the judge. However, despite referring to more than a normal emotional dependence,

the judge again referred to the lack of evidence as to the Appellant's circumstances in Nepal and the fact that the Appellant had failed to produce necessary evidence that she is dependent on her parents [12].

12. The Court of Appeal in **Rai** summarised the current guidance in relation to whether there is family life between adult relatives. Looking at paragraphs 7 to 13, I am satisfied that the judge properly applied these principles to the evidence before him. He considered the evidence and concluded that there was insufficient evidence to demonstrate that there is a family life between the Appellant and her parents within Article 8.
13. Although there was some evidence before the judge, as highlighted at paragraph 10 above, there was a lack of any direct evidence as to the Appellant's circumstances in Nepal. Evidence of remittances and visits to Nepal are not necessarily in themselves evidence of real committed or effective support between the parents and their adult daughter. The judge had no evidence as to what accommodation the Appellant lived in or who paid for that accommodation. There was no evidence as to who the Appellant lived with before the parents left Nepal. The judge referred to the lack of evidence on several occasions in his findings. In my view the issue in this appeal was not, as asserted by the Appellant, the judge's application of the wrong test, but rather the lack of evidence before the judge as to the nature and extent of family life between the parties. This led to the judge's conclusion that he could not be satisfied on the basis of the evidence before him that in this case there was sufficient evidence of family life within Article 8(1) between this Appellant and her parents. I find that this conclusion was open to the judge on the basis of the evidence before him. It may well be that the Appellant can make a further application with further evidence to demonstrate family life. However the judge could decide the appeal only on the evidence before him. In so doing he did not fall into error.
14. It was conceded by Mr Tufan that the judge failed to adequately apply the case law to his assessment of proportionality at paragraphs 19 to 24. However this is not a material error in light of the fact that there is no material error in the judge's decision in relation to family life.
15. In these circumstances I consider that there is no material error in the decision of the First-tier Tribunal.

Notice of Decision

16. The decision of the First-tier Tribunal does not contain a material error of law.
17. Therefore the decision of the First-tier Tribunal shall stand.
18. No anonymity direction is made.

Signed

Date: 7 July 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed

Date: 7 July 2017

Deputy Upper Tribunal Judge Grimes