



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

Appeal Number: HU/13599/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 26th January 2018**

**Decision & Reasons
Promulgated
On 27th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

**MISS SABITA BURA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms N Nnamani, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal whose date of birth is recorded as 24th June 1989. On 12th October 2015 she made application for settlement in the United Kingdom on the basis of being a daughter of an ex-Gurkha soldier presently settled in the United Kingdom together with his wife (the Appellant's mother).
2. On 10th November 2015 a decision was made to refuse the application and the Appellant appealed. The appeal was heard on 3rd May 2017 by Judge of the First-tier Tribunal Geraint Jones QC. He found that the Appellant

had failed to demonstrate family life between her and her parents such that the appeal fell to be dismissed. He made plain at paragraph 31 that he found Article 8 was not engaged. He went on to say however that even if it were engaged he would have had no hesitation in arriving at the conclusion that it would not be disproportionate of the United Kingdom to decline to enhance the “minimal family life” currently enjoyed between the Appellant and her parents, especially given the status quo has arisen through the choices, freely made, on the part of her parents.

3. Clearly, when read as a whole but focusing on that particular paragraph (31), significant weight was given by the judge to the decision of the Appellant’s parents to leave the Appellant behind when they came to the United Kingdom.
4. Not content with the decision of Judge Jones QC, by notice dated 1st June 2017 the Appellant made application for permission to appeal. There were three grounds.
5. Firstly, it was submitted that the judge had erred in law by failing to have regard to the guidance in the cases of **Gurung [2012] EWCA Civ 62** and **Ghising 2012 UKUT 377; [2013] UKUT 567**. Secondly, that the judge had failed to make a proper assessment of whether the Appellant enjoyed family life with her parents. Thirdly, that there was an erroneous finding on proportionality.
6. In the event the issues narrowed because Mr Clarke quite fairly and properly accepted that if there were established to have been family life between the Appellant and her parents, on the facts of this case the proportionality assessment would necessarily lead to a conclusion that the Appellant should be admitted to the United Kingdom. However, that did not mean that Mr Clarke did not forcefully argue that the finding of Judge Jones QC with respect to there not being family life should not be maintained.
7. In part, the reason why the applicable Rule, Appendix K, was not relied upon below was because it was submitted that it did not adequately deal with the historical wrong done to families of Gurkhas, well-documented and dealt with in the authorities.
8. Although this was the Appellant’s appeal Mr Clarke addressed me first, placing before me the case of **PT (Sri Lanka) v Entry Clearance Officer [2016] EWCA Civ 612**. At paragraph 22 Underhill LJ who gave the judgment of the court, posed this question, “Were the Appellant’s Article 8 rights engaged? He went on to say:

“22. As regards the law, I can start with Kugathas.” In that case the appellant was resisting 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 depends 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 the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.'"

He went on at paragraph 23 to say:

"23. It appears to have been the case that some tribunals have read Kugathas as establishing a rebuttable presumption against any relationship between an adult child and his parents or siblings being sufficient to engage article 8. In Ghising v Secretary of State for the Home Department [2012] UKUT 00160 (IAT) the Upper Tribunal was critical of that reading. 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."

9. Judge Jones QC then went on to consider a number of authorities but principally Mr Clarke relied on what appears at paragraph 25 in which reference was made to the case of **Singh [2015] EWCA Civ 630** in which Sir Stanley Burnton reviewing the authorities but not to **Ghising** itself or **Gurung** concluded that:

"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."

That contrasts with other guidance more recently the case of **AA -v- United Kingdom (Application No.8000/8 in the European Court of Human Rights)** in which it was said that:

"An examination of the courts 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."

That in fact was a point helpful to the Secretary of State insofar as in that case the adult was living with the parent.

10. The grounds, and I focus on Ground 2, because that is where the focus of the appeal was, suggested that in essence the decision of the judge was against the weight of the evidence. It is perfectly clear, reading the decision, that Judge Jones QC gave considerable weight to the decision of the parents to leave the Appellant behind as evidence of a lack of family life between the Appellant and her parents in the United Kingdom. He recognised that there was a policy in Appendix K which was, he said, the response of Parliament to the perceived historical wrong done to Gurkha children. He noted that no application was made by the Appellant to live in the United Kingdom until the 2015 policy was introduced by which time the Appellant was 26 and by that time she lived independently of her parents and had done so for just over four years. He notes that the Appellant's father's evidence was that it was not acceptable for a young female to live on her own without her parents but Judge Jones QC went on to observe that there was no suggestion in the evidence that the Appellant had done anything other than that since her parents chose to come to the United Kingdom in September 2011, to settle. If there was some cultural impediment to separation then they would not, he found, have chosen to relocate to the United Kingdom. He noted that money was being sent to the daughter but that the evidence suggested that payments began at or about the time of the decision to make the application. There was no sufficient evidence he said of the Appellant's living arrangements or expenses. As I have said he went on to focus on the remittances such as they were, noting that they only began in February 2015, some eight months prior to the Appellant's settlement application being made.
11. He then went on to make specific findings of fact all of which are set out at paragraph 23 of the decision. Then at paragraph 26 he found that the Appellant had not established that there is, or continues to be family life within the meaning of Article 8 and he did so for these reasons:
- (i) The Appellant had been living independently of her parents since September 2011.
 - (ii) The Appellant had been attending university and most inevitable that as a student she had built up her own circle of friends and acquaintances.
 - (iii) He rejected the assertion that an adult child, an adult daughter, remains the responsibility of her parents if that assertion is intended to extent to that responsibility being fulfilled when it is convenient for it to be said to be necessary of fulfilment in an immigration context, but not otherwise.
 - (iv) The telephone or other electronic contact that has taken place between the Appellant and her daughters is no more than might reasonably be expected between parents and their adult children, even though, I must acknowledge, that will vary considerably from family to family and individual to individual.
 - (v) Although the Appellant's parents have made visits to Nepal, that is not indicate of, nor was it claimed to be in consequence of, the

Appellant being emotionally dependent upon them so that such visits were a matter of necessity rather than choice.

(vi) The Appellant is 27 years of age. She is a young woman who, as I have found, has lived independently since September 2011.

12. I was taken to the case of **Rai [2017] EWCA Civ 320**. The question as to whether or not Article 8 was engaged with reference to paragraph 17 of the judgment which reads:

*“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 LJ 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 LJ said (in paragraph 14 of his judgment, with which Longmore and Aikens LJ 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’.”*

13. Then at paragraph 39 in the case of **Rai** it is of note that an issue of fact goes to proportionality rather more than family life but still relevant in considering the decision as a whole. That reads:

“The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: ‘... not compulsory but ... voluntarily undertaken ...’ (paragraph 20), ‘... having made the choice to come to the [United Kingdom]’ (paragraph 21), ‘... the willingness of the parents to leave ...’ but that, in my view, was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.”

14. The final passage in the case of **Rai** was at paragraph 61 forming part of the judgment of Lord Justice Beatson who again referred to the case of **Singh** but saying there was no requirement of ‘exceptionality’, that all

depends on the facts and that there must be something more than the love and affection between an adult and his parents or siblings which will not in itself justify a finding of family life.

15. I have looked with great care at the decision of Judge Jones QC. An error of law based on findings of fact is one which the Upper Tribunal should be slow to make but in my view it was not open to the judge on the evidence to find that there was no family life. The statement of the Appellant's father was to the effect that he did not make application for his daughter earlier than he did because of the advice that he had received to the effect that it would be refused. His wife came to the United Kingdom to strengthen the case for their daughter. That was the advice they had received. At paragraph 8 he said that he and his wife had travelled to Nepal to see their daughter on four occasions in all and had tried to maintain their spirits in the hope that they would soon be reunited with their daughter. As soon as the policy was announced allowing Gurkha children to make application he was very happy. There are four children of the marriage but only this Appellant is living alone dependent on him, the others are leading their own independent lives. He said at paragraph 19 that his daughter is still emotionally and financially dependent on him whilst saying that in his culture it was not acceptable for a young, single, child to live on their own without their parents. I pause to observe that it is important in this jurisdiction generally to take account of cultural imperatives. As to contact, regular telephone calls were made, notwithstanding the expense, and money would be sent as required. His evidence was supported by that of his wife. There was also a signed witness statement of the Appellant herself.
16. Given that the Secretary of State was not represented at the hearing below the evidence of the Appellant, her father and mother went unchallenged. The decision of the judge to dismiss the appeal was clearly, in my judgment, when reading the decision as a whole, influenced by the decision of the Appellant's parents to come to the United Kingdom and leave their daughter behind but that factor has played too large a part in my view in his finding that there was no family life. To do, as Judge Jones QC has done imports the very historical wrong which goes certainly to proportionality but also in the mind of this judge when one reads the decision has informed the finding that there was no family life.
17. If the family life is no more than the normal emotional ties of a parent and child, in the ordinary case that would be the end of the matter and the appeal would be dismissed but not so in the case of a Gurkha child. As Mr Clarke quite rightly and properly accepted, the proportionality assessment in this case on the remaking necessarily would lead to the conclusion that the appeal should be allowed. He was right to make that concession but it does mean that it is not necessary for me to go through the various proportionality considerations in the light of that concession.
18. I have no hesitation whatsoever in finding that the judge materially erred in finding against the weight of the evidence that there was no family life.

Article 8(1) was clearly engaged on the basis of the available evidence. Contact has been maintained but there was also evidence of dependency even if the documentary evidence was lacking but, even allowing for the evidence on balance of probabilities, in the absence of challenge from the Secretary of State and with three witnesses speaking to the emotional and financial support it was not in my judgment open to the judge to find that there was no family life unless he could point to something more material which entitled him and justified his decision to reject their evidence.

19. In all the circumstances the decision of the First-tier Tribunal is set aside and remade such that I find there to be family life and on the basis of the concession, it being disproportionate to withhold entry clearance from the Appellant, the appeal is allowed on human rights grounds.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed

Date: 22 February 2018

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Deputy Upper Tribunal Judge Zucker