



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/12309/2015
HU/12311/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 30 January 2018**

**Decision & Reasons
Promulgated
On 1 March 2018**

Before

**Hon Mr Justice WARBY
UPPER TRIBUNAL JUDGE RIMINGTON**

Between

Entry Clearance Officer - New Delhi

Appellant

And

**MR BEDANG LIMBU
MISS ANU LIMBU
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: Mr Dieu, instructed by NC Brothers & Co Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State on behalf of the Entry Clearance Officer, but nonetheless for the purposes of this decision we shall refer to the parties as they were described before the First-tier Tribunal.

2. The appellants are siblings and nationals of Nepal born on 12th January 1987 and 18th April 1988 respectively. They applied for entry clearance to settle in the United Kingdom as the adult dependent relatives of their father, an ex Ghurkha soldier, Mr Jagat Limbu. That application was refused and they appealed. First-tier Tribunal Judge Birk allowed the appeal on Article 8 grounds finding that family life had been established between the appellants and their sponsor in the United Kingdom.
3. The Secretary of State applied for permission to appeal against the First-tier Tribunal decision advancing that the First-tier Tribunal Judge misdirected herself in law. The grounds read as follows:

'The Tribunal reminds itself of the appropriate test at paragraph 16 where it refers to Kugathas. However, it is respectfully submitted that it did not go on to apply that test. The appellants are 30 and 29 years old and they have been living apart from the sponsor for 9 years and their mother for 5 years. Although the appellants' family has maintained regular contact and their parents have visited them on several occasions, it is respectfully submitted that the Kugathas standard requires more than that. The Tribunal has not gone on to consider elements of dependency beyond the normal emotional ties. Furthermore, it has not even gone on to make evidence based findings on emotional dependency. In view of this the decision on this case is incomplete and it is submitted that the case needs to be looked at afresh'.

4. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on the basis that

'Although their family have maintained regular contact, including visits on several occasions it is arguable that the Kugathas standard requires more than that. The Judge has not gone on to consider elements of dependency beyond the normal emotional ties or based any findings on emotional dependency'.

5. The main issue raised by the appeal is whether the FTTJ erred in law in her approach to the question of whether a family life within the ambit of Article 8 existed at the material time between the adult Appellants and their father, "the sponsor".

Legal and policy context

6. The applicable principles are well-established, and were recently reviewed and re-stated in **Rai (Jitendra) v Entry Clearance Officer [2017] EWCA Civ 320**. Some key points are that:
 - (1) The burden of proof to show family life exists and the ECHR is engaged, rests with the appellants and the standard of proof is the balance of probabilities. The Secretary of State must show the decision is proportionate.
 - (2) It is not enough to show the normal emotional ties that would be expected between a parent and their adult child; something more

must be shown: **Kugathas v SSHD [2003] EWCA Civ 31**. Sedley LJ 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'.

- (3) One factor that is relevant, though not determinative, is whether the adult child has formed a family of his or her own: **Gurung v SSHD [2013] EWCA Civ 8**.
- (4) The judgments in **Kugathas** should not necessarily be read too restrictively.
- (5) In the end, the assessment is a holistic one and ultimately as per Lord Dyson M.R. in **Gurung v SSHD [2013] EWCA Civ 8** '[it] all depends on the facts'. There should be careful consideration of the facts in the case.
- (6) As Sir Stanley Burnton stated in **Singh v SSHD [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 ...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'.

The evidence

7. The Judge recorded in her decision that she had heard evidence from the sponsor, who gave evidence via a statement and was cross-examined, giving evidence through a Nepalese interpreter. The Judge also referred to documentary evidence and the fact that she had heard submissions on the Appellants' behalf from Mr Dieu, who has appeared before us, and from Mr Hogg, the Home Office Presenting Officer who appeared below.

The Judge's decision

8. In paragraphs [9] and [19] of the decision under appeal, the FTTJ made the following findings of fact:
 - (1) The sponsor came to reside in the UK in 2008. He left Anu, the second Appellant, in order to take the opportunity to come here even if it meant leaving his daughter (she was 20 years old at the time). The appellants are their only children.
 - (2) In 2010 the Appellants applied for entry to the UK. In the same year the sponsor went to visit them.
 - (3) In 2012 the Appellants' mother followed her husband to the UK.
 - (4) The Appellants "had been studying though that is now completed". They live together in a rented house as the family house is rented out, "because it is Dharan and the Appellants were not willing to live there when the sponsor came here." There are no jobs there.

- (5) Throughout the period of separation, the Appellants “have been supported by the sponsor”, by means of regular payments, evidenced by money transfer receipts. The sponsor pays the rent on the property in Nepal.
- (6) The sponsor visited his adult children again in 2014 and a third time in 2016.
- (7) There was “evidence of contact between the Appellants and their parents which is described as using modern forms of communication”.
- (8) Neither Appellant had formed a separate family unit.

9. For these reasons, the FTTJ reached the conclusion that

“... the Appellants have established that their family life does exist with their father and they are a family unit despite the physical separation for a number of years.... and that they remain the responsibility of their parents.”

10. The Judge proceeded to conclude that the Entry Clearance Officer’s decision represented an interference with the family life thus established. She accepted that the interference pursued the legitimate aim of maintaining effective immigration control by lawful means. However, having balanced all the relevant factors the decision to refuse entry clearance was held to be disproportionate.
11. In reaching this last conclusion the Judge placed great weight on the historical injustice to the children of ex-Gurkha soldiers, and the implications of that for the Article 8 balancing exercise, referring to **Patel v ECO Mumbai [2010] EWCA Civ 17** and **Ghising (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567**. She found on the evidence that the parties spoke English and that the sponsor would be providing accommodation and financial support so that none of the factors specified in s 117B seriously undermined the claim.

Submissions

12. For the Secretary of State, Mr Avery does not criticise the Judge’s approach to the proportionality assessment. He focuses his attack on the finding that a family life existed. He argued that the Judge’s findings on both law and fact were ‘thin’ and that there was little reasoning. He referred us to **Rai (Jitendra)**. The family connection and financial support were indicators of family life but insufficient to establish family life. There was little indication in this instance of any participation by the sponsor in decisions for or the emotional life of the appellants. The decision should be sufficiently detailed to be understood. There needed to be a finding with regard family life when the sponsor left Nepal and the continuing nexus to the present day.
13. Mr Dieu assured us that the decision when read as a whole referred to the relevant authorities at [16] and urged us to consider the assessment of family life in stages. The parent blood bond was the first stage but

insufficient; the next stage was love and affection and the authorities confirmed that more than that was required and it was what was beyond and this next stage which was important. He referred us to **Kugathas**. At paragraph [18] the Judge set out the levels of support which were real committed and effective. There was evidence of financial transfers, payment of rent on the property in Nepal for the appellants and emotional support in the form of three separate visits. The reference to modern communication identified the log of telephone contact between the sponsor and the appellants. There had been no challenge from the Home Office Presenting Officer to any of the evidence supplied. Financial and emotional support was intertwined. He accepted that the Judge failed to detail the statements of the appellants which were present in the bundle but the Judge specifically accepted the statement and evidence of the sponsor which was highly pertinent.

Discussion and conclusions

14. It is a fair observation that the reasoning in the Judge's decision, on first blush, appears rather thin. We have however been persuaded that the decision, when read carefully as a whole, makes adequate findings in relation to the central issue that is family life under Article 8.
15. Before coming to her findings of fact and her evaluation of the merits the Judge had made clear (in paragraph [8] of the Decision) that she would summarise in her decision "only the most salient points" of the evidence of submissions, and that she took into account all the documentation before her.
16. At the hearing of this appeal it became apparent that the documentation before the FTTJ was more extensive and more detailed than might appear from her summary. It has proved possible, by reference to the underlying evidence, to appreciate fully the reasoning in the Judge's account of the facts. This, however, is not an exercise in creating reasons where none existed.
17. In terms of the law the Judge cited the correct authorities at paragraph [16] of her decision. She directed herself to **Kugathas** clearly identifying that more than normal emotional ties would be expected of adult family members. She also identified that **Gurung** (in fact with reference to **Ghising** (family life - adults-Gurkha policy) [2012] UKUT 160) gives clear direction on the approach to be taken with reference to adult Gurkha dependants. Extensive recitation of the law is not required when it is evident that the Judge applied the correct law in substance. That the Judge used a form of shorthand in referring to the law does not indicate an error of law when no error can be found in its application. The Judge cut through verbiage to arrive at the heart of the matter which was whether family life existed. Brevity and concision does not necessarily indicate an error of law.

18. At paragraph [18] the Judge specifically accepted the sponsor's evidence finding his answers consistent and clear and she relied on his statement to support her findings in relation to family life. At paragraph [7] of the sponsor's statement he recorded

'I understand that once, the British Government stated that it was not their intention to split up Gurkha families just because one child was over eighteen years, but that is exactly what they have done in Anu and Bedang's cases. They are completely dependent on their mother and I for absolutely everything. We pay for their accommodation, their clothes, their food and drink, all their bills and we paid for all of their studies until they graduated' W/S [7]

'However, their settlement applications have never been just about money. They are my dependent children. Even though they are over eighteen they need their mother and me to look after them. They have shown that alone, they do not cope very well and that they miss their mother and me' W/S [8].

'There are also cultural considerations that we have to consider. Nepalese society expects a family to stay together and support each other until a child is able to support himself, and neither Anu nor Bedang can do that yet, because they cannot work because there is no work available, and they are not married. ' W/S [9].

19. This evidence was reflected by the witness statements of the appellants which identified (as noted by the Judge in her recitation of the facts) that the mother had stayed with the appellants for a further four years after the father had departed for the United Kingdom. The appellants made their first applications immediately on the departure of the sponsor, in 2010, which were refused. Their applications which generated the decisions and this appeal was in fact dated 7th October 2015. Although criticised for failing to consider whether there was family life at the point of separation and currently, the Judge specifically noted that the family lived together prior to the departure of the sponsor, and then their mother, and the Judge accepted that throughout the period of separation the appellants had 'been supported by the sponsor'. The Judge had this to say

'There have been produced bank statements and money transfer receipts and the sponsor pays for the rent on the property in Nepal'

Indeed there are financial remittance receipts in the documentation from the sponsor to the appellants dating back to October 2013 and bank statements of the appellants showing their financial transactions. These referred to IME transactions and for which a substantial quantity of receipts were produced and which dated back to 2010.

20. There were also certificates from the Dharan Municipality Office dated 2009 confirming the appellants' single status. The sponsor confirmed this persisted. The Judge found that 'neither has formed a separate family unit elsewhere'.

21. The Judge made a rather oblique reference to the evidence of contact between the 'Appellants and their parents which is described as using modern forms of communication' but continued to find 'the sponsor and the appellants' statements are sufficiently detailed about the level of contact'. We note there was a 'Call Record History' from Lycamobile and a log from Nepal Telecom and numerous and frequent screenshots of contact showing evidence of ongoing contact which continuing over time. The documentation was substantial since at least August 2015. The first appellant confirmed in his statement that

'I speak to them usually everyday, and they come to see Anu and me as often as they can afford. We speak using our mobile phones and using the social media application Viber. Copies of all our itemised phone bills and Viber communications are attached to this statement'.

22. The Judge also identified that the contact was not limited to modern means of communication but also 'the sponsor has visited the Appellants on 3 occasions, 2010, 2014 and 2016'. The expense of those visits was highlighted in the statement of the first appellant.

23. In our view the Secretary of State is attempting to argue that there needs to be something akin to exceptional in order to succeed. The policy is aimed at rectifying historic injustice and as explained the children of the sponsor would have settled with him had he not been denied that right hitherto. The Judge did address the issue of family life albeit that the family were separated for 9 years but that was not merely through choice. The Court of Appeal in **Rai (Jitendra)** analysed the approach of the Secretary of State regarding the approach to family life and rejected the approach of 'looking *not just* for a sufficient degree of financial and emotional dependence to constitute family life' [our emphasis]. This was considered to be an approach which was too exacting. Nor did the Court sanction any critical emphasis on a sponsor's voluntary choice to leave adult children in Nepal. This might have the effect of undermining the existence of family life. The question was whether family life existed at the time of the sponsor's departure and whether it endured beyond it 'notwithstanding their having left Nepal when they did'. [39].

24. As set out in **Shizad (sufficiency of reasons: set aside)** [2013] UKUT 00085 (IAC) 'Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge'.

25. Unpicking the threads of the Judge's decision it is clear that the decision is concise but nevertheless the judge has enlisted the correct interpretation of the law and made relevant findings on the key points regarding Article 8 family life. Overall the findings of the First-tier Tribunal Judge fulfilled the requirement of the irreducible minimum for family life because the support was 'real' and 'committed' and 'effective'. To our

minds although the Judge has, in some respects, expressed herself in shorthand the meaning is clear and the Secretary of State is seeking to varnish the requirements to show family life exists by adding an extra layer to the established test. As identified above 'it all depends on the facts'. In this instance those facts as found support the finding of continuing family life between the sponsor and appellants. We therefore dismiss the Secretary of State's appeal.

Notice of Decision

The appeal of the Secretary of State is therefore dismissed and the decision of First-tier Tribunal Judge shall stand.

No anonymity direction is made.

Signed Helen Rimington

Signed 27th February 2018

Upper Tribunal Judge Rimington