



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10016/2015

THE IMMIGRATION ACTS

Heard at Field House
On 28 March 2018

Decision & Reasons Promulgated
On 3 May 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

RAM KUMARI PUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Nnamani, Counsel, instructed by Howe & Co Solicitors
For the Respondent: M I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a remade decision following the identification of a material error of law in the decision of Judge of the First-tier Tribunal S Meah, promulgated on 20 March 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 14 July 2015 refusing her entry clearance application as an adult dependent child of a former Ghurkha.
2. In an 'error of law' decision promulgated on 6 February 2018 I found that judge Meah erred in law by approaching the earlier decision of Judge Beg, promulgated on 13 June 2012, without considering the likelihood that Judge Beg may have too restrictively interpreted the authority of Kugathas [2003] EWCA Civ 31 when considering whether the appellant enjoyed family life with her parents, and, in particular, her mother. I was additionally satisfied that Judge

Beg may have set too high the threshold needed to demonstrate family life between an adult child and her parent. In Kugathas the Court of Appeal indicated that support by a parent of an adult child had to be 'real' or 'committed' or 'effective'. The use of the conjunctive by Judge Beg (who required "... real committed and effective support") suggests that she may have applied an unduly restrictive test. In Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 the Court of Appeal saw force in similar submissions (see paragraph 36). Judge Meah did not consider this aspect of Judge Beg's decision.

3. Having found material legal errors, and having heard the representations from both parties, I agreed that the appeal would remain in the Upper Tribunal but that it would be adjourned to enable further evidence to be provided.

Factual Background

4. The appellant is a national of Nepal, date of birth 30 May 1981. On 26 September 2013 she applied for leave to enter the UK on the basis of her relationship with her parents. Her father, Hukum Singh Pun Suk Bahadur Gurung, was discharged from the Brigade of Gurkhas on 27 June 1982 and was granted Indefinite Leave to Enter the UK in late 2009 following a change in the Home Office policy relating to former Gurkhas. He entered the UK in July 2010. The appellant's mother, Purnakali Pun, was granted Indefinite Leave to Enter in early 2010 and she entered the UK in September 2012. She has since made several trips back to Nepal to see the appellant.
5. The appellant previously applied for leave to enter the UK in 2011. This application was refused on 4 November 2011 and an appeal dismissed by Judge of the First-tier Tribunal Beg on 13 June 2012. Judge Beg did not find that the appellant had established a sufficiently strong family life with her parents so as to trigger the operation of article 8 ECHR.
6. The entry clearance application made in September 2013 was initially refused on 3 December 2013 but this decision was withdrawn the day prior to an appeal hearing. The application was reconsidered and again refused on 14 July 2015 because the appellant did not meet the requirements of Annex K of Chapter 15 of the Immigration Directorate Instructions (IDIs), which sets out the requirements for a grant of entry clearance for adult children of former Gurkhas, as she was over the age of 30 when her application was made. The respondent considered whether article 8 considerations might warrant of grant of leave to enter but was not satisfied that the appellant had established family life with her parents.
7. At the First-tier Tribunal hearing on 3 March 2017 the appellant's representative conceded that she could not meet the requirements of the immigration rules or the respondent's policy at Annex K, Chapter 15 of the IDIs. It was accepted by the respondent that the appellant was under the age of 18 at the time of her father's discharge and that a settlement application would have been made by

her before 2009 had the option been available. Neither representative resiled from these stated positions in the appeal before me. In addition, Mr Jarvis indicated that, if I was satisfied that family life existed (article 8(1)), then the requirements of article 8(2) would be met (in other words, that the refusal of entry clearance would be disproportionate based on the historical injustice identified in Gurung v Secretary of State for the Home Department [2013] 1 WLR 2546).

The resumed hearing

8. At the resumed hearing the appellant relied on a bundle of documents that was before the First-tier Tribunal hearing, running to 121 pages, and a supplementary bundle of documents running to 20 pages. The original bundle contained, *inter alia*, statements from the appellant, her mother and father all dated 24 February 2017, a copy of the appellant's passport, copies of her parents' passports, details relating to her father's military service with the British Army and his pension, various educational certificates and diplomas awarded to the appellant including her School Leaving Certificate Examination and Higher Secondary Education Board Academic Transcript, a letter from Dillibazar Kanya Multiple Campus dated 26 August 2013 indicating the appellant was in the 3rd year of a Bachelor's Degree having enrolled in 2011, and bank account statements relating to the appellant's parents. The original bundle additionally contained a number of money transfer receipts showing funds sent by both of the appellant's parents to her from 2013 to 2016.
9. The supplementary bundle contained a supplementary statement from the appellant's father, dated 19 March 2018, various documents confirming his travel to Nepal at the beginning of 2018, and some medical documents originating from Nepal indicating that the appellant recently suffered from abdominal pain. The bundle also contained some additional money transfer receipts in respect of funds sent by the appellant's mother to her on 3 occasions in 2017.
10. During the hearing the appellant's mother provided documents purporting to be the appellant's telephone records that included calls received by her from the United Kingdom covering the period from November 2016 to February 2017.
11. In her statement the appellant said she lived on her own in the family home in Nepal. She described a terrible road accident in which her kneecap was destroyed and her need for reconstructive surgery and a long period of rehabilitation. Without the help and constant support of her parents she did not think she would have recovered as quickly. The mental scars from the bike accident still haunted the appellant; she still feels very scared to ride motorbikes and usually stays inside the family home. Although she attended Dillibazar Kanya Multiple Campus from 2011 it took her almost 1½ hours to walk there and, although she took a taxi when she felt tired, this was very expensive. The appellant claims she later lost interest and could not continue her studies, and

that she sometimes still feels pain in her knee. She is lonely and desperate most of the time, and very sad. She misses her parents all the time and, although they try to keep in touch by telephone, this is not the same as being together in real life. She cries a lot when she speaks to her parents. The appellant described how someone has been knocking and bashing her door at midnight once a week and that this is been going on a long time, and that she has had men's underwear and trousers and stones thrown at her window. She did not want to report these matters to the police believing that this would only escalate the consequences. The appellant is also concerned about the possibility of another serious earthquake striking the country. The appellant confirms that she is single and unemployed and financially reliant on her parents.

12. The following is a summary of the evidence given by the appellant's father in his statements. The appellant was still emotionally and financially dependent on him and his wife. He confirmed that he would have applied for settlement together with his dependent family had he been given the opportunity to do so, and that the appellant would have then qualified for settlement as a minor dependent when he was discharged from the army on 27 June 1982. The appellant's father has 2 sons, Hari, who is present and settled in Hong Kong with his wife and children, and Kamal, who is also present and settled in Hong Kong with his wife and child. The appellant's sister, Sindhu, is married and working in Spain where she lives with her husband. The appellant continues to live on her own. After his discharge from the British Army the appellant's father obtained work as a Security Guard in Brunei in the Gurkha Reserve Unit. The appellant's father maintained that she would become depressed as soon as she was left on her own and would often cry so much that her parents would have to travel back to console her and reiterate that she had not been stranded. A brief description was given of the serious motorbike accident suffered by the appellant. Although she is able to walk, she sometimes suffers aches and pain.
13. It is the duty of the appellant's father to find a proper match for her and sent her to her husband's home. In Nepalese society it is unacceptable for young women to live without their parents. The appellant would work in Nepal if she had the opportunity to do so but it was difficult to find jobs without personal contacts. The appellant's father was additionally concerned that, as a young woman, she would be vulnerable to trafficking and exploitation. The appellant's father and his wife were very anxious for her safety and she was living on her own. He maintained that they were a very close family and that his family life with the appellant was unbroken. He recently travelled urgently to Nepal as the appellant said she was very ill. She was scared and had no one to look after her. The appellant was said to be in a miserable condition and a doctor advised her father that she was not eating good food. If the appellant is refused entry clearance her father indicated that he and his wife will be forced to return to Nepal.
14. The following is a summary of the evidence given by the appellant's father at the hearing. He speaks to her daily. He and his wife previously visited the

appellant in November 2017 but only he went back in February 2018. In cross-examination the appellant's father explained that, although the appellant could undertake small jobs, there may be a perception that she was unable to work and men may therefore not want to marry her. He had not looked for a husband for her because the appellant could have found a husband herself. After some confusion the appellant's father stated that his other daughter got married in 2012 and went to Spain in 2014. Prior to Sindhu moving to Spain she lived with the appellant in the family home in Nepal. Both his sons settled in Hong Kong around 1994. Although in the 2012 appeal the appellant's father said that Hari was planning to move back to Nepal this did not happen as he wanted to continue working in Hong Kong. The appellant's grandmother died in June or July 2017 and her paternal uncle, from whom the appellant's father had 'separated', had his own family. The appellant experienced some problems from drug addicts who harassed her and threw stones at the windows of her home.

15. The appellant's father initially claimed that her serious motorcycle accident occurred after he had entered the UK. He then explained that he might have forgotten when this occurred. He did not know whether the appellant had undertaken any further education since she stopped attending the Dillibazar Kanya Multiple Campus. The appellant did not work on agricultural land owned by her family, which was located in a village and not in Kathmandu. In response to questions from me the appellant's father confirmed that they only communicated by telephone and not the Internet. Although the appellant undertook a hairstylist course she was unable to find a job. In re-examination the appellant's father explained that his brother lived with his wife, his son his daughter-in-law, his daughter and grandson.
16. The following is a summary of the evidence contained in the statement written by the appellant's mother. The appellant has always been dependent on her and her husband for financial and emotional support. She and the appellant used to spend a considerable amount of time together in Nepal. They used to eat their meals together and would go on holiday together visiting family and friends. The appellant's mother waited nearly 2 years to enter the UK pursuant to her grant of ILE because she could not leave the appellant on her own and hoped that the appellant's previous application would be successful. She and her husband travelled back and forth to Nepal on numerous occasions to see the appellant and it was very difficult to leave her behind when they returned. When she first came to the UK pursuant to the grant of ILE the appellant's mother felt she had no choice. The appellant's mother claims that she does not have the courage to live without her beloved daughter and that her heart is torn to pieces. She is anxious about the appellant's safety given that she lives on her own and that she has been facing harassment. The appellant's mother had to look after the appellant and her siblings when their father was serving in the Gurkha Reserve Unit for almost 10 years. Although the family had some relatives in their village they had their own financial problems and it was the duty of the appellant's parents to look after her and find an appropriate match for her.

17. The following is a summary of the appellant's mother's oral evidence. She and the appellant sometimes spoke daily, sometimes every other day. They communicated by telephone. The appellant's mother produced a number of standard phonecards that she would use to telephone the appellant. She last visited the appellant in November 2017, returning in December 2017. She did not go in February 2018 because they did not have enough money, because she had only been there 22 days beforehand, and because her husband would deal with the hospital and the x-rays. The appellant's mother wanted the appellant to live in the UK because she was very worried about her, and because the appellant was alone and because there was no one to look after her and her husband. Prior to the commencement of cross-examination the appellant's mother became tearful and emotional and I gave her some time to compose herself before resuming of the hearing.
18. In cross-examination, after describing the immigration history of her other children, the appellant's mother explained that children in Nepal normally lived with their parents until they got married. Although there was no cultural expectation that the young woman should not live alone, a young woman could not live with other people if not married. The appellant's mother was aware of the harassment problems her daughter was having and had advised her to stay indoors, to stay calm and not to mix with others. The appellant used to take a micro-bus and 3-wheeler transport when available to her college. She stopped studying around 2014/2015. The appellant's mother confirmed that the appellant's grandmother died in June/July 2017, and that the appellant's paternal uncle was more than 84 years old. He could not look after the appellant as he was often in hospital and his family had their own problems and they had to look after their own family first. The appellant could either get married through a love match or if a boy's family made overtures about marriage. Neither had occurred in respect of the appellant. It was suggested that the appellant's mother and her husband were exaggerating the appellant's difficulties because they wanted her to have a better life outside Nepal. The appellant's mother said that they could look after the appellant when she came to the UK and that she would be able to look after them. In response to questions from me the appellant's mother said she did not worry about her other daughter as she was married and was looked after by her husband. At this point the appellant's mother again became tearful. In re-examination she explained that she always worried about the appellant who was alone. She did not stop the appellant from getting married.
19. I heard submissions from both representatives and reserved my decision.

Findings of fact and reasons

20. Having set aside the decision of Judge Meah, I must approach the earlier decision of Judge Beg in accordance with the *Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka Lanka** [2002] UKIAT 00702 principles. I regard

Judge Beg's decision as my starting point. Although not binding on me I am not hearing an appeal against it and, as an assessment of the matters that were before Judge Beg it should simply be regarded as unquestioned, although it may be built upon. I must however also take into account, for the reasons given in my 'error of law' decision, the possibility that Judge Beg may have too restrictively interpreted the principles enunciated in Kugathas and that she may have set too high the threshold needed to demonstrate family life between an adult child and her parent (applying Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320, (Singh & Anor v Secretary of State for the Home Department [2015] EWCA Civ 630, PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612, and Butt v Secretary of State for the Home Department [2017] EWCA Civ 184). I additionally note that Judge Beg did not hear oral evidence from the appellant's mother, who remained in Nepal until after the First-tier Tribunal's 2012 decision. A further change in circumstances is that the appellant's brother in Hong Kong is no longer intending to return to Nepal.

21. Paragraphs 24 and 25 of Judge Beg's decision are particularly relevant and I set them out below.

24. The appellant also stated at paragraph 13 of her witness statement that she is "inseparable" from her mother. I find that there is little evidence that the appellant is inseparable from her mother. The fact that she may choose to go shopping with her mother and have a degree of moral support from her mother because she is self-conscious about her scars on her leg does not in itself provide cogent evidence that the appellant's relationship with her mother goes beyond normal emotional ties to a relationship or [*sic*] real committed and effective support. As a [*sic*] adult child I do not find that the appellant's relationship with her parents goes beyond normal emotional ties to a relationship of real committed and effective support and I therefore find that it is not a family life within the purpose and meaning of Article 8. I find that even if the relationship can be deemed to be a family relationship within the spirit of Article 8, I do not find that any interference in the appellant's Article 8 rights would be disproportionate in all the circumstances.

25. I find that the appellant is able to live in a home owned by her mother. She has access to university education. She is financially supported by family members. I find that the appellant has private life which can continue in Nepal. The appellant's mother has never been to the United Kingdom and has chosen to remain in Nepal when the sponsor came to the United Kingdom for settlement. I find that even if the appellant's mother chooses to go and live in the United Kingdom because she has settlement rights, there is no reason why the appellant would not be able to continue living in her own home in Nepal. The sponsor gave evidence that his son Hari who presently lives in Hong Kong is planning to move back to Nepal. The sponsor said that he intends to transfer the family home into the name of his son Hari in due course. There is no evidence that the appellant would not be able to continue living in the same home and to have the additional moral support from her brother.

22. Judge Beg found that the appellant's mother gave her a "degree of emotional support", although the judge did not find that this went beyond normal emotional ties to a relationship of "real committed and effective support" (the

judge wrongly used the conjunctive 'and' rather than the disjunctive 'or'). The emotional support was partly based on the appellant's self-consciousness with the scars from her accident. This is clearly an element of a relationship not commonly seen in those between adult children and their parents. I found the evidence from the appellant's mother to be measured and genuine. She gave her evidence in an open and forthright manner and there was no discernible attempt at any embellishment. Her evidence was consistent with the documents before me and internally consistent with her own evidence. I found the appellant's mother to be a credible witness. The fact that the appellant's mother became very emotional during her evidence is also indicative of the existence of a strong emotional bond between her and the appellant, although it is clearly not determinative.

23. Until her mother entered the UK in 2012 she and the appellant had always lived together. The mother's evidence that she and the appellant went shopping together, would eat together and holiday together was not challenged and is, in any event, inherently plausible. In light of my evaluation of the manner in which the appellant's mother gave her evidence I accept that they have a close relationship. This is reinforced by the fact that the appellant's mother waited nearly 2 years to enter the UK following her grant of entry clearance so as to remain with her daughter.
24. I have no reason to doubt the appellant's assertions in her statement that she does feel lonely, desperate and sad, and that she cries a lot when she speaks to her parents, evidence that was corroborated at the hearing. The appellant had always lived with her mother and it is entirely plausible that she would have developed a strong emotional relationship, particularly having undergone a serious and traumatic motor vehicle accident in the past. I additionally note that it was the appellant's mother who would have raised her whilst the appellant's father was serving in the Gurkha Reserve Unit in Brunei for nearly 10 years after being discharged from the British Army. This suggests that the appellant's mother was the principle parent for much of the appellant's formative years and is likely to have reinforced the strength of the relationship between the appellant and her mother.
25. The appellant's assertion that the bike accident still haunts her, although not supported by any mental health evidence, is inherently plausible given the seriousness of the accident. I am satisfied that the appellant's mother has provided a significant degree of emotional support to the appellant following a serious accident. Although there is no medical evidence that the bike accident has any continuing physical effect on the appellant I am satisfied that the accident reinforced the strong parent-child relationship between the appellant and her mother. I take into account that it has been over 15 years since the bike accident. The accident may nevertheless have established a stronger than normal relationship between the appellant and her mother. This is supported by reference to the unchallenged evidence of the high frequency that the appellant and her mother communicate, and the unchallenged evidence that the

appellant's mother has returned to Nepal at least twice a year since entering the UK. It is also supported by the powerful emotion exhibited by the appellant's mother when talking about the impact on her of being separated. I find that the continued separation is having a significant detrimental impact on the appellant and her mother and I accept the mother's vivid description that her heart "is torn into pieces."

26. The letter from Dillibazar Kanya Multiple Campus dated 26 August 2013 indicates that the appellant was in the 3rd year of a three-year Bachelor's Degree and that she participated in several extra-curricular activities. The appellant's attendance at university and her involvement in extracurricular activities suggests that she has established a private life of her own. The more developed a person's private life is, the greater the probability that they are not dependent on a parent or parents. The evidence that the appellant has attended university until, at the very least, her 3rd year, and her involvement in extracurricular activities suggests that she has a relatively developed private life. There is however no further evidence of the nature and quality of the other private life relationships she has developed. I remind myself that the fact that a person may have a relatively developed private life does not exclude the concomitant existence of strong emotional dependency on close family members. I additionally note that the appellant's grandmother, who previously lived close by and from whom the appellant may have been able to obtain some degree of emotional support, died in June/July 2017. I also note the unchallenged evidence that the appellant's aged paternal uncle is not in a good state of health and that his family have their own priorities.
27. Although Judge Beg found that the appellant was able to travel, study and work between 2004 and 2011, she did not find that the appellant had actually worked. Indeed, Judge beg found, at [25], that the appellant was financially supported by family members. Both the appellant's parents maintain that she has never worked and the appellant's financial dependency on her parents was not challenged by Mr Jarvis. This is further confirmed by a number of documents, including the letter from Dillibazar Kanya Multiple Campus dated 26 August 2013, and the various consistent money remittal slips relating to funds sent by the appellant's parent to her. I therefore find that the appellant is financially dependent on her parents.
28. I find that the appellant has persuaded me that, on the balance of probabilities, she has not remained single in an effort to demonstrate emotional dependence on her parents, but that she has not been approached by anyone with the designs of marriage and that she has simply not met anyone with whom she would wish to be in a relationship. The fact of being single does not of course render a person emotionally dependent on a parent. But being single is a factor that I am entitled to take into account as tending to support the appellant's claim that she does have more than the normal bonds of love and affection between an adult and her parents.

29. Having carefully considered the decision of Judge Beg as my starting point, and having cumulative regard to the above findings, I am satisfied, for the reasons given above, that the appellant is being provided with real or committed or effective support by her mother and that this relationship does contain elements elevating it beyond the normal emotional ties between adult children and their parents. I consequently find there is family life between the appellant and her mother within the terms of article 8(1) ECHR.
30. Having found that there is family life, and in light Mr Jarvis's concession in respect of article 8(2), I find, particularly in light of the historic injustice, that the refusal of entry clearance constitutes a disproportionate interference with article 8.

Notice of Decision

The human rights appeal is allowed



1 May 2018

Signed
Upper Tribunal Judge Blum

Date