



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

Appeal Numbers: HU/05920/2015
HU/06042/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 10 June 2019**

**Decision & Reasons Promulgated
On 19th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

**MR JIT BAHADUR GURUNG
MISS PUSPA GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:

For the Appellants: Mr Hoa Dieu, Counsel, instructed by N C Brothers & Co,
Solicitors

For the Respondent: Mr Ian Jarvis, Home Office Presenting Officer

RE-MAKE DECISION AND REASONS

This is the remaking of a decision of First-tier Tribunal Judge E B Grant, dated 3 December 2018, which I set aside in a decision of 29 March 2019. The remake hearing had originally been listed for 10 May 2019 but had to be adjourned due to non-compliance with the directions given when the error of law was found. The matter was re-listed for today and I am grateful to the representatives of both parties for their considerable assistance in narrowing the issues.

The appeal concerns two siblings who are both citizens of Nepal. Mr Jit Bahadur was born on 21 January 1990 and his sister, Miss Puspa Gurung, on 17 May 1991. Their sponsor is their father, who is resident in the United Kingdom, and who served for some sixteen years in the 1st Battalion of the 2nd Gurkha Rifles up until his retirement from military service on 21 May 1981. The appellants applied for entry clearance in order to settle in the United Kingdom as dependents of their father. This was refused on 24 August 2015.

Background

The background facts were not the subject of dispute, and I rely on the summary in the decision of the First-tier Tribunal. The appellants were born some ten years after their father had retired from the British Army. The family lived in Ghalegun, Nepal. The appellants are the youngest of nine siblings, the other seven being married with established lives in Nepal.

In 2009, learning of the more benevolent attitude which the British Government had been compelled to take in allowing ex-Ghurkhas to settle in the United Kingdom, the appellants' father started to raise money so the whole family (by which I mean the two appellants and their parents) could relocate here.

The appellants and their parents applied for settlement in the United Kingdom in 2009. The parents' application was allowed. That of the appellants (who would have been 18 or 19 at the time) was refused. Expecting a further change in Government policy which would have been more generous to adult dependent children, the parents remained in Nepal in the hope of making the move with the appellants as a family unit. By 2011 no amendment to the Immigration Rules had been brought into effect and so the parents came without the appellants. The appellants' mother sadly died in November 2018.

When they travelled to the United Kingdom from Nepal in 2011, the appellants' parents left money for them and regularly sent remittances home thereafter. This constituted the appellants' sole source of income in Nepal. The parents made annual visits to Nepal, the last being in 2017. Regular telephone contact was maintained. The appellants' father travelled to Nepal in December 2018 for his wife's funeral.

Matters for determination

Mr Jarvis, who acts for the Secretary of State, concedes that there has been financial support from the parents to the appellants which he accepts is continuing. The narrow issue which he invites me to determine is whether there was (and remains) the necessary degree of emotional dependency for the purposes of engaging Article 8. His position is that were I to be satisfied that the appellants had established the requisite family life under

Article 8(1), then he would not argue against the appeal being allowed having regard to the historic injustice in cases of this type.

Thus the narrow issue for my determination is whether the appellants have discharged the burden of satisfying me to the civil standard of the necessary degree of emotional dependency between themselves and their father and, until her death last November, their mother.

Evidence

In addition to the material that was before the First-tier Tribunal, which is largely uncontentious, I have had the advantage of considering additional short witness statements from each of the appellants, together with a slightly lengthier addendum statement from their father. The father gave evidence before me through an interpreter.

In summary, neither appellant has married or formed a permanent relationship. They rely entirely on their father for income. They were distressed not to have been united with their parents at the time their mother died, and are concerned that they have not been present to comfort their father in his grief, or to offer him emotional and practical support as his health declines.

The appellants' father describes his wife dying suddenly, within three months of having cancer diagnosed. She was not able to travel but regularly spoke to the appellants by telephone and video call. She wanted to hug them but was unable to. Her body was returned to Nepal for cremation, and he derives some comfort from the fact that the appellants were at least able to see her dead body at the last. He worries for the appellants because when he is dead, there will be no one to support them.

The appellants' father travelled to Nepal for the cremation rituals and stayed there during December 2018 and January 2019. He states that the family bond linking them emotionally persisted from 2011 when he and his wife moved to the United Kingdom. He indicates that he will struggle to look after himself and attend hospital appointments unless the appellants are permitted to come to the United Kingdom and live with him.

His oral evidence before me supplemented his written statements. He confirmed that he spoke with the appellants every day, by Facebook Messenger or Viber; that the conversation tends to relate to their sadness at his wife's death, and the outcome of these proceedings. He says the first appellant is looking for a job, but has had no success. In cross-examination, he seemed unaware of the particular matters which caused the second appellant to be worried, matters she had touched on in her witness statement stating that the security situation in Kathmandu was such that she was fearful to go out alone. He says the second appellant goes to the gym and to the market with her friends. He confirmed that in Nepalese culture, it was usual and expected that parents would care for their children until they marry. He still regards the appellants as his

responsibility. He stated that the first appellant plays football, goes to the gym and goes out with friends. He says he sends money to the appellants, and the first appellant has a card so he can take money from the ATM.

In answer to questions from me he stated that the first and second appellants live in separate accommodation and each pays rent. The family home in their village is locked up and unoccupied. These answers were clarified in response to some further questions from Mr Dieu: the separate accommodation referred to comprises different rooms within the same building, the rent for which was met out of money which he sent to them via International Money Express. The appellants have no other source of income. His other seven children are all married with their own families.

Submissions

Mr Jarvis put his case succinctly, adopting his skeleton argument and the legal approach on which he and Mr Dieu were agreed. Whilst conceding the presence of financial support, he submitted that the appellants had failed to demonstrate emotional dependency. He submitted that there was insufficient material before the Tribunal to conclude that there was a sufficient level of emotional dependency, demonstrated to the requisite degree, having regard to particular features such as age, health and vulnerability.

He pointed out, with some justification, that the vast bulk of the appellants' evidence had been directed towards financial dependency, and the recent feature of grieving for their deceased mother, a matter which had not been within the appellants' contemplation when they sought leave to enter the United Kingdom. Mr Jarvis submitted that there was no emotional connection, which could properly be categorised as "real, effective and committed".

Mr Jarvis also commented that it was surprising the appellants' father seemed to know so little about his daughters' apparent worries. Had they spoken every day, and were so close emotionally, she would have been expected to have shared her concerns. There was no explanation of why the appellants (the first appellant in particular) had been unable to find work, save that the labour market generally was poor.

Mr Dieu submitted that that appellants' credibility had not been challenged, and that the Tribunal should not speculate why these appellants - both in their late twenties - were still being bank-rolled by their father. The case law does not sanction an enquiry into the motivations of individuals in the choices they make. The undisputed evidence was that the appellants' sole source of income was their parents and, latterly, their father alone. There was no expectation that any part of this money should be repaid in the future.

Mr Dieu identified certain features in the evidence which, he submitted, pointed to emotional ties sufficient to demonstrate that Article 8 is engaged. They included, first, that the appellants' parents returned annually to visit them. Secondly, that daily telephone contact exceeded the norm as between parent and child. Thirdly, that the recent death of the appellants' mother had produced a heightened emotional interdependency and this was a matter to which regard should be had in this case. At my invitation, he added a fourth feature, namely that neither appellant had married, entered into a relationship or established a separate family life of their own. Neither has become independent or self-sufficient.

Mr Dieu referred me to **Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320**, and in particular the enjoiner at paragraphs 36 and 37 that the threshold is not to be elevated to a requirement of some extraordinary or exceptional feature; all that was required was that parental support be "real" or "committed" or "effective". The relevant passages are set out below.

The relevant law

Put shortly, the underlying issue is whether the refusal to provide entry clearance to each of the appellants would amount to a disproportionate interference with their right to a family life under Article 8 of the European Convention on Human Rights. The starting point is that as a general rule, adult children do not enjoy a subsisting family life with their parents. However, there is no bright line transition of universal application upon children obtaining their majority. Each case turns on its own particular facts, albeit there are now a number of decided cases which point to relevant, though not exhaustive, considerations.

I start with the Court of Appeal decision of ***Patel, Modha & Odedra v Entry Clearance Officer (Mumbai)*** [2010] EWCA Civ 17, in which Sedley LJ stated:

"14. You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – 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. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2).

15. As the individual cases to which I now turn illustrate, the effect of this is to reverse the usual balance of art. 8 issues. By the time

they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of art. 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of art. 8(1), the balance of factors determining proportionality for the purposes of art. 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in *NH (India)*, the family would or might have settled here long ago.”

(Emphasis added)

I also have regard to ***R (on the application of) Gurung & Ors, v Secretary of State for the Home Department [2013] EWCA Civ 8***, the Master of the Rolls, giving the judgment of the Court of Appeal, stated as follows:

“45. Ultimately, 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. Ms McGahey submits, therefore, that the case law, both domestic and European, can be of only limited assistance. She (rightly) accepts that, as a matter of law, 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. It all depends on the facts.

[...]

50. We accept the submissions of Ms McGahey that the FTT did not make any error of law in reaching its conclusions. The critical issue was whether there was sufficient dependence, and in particular sufficient emotional dependence, by the appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the FTT to determine. In our view, the FTT was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent.

More recently, the Master of the Rolls returned to the subject in ***BRITCITS v The Secretary of State for the Home Department [2017] EWCA Civ 368***, stating:

74. Firstly, as I have said, I reject the appellant’s submission that there is family life which engages Article 8 in every case where a UK sponsor wishes to bring their elderly parent to the UK to look after them. As Sedley LJ said in *Kugathas* at [18], [24] and [25] with regard to an adult, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, enough to constitute family life; there is no presumption that a person has a family life, even with the members of a person’s immediate family. The court has to scrutinise all the relevant factors. There must be something more than normal emotional ties. As Lord Bingham said in *Huang* at [18]:

“Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family,

the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

(Emphasis added)

Finally, I come to **Jitendra Rai v Secretary of State for the Home Department** (above) in which Lindblom LJ considered the application of Article 8(1) in circumstances such as these as follows:

36. As Ms Patry submitted, it was clearly open to the Upper Tribunal judge to have regard to the appellant's dependence, both financial and emotional, on his parents. This was, plainly, a relevant and necessary consideration in his assessment (see the judgment of the court in *Gurung*, at paragraph 50). If, however, the concept to which the decision-maker will generally need to pay attention is "support" - which means, as Sedley L.J. put it in *Kugathas*, "support" which is "real"; or "committed" or "effective" - there was, it seems to me, ample and undisputed evidence on which the Upper Tribunal judge could have based a finding that such "support" was present in the appellant's case. He found, however, that the appellant had a "reliance upon his parents for income that does not place him in any particular unusual category either within this country or internationally" (paragraph 23 of the determination), and no "indication on balance of a dependency beyond the normal family ties and the financial dependency" (paragraph 26). These findings, Mr Jesurum submitted, suggest that he was looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them. Mr Jesurum submitted that this approach was too exacting, and inappropriate. It seems to reflect the earlier reference, in paragraph 18 of the determination, to the requirement for "some compelling or exceptional circumstances inherent within [an applicant's] own case". In any event, Mr Jesurum submitted, it elevated the threshold of "support" that is "real" or "committed" or "effective" too high. It cannot be reconciled with the jurisprudence - including the Court of Appeal's decision in *Kugathas* - as reviewed by the Upper Tribunal in *Ghising (family life - adults - Gurkha policy)* (in paragraphs 50 to 62 of its determination), with the endorsement of this court in *Gurung* (in paragraph 46 of the judgment of the court). It represents, Mr Jesurum contended, a misdirection which vitiates the Upper Tribunal judge's decision.

37. In my view those submissions of Mr Jesurum have force.

Outcome

Applying the law to the limited factual issue which falls to be determined, my conclusions can be shortly stated. I remind myself that in determining whether Article 8 is engaged it is unnecessary and impermissible to search for some extraordinary or exceptional feature which justifies a finding of

dependency in respect of an adult child on one or more parent(s). The Tribunal's task is more limited, namely to evaluate whether the evidence reveals a level of support which can properly be categorised as real, committed or effective.

The undisputed presence of financial support is a significant factor but is not, of itself, sufficient to be dispositive. It is possible to conceive of a free-loading and exploitative adult child living off a parent's largesse with no emotional dependency of any sort. However, I do not consider this to be the case here. The Tribunal is entitled to be curious as to why the two appellants have failed to make their own way in the world, when their seven elder siblings seem to have done so without incident. Why in their late 20s they remain financially dependent on their father was largely unexplored in the evidence and remains unexplained. There is no suggestion of physical or mental infirmity, inadequate education, or any other particular circumstance. The evidence adduced by the appellants is extremely thin. That said, the fact of financial support or dependency has been conceded on behalf of the Secretary of State and it would be unjust of me to draw an adverse conclusion due to the paucity of justification for a situation which is not in dispute.

I do not consider that the recent bereavement suffered by the appellants in the loss of their mother (and the sponsor in the loss of his wife) is, of itself, sufficient to amount to an emotional dependency. It is, with all due respect and sympathy to the individuals, a tragic source of grief but not something which can establish or fuel a dependency status.

However, by the narrowest of margins, I have come to the conclusion that in the particular circumstances of this case, a combination of three distinct but overlapping features are just sufficient to persuade me of the existence of real, committed and effective emotional support. They are (i) the comprehensive financial support given by the parents to the appellants ever since the former left Nepal in 2011 and the lack of any other source of income to meet the appellants' daily needs; (ii) the frequency of contact between the parents (and now the father alone) amounting to daily conversations on Messenger and Viber which is considerably more than one would ordinarily expect of parents and adult children, suggestive of a deep-seated emotional need; and finally and most significantly (iii) the fact that neither appellant has married or formed a relationship, establishing a family life separate from that which existed when the appellants' parents left Nepal. At that time all four lived together in a family home in their village. I accept (and It was not challenged) that the reason for the appellants vacating the family home was to try gain access to educational opportunities in Kathmandu with the prospect (albeit unfulfilled) of securing employment thereafter. The evidence suggests a functioning and enduring family unit, even after the parents had left Nepal, and in the circumstances of this case, the level and durability of financial support is also indicative of ongoing emotional support.

For these reasons, taking cumulatively, I find that the emotional dependency between the appellants and their parents (and now the father alone) is such that the refusal of entry clearance amounts to an interference with the appellants' Article 8 rights.

In the light of the concession made on behalf of the Secretary of State, this finding is dispositive of the appeal. Mr Jarvis accepts that were I to conclude that the requisite degree of emotional dependence was proved, then the proportionality analysis would play out in the appellants' favour in consequence of historic injustice. For completeness, I record that in the absence of the Secretary of State's concession, I would have so concluded applying **Razgar** principles.

It therefore follows that this appeal is allowed on human rights grounds.

