



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/23188/2018

THE IMMIGRATION ACTS

Heard at Field House
On 2nd January 2020

Decision & Reasons Promulgated
On 14th February 2020

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR AMIR GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms A Jaja, instructed by Everest Law Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nepalese national born on 8th February 1993 and appeals against the determination of First-tier Tribunal Judge Cohen who dismissed his appeal against the decision of the Entry Clearance Officer (the "Entry Clearance Officer") dated 26th October 2018. The ECO had refused to grant him entry clearance to settle in the UK as the adult dependent relative of Mrs Ram Kumari Gurung his mother

and sponsor, who is a widow of a former Ghurkha soldier. The application was considered under paragraph EC-DR1.1 of Appendix FM of the Immigration Rules and refused under the Home Secretary's policy as outlined in Annex K IDI Chapter 15 Section 2A 13.2 as amended on 5th January 2015.

2. In sum, the respondent was not satisfied that the relationship between the adults constituted family life and found that any family life could continue in the manner currently enjoyed without interference by the decision.
3. This matter had previously been the subject of appeal in 2011 not least because as at the date of application the matter fell outside the applicable Immigration Rules and the continued exclusion was not a breach of the United Kingdom's international obligations under Article 8. This decision however referred to the authorities prior to **Ghising and Others (Gurkhas/BOCs : historic wrong: weight) [2013] UKUT 567** which followed **Gurung and others [2013] EWCA Civ 8** and **Jitendra Rai v ECO [2017] EWCA Civ 320**.
4. First-tier Tribunal Cohen recorded in his determination that on the day of the appeal he had two similar cases in which Everest Law Solicitors were acting and he noted two identical paragraphs in the witness statements of the different cases.
5. The judge recorded the evidence of the sponsor stating that she remitted funds to the appellant every two to three months for approximately £50 and that the sponsor needed to go to Nepal to access her pension there. She sometimes used the "Hundi" system. The sponsor under cross-examination confirmed that she did not have evidence of the appellant seeking employment and he was educated to higher school level. She stated her son had never worked.
6. The judge made the following findings:
 - (1) There was no provision under the Immigration Rules or policy for leave to enter to be granted.
 - (2) The appellant was the adult child of the widow of a Ghurkha.
 - (3) He would need to show exceptional compassionate circumstances warranting his appeal being allowed (paragraph 25).
 - (4) It was argued that the appellant was totally financially dependent upon the sponsor but there was no evidence to indicate why it was necessary for him to be totally financially dependent as the appellant was educated and in good health and there was no reason why he could not find some form of gainful employment. He lived with his older divorced sister (paragraph 26).
 - (6) The sponsor gave unconvincing evidence why he could not find work and the judge observed that it was "within my knowledge and I put it to the parties that the unemployment rate in Nepal is just 4% and the fact that he lived close to town made his prospects of gaining employment better". (paragraph 27).
 - (7) The sponsor provided some money transfers showing remittance of funds and it was submitted that other funds were remitted through the "Hundi" system but 'there was no evidence to support that claim'. The judge did not accept that

the appellant was 'entirely dependent on the sponsor over the course of the period that the sponsor had been in the UK'. The sponsor had three children who were all remaining in Nepal and she was reliant on a very limited income in the UK herself.

- (8) The appellant's bank account had not been submitted. This was indicative that he was working (paragraph 29).
- (9) The evidence of contact between the appellant and the mother was unexceptional and not beyond the norm (paragraph 30).
- (10) The sponsor was working in the UK and self-supporting and in good health.
- (11) The judge rejected the evidence of the sponsor in part because of the duplicated paragraphs in the sponsor's witness statement and that of another appeal (paragraph 32)
- (12) The father died prior to completing his service and this was put into the balancing exercise in relation to compassionate circumstances and the judge did not find historical injustice in this case had significant weight because the father died before completing his service and thus it did not fall within **Ghising**.
- (13) The judge specifically found that family life did not exist between the parties or that the relationship between the appellant and his adult relative in the UK extended beyond normal family ties bearing in mind he lived with his divorced sister and her children and had formed an independent life in Nepal. The judge found that the appellant was working and they had not lived together since 2010. He lived with other family members. The appellant could keep contact through family visits and modern means of communication.
- (14) The judge did not find the appellant's circumstances were exceptional compassionate circumstances or would be allowed with reference to **R (Agyarko) [2017] UKSC 11**.

7. The grounds of appeal were as follows:

- (i) There was a failure to apply the correct test for family life between adults. The correct question was whether there was support between the appellant and sponsor his mother, which was "real", "effective" or "committed" as set out in **Jitendra Rai v Entry Clearance Officer [2017] EWCA Civ 320** at paragraph 17. Whether it was of need or choice, whole or partial replaceable or not, arguably related to proportionality, not matters which went to whether Article 8(1) was engaged. It was not necessary to look for something extraordinary or exceptional featuring the appellant's dependence upon his parents as a necessary determinant of the existence of family life with them. That elevated the threshold of "support" that is "real" or "committed" or "effective" too high. It was also set out that what may constitute extant family life fell well short of what constituted dependency.

The appeal added that the judge failed to have proper regard to the established binding case law of **Ghising and Others (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 567** and **Gurung and Others [2013]**

EWCA Civ 8 in respect of proportionality. The judge conflated the issues of whether family life existed and proportionality and treated the respondent's immigration policy as if it was part of the Immigration Rules.

The judge erred in his assessment of whether Article 8 was engaged in that he had regard to irrelevant matters.

- (ii) The First-tier Tribunal Judge failed to take into account very relevant evidence that was present and instead rejected financial dependence on the basis of what he saw as being absent. The judge found no evidence of financial dependence because he thought:
- a. The evidence was unconvincing that the appellant could not find a job, but this was not uncommon in Nepal.
 - b. His bank account was not submitted but there was no evidence the appellant had one.
 - c. The evidence of funds did not show he was entirely financially dependent on the sponsor but there were twelve remittances over a period of time.
 - d. The judge supplied his own research in finding or substantiating or providing any basis regarding the employment.
 - e. He rejected the appellant's statements and the sponsor's statement because there were similarities with another statement, but the contents of both paragraphs were common to Ghurkha appeals and there was nothing controversial or contentious about them.

Further, it was argued, the appellant's life with his sister did not exclude him from having a family life with his mother since his birth and whom he was emotionally and financially dependent. The crux of the case was whether there was evidence of more than normal emotional ties as per the case of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31.**

- (iii) There was a failure to perform the proportionality assessment and properly consider the issue of historic injustice. The judge failed to consider family life correctly under Article 8(1) and therefore found it was not engaged and failed to consider Article 8(2) finding there were no countervailing considerations in favour of the respondent's position on the facts of the case. The grounds submitted that if Article 8(1) was engaged the appeal should have been allowed bearing in mind the historic weight and **Ghising and Others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567.**

8. At the hearing before me Ms Jaja submitted, on behalf of the appellant, that the judge had effectively not applied a proper direction or included the legal principles set out in **Jitendra Rai** and failed to take into account the relevant evidence.
9. The previous application for entry clearance, for which the determination was not available, was in fact a joint application between the appellant and his mother. She was granted entry clearance, but the appellant was refused.

10. Ms Jaja submitted that the judge, impermissibly, applied the requirement of 'exceptionality' in considering whether there was Article 8 family life. Further errors consisted of the judge rejecting evidence on the basis of no bank statement and thus the refusal of the appeal on the basis of something not being there. There was a simple explanation in that the appellant did not have a bank statement, but he was not asked.
11. It was also relevant to note that the mother had travelled six times to Nepal, which was relevant evidence as to whether family life continued to exist and to whether there was continued emotional dependency but the judge did not refer to that evidence at all. The judge may well have come to a different conclusion in relation to the financial support of the appellant and the emotional support, had he taken into account all the relevant facts. It was also relevant that the judge had given no weight to the witness statements at all despite the fact that the duplicated paragraphs were merely generic paragraphs and Ms Jaja submitted that they were merely a reiteration of case law.
12. Mr Clarke referred the court to paragraph 17 of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31**. Real and committed support could be evidenced by money but needed more than just financial remittances. By considering substance rather than form it was necessary to look at the way the judge had set out his findings and he only considered the human rights findings from paragraph 35 onwards. He acknowledged that the policy was not determinative of the appeal. Annex K looks at many of the facets of whether someone has family life and whether they are in fact living an independent life. The use of the word exceptional was in relation to the policy guidance and not of what was said in **Rai**.
13. It was clear that the appellant was living with his older sister and the judge found at paragraph 28 that the appellant did have another income stream. It was open to the judge at paragraph 29 to take into account the fact that the appellant had no bank account. There was nothing exceptional in the terms of the level of contact. It was open to the judge to find at paragraph 31 that the sponsor was working and to reject the evidence in the witness statements. In fact, there was very severe criticism of the representatives that the witness statements were not informed what the appellant had actually said, and this was a serious allegation. The judge was right to apply no weight to the witness statements.
14. At paragraph 33 the judge found that the father had died before the discharge and this generated the problem that without family life the appellant could not get to Article 8(2). The reality was that if the father died before discharge, he would never have been deprived of the right to apply for leave to remain.
15. What is found at paragraph 36 from the fact that the appellant lived with his sister chimes was the fact of an independent life and as such he would have unexceptional contact with his mother and it was more likely than not that he was working.

16. It was not a satisfactory way to structure the determination, but it was sustainable in the light of the findings. And it was argued the judge had not taken relevant factors into account but nevertheless the evidence accepted was that the appellant was educated, lived close to a town and it was open to the judge on that basis to consider and find he was living independently.
17. Ms Jaja responded that the judge should have been absolutely clear whether he was looking at exceptionality under the policy or in relation to Article 8.

Analysis

18. In relation to ground (i), I am not persuaded that the judge was merely, from paragraph 26 onwards, applying considerations in relation to the policy, as valiantly submitted by Mr Walker. The judge specifically referred to the Immigration Rules and policy at paragraph 24 and had stated at paragraph 25

"The appellant would therefore need to show that he has exceptional compassionate circumstances warranting his application/appeal being allowed".

19. As pointed out at paragraph 17 of **Rai**

"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".

20. In other words, it was not permissible to elevate the requisite threshold of support, that is real or committed or effective, to too high a threshold approaching exceptionality or to show that the appellant was required to show he was 'entirely' financially dependent on the sponsor as the judge did.
21. At paragraph 28 the judge, however, stated

“The sponsor has provided some money transfers showing the remittance of funds to the appellant. However, it is submitted that other funds are remitted through the Hundi system. There is no evidence to support this claim. I do not find that the evidence of funds remitted show that the appellant has been entirely financially dependent on the sponsor over the course of the period that the sponsor has been present in the UK, particularly noting that the sponsor has 3 children who are all remaining in Nepal and she is on a very limited income in the UK herself.”

22. And at paragraph 30 the judge had this to say, “Evidence of contact between the appellant and his mother in the UK is unexceptional and not beyond the norm.”
23. These findings indicate that the judge has proceeded on the basis that there needed to be some exceptionality in order to constitute family life and is contrary to **Jitendra Rai** and that was an error of law.
24. Ground (ii) argued that the First-tier Tribunal Judge erred in the treatment of the evidence, not least the judge had failed to take into account relevant evidence. It appears that the sponsor’s statement was given no credence as a result of duplicated sections in the witness statements. The judge found at the outset at paragraph [10] “I could not be satisfied that the sponsors had actually stated what was included in their witness statements. I attach no weight to these statements therefore”. There was no explanation from the solicitors who had prepared the statements as to why the judge found identical replicated statements in the personal witness statements of the appellant and sponsor in another appeal but, that said, it would appear from paragraphs 10 and 32 of the decision that the judge has accorded no weight to the statements at all. It is the responsibility of the solicitors to prepare a statement and although I accept that the sponsor would be responsible for reading and signing those statements, the replication of something which was described as “generic” and common to Gurkha appeals, should not preclude consideration of the rest of the evidence in the statements some of which was relevant, pertinent and germane; the evidence should not have been dismissed out of hand.
25. There were various factors raised which were relevant, even on the findings of the judge himself, such as the appellant living in the family home, that were disregarded when considering family life. The judge did not consider whether family life existed at the time of the departure of the sponsor from Nepal and endured beyond it notwithstanding the sponsor having left Nepal when, and under the circumstances she did. The critical question is whether, as a matter of fact, the appellant still enjoyed family life with his sponsor; in relation to this issue the judge failed to take into account the numerous visits made by the mother to Nepal and seemingly her evidence as to support. There is no requirement that the appellant should have been entirely financially dependent on the sponsor as the judge appeared to consider was required at paragraph 28. That the appellant did not have a bank account was not necessarily an indicator that the appellant worked, possibly the opposite, and not necessarily a factor to be taken against the appellant when possibly indicating an overlay of alternative cultural standards. The evidence of the Hundi system transfer was that of the sponsor which the judge appears to have rejected for the reasons

which are not adequately explained and thus sustainable. Further that the appellant lived with his sister and that there were other family members in Nepal did not preclude family life with the sponsor.

26. As such I find that the judge erred in the approach to the evidence and when considering whether family life existed and as a result failed to make the relevant findings and failed to consider Article 8(2) as a result of finding no family life. The judge failed to follow the relevant authority in relation to finding family life and as a result failed, as maintained in ground (iii), to follow the authority on proportionality specifically that of the Court of Appeal in **R on the application of Gurung and Others v Secretary of State for the Home Department [2013] 1 WLR 2546 and in relation to historic injustice**. Taken against the appellant was the fact that the father died before his discharge. That did not preclude the mother from entering the UK as the spouse of a former Gurkha and equally should not have been visited on the appellant.
27. The treatment and assessment of the evidence is such that the findings are materially unsafe.
28. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement. I preserve no findings of fact.

Direction

29. There was considerable criticism of the appellant's and sponsor's witness statements because of the preparation thereof. Fresh witness statements should be prepared and filed and served at least fourteen days prior to any substantive hearing in the First-tier Tribunal.

Signed *Helen Rymington*

Date 20th January 2020