



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01685/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 May 2018

Decision & Reasons Promulgated
On 21 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MISS NIRMALA PURJA
(ANONYMITY DIRECTION NOT MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Bentiez, counsel instructed by Howe & Co,
solicitors

For the Respondent: Mr. E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal came before me for a hearing on 23 February 2018, when I found an error of law and adjourned the appeal for a resumed hearing. A copy of that decision, dated 21 March 2018 is appended.

Hearing

2. Ms Benitez stated at the outset of the hearing that the Appellant was not seeking to rely on any new evidence but would rely on the previous bundle submitted on 20 June 2017.
3. I heard evidence from the Sponsor, with the assistance of a Nepali interpreter. She adopted her statement dated 9 June 2017 and her previous undated witness statement and confirmed that she cannot read or write in Nepali and is illiterate. Evidence was submitted of a visit to the Appellant on 21 March 2018. The Sponsor stated that her daughter lives close to Pokhara in Bheg Khola. She is living alone and she is not working. Her rent, bills and food are paid from money she sends. The Sponsor said that the purpose of her visit to Nepal was to see her daughter and that she stayed with her. The Sponsor confirmed that she also stayed with her daughter on her three other visits to Nepal.
4. The Sponsor confirmed that she has some money transfer receipts and that she sent money every month to Nepal. The Sponsor also said that she took some money with her 200,000 rupees - over £1000, when she visited, for food and other things. She said that she spoke to her daughter every day on the phone. The Sponsor said that they talked about family matters and the Appellant asks her when is she coming to the United Kingdom. The Sponsor was asked how the Appellant feels about being separated from her and she replied that her daughter wants her company and that they want to talk together and stay together. She said that she felt very hopeless about her daughter being in Nepal.
5. The Sponsor was asked why she applied for her daughter to come to the United Kingdom and not her son, Tulprasad, to which she replied that it was difficult for her to obtain and so she decided to apply for her daughter first and later her son. When asked why she chose her daughter first she replied that the Appellant is the closest one and that she loved her too much, although she loves her son also. She said that her last visit had not been too long, around 2 months. The Sponsor's passport was handed up, which showed that she had entered Nepal on 21 March 2018 and exited on 17 May 2018.
6. In cross-examination the Sponsor confirmed that she had stayed in Bheg Khola on her last visit and on previous occasions. She clarified that the name of the village is Myagdi, known as Myafdi Khola. She said that the family owns the property where her daughter lives; that it is a small place and they all used to live together there. The Sponsor said that Tulprasad lives in a separate place in Nepal and he has not been to any other foreign countries. The Sponsor said that she wanted her daughter to be here to look after her because she needs medicine sometimes for medical conditions and she can help her. She confirmed that her daughter is not married. Mr Tufan put to the Sponsor that a document produced as verification of the certificate of relationship refers to the Appellant as "Mrs" which suggests that she is

married. The Sponsor said that the person who has written this may have written it wrong because the Appellant is not married.

7. The Sponsor was asked if she received pension credit and pension through her husband and she said that she received benefits. Ms Benitez informed me that the Sponsor should be receiving widow's pension but doesn't seem to be. She said that her daughter did not work and had never worked. She said that in addition to financial support she did provide emotional support in that she loved her very much and her daughter loves her as well.

8. There was no re-examination or questions from me.

9. In his submissions, Mr Tufan stated that this is a slightly unusual case in that the Gurkha soldier had died before the entry clearance application was made and so the Appellant is a dependent of a dependent. He accepted if Article 8(1) is engaged then Article 8(2) falls in the Appellant's favour. He submitted that the issue is whether the support this Sponsor provides is real, committed and effective *cf.* Kugathas and Rai. He accepted that it appears there is some financial support albeit the documents post date the decision, but later evidence can be taken into consideration in terms of Article 8 assessment. He submitted that evidence of financial support is not sufficient *cf.* AAO at [35] and that what is needed to be shown is emotional support above and beyond normal emotional dependency between adults and that on the evidence today this does not come within the Kugathas criteria for the Appellant to succeed and Article 8(1) was not engaged thus the Appellant does not come within Article 8 (2).

10. In her submissions, Ms Benitez sought to rely on the skeleton argument before the First tier Tribunal and the specific jurisprudence with regards to Gurkhas. She submitted that Kugathas is displaced by this, as had been accepted by the Respondent and the relevant policy is at page 290 of bundle of authorities *cf.* Annex K in respect of adult children of former Gurkhas. Ms Benitez submitted that the conditions are all satisfied except for [8] as they have been living apart from more than 2 years. The entry clearance application had been made on 17 November 2015 and the reason why there is a more than 2 years separation is that the Sponsor arrived in 2010 when her daughter was 22 and the Respondent had no policy in place at that time for children over 18 to join their parents. The policy came into force on 5 January 2015 thus there was no policy to cover the Appellant's circumstances at the earlier time.

11. Ms Benitez sought to rely on the judgment in Rai at [42]. She submitted that they would have applied to come together as a family unit had it not been that there was no policy in place so there was no ability to apply in 2010. The Sponsor at [4] of her first witness statement states this in terms. She submitted that the principle of family reunion recognizes that sometimes families are separated not out of choice.

12. Ms Benitez asked me to make a finding as to the existence of family life when the Sponsor left Nepal. The Appellant was at that time 22 and still dependent on her mother. She submitted that family life is still extant and has been maintained by four visits to the family home and the fact that the daughter has remained in the family home indicates she is still attached. They speak every day on the telephone. The Sponsor's evidence is that she loves all her children but is closest to her daughter. She lives alone and has not formed a new family. Ms Benitez submitted that this appeal clearly falls within the spirit of the policy and that family life has continued despite the delay from 2015 to 2018 because of the appeal process and that this cannot mitigate against the continuation of family life.

Findings

13. I have considered this appeal in light of the jurisprudence that pertains to the dependents of Gurkhas *viz* Ghising [2013] UKUT 00567 (IAC); Gurung [2013] EWCA Civ 8; Rai [2017] EWCA Civ 320 and also the judgments of the Court of Appeal in Kugathas [2003] EWCA Civ 31 and AAO v Entry Clearance Officer [2011] EWCA Civ 840.

14. I have also borne in mind the fact that the findings of fact made by First tier Tribunal Judge Wright at [26](5) and (8) stand *viz* that there is no evidence of remittances between December 2010 and August 2015; one remittance for 2015; four for 2016 and three for 2017 and that there is no real evidence about how the Appellant relates to her mother or what emotional sustenance she receives from her and that there is no witness statement from the Appellant.

15. I address first the question of whether or not there is family life between the Appellant and her mother, the Sponsor. I have no hesitation in finding that there was family life between them up to the time the Sponsor entered the United Kingdom on 16 September 2010 as they were living in the same household and the Appellant was financially and emotionally dependent on her mother, particularly since her father, having served as a Gurkha for 9 years from 1960 to 1969, passed away on 9 August 1999.

16. The issue is whether family life has continued to subsist between the Appellant and the Sponsor since that time. I have had particular regard to the judgment of the Court of Appeal in *Rai* (op cit) at [18] and [19]:

"18. In Ghising (family life – adults – Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in Kugathas had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

"61. Recently, the [European Court of Human Rights] has reviewed the case law, in [AA v United Kingdom [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family

of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. ..."

The Upper Tribunal set out the relevant passage in the court's judgment in AA v United Kingdom (in paragraphs 46 to 49), which ended with this (in paragraph 49):

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in Gurung (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy), including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

17. I adopt the reasoning of their Lordships and find that the test to be applied in this case is fact sensitive and there is no requirement of exceptionality when considering the existence of family life between the Sponsor and the Appellant.

18. The Sponsor's evidence, as set out in her previous undated witness statement is that at the time her husband was discharged from the army, after exemplary conduct, there was no Gurkha settlement policy otherwise they would have applied at that time and then the Appellant would have been born in the United Kingdom; she was unable to afford to make an application for entry clearance for the Appellant at the time she applied because it was very difficult to afford even her own application; this is the reason for the delay in making an application on behalf of the Appellant; the Appellant remained emotionally and financially dependent on her and remains her responsibility as an unmarried daughter.

19. In her oral evidence, the Sponsor came across as elderly and quite easily confused, even with the assistance of the Nepali interpreter, for example she was unable to recall when and for long she had visited the Appellant in Nepal, even though she had returned to the United Kingdom only 8 days prior to the appeal hearing. I bear in mind the fact that she is illiterate. I find that there was nothing inherently implausible in her evidence and no inconsistencies arose in cross-examination thus I accept her evidence.

20. Whilst there is limited evidence of financial remittances over the entirety of the period of time, as was recorded by First tier Tribunal Judge Wright, the Sponsor states that she has been financially supporting the Appellant since

she came to the United Kingdom in September 2010. I find in light of the Sponsor's evidence, which I accept, that the Appellant has never worked and is entirely financially dependent on her mother and that in addition to remittances the Sponsor has taken money when she has visited the Appellant, most recently £1000. The Sponsor receives a pension and benefits and I find that she supports the Appellant from these funds.

21. As to emotional dependency, despite the fact that the verification of certificate of relationship dated 11 June 2017, which is in English, refers to the Appellant as "Mrs Nirmala Purja" I accept the Sponsor's evidence that the Appellant is unmarried and that the reference to "Mrs" is a mistake made by the person who compiled the document. I make this finding bearing in mind the fact that the purpose of the document was to attest to the relationship rather than the marital status of the persons concerned. Consequently, I find that in light of the Sponsor's evidence, which I accept, that she and the Appellant speak on the telephone on a daily basis and that the Sponsor has, despite limited means, continued to financially support her daughter and has visited her four times, most recently shortly before the appeal hearing, that the Appellant is emotionally dependent on her mother. I further find that the Sponsor is emotionally dependent on her daughter, the Appellant and that they are the most important person in each other's lives.

22. It follows that I find that family life not only existed at the time the Sponsor left Nepal in order to take up her right, as the widow of a Gurkha veteran, to indefinite leave to enter the United Kingdom in 2010 but that family life has been maintained and continues to subsist between the Sponsor and the Appellant. Thus I find that Article 8(1) of the ECHR is engaged. That being the case, Mr Tufan conceded that, in light of the Gurkha specific jurisprudence, that the refusal of entry clearance is a disproportionate interference with the right to family life between the Appellant and the Sponsor.

Decision

23. The appeal is allowed on human rights grounds. I direct that the Appellant be granted entry clearance.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman
18 June 2018