



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-001104
UI-2023-001105
First-tier Tribunal Nos: HU/50518/2022
HU/50158/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 15 June 2023**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**YAM BAHADUR GURUNG
RAN BAHADUR GURUNG
(NO ANONYMITY ORDER MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M West, Counsel
For the Respondents: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 5 June 2023

DECISION AND REASONS

1. The appellants are citizens of Nepal born on 15 February 1991 and 28 December 1981 respectively. They appeal against the decision of First-tier Tribunal Judge Latta promulgated on 6 February 2023 dismissing their appeals against the refusal of entry clearance on human rights grounds.
2. The appellants applied for leave to enter the UK as adult dependants of a former Gurkha soldier, their father ('the sponsor'). The sponsor did not attend the appeal hearing because he was in Nepal visiting the appellants. The appellants were represented and no application for an adjournment was made. It was accepted the appellants could not meet the requirements of the immigration rules and the issue before the judge was whether there was family life under Article 8.

The judge's findings

3. The judge made the following relevant findings:

- “29. I am aware of the guidance in Kugathas v SSHD (2003) INLR 170 where it was held that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members, and that the normal emotional ties between a parent and an adult child would not, without more, be enough.
30. As highlighted above, the Sponsor did not attend the hearing to provide oral evidence. It has therefore not been possible to test his evidence, and to establish whether there are more than the normal emotional ties between parent and child.
31. In the refusal decisions, there is an acceptance by the Respondent that there is some financial support between the Sponsor and the Appellants. However, it has not been possible to test the full extent of the financial support which is provided.
32. In addition to the failure of the Sponsor to attend the hearing, there has also been an acceptance by both Appellants that they resided outside of Nepal for a significant period of time whilst undertaking work.
33. In the case of the first Appellant, he resided in Kuwait between 24 March 2017 and 29 February 2020. With regards to the second Appellant, he resided in Saudi Arabia for work between 10 March 2015 and 12 May 2019.
34. It is not disputed that the Sponsor left Nepal to settle in the UK in 2012. Therefore, the Appellants have both lived and worked apart from the Sponsor, in a country outside of Nepal, for a significant period after he travelled to the UK.
35. In my view, on the evidence presented to the tribunal considered in the round, there is no dependency beyond the normal emotional ties between a parent and adult children in this case. In my view, the Appellants have not established, on the balance of probabilities, that there is family life in this case”

Grounds of appeal

4. The appellants appealed on the grounds the judge failed to attach any weight to the witness statements and the financial remittances from the sponsor to the appellants in Nepal. The judge failed to follow the guidance in Rai v ECO [2017] EWCA Civ 320 and failed to give adequate reasons for his finding that there was no family life between the appellant and the sponsor.
5. It was submitted the judge failed to properly apply Kugathas and to consider the evidence in the witness statements of daily telephone calls, numerous visits by the sponsor to Nepal and the sponsor's loan to finance their travel abroad. The appellants lived in the sponsor's house in Nepal and were financially dependent on the sponsor. There was no assessment of emotional dependency.
6. Permission to appeal was granted by First-tier Tribunal Gumsley on the grounds it was arguable the analysis and reasons for the findings made and the conclusions reached by the judge were inadequate.

7. The respondent submitted a rule 24 response stating the judge attached little weight to the witness statements and the documentary evidence because the sponsor was absent and the evidence could not be tested. It was accepted the appellants had spent a considerable amount of time working overseas and it was open to the judge to conclude the appellants had failed to establish family life with the sponsor.

Submissions

8. Mr West relied on the written grounds and submitted the judge had failed to attach appropriate weight to the witness statements. The finding at [30] was curious and the judge misdirected himself in law. The judge failed to consider the evidence in the witness statements and made no reference to the relevant factors relied on in the grounds. The judge failed to give adequate reasons for the weight he attached to the evidence in the witness statements.
9. The judge failed to consider the documentary evidence and made no reference to remittances from the sponsor to the appellants or to the fact that the sponsor had given the appellants access to his pension. The judge failed to consider the core facts relevant to whether the appellants had established family life with the sponsor. The judge's conclusion at [35] was not supported by adequate reasons.
10. Mr West submitted the appellants lived in the family home when the sponsor came to the UK and they lived in the family home at the date of hearing. The judge had failed to consider Rai at [39]:

“... 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.”
11. In addition, the appellants were unmarried and financially supported by the sponsor who regularly contacted them by telephone and visited them in Nepal. At [30] the judge closed his mind and failed to consider whether there were more than normal emotional ties relying only on factors not in the appellants' favour. The judge had failed to grapple with the facts in the witness statements and his reasons were inadequate.
12. Mr Clarke submitted the grounds were misconceived. There was no presumption in favour of family life. At [30] the judge found it was not possible for the appellants to establish more than normal emotional ties because there was no oral evidence which could be tested in cross-examination. The judge attached little weight to the sponsor's evidence and was entitled to do so. It was the respondent's case that the dependency was not genuine and therefore credibility was in issue. The appellants did not seek an adjournment to enable the sponsor to attend the hearing. The judge was mindful the burden was on the appellants and his finding that they had failed to establish more than normal emotional ties was open to him on the evidence before him.
13. The assertions in the witness statement were not tested. The judge attached little weight to this evidence and was not required to refer to the facts contained therein. The appellants had lived outside the family home and the judge was unable to make a finding in favour of family life because none of the evidence could be tested. The judge found he could attach little weight to the appellants' evidence and then gave reasons for why the evidence did not establish family life.

14. In response, Mr West submitted the judge had adopted the wrong approach in failing to attach any weight to the witness statements and he had failed to give reasons for why he did not accept this evidence. The appellants did not have to establish dependency. Even if the judge attached little weight to the witness statements, he still had to consider the documentary evidence and he failed to refer to it at all. Taking into account all the evidence before the judge, the appellants had established family life with the sponsor.

Conclusions and reasons

15. The respondent did not accept the appellants had established family life with the sponsor and this was the only issue on appeal to the First-tier Tribunal. The burden is on the appellants to establish that family life exists. I am satisfied the judge properly directed himself on the test to be applied at [29]. The appellants had to show real or effective or committed support between them and the sponsor over and above normal emotional ties between a parent and adult child.
16. The hearing before the First-tier Tribunal was conducted by CVP and the sponsor did not attend. The judge was aware he was visiting the appellants in Nepal (see [14]). The appellants were represented and there was no application to adjourn.
17. The decision is brief but it is apparent on reading it as a whole that the judge attached little weight to the evidence in the witness statements. The judge was entitled to so because the evidence could not be tested in cross-examination. The judge gave adequate reasons for why the evidence in the witness statements attracted little weight. There was no material error of law in the judge's failure to refer to factual assertions in the witness statements.
18. The respondent accepted the sponsor provided some financial support to the appellants and therefore any failure to specifically refer to remittances from the sponsor was not material. The full extent of that financial support could not be tested in the absence of oral evidence.
19. It was not in dispute that the appellants had lived outside the family home in Nepal for considerable periods of time after the sponsor came to the UK. This is a relevant factor and the judge was entitled to find this undermined the existence of family life between the appellants and the sponsor. The judge's findings were consistent with the guidance in Rai.
20. The judge gave adequate reasons for why he did not accept the appellants' evidence of family life and relied on evidence which mitigated against it. The judge's finding that the appellant had failed to establish family life under Article 8(1) was open to him on the evidence before him. I find there was no material error of law in the decision promulgated on 6 February 2023 and I dismiss the appellants' appeals.

Notice of Decision

The appeals are dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 June 2023