



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No. UI-2024-000311

First-tier Tribunal No. HU/01039/2023
(HU/51964/2023)

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 15th of March 2024**

Before

**UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

Between

**Harka Bahadur LIMBU
(ANONYMITY ORDER NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant:

Mr M West of Counsel, instructed by Gurkha Solicitors Ltd

For the Respondent:

Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 11 March 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First Tier Tribunal Judge Wyman promulgated on 23 November 2023 dismissing an appeal against a decision dated 10 January 2023 refusing an application for entry clearance as the adult dependent child of a former Gurkha soldier.
2. The Appellant is a citizen of Nepal born on 27 June 1985 his father, Bibahadur Limbu served in the Brigade of Gurkhas between 1962 and 1977. Following service, the Appellant's father returned to Nepal where he

lived with his family until his death in 2016. The Appellant worked in Malaysia between 2015 and 2019, returning to live in the family home. The Appellant and his mother, Budmati Limbu (d.o.b. 1 January 1948), applied for entry clearance at the same time in September 2022; his mother's application was successful and she arrived in the UK in April 2023. However, the Appellant's application was refused for reasons set out in a decision letter dated 10 January 2023 (helpfully summarised at paragraphs 10-18 of the 'Decision and Reasons' of the First-tier Tribunal).

3. The Appellant appealed to the IAC.
4. The Appellant's appeal was dismissed for reasons set out in the 'Decision and Reasons' of Judge Wyman promulgated on 23 November 2023.
5. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Dainty on 25 January 2024. In material part the grant of permission to appeal states:

*"It is arguable that the judge made a mistake of law by requiring at [49] that the Appellant demonstrate real, committed and effective support to show family life between a parent and adult child, when the case law demonstrates that real, committed OR effective support is all that is required (see **Rai v ECO [2017] EWCA Civ 320**). It is therefore arguable that the judge imposed a too high standard."*

6. The Respondent has not filed a Rule 24 response, but Ms Isherwood indicated that the challenge to the decision of the First-tier Tribunal was resisted.

Application

7. At the hearing Mr West raised as a preliminary matter an application to rely upon an unreported decision of the Upper Tribunal, with reference to paragraph 8.1(a) and 8.2 of the Practice Direction of the Immigration and Asylum Chamber of 13 May 2022. He provided a copy of a Decision of Deputy Upper Tribunal Judge Jarvis in UI-2023-004562 issued on 7 December 2023, and indicated that he wished to rely upon it for the proposition that the test derived from **Kugathas v SSHD [2003] EWCA Civ 31** and explained in **Rai v ECO [2017] EWCA Civ 320**, with reference to 'real', 'committed', or 'effective' support was a disjunctive test and not a conjunctive test. In this context it was noted that as much had been conceded by the Respondent's representative: see paragraph 13 of the unreported case. Mr West told us that he was not aware of there being any reported decision exactly on point.

8. The consideration of this issue in **Kugathas** is helpfully set out in **Rai**, before the Court made its own observations in the context of the submissions being advanced before it. The following passages from **Rai** are particularly germane:

"17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "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 L.J. 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". ..."; and

"36. ... 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. ...”

9. In our judgement it is readily apparent from **Kugathas**, and in turn the discussion in **Rai** – and in particular the repetition of ““real” or “committed” or “effective””- that the test is disjunctive (through the use of ‘or’) rather than conjunctive (in which case the use of ‘and’ might be expected). **Kugathas** and **Rai** are clear enough authority in themselves for the proposition of this being a disjunctive test. It is not necessary to resort to reliance upon an unreported case in which there was no argument on the issue (the point being conceded by the Respondent’s representative), and consequently no further consideration of the jurisprudence.
10. In the circumstances we do not accede to Mr West’s application because condition 8(2)(c) of the Practice Direction is not met.

Error of Law

11. In the premises, the Judge acknowledged that at the time the Appellant’s father retired from the Brigade of Gurkhas there was no settlement policy in place that would allow him to come to the United Kingdom with his family (paragraph 45). The Judge found that an application for settlement would have been by the Appellant’s father before 2009 had such an option become available (paragraph 46). Further in the premises, the Respondent has not sought to rely upon any public interest beyond the effective maintenance of immigration control. As such, in accordance with **Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)**, the determinative issue before the First-tier Tribunal was whether or not Article 8 was engaged.
12. Further to the above, at paragraph 49 the Judge stated:

“... The key issue is whether there is Article 8(1) family life which establishes “real committed and effective” support more than the normal emotional ties between a parent and an adult child. (Rai [2017] and Kugathas)”.

13. Although Mr West's application to rely upon an unreported case has been refused, for the reasons already explained, we accept his proposition that the question of whether support is real, committed, or effective is disjunctive. It follows that the Judge's apparent identification of a conjunctive test indicates a misdirection.
14. We note Mr West's observation that the use of quotation marks seemingly acts to emphasise or elevate the phrase 'real committed and effective' notwithstanding that this is not a direct quotation from either **Rai** or **Kugathas**. We also note that in the rehearsal of applicable jurisprudence at paragraphs 29-38 the Judge does not make any express reference to any of the dicta addressing 'real', 'committed', or 'effective'.
15. Be that as it may, it is in any event not possible to identify any aspect of the subsequent reasoning in which the Judge makes an evaluation by reference to any of the three adjectives.
16. The Judge found that the Appellant's mother did provide him with material support, and that there was mutual emotional support. At the time of the application and at the time of the Respondent's decision it appears to be the undisputed evidence that the Appellant and his mother were living together in the same household. Nor was it apparently disputed that such household was funded through the mother's pension, the Appellant not being in employment. Since coming to the UK the Appellant's mother's income had been boosted through pension credit. The Judge found - "*I accept the appellant remains living in the former family home where he lived with his parents. The appellant receives financial support from his mother, in the form of regular remittances from Mrs Limbu's state pension*" (paragraph 50). See further: "*I accept there is ongoing emotional support between the appellant and his mother on a regular basis. However, this is no different from any parent and child who live away from each other, whether within the same country or internationally. I accept that there are regular telephone calls, as is the norm. I also accept that he receives money from his mother.*" (paragraph 56); and "*There is evidence of financial support and ongoing contact between the Appellant and the Sponsor*" (paragraph 59).
17. However, when finally determining the issue of the engagement of Article 8(1) the Judge appears to limit herself to the following:

"However, the case of Kugathas states that generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent minor children. The appellant is not a minor. He has lived and worked abroad in Malaysia from 2015-19. He has therefore had a life living away from his parents. He is 38 years old as at the date of the hearing." (paragraph 60)

18. In the circumstances, the Judge having found that there were the normal emotional ties that might be expected between a parent and an adult child (paragraph 56), and having found that there was the provision of financial support, does not appear to have reconciled such findings with the case law, or otherwise analysed the support within the jurisprudential framework discussed above – to determine whether such support took matters beyond ‘normal emotional ties’ because it was real or committed or effective.
19. We note that Ms Isherwood emphasised aspects of the case in which the Judge expressed reservations about the merits – in particular that the Appellant had spent some time working away from the family home, and the Sponsor’s uncertain – “*deliberately vague*” – evidence in relation to her other children (paragraph 53) and the timing and reasons for the Appellant’s return to the family home after working in Malaysia (paragraph 55). However, in our judgement such matters do not remedy either the fundamental misdirection at paragraph 49, or the lack of any clear reasoning within the framework of the jurisprudence in respect of support beyond normal emotional ties.
20. Accordingly, we find that the decision of the First-tier Tribunal is vitiated for error of law, both in respect of a material misdirection and for an absence of adequate reasoning. The decision of the First-tier Tribunal requires to be set aside in consequence.

Remaking the Decision in the appeal

21. Although the decision of the First-tier Tribunal is set aside, we are content – having heard representations from the parties – that the findings of primary fact should be preserved – in particular in respect of the ongoing mutual emotional support, and the financial support provided by the Appellant’s mother. In such circumstances we are also content that the decision in the appeal should be remade without requiring a further hearing. For the avoidance of any doubt, in this context we have at this stage again taken into account Ms Isherwood’s comments concerning the Judge’s observations as to the unsatisfactory nature of aspects of the evidence.
22. We have little hesitation in concluding that family life existed between the Appellant and his mother from the time he returned from working abroad in Malaysia to live in the family home with his, by then, widowed mother: there does not seem to be any dispute in respect of ‘normal emotional ties’ at this point (or at any point since), and the Appellant was provided with the material support of living in the family home, together with financial support through his mother’s pension. Such material support

can be appropriately characterised as any and all of real, committed, or effective.

23. It was found by the First-tier Tribunal that subsequent to the Appellant mother's entry to the UK normal emotional ties continued, as did financial support. The continuation of such support notwithstanding the change of circumstances in our judgement indicates its committed nature.
24. In all the circumstances we find that Article 8 is engaged.
25. As previously noted, the Respondent is not relying upon anything beyond the public interest in maintaining a firm immigration policy: cf. paragraph (4) of the headnote in **Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)**. We conclude therefore that the proportionality balance favours the Appellant by reason of the historic injustice and the absence of any countervailing factor beyond the maintenance of effective immigration control.
26. The appeal is allowed on Article 8 grounds accordingly.

Notice of Decision

27. The decision of the First-tier Tribunal contained a material error of law and is set aside.
28. We remake the decision in the appeal. The appeal is allowed on human rights grounds.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

12 March 2024

To the Respondent

Fee Award *(This is not part of the determination)*

As we have allowed the appeal based on the same case which was advanced before the Respondent, we have decided to make a fee award of any fee which has been paid or may be payable.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber),
qua a First-tier Tribunal Judge

12 March 2024