



IAC-AH-SAR-V1

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

**Appeal Number: HU/11903/2019 (V)**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 20 November 2020**

**Decision &  
Promulgated**

**On 13 January 2021**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**NISHA GURUNG  
(ANONYMITY DIRECTION NOT MADE)**

**And**

**ENTRY CLEARANCE OFFICER**

Appellant

Respondent

**Representation:**

For the Appellant: Mr S Jaisri instructed by Sam Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

This has been a remote hearing to which both parties have consented. 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. I did not experience any difficulties, and neither party expressed any concern, with the process.

**DECISION AND REASONS**

1. The appellant is a citizen of Nepal born on 4 October 1987. Her father (“the sponsor”) is a former Ghurkha soldier who moved to the UK in 2012, along with his wife and son (the younger sibling of the appellant).
2. On 29 February 2016 the appellant applied for entry clearance. The application was refused on 9 March 2016. The appellant’s ensuing appeal was heard by Judge of the First-tier Tribunal Fox, who dismissed it in a decision promulgated on 12 December 2016. At paragraph 14 of his decision, Judge Fox found that:

“the family ties that exist are no more than those that normally exist between adult [sic] parents and children”.

Despite this finding, at paragraph 17 Judge Fox stated that:

“there has been family life that has been interfered with in an entirely proportionate manner”.

3. I pause to note that typically the conclusion that would follow from a finding that family ties do not go beyond those that normally exist between adult children and parents is that Article 8(1) is not engaged: see *Singh v SSHD* [2015] EWCA Civ 630 at paragraph 24 where it is stated that:

“the love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more”.

4. I also note that Judge Fox stated at paragraph 18 that because an application had not been made under Appendix FM and paragraph 276ADE of the Immigration Rules:

“a full consideration of Article 8 ECHR rights has not been undertaken by the respondent or by myself today”.

5. On 15 March 2019 the appellant applied again for entry clearance. The application was refused on 3 June 2019. The appellant appealed against this decision to the First-tier Tribunal, where her appeal was heard by Judge of the First-tier Tribunal O’Keeffe (“the judge”). In a decision promulgated on 12 March 2020, the judge dismissed the appeal. The appellant is now appealing against this decision.

**The Challenged Decision**

6. The judge summarised the appellant’s case as being that:
  - (a) She is emotionally and financially dependent on the sponsor and his wife.
  - (b) It was only because the Immigration Rules did not allow it that she did not apply to enter the UK at the same time as her parents.

- (c) Before leaving Nepal, the sponsor looked after her, providing her with accommodation and financial support; and this support has continued thereafter.
  - (d) The sponsor has visited the appellant in Nepal frequently, and stays with her there.
  - (e) The sponsor and appellant speak regularly on the telephone.
7. The judge stated that, in accordance with the decision in *Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* \* [2002] UKIAT 00702, the previous decision (of Judge Fox) was her starting point.
8. At paragraph 21 the judge stated that she accepted, in line with Judge Fox, that family life existed in December 2016. She stated that the question for her to resolve was whether family life continues to exist.
9. The judge found, at paragraph 27, that the appellant had:
- “not demonstrated that she has been financially dependent on her parents since 2016.”
10. At paragraph 30 the judge stated that she was:
- “not provided with any particular examples of how the appellant is emotionally dependent on her parents.”
11. The judge concluded at paragraphs 32–33:
- “32. For the reasons set out above, I find that the appellant has not demonstrated that she is financially dependent on her father although I accept she does receive some support from the UK. I have not been provided with any particular evidence of emotional dependency which is real, committed and effective.
33. The question of whether family life exists is a question of fact. On the evidence before me considered as a whole, I find that it has not been demonstrated that family life currently exists between the appellant and her sponsor. It has not been demonstrated that Article 8(1) is engaged in this case. There is no need for me to consider the question of proportionality and the weight of any historical injustice in this case”.

### **The Grounds of Appeal**

12. The appellant advanced two grounds of appeal. Both grounds rely heavily, and cite from, the Court of Appeal decision in *Rai v SSHD* [2017] EWCA Civ 320.
13. The first ground submits that the judge failed to conduct the assessment required by *Rai*, which is to assess whether there is real, committed or effective support between the appellant and sponsor, giving weight to the strength of ties on departure. It is also stated in the grounds that there was a failure by the judge to consider the fact that the appellant still resides in the family home.

14. The second ground of appeal submits that the judge failed to adopt the correct approach to assessing whether there was any emotional dependence; which, it is argued, required consideration to be given to the fact that the appellant would have applied to come to the UK with her family had she been able to do so. It is also stated in this ground that the judge's reference to the absence of health needs was misplaced as this is immaterial to whether there is emotional dependence. Further, it is claimed that the judge failed to assess the evidence of continued contact and support, including the frequent visits by the sponsor to the appellant in Nepal.

### Submissions

15. The central argument made by Mr Jaisri was that the approach taken with respect to financial and emotional support was inconsistent with *Rai*, as the judge approached the appeal as if the relevant question was whether the appellant was emotionally and financially dependent on the sponsor, rather than whether she received support from him.
16. Mr Jaisri also argued that, in respect of financial support, the judge failed to take into consideration that substantial sums of money were left by the sponsor with the appellant when he visited.
17. He submitted that the judge's reference to the appellant's health needs indicates that the wrong test was applied, as it is not necessary for a person to have health needs for family life to be engaged.
18. Mr Kotas referred to paragraph 19 of the decision where the judge gave a clear self-direction as to the relevant test specified in *Rai*, and argued that it was clear *Rai* had been followed. He placed reliance on a recent Court of Appeal decision *AA (Nigeria)* [2020] EWCA Civ 1296, where at paragraph 34 it is stated:

“Experienced judges in this specialised Tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so”.

19. Mr Kotas also argued that the judge was entitled to consider dependency in the context of assessing whether there was support such that Article 8(1) was engaged. He submitted that it was not an error to note the absence of health needs or the absence of examples of emotional dependence as these are relevant to assessing whether there is support. In summary, he maintained that the judge was entitled to reach the conclusions she did based on the evidence that was before her.

### Analysis

20. The judge found (at paragraphs 27 and 32 of the decision) that the appellant had not demonstrated financial dependency on her parents and (at paragraphs 30 and 32) that she had not demonstrated emotional dependency on her parents. These findings - about the absence of dependency in the relationship between the sponsor and appellant - are central to the judge's reasoning for finding that article 8(1) ECHR was not engaged.

21. Dependency, however, is not the issue to be determined when evaluating if a relationship between a parent and adult child engages article 8(1). This was made clear by Sedley LJ in paragraph 14 of *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17 (cited with approval in *Rai* at paragraph 17), where he stated that:

"what may constitute an extant family life [between adult children and their parents] falls well short of what constitutes dependency"

22. I agree with Mr Jaisri that the judge fell into error by applying a test of dependency to the question of whether article 8(1) was engaged rather than approaching the issue in accordance with the legal principles applicable, as summarised in paragraphs 16 – 20 of *Rai* and encapsulated by Sir Stanley Burnton in paragraph 24 *Singh v SSHD* [2015] EWCA Civ 630:

"I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. 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 purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. 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".

23. With respect to the remaking of the decision, my initial view was that the findings of fact could, and should, be preserved in their entirety. However, on reflection I have decided to not preserve any findings and to remit the appeal to the First-tier Tribunal to be made afresh by a different judge. The reason for this is that, in my judgment, it was legally erroneous for the judge to take as a starting point that family life existed in 2016 on the basis of Judge Fox's decision, when Judge Fox did not explain how he reconciled his finding that the family ties between the appellant and sponsor did not go beyond that which exists normally with his conclusion that family life for the purpose of Article 8(1) existed (see paragraph 2 above); and also stated that he was not giving "full consideration" to rights under article 8 (see paragraph 4 above). For these reasons, in my view, when determining this appeal afresh, a judge will need to consider for him/herself the full factual matrix in respect of the relationship (and family life) between the appellant and her parents without being constrained by the decision of Judge Fox.

### **Notice of Decision**

The appeal is allowed.

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal for the decision to be made afresh by a different judge. No findings are preserved.

No anonymity direction is made.

Signed

*D Sheridan*

Upper Tribunal Judge Sheridan

Date 5 January 2021