



Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/07659/2019

HU/07661/2019

HU/07698/2019

THE IMMIGRATION ACTS

Decided Under Rule 34 (P)

Decision & Reasons Promulgated

On 28 September 2020

On 01 October 2020

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MS KALPANA RAI

MR MOHAN SHER RAI

MR DIL KUMAR RAI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

For the ENTRY CLEARANCE OFFICER

Respondent

Representation (by way of written submissions)

For the appellant: Everest Solicitors; no submissions received

For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. These joint appeals come before me following the grant of permission to appeal to the appellants by Upper Tribunal Judge Rintoul on 6 August 2020 against the determination of First-tier Tribunal Judge Hatton promulgated on 17 January 2020 following a hearing at Hatton Cross on 9 January 2020.
2. The appellants are siblings aged 42, 39 and 37 at the date of the hearing. They are Nepalese nationals. They seek to join their father, the sponsor, as adult dependent children. The sponsor is a retired Gurkha soldier with settled status in the UK since October 2015. He has been married twice and has outlived both wives. He has six children from his second wife. One of them qualified for entry and accompanied him to the UK.
3. The applications were made on 28 December 2018 and refused by the ECO on 11 March 2019. The decision was upheld by the Entry Clearance Manager on 5 August 2019 after the appellants filed a human rights appeal¹. They claim that they have family life with their father and that they remain dependent upon him.
4. The ECO was not satisfied that they met the requirements of EC-DR.1.1(d) of Appendix FM because they had failed to show that they were unable to care for themselves on a daily basis and had demonstrated no exceptional circumstances. Additionally, they had each other to rely on. The applications were also refused under article 8 because the respondent found that they had failed to demonstrate that they were financially and emotionally dependent upon their father beyond that normally expected between a parent and adult children. They had been living apart since their father settled in the UK in October 2015. Their personal circumstances were considered but nothing was found which warranted a grant of leave outside the rules. The relevant case law on Gurkha children was taken into account but it was noted that the sponsor applied for settlement when the appellants were already adults and in the knowledge that adult children did not automatically qualify for

¹ Although it is claimed in the skeleton argument that it is unclear whether the decisions were reviewed by the ECM, the papers clearly show that they were.

settlement. It was not accepted that they had established family life with the sponsor over and above that between adult children and parents, nor that they had demonstrated real, committed or effective support from him. The issue of the historical injustice was also considered but it was found that the effect of this was not such that they had been prevented from leading normal lives.

5. The appeals came before Judge Hatton who heard oral evidence from the sponsor and his UK based daughter. He commenced his consideration of the evidence by considering whether the appellants were capable of satisfying the relevant provisions of the immigration rules. For the reasons set out at 21 to 37, he was not satisfied that the rules had been met. He considered the respondent's published policy guidance on Gurkha family members but found that the appellants could not meet the age requirement because they had all been well over 30 years old at the time the applications were made. Additionally, he was not satisfied that the appellants were financially and emotionally dependent on the sponsor because from the evidence it was apparent that the vast majority of the sponsor's income came from payments into his bank accounts by his daughter in the UK. The judge, therefore, found that although payments were made to the appellants in their father's name; in substance, the funds came from the appellants' sister. The judge was not satisfied that the sponsor would have been able to make periodic payments to the appellants if he did not receive these regular sums of money from his daughter.
6. The judge also considered that the appellants were able to support themselves by undertaking manual work. He noted that they had worked the family land to grow crops to feed themselves and also worked the neighbouring land for food. He further noted that the second appellant had worked in Kuwait for three years. He attached little weight to the documents purportedly issued by the local municipality certifying the appellants as being "*totally unemployed*" because contrary to the sister's oral evidence that all official documents were written in Nepalese, these documents were in English. This was put to the sister who then maintained that they were translations but the judge noted that there was nothing on any of the documents to suggest that they had been certified as translations. The judge also found that, further, the policy requirements were not met because the appellants had been living apart from their father for over two years at the time the applications were made.
7. The judge then proceeded to consider article 8. He was satisfied that the appellants had a genuine and subsisting relationship with their father but he found that it did not constitute family life within the meaning of article 8 (1) because there was insufficient evidence that

the level of dependency between the parties went beyond the range of normal emotional ties. He properly self directed that each case had to be analysed on its own merits as to whether or not family life existed and that there was no general proposition that article 8 could never be engaged when the family life sought to be established was between adult children and their parents. He had regard to the exceptional position of Gurkha veterans and their families but in view of the appellants' manifest failure to meet several of the requirements of the policy he considered that their circumstances were incapable of engaging article 8. He concluded that the refusal did not constitute a disproportionate interference with the appellants' rights within the meaning of article 8(2). Accordingly, he dismissed the appeal.

8. The grounds are, as Upper Tribunal Judge Rintoul observes, unnecessarily lengthy. They essentially take issue with the judge's finding of family life and I shall deal with them in greater detail below. Permission to appeal was granted on the basis that the judge had "*just*" arguably failed to consider dependence on the sponsor for accommodation but Judge Rintoul queried whether this would be material, given the other findings, and he found the other grounds to be weak.

Covid-19 crisis: preliminary matters

9. The matter would ordinarily have been listed for a hearing at Field House following the grant of permission but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen and instead directions were sent to the parties on 6 August 2020 along with the grant of permission, and again on 20 August 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.
10. The Tribunal has received written submissions from the respondent but there has been no response from the appellants' representatives. I now consider the matter.
11. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of

the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

12. I have had careful regard to all the evidence before me before deciding how to proceed. The respondent has raised no objection to the matter being considered on the papers. The appellants have failed to respond in any way despite being issued directions twice by the Tribunal. I also note that the respondent's submissions were forwarded to them on 21 August 2020 so in effect they have had three opportunities to reply.
13. In the absence of the appellants' non compliance despite repeated opportunities to do so, I am satisfied that it would be appropriate to proceed to consider the matter on the papers. I am aware that a full account of the facts are set out in the papers on file and that the issues to be decided are straightforward. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I consider that a speedy determination of this matter is in the appellants' best interests. I am satisfied that I am able to fairly and justly deal with this matter on the papers before me and I now proceed to do so.

Submissions

14. The respondent's submissions are dated 21 August 2020.
15. For the respondent, Mr Clarke opposes the appellants' appeals and submits that the judge found that neither emotional nor financial dependency had been established. He points out that the grounds fail to challenge the finding that the sponsor merely acts as a conduit for the remittances sent effectively by the appellants' sister which put paid to any argument as to the appellants' financial dependency upon the sponsor.
16. It is submitted that the judge did not consider the appellants' inability to meet the terms of the policy as determinative because he went on to consider article 8. However, Mr Clarke submits that it was an unavoidable fact that financial and emotional dependency were factors for consideration under the policy and that the judge cannot be criticized therefore for referring back on his earlier findings when considering article 8. It is submitted that in the absence of the required dependency, the grounds fail to articulate how the relationship between the sponsor and the appellants can be elevated as being beyond normal emotional ties. The evidence of

communication it itself did not support the contention of emotional dependency and that cohabitation over five years ago cannot disturb the finding of family life at the date of the hearing. Mr Clarke relies on Singh [2015] EWCA Civ 630 where the court held at paragraph 24: *"In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purpose of article 8"*. He submits that the judge did take the sponsor's pension into account but that he found that without the input from his daughter in the UK, he would not be able to afford to support the appellants.

17. As to the argument in the grounds that the appellants are unmarried and therefore culturally part of the sponsor's household, Mr Clarke submits that this is unsupported by any independent evidence and in effect invites a finding that family life should be found to be established in the cases of all unmarried Nepalese appellants. It is submitted findings must be made based on evidence and not presumptions and that the argument has no regard to the appellants' living and working arrangements for the last five years. It is also pointed out that the findings as to the documentary evidence from the municipality are unchallenged.
18. On the issue of accommodation, Mr Clarke submits that this element alone cannot be regarded as material particularly in the absence of emotional dependency or evidence that the appellants' possession of the property is anything more than expedient to its upkeep and maintenance.

Discussion and conclusions

19. I have considered all the evidence, the determination, the grounds for permission and the respondent's submissions.
20. The issue to be determined is whether the judge erred in his findings on family life and his conclusions under article 8.
21. The grounds for permission commence by putting forward arguments against the decision of the First-tier Tribunal Judge who refused permission to appeal. As permission was subsequently granted, I have no need to consider those arguments and focus on the single ground that has been put forward but which is subdivided into three points.
22. Ground one (although no other grounds have been put forward) is that there were errors of approach when considering the engagement of article 8(1). There are three sub-headings : (i) *"Improperly raising the evidential burden by requiring evidence of dependency when all that is required is real, effective or committed*

support"; (ii) relying on failure to meet Annex K as evidence of lack engagement (sic) of article 8(1); and (iii) failure to consider evidence of ties beyond normal emotional ties". I take each in turn.

23. With respect to the first argument, the judge had regard to Kugathas and Ghising which are both cited in the grounds. He also had regard to the nature of the support the appellants received from their father. No challenge has been raised in respect of the judge's finding that the sponsor in effect simply forwards money on an occasional basis to the appellants which comes to him from his daughter in the UK. Without those funds, he would not be in a position to send money to the appellants and so the appellants have failed to establish that they are in receipt of real, effective or committed support from their father. Whilst the grounds selectively refer to the judge's finding that the appellants receive modest sums from their father, they fail entirely to engage with the finding that those sums emanate in fact from the appellants' sister.
24. The grounds maintain that it was agreed at the hearing that the appellants could not meet the provisions of the respondent's published policy on Gurkhas and their families at Annex K of the IDIs at Chapter 5. As far as I can see, this is not recorded in the determination and the skeleton argument refers several times to the policy (at 4, 27-30 and 46). In any event, the judge properly considered it and correctly found that the provisions had not been met because the appellants were all well over the 30 year age limit and because they had lived apart from their father for three years plus at the time the applications were made as opposed to the two years or less that the policy envisages. The complaint now is that the judge relied on the inability of the appellants to meet the provisions of the policy when considering article 8. It is argued that the policy is not determinative of article 8 and that decision makers should proceed to consider article 8 after considering whether the policy requirements have been met.
25. That is, however, exactly what the judge has done. At paragraphs 38-65 he considers the policy and gives full reasons for why he finds that this has not been met. He then proceeds to consider article 8 (at 66-75). As Mr Clarke points out in his submissions, given that the policy calls for an assessment of the dependency between the applicants and their parent in the UK, it was wholly reasonable for the judge to refer back to the findings he had made on that issue when assessing article 8, family life and proportionality. There is nothing in the determination to indicate even remotely that the judge considered his findings under the policy to be determinative of article 8 issues and the grounds do not point to any part of the judge's reasoning or conclusions to suggest otherwise. Had the judge considered the failure to meet the provisions of the policy to

be determinative, he would have said so and there would have been no need for him to undertake an article 8 assessment. What the judge did when considering the issues of article 8 was to refer to the findings he had already made on family life and dependency which were also relevant to this assessment. In addition, having accepted that there was a genuine relationship between the sponsor and the appellants, he had regard to whether there was anything more than what would normally be expected between them. In so doing, he properly directed himself (at 68-69). It was open to him to find that the modest sums that were sent to them in effect came from the appellants' sister, that the appellants had lived apart from the sponsor for some five years and over three years at the time of the application, that telephone contact (which the sponsor claimed in oral evidence was every day, every week or every month) did not in itself show anything over and above what one would normally expect, that despite the issue of historic injustice the decisions did not show unfairness and that there were no exceptional circumstances which warranted a grant of leave outside the rules in these cases. Those are all findings which were open to the judge on the evidence before him.

26. It is also argued that the judge failed to consider matters which show that more than normal emotional ties existed. These are said to be cohabitation, financial dependence, dependence on the sponsor for accommodation and emotional ties. These were, however, matters that were considered but, in any event, on the available evidence, they are not capable of sustaining a claim of family life engaging article 8.
27. The fact that the appellants lived with the sponsor until his departure in 2015² does not mean that they continue to have a family life with him. No applications were made for them at the time of the applications made by the sponsor and his youngest daughter in 2015 and indeed it took over three years for the appellants to submit their entry clearance applications after the sponsor and their sister had settled in the UK. They have, in the meantime, had each other to turn to for family life as well as their two older sisters who remain in Nepal with their families. Furthermore, following the sponsor's departure, the second appellant moved away to Kuwait to work for three years and the appellants have worked on a neighbouring farm where it appears their work was paid for in kind.
28. The judge accepted that there was evidence that the sponsor had sent small sums of money to the appellants however as he found

² The reference in the skeleton argument to the appellants' parents applying for entry clearance in 2009 and it being granted in 2010 (at 30) is erroneous. The application for entry clearance was made in 2015 and the sponsor was the only parent who applied; the appellants' mother having passed away in 2013.

those sums would not have been sent had the sponsor not been given the money by his daughter. Without her support, the sponsor would not have been able to send money to the appellants or to let them withdraw his pension in Nepal, although by his own admission that was a meagre sum. That finding is unchallenged.

29. I accept that the judge did not specifically refer to the fact that the appellants continue to live in the family home however, this omission does not render the determination unsustainable. Given the numerous other findings, key matters being unchallenged, this cannot possibly alter the outcome of the appeal.
30. The grounds refer to emotional ties. It is argued that it is the culture of Nepal for unmarried children remain part of their parent's household. There was, however, no independent evidence before the judge as to Nepalese cultural norms and no reason for him to have made a finding of family life given the specific circumstances of the appellants based on mere assumptions. One could just as easily argue that if unmarried children were considered to remain part of a parent's household, they would not be left behind for numerous years before attempts were made for them to join the absent parent. Evidence of messages between the parties has been adduced but in the absence of any translations for the messages, it is impossible to know what the nature of the contact amounts to or to assess whether it can be said to show emotional dependency.
31. On the basis of the evidence before the judge, the findings were properly made and are fully sustainable. No errors of law have been established.

Decision

32. The decision of the First-tier Tribunal does not contain any errors of law and it is upheld. The appeals are dismissed.

Anonymity

33. No anonymity order has been sought at any stage and I see no reason to make one.

Signed

R. Kekić

Upper Tribunal Judge

Date: 28 September 2020

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