



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/22670/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC (Skype)
On the 13th October 2020

Decision & Reasons Promulgated
On 21st October 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Miss Narmaya Thapa
(no order for anonymity)

Appellant

And

Entry Clearance Officer

Respondent

For the Appellants: Ms McCarthy of Counsel instructed by Everest Law Solicitors
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal born on the 20th May 1986. She seeks entry clearance to the United Kingdom on human rights grounds; specifically wishes to join her mother Mrs Tiratha Kumari Thapa, the widow of a former Gurkha now settled in the United Kingdom. The application for entry clearance was refused in a decision dated the 10th October 2018.
2. The Appellant's appeal against that decision came before the First-tier Tribunal (Judge Aujla) on the 12th November 2019. By his decision promulgated on the 15th

November 2019 Judge Aujla dismissed both the appeal on human rights grounds. He concluded that the Appellant could meet the requirements of Annex K of the Immigration Rules. Insofar as the Appellant relied on Article 8 'outside of the rules' Judge Aujla did not consider that a family life existed nor accordingly that the decision to refuse entry clearance was disproportionate.

3. The Appellant sought permission to appeal to the Upper Tribunal. Permission was granted by the Upper Tribunal (Judge Finch) on the 27th July 2020.

The First-tier Tribunal Decision

4. That the Appellant could not meet any requirement of the Immigration Rules was not in issue. It was plainly accepted that she could not. That, properly, was the starting point for the First-tier Tribunal's enquiry.
5. From there it proceeded to consider Article 8 'outside of the rules'. The first matter was to consider whether Article 8 was engaged. Applying R (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27 that involved making a finding as to whether the Appellant, by then a 33 year-old woman, shared a family life with her widowed mother. The Tribunal directed itself to the guidance on the point in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Ghising (family life - adults- Gurkha policy) [2012] UKUT 00160 (IAC), Gurung v Secretary of State for the Home Department [2013] EWCA Civ 8 and Ghising & Ors (Gurkhas/BOCs - historic wrong - weight) [2013] UKUT 567 (IAC) and found as follows.
6. The Appellant is a fit and well adult woman who is living alone in the former family home in Nepal. She may feel lonely from time to time, but this does not mean that she is in need of the emotional support of her 79 year-old mother. The Appellant's siblings are all married and living in Nepal and if necessary, she could turn to them for support. Even though there is evidence that the Sponsor is remitting money to the Appellant, it was not accepted that there is any financial dependency here. There is no reason why the Appellant cannot take up work to support herself, "like any other woman of her age in her country". The Sponsor's evidence that she needed her daughter to look after her is contrary to the underlying basis upon which the application was made: ie that the daughter is dependent upon the mother. If necessary, the Sponsor could look to social services for help. It was the sponsor's choice to relocate here. For all of those reasons, the Tribunal was not satisfied that there was, for the purpose of Article 8, a 'family life' between the Appellant and her mother.
7. Having made that finding the Tribunal went on to deal with proportionality in the alternative. It found as follows:

"I find that the interference with the Appellant's family life was caused not by the Respondent's decision but the sponsor's voluntary choice to relocate to the United Kingdom on the 27th February 2012 when she was already 72 years old and the Appellant was 27 years old. In any event, taking the circumstances of the Appellant

and the sponsor into account and the fact that there was no explanation as to why the Appellant was not able to engage in productive and resourceful work and maintain herself like most other people in Nepal who are able to sustain themselves, I find that the interference with her family life with the sponsor was fully proportionate”.

The Grounds

8. The Appellant’s grounds are drafted by Counsel Ms K McCarthy, who identifies multiple errors in approach by the First-tier Tribunal. The point can however be reduced to this: despite the fact that the Tribunal sets out various cases at some length in its decision, it has failed to properly apply the guidance therein, and has moreover failed to direct itself to the last and most significant Gurkha case of all, Jitendra Rai v Entry Clearance Officer (New Delhi) EWCA Civ 320 [2017]. The key findings of the First-tier Tribunal here are squarely contrary to the guidance in Rai.

The Response

9. For the Entry Clearance Officer Mr McVeety submitted that on the facts found by the judge he was entitled to conclude that there was no family life: the bare fact of financial support was not sufficient to demonstrate real, effective or committed support. Mr McVeety placed particular emphasis on the evidence recorded as having been given by the Sponsor at the hearing to the effect that she gives her daughter no emotional support. He submitted that this was the end of the matter and that this alone justified the finding that there was no family life here.

Discussion and Findings

10. The operative law in respect of such applications is summarised by the Court of Appeal in its decision in Rai.
11. In this Article 8 appeal the first question that had to be decided was whether there was between the Sponsor and the adult Appellant a family life capable of engaging the Convention. In Rai the Court of Appeal set out the authorities relevant to this matter:

“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". In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

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".
20. To similar effect were these observations of Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

"24. 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."

12. From these authorities the Court drew two conclusions relevant to the First-tier Tribunal's enquiry. First, that *Kugathas* has been restrictively read and in fact there exists no requirement of 'exceptionality' when considering the family life shared between adult children and their parents. Second, that the language of 'dependency' is unnecessary. What matters is whether the adult child derives real, committed or effective *support* from his parents. This could be in the form of financial, physical and/or emotional support. It is against that legal background that I have evaluated the decision of the First-tier Tribunal.
13. I deal first with Mr McVeety's point on the oral evidence given by the Sponsor. In its summary of her evidence the Tribunal has recorded [at §17]: "she accepted that she did not provide emotional support and help to the Appellant. She was providing no financial help or other guidance". Whilst agreeing that this evidence was starkly contrary to all of the other material in the case, in particular to the Sponsor's own witness statement, Mr McVeety submitted that this was testimony crucial to the outcome, since it would be difficult to see how Article 8 could be engaged if those things were true. The difficulty with this submission is twofold.
14. First of all, the evidence recorded at §17 is squarely contrary to everything that the Sponsor, and indeed the Appellant, had said elsewhere. That the matter does not appear to have been visited in re-examination, or by the Judge himself, strongly suggests that everyone present at the hearing put it down to the confusion of a 79 year-old giving evidence through an interpreter. That this is so is illustrated by her apparent denial that she sends her daughter money, when everyone, including the Judge, accepts that does: remittance receipts were provided.
15. Second, and more importantly, the Judge places no weight at all on this evidence in his reasoning. The Judge instead proceeds on the basis of the case as put - that there continues to be a close bond between mother and daughter - and the documentary evidence which established that Sponsor was indeed financially supporting the Appellant. The case is rejected for another reason entirely, to which I now turn.

16. The reasoning under the heading “consideration and findings of fact” is characterised by an unrelenting focus on one thing: the choices made by the parties. For the reasons succinctly expressed in Rai, I am satisfied that this was an error of law. The question of whether there is, at this moment, a family life between these two adults, is a factual assessment. It does not turn on what they could, should, or might do in the future. It is however clear that instead of focusing on that matter, the First-tier Tribunal instead placed great weight on its assessment that the Appellant *could* work to financially support herself in Nepal and thereby gain her independence from her mother. This reasoning is wholly contrary to the guidance in Rai. The Appellant did not need to establish a dependency of necessity in order to demonstrate that she continued to share a family life with her mother. As a matter of fact, financial support was, and had for many years been, given. There was evidence before the Tribunal – to which I return below – of the strong emotional bond between mother and daughter which, consistent with Nepalese culture, persisted despite the Appellant being an adult. The reference to the Appellant’s health is highly suggestive of the test of exceptionality, held in Rai to be erroneous. The reference to ‘choices’ made by the parties overlooked the extremely difficult financial circumstances faced by Gurkha families like this one. That it *could* be otherwise – the Appellant *could* work, or marry, or never speak to her mother again – was not relevant to the facts as they stood at the date of the decision before the Tribunal.
17. As to proportionality – addressed in the alternative – I am satisfied that the Tribunal erred in failing to give any weight at all to the historical injustice visited upon members of the Gurkha regiment, discussed *in extenso* in the many cases cited by the Tribunal. In the context of this family the salient point was that had the Appellant’s father been permitted to settle in the United Kingdom in 1969 after he had completed his 12 years of active service to the British Army, he would have done so. The Appellant would have been born here, and would be a British citizen. As the caselaw makes clear, the finding that she *could* get a job in Nepal went nowhere near to outweighing that powerful factor.
18. I therefore set the decision of the First-tier Tribunal aside.
19. On the facts before me I am satisfied that the relatively low threshold for engagement of Article 8 is met. The following facts are particularly relevant to whether the Appellant enjoys a family life with her mother:
 - a) According to Nepalese culture the Appellant will remain part of her parents’ household until she marries;
 - b) She remains living in the family home which she has never left;
 - c) Prior to her mother coming to the United Kingdom the two had always lived together, and they were particularly reliant upon one another after the long illness and death of their father/husband;
 - d) The Appellant is living a long distance from her siblings in Nepal;
 - e) The Sponsor is experiencing loneliness and distress without her daughter;

- f) The Sponsor financially supports the Appellant.
20. Applying the guidance in Rai (and other cases cited) I am satisfied that the Appellant had demonstrated that she still enjoys a family life with her mother.
21. As Mr McVeety accepted on behalf of the Respondent, the only realistic outcome from there is for the appeal to be allowed, given the very substantial weight that is to be attached to the historic injustices perpetrated against the Gurkhas. Put simply the consequence of that injustice, for this family, is that Appellant was not born British: had her father been permitted to settle in this country following his discharge from the Gurkha regiment, she would have been born here to a settled migrant.

Decisions

22. The decision of the First-tier Tribunal is set aside for error of law.
23. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.
24. There is no anonymity order.

Upper Tribunal Judge Bruce
13th October 2020