



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02117/2015
HU/02118/2015

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2017

Decision & Reasons Promulgated
On 6 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

BUDDHA RANA
PRIYA RANA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr. E. Wilford, Counsel instructed by Makka Solicitors Ltd
For the Respondent: Mr. P. Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Nixon, promulgated on 19 October 2016, in which she dismissed their appeals against the Respondent's decision to refuse entry clearance.
2. Permission to appeal was granted as follows:

"The grounds, which were in time, complain that the judge erred in: (1) directing herself in line with *Kugathas* without reference to more recent case law; (2) incorrectly

directing herself that only facts at date of decision could be taken into account; (3) irrationality in finding that the appellants were self sufficient despite their dependency on their father; and (4) only considering family life not private life.

The grounds, which are concise and well-drafted, are arguable. The Court of Appeal in *Gurung* approved the UT guidance on family life at paras 50-62 of *Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)*. This corrected a misunderstanding that had led to an overly narrow approach based on *Kugathas*. Although the judge refers to *Gurung* it is arguable that she erred in law in not applying the relevant legal framework in assessing whether there was family life. Without refusing on any ground it appears to me that the first and third have most force and justify close examination.”

3. The Sponsor attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Submissions

4. Mr. Wilford relied on the grounds of appeal, in particular grounds 1 and 2. He referred me to the case of Rai [2017] EWCA Civ 320 which post-dated the decision and the grant of permission to appeal. This had clarified that what was necessary was to ascertain whether or not there was the existence of real, committed or effective support. In summary, he submitted that the facts of this appeal were similar to those in Rai. The judge had made clear findings that financial and emotional support was being provided by the Sponsor to the Appellants. These findings were such that there was real, effective and committed support. The judge had applied Kugathas too rigidly, an error which had been identified in the case of Ghising. In the light of the finding that there was dependence, Article 8(1) was engaged, and the judge should have found that family life existed.
5. In paragraph 10(7) the judge introduced an elevated threshold by stating that, although the usual emotional bonds between parents and child were present, the requisite degree of emotional dependence was absent in this case. I was referred to paragraph 36 of Rai.
6. Mr. Armstrong relied on the Rule 24 response and the case of Gurung [2013] EWCA Civ 8, paragraph 26. He submitted that the case of Rai did not differ drastically from Gurung. Paragraph 36 of Rai stated that there was a need for dependency beyond normal financial ties and normal emotional dependence.
7. The judge had not found that family life existed. At the date of the hearing the Appellants were 29 and 25 and had lived separately from the Sponsors for five years. There was nothing unusual to show exceptionality on the facts. There was no medical evidence for the second Appellant. The question to be asked was whether exceptional circumstances had been demonstrated and they had not. It was a narrow issue of exceptional circumstances and was a well-reasoned decision on that issue with no material error of law.

8. In response, Mr. Wilford submitted that the Mr. Armstrong's submissions were an invitation to make the same error that was subject to the appeal in Rai. The judge had not considered family life at the date the parents had departed from Nepal and whether family life had ended when they had departed. I was referred to paragraph 39 of Rai where the court found that the judge had not engaged with the issue of whether family life had endured beyond separation.
9. With reference to paragraph 36 of Rai, it was not necessary to find exceptionality. Real, effective and committed support did not have to equate to something exceptional and extraordinary. Exceptionality was a too exacting and inappropriate test, which was not compatible with real, effective and committed support, as accepted by the Court of Appeal in Rai [37].
10. In summary it was a very short decision and the judge had failed to apply the appropriate legal framework. She had failed to recall the Upper Tribunal in Ghising. The fact that the Appellants lived together did not militate against family life existing between them and their parents. I was referred in this respect to [39] of Rai.
11. In relation to the finding that the Appellants were self-sufficient he questioned how this finding made sense. In paragraph 10(5) the judge states: "I find therefore that, but for their financial dependence on their father, they are self-sufficient". It was unclear how somebody could be both financially dependent on somebody else and still self-sufficient.

Error of law

12. I have carefully considered the cases of Rai and Ghising. As at the date of the hearing and the grant of appeal, the case of Rai had not been promulgated. However, in the case of Ghising the need for the Tribunal not to be too restricted in its application of Kugathas had already been discussed. Paragraph 54 of Ghising refers to Kugathas and the question of whether there is real, committed or effective support. In paragraph 56 of Ghising there is a reference to the fact that Kugathas had been interpreted too restrictively in the past. This is clarified now in Rai, paragraph 36.
13. Paragraph 36 of Rai states:-

"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."*

14. The judge found that the Appellants were financially dependent on their father, the Sponsor, [10(5)]. I find that the finding that the Appellants are self-sufficient, notwithstanding their financial dependence on their father, does not follow. The judge has found that the Appellants are financially dependent on their father [10(5)]. She has found that they live in the family home [10(5)]. I therefore find that both their accommodation and their financial support are being provided by their father, so it is hard to see how they can be found to be self-sufficient.
15. The judge finds that the Appellants and Sponsor speak on the phone and via Viber [10(5)]. She states that this is something that she would expect of family members living apart "and this contact does not in my judgment point to anything over and above the usual emotional ties". In [10(6)] she finds that the fact that their father visits them "in itself is not suggestive of emotional dependence". In [10(7)] she asks whether they have shown that there is a "sufficient emotional dependence on their parents to justify the conclusion that they enjoyed family life". She then goes on to state that while they are "financially dependant (sic) on their father, I find that, although the usual emotional bonds between parent and child are present, the requisite degree of emotional dependence is absent".
16. I find that the judge has applied an elevated threshold to the requirement to show emotional and financial dependence and has failed to apply the case law, both that of *Ghising* and *Rai*. I find that the judge took the same approach as had been taken by the Upper Tribunal Judge in *Rai*. The judge found financial dependence, which in and of itself would have been sufficient to make a finding of family life for the purposes of Article 8(1), being a level of dependence between an adult child and their parent which goes above and beyond the normal dependence to be found in such a relationship. The judge was looking for something extraordinary and exceptional with regard to the emotional support provided by the Sponsor. All that needs to be shown is support that is real, committed or effective, with reference to the case of *Kugathas*. There does not need to be any compelling or exceptional circumstance inherent within the case in order for an appellant to show that there is

real, effective or committed support.

17. This was clearly set out in the case of Ghising with reference to the case of Kugathas. I find that the judge has looked for something exceptional, as is shown by the fact that she is looking for the “requisite degree of emotional dependence” as opposed to real committed or effective emotional support. I find that the judge has applied Kugathas too restrictively, and while she has referred to the case of Gurung which applied the case of Ghising, she has not correctly applied the case of Ghising, in particular paragraphs 50 to 62.
18. Further, her finding that the Appellants are able to provide each other with companionship and emotional support is not relevant to the central focus of the case. The important point is whether there is family life between the Appellants and their parents, not whether family life exists between the two siblings. Paragraph 39 of Rai states:-

“But that, in my view, was not to confront the real issue under Article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.”
19. The First-tier Tribunal Judge has not given any consideration to the existence of family life between the Appellants and Sponsor when the Sponsor left Nepal, and what has happened since then to break that family life, such that family life no longer endures. Given that she has found that the Appellants live in the family home and are financially dependent on their father, and has also found that they are in contact, and that the Sponsor has made visits, she has not pointed to anything that has occurred to break the family life in existence when the Sponsor came to the United Kingdom.
20. I find that the decision involves a making of a material error of law in the judge’s failure to apply the legal framework set down in the case of Ghising, now further clarified by Rai.

Remaking

21. It had been conceded by the Respondent’s representative at the hearing in the First-tier Tribunal that, were Article 8(1) engaged, it would be a disproportionate interference under Article 8(2) with reference to the case of Gurung. At 10(3) the judge quotes from Gurung:

“I accept that it is now well-established that, where Article 8 is engaged and, but for the historic wrong, the appellant would have settled in the UK some time ago, that this will usually determine the issue of proportionality in the appellant’s favour, although it is not determinative. This point has in fact been sensibly conceded by Mr Swaby.”

22. Following this concession, it was accepted before me that there was only one issue, whether or not Article 8(1) was engaged.
23. There is no dispute over the factual circumstances of this case. I find that the Appellants are financially dependent on the Sponsor. I find that they live in the family home. I find that they are in frequent contact with the Sponsor over the phone and Viber. I find that the Sponsor has visited the Appellants on an annual basis.
24. I have taken into account the case of Rai, in particular paragraphs 36 and 39, as well as paragraphs 50 to 62 of Ghising. I find that the support which the Appellants receive from the Sponsor is real, committed and effective. I find that the Appellants are totally financially dependent on the Sponsor. I find that this level of dependence goes above and beyond the normal dependence to be found in such a relationship. Further, I find that the Appellants are emotionally dependent on the Sponsor. I find that this emotional support is real, effective and committed.
25. I therefore find, following the case of Rai, that the Appellants have shown that they have family life with the Sponsor sufficient to engage the operation of Article 8(1).
26. As it has been conceded that any interference in this family life would be disproportionate under Article 8(2), I find that the Appellants have shown on the balance of probabilities that the decisions are a breach of their rights, and those of the Sponsor, to a family life under Article 8 ECHR.

Decision

27. The decision of the First-tier Tribunal involves the making of a material error of law, and I set the decision aside.
28. I remake the decision allowing the Appellants' appeals on human rights grounds, Article 8 ECHR.
29. No anonymity direction is made.

Signed

Date 5 June 2017

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. The Appellants did not meet the requirements of the immigration rules or the policy in relation to adult children of former Gurkha soldiers.

The Respondent noted in the decision that evidence of emotional reliance had not been provided. In the circumstances where further evidence was provided for the appeal, I have decided to make no fee award.

Signed

Date 5 June 2017

Deputy Upper Tribunal Judge Chamberlain