



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

Appeal Number: HU/07313/2019 (V)

**THE IMMIGRATION ACTS**

**Heard Remotely at Manchester CJC**

**Decision & Reasons Promulgated**

**On 16 November 2020**

**On 20 November 2020**

Before

**UPPER TRIBUNAL JUDGE PICKUP**

Between

**REETU CHAMLING**

**(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the appellant: Mr M Moriarty, instructed by Everest Law Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

**DECISION AND DIRECTIONS (V)**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, a national of Nepal with date of birth given as 9.11.82, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 30.1.20 (Judge Aujla), dismissing her appeal against the respondent's decision of 21.2.19 to refuse her application made on 3.1.19 for entry clearance to the UK as the adult dependent child of her parents, settled in the UK since 2012 as a former Gurkha and his wife.
2. In granting permission on 14.4.20, the First-tier Tribunal (Judge Gumsley) found it arguable that the First-tier Tribunal Judge failed to properly apply the test of real, effective or committed support and erroneously applied higher requirements of support of necessity, and something beyond 'normal emotional dependency,' when considering whether there was family life engaging article 8 ECHR. The grounds also argued that the First-tier Tribunal erred in its approach to the financial evidence.
3. On 2.7.20, the Upper Tribunal issued directions proposing that the error of law issue be determined without a hearing and provided for further written submissions. In response, the appellant's representatives submitted further written submissions, dated 8.7.20, together with further evidence. On 23.7.20 the Upper Tribunal received the respondent's written submissions in reply. All these submissions are now in the Tribunal's case file.

#### *The Error of Law Findings*

4. In summary, both parties agreed that there were such errors of law in the decision of the First-tier Tribunal such as to require it to be set aside. Neither party sought an oral hearing. Accordingly, I determined the error of law issue on the papers, pursuant to Rule 34.
5. In respect of the grounds relating to the financial evidence, the respondent accepts that at [39] the First-tier Tribunal overlooked evidence of financial support and made an incorrect finding, which was material to the conclusion under article 8(1). The respondent also agrees that an error of law is disclosed in the finding at [43] of the impugned decision in that the judge appears to have concluded that the respondent's decision was proportionate simply on the basis of the parents' choice to relocate to the UK. Whilst the respondent did not accept that the First-tier Tribunal Judge set the bar too high in the assessment of family life, it was conceded that this point will need to be reconsidered on a remaking of the appeal.
6. Having carefully considered the grounds and submissions, for the reasons set out in my error of law decision, I found such error of law in the decision of the First-tier Tribunal as to require it to be set aside and remade.

7. In particular, I was satisfied that the First-tier Tribunal made a factual error as to the evidence in relation to financial support. At [39] the judge found that there were no remittances prior to 2018, when the evidence in the bundle disclosed remittances back to early 2015 and the witness statement evidence was that the parents were regularly sending both the appellant and her brother money to share between them and granted access to their bank account.
8. I was also satisfied that at [35] and [36] the judge appears to have approached the consideration of the evidence on the basis that it was for the appellant to demonstrate that emotional and financial support was made of necessity, when there is no such requirement. More significantly, at [38] of the decision the judge also erroneously sought something beyond 'normal emotional dependency,' an incorrect formulation of the test, probably combining 'something more than normal emotional ties' and the requirement in Gurung that a degree of 'emotional dependence' is required. In deciding whether there was family life, the judge should have considered whether such support as the appellant received was 'real, effective or committed.'
9. Having set the decision aside, I proposed that it could be remade in the Upper Tribunal at a resumed hearing, held remotely. I issued directions providing the opportunity to make written submissions objecting to a remote hearing, and directing the compilation, lodging and service of a consolidated bundle for the resumed hearing. No objection to a remote hearing was made.
10. I have in the Tribunal's case file the appellant's bundles prepared for the First-tier Tribunal appeal hearing, the respondent's bundle, and the appellant's skeleton argument. I have also received a supplementary appellant's bundle, submitted by email on 13.11.20, outside the time limits provided for in the directions. The email refers to a consolidated bundle submitted on 12.11.20 and containing 7 attachments, but I have not received this. Mr Moriarty explained that the missing documentation was little more than that which was before the First-tier Tribunal, together with the Tribunal directions and decisions since then. Mr McVeety had not seen either sets of bundles but during the hearing was able to access the emails containing the bundles and took no issue on the late service and confirmed he was in a position to proceed.
11. The appellant's father and sponsor Mr Rai attended the hearing remotely, as did a Nepalese interpreter, Ms Ranabhat. Mr Moriarty explained that whilst the appellant's mother was in the room, he did not intend to call her but would have a few questions of Mr Rai to bring the situation up to date. Following the oral evidence of Mr Rai, the interpreter was released and the hearing proceeded by submissions only.
12. I have carefully considered the issues in the appeal in the light of the submissions made to me and the documentary and oral evidence of Mr Rai.

*Relevant Background*

13. The adult appellant, now 38 years of age, is the daughter of Kadam Bahadur Rai, a retired Gurkha soldier, and his wife Ratana Sila Rai, who came to the UK from Nepal in 2013 and have Indefinite Leave to Remain. They are the sponsors to the appellant's application for entry clearance as their adult dependent child, made at a time when she was 36 years of age.
14. The appellant's father served in the Brigade of Gurkhas for some 15 years, retiring in 1969. Following a change of policy and in recognition of his service, in 2013 he was granted Indefinite Leave to settle in the UK. However, by that time the appellant was 18 years of age and under the policy she was unable to apply to accompany or join her parents in coming to the UK. It is asserted that had not the long-standing historical injustice against family members of former Gurkhas not taken place, the appellant's father would not have been deprived of the right to settle in the UK many years earlier and the appellant would either have been born in the UK or at the very least been able to accompany her parents whilst she was still a minor.
15. The application was refused following consideration of the Secretary of State's policy in respect of Foreign and Commonwealth HM Forces dependants over the age of 18 as amended (the policy), paragraph EC-DR 1.1 of Appendix FM of the Immigration Rules, and article 8 ECHR outside the Rules. The Entry Clearance Officer was not satisfied that the appellant met the terms of Annex K of the policy as she was over the age of 30 and had lived apart from her parents for over two years. Neither was it accepted that the evidence submitted with the application demonstrated that she was financially and emotionally dependent on her parents, or that there were more than the emotional ties normally to be expected between an adult child and a parent. The Entry Clearance Officer noted limited evidence of contact between the appellant and her parents, together with some money transfer receipts, but was not satisfied that the appellant was financially and emotionally dependent. In the premises, it was not accepted that article 8 was engaged on the limited evidence of family life between the appellant and her parents. The respondent's case is that even if article 8 is engaged, the historic injustice has not been such as to prevent the appellant from living a normal life, and therefore did not outweigh the public interest of enforcing immigration control to be considered in the proportionality balancing exercise.
16. The refusal decision was reviewed but maintained by the Entry Clearance Manager on 18.11.19, considering that article 8 was not engaged in terms of family life and that there were no exceptional circumstances.
17. The appellant accepts that she does not fall within the terms of the 2009 policy, or Appendix FM, but maintains that this is a historic injustice case and relies on extant family life pursuant to article 8. In any event, under s82(1) the appeal can only be pursued on human rights grounds. It is for the appellant to

demonstrate on the balance of probabilities that she continues to enjoy family life with her parents within the meaning of article 8(1). It is submitted that in historic injustice cases the public interest in enforcing immigration control is outweighed by the evidence of extant family life.

18. In Gurung v SSHD [2013] EWCA Civ 8, the Court of Appeal held that if a Gurkha could show that but for the historic injustice he would have settled in the UK at a time when his now adult dependent child would have been able to accompany him as a dependent child under the age of 18, that is strong reason to find it proportionate to permit the child to join his parent in the UK. The historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.
19. Kugathas v SSHD [2003] EWCA Civ 31 held that there is no presumption of family life and that blood ties and the concern and affection that ordinarily goes with them are not sufficient to constitute family life within the meaning of article 8. The protection of family life under article 8 does not extend to relationships between adult relatives “without evidence of further elements of dependency, involving more than the normal emotional ties.” Dependency is not limited to economic dependency, but requires real, or committed or effective support.
20. In Ghising and others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 567 (IAC), the Upper Tribunal held that where article 8 is engaged and that but for the historic wrong the appellant would have been settled in the UK long ago, that fact would ordinarily determine the outcome of the article 8 proportionality assessment in the appellant’s favour, where the public interest factors relied on by the respondent consists solely of the public interest in maintaining a firm immigration policy.
21. Neither reaching the age of majority nor voluntary separation necessarily ends family life within the meaning of article 8. However, a degree of emotional dependence must continue, which turns on whether the appellant has had and continues to enjoy support which can properly be described as ‘real, or effective or committed,’ pursuant to the decision of the Court of Appeal in Rai v Entry Clearance Officer Delhi [2017] EWCA Civ 320. The support provided does not need to be of necessity or irreplaceable. Each case must be analysed on its own facts in order to decide whether family life exists within the meaning of article 8(1).
22. In support of her claim, the appellant relies on extensive documentary evidence, which it is claimed, demonstrates that her parents have and continue to provide her with real, or effective and committed emotional and financial support, thereby demonstrating that family life engaging article 8(1) continues.
23. In relation to the public interest, the respondent does not assert anything over and above the public interest in maintaining a firm immigration policy.

24. The unchallenged facts can be summarised as follows:
- a. The parents chose to apply for settlement at a time when the appellant was already an adult and in the knowledge that under the policy then in force adult children did not automatically qualify for settlement;
  - b. However, the father was deprived of the opportunity to settle in the UK long before he was able to do so and when the appellant might have been either born or raised as a child in the UK;
  - c. The appellant remains unmarried, unemployed and without her own family unit;
  - d. She has been living apart from her parents for over two years since they came to the UK and now over 6 years;
  - e. However, she has six elder siblings still living in Nepal;
  - f. She continues to live in accommodation provided by her parents. At the present time and for the past year, her brother Sandesh Rai is living with her, although he normally lives in the UK. Mr Rai explained that he has been unable to return to the UK because of the Covid-19 pandemic restrictions;
  - g. She enjoys good physical, emotional and mental health;
  - h. Her parents have provided at least some financial support, set out in the appellant's documentary evidence which dates from 2015. Mr Rai's witness statement confirmed that he provided financial support from before 2015. In his oral evidence before me, he confirmed that he continued to make financial remittances to the appellant, as demonstrated by the documents in the new supplementary bundle.
25. As noted above, when considering whether there was extant family life engaging article 8(1) the First-tier Tribunal Judge erroneously relied on a finding that the appellant did not need continuing emotional support from her elderly parents and doubted what kind and level of support they could provide at their very advanced ages. The judge considered that if she needed such support, she could call on her siblings in Nepal.
26. Whilst the fact of the age of the appellant, the age of her parents and their ability to provide financial or emotional support are all relevant factors, as is the likely availability of at least emotional support from her siblings in Nepal, including for the time being Sandesh, it matters not whether the support she in fact receives from her parents is provided of necessity.
27. I accept the unchallenged assertion in the father's witness statement that he always wanted to settle in the UK. He explained that he first heard about new rules for ex-Gurkha soldiers and their families in 2009. By that time his children were over the age of 18. He stated that he couldn't afford the application fee and didn't intend to apply but later changed his mind, borrowing the money. In the UK, he relied on housing benefit and pension credit as his only source of

income, saving some of that to send to the appellant and to save up for return travel to Nepal. Having been able to assess Mr Rai at the remote hearing, I accept as credible his evidence that had the policy been available to him when he retired from military service he would have raised his family in the UK and his daughter would, therefore, have been born here.

28. In relation to financial support, as noted above the appellant's bundle contains remittance receipts going back to 2015 and the father's witness statement suggests that he has been providing financial support since he and his wife arrived in the UK in January 2013. As stated, he confirmed the continuation of financial support, evidenced by the remittal documents in the supplementary bundle. I also note and accept as genuine the evidence of continued telephone or social media contact.
29. I also note that the parents have visited the appellant in Nepal three times, in 2015, 2016, and 2018.
30. In his evidence before me, Mr Rai confirmed that he sent the appellant between 7,000 to 8,000 Rupees each month, though there had been some problems over the past two or three months because of the pandemic. He also confirmed that apart from the appellant and Sandesh living in his former home in Nepal, there were other children living independently elsewhere in Nepal.
31. In his submissions, Mr McVeety very fairly accepted that there could be little doubt that on the facts of this case family life continues between the appellant and her parents, with credible evidence of emotional support by regular visits and telephone contact, as well as continuing financial support. He also accepted that the appellant is unmarried, single, and still living in the family home in Nepal, entirely financially supported by her parents. In the premises, he did not challenge the claimed dependency and that it continues.
32. On the evidence and facts applied to the relevant legal criteria, I am satisfied that despite her mature age, the appellant has been and remains dependent on the financial and emotional support of her parents. I am satisfied that family life existed between them before the parents came to the UK and has continued thereafter. The documentation submitted with the application may have been insufficient to persuade the Entry Clearance Officer but I am satisfied that the support provided to the appellant is real, effective and committed, extending beyond mere financial support. In the premises, I am satisfied that there exists between the appellant and her parents family life which engages article 8 ECHR.
33. Given the historic injustice factors which apply to this case, and that there are no public interest considerations other than maintenance of immigration control, I am satisfied that in the article 8 proportionality balancing exercise, there is strong reason to find that the public interest is outweighed, so that the refusal of entry clearance was disproportionate.

34. It follows that the appellant should be allowed entry clearance to join her family in the UK.

*Decision*

For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and be remade by allowing the appeal.

I set aside the decision of the First-tier Tribunal.

I remake the decision in the appeal by allowing it on family life human rights grounds, pursuant to article 8 ECHR.

I make no order for costs.

I make no anonymity direction.

**Signed** *DMW Pickup*

**Upper Tribunal Judge Pickup**

**Dated 16 November 2020**