



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: **UI-2023-002032**
First-tier Tribunal Nos:
HU/54153/2021
IA/10665/2021

THE IMMIGRATION ACTS

**Decision and Reasons Issued:
On the 18 October 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

**PRABIN RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation

For the Appellant: Mr Michael West, Counsel, instructed by Everest Law
Solicitors
For the Respondent: Ms Arifa Ahmed, Senior Presenting Officer

Heard at Field House on 11 September 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Appellant from the decision of First-tier Tribunal Judge Hatton (“the Judge”) promulgated on 5 May 2023. By that decision, the Judge dismissed the Appellant’s appeal from the Entry Clearance Officer’s decision to refuse his human right claim made in his application for entry clearance to the United Kingdom.

Factual background

2. The Appellant is a citizen of Nepal and was born on 25 October 1986.
3. The Appellant made an application for entry clearance on 22 January 2021 as an adult child of his father, Mr Purna Bahadur Rai, a former Gurkha settled in the United Kingdom. The Entry Clearance Officer refused that application on 15 April 2021. The Entry Clearance Officer held that the Appellant was unable to meet the requirements for entry clearance as an adult dependent relative under Appendix FM to the Immigration Rules. The Entry Clearance Officer also held that the refusal of the Appellant's application was compatible with Article 8 of the European Convention on Human Rights.
4. The Judge heard the Appellant's appeal from the Entry Clearance Officer's decision on 27 April 2023. The Judge found that the Appellant was unable to meet the requirements in the Immigration Rules or the policy guidance entitled *Gurkhas discharged before 1 July 1997 and their family members*. The Judge held that Article 8 was not engaged because there was no family life between the Appellant and his father. The Judge dismissed the appeal in a decision promulgated on 5 May 2023.
5. The Appellant was granted permission to appeal from the Judge's decision on 14 June 2023.

Grounds of appeal

6. The pleaded grounds of appeal are directed solely at the Judge's conclusion that there was no family life between the Appellant and his father for the purpose of Article 8. It is contended that the Judge failed to apply the correct test and make relevant findings of fact.

Submissions

7. I am grateful to Mr West, who appeared for the Appellant, and Ms Ahmed, who appeared for the Entry Clearance Officer, for their assistance and able submissions. Mr West developed the pleaded grounds of appeal in his oral submissions. He invited me to allow the appeal and set aside the Judge's decision. Ms Ahmed relied on her Rule 24 response. She resisted the appeal and submitted that the Judge's findings of fact were open to him and disclosed no error of law. She invited me to dismiss the appeal and uphold the Judge's decision.

Discussion

8. The relevant principles relating to family life in the case of adults have been explored in a line of well-known authorities starting from *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 [2003] INLR 170. A helpful distillation of those principles is set

out in *Mobeen v Secretary of State for the Home Department* [2021] EWCA Civ 886, at [44]-[46]. Whether or not family life exists is a fact-sensitive enquiry which requires a careful assessment of all the relevant facts in the round. However, the case-law establishes clearly that love and affection between family members are not of themselves sufficient. There has to be something more. Normal emotional ties will not usually be enough and further elements of emotional and/or financial dependency are necessary, albeit that there is no requirement to prove exceptional dependency. The formal relationship between the parties will be relevant, although ultimately it is the substance and not the form of the relationship that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions.

9. The Judge referred to *Kugathas* and, at [89], held:

“In accordance with the above principles, having conducted a detailed examination of the evidence before me, I am satisfied the Appellant has not demonstrated a degree of closeness with his sponsor/father that engages the ratio of *Kugathas*.”

10. The suggested “detailed examination of the evidence” for this purpose is not apparent from the Judge’s reasoning. The Judge’s decision is quite detailed. The Judge, at [27]-[50], conducted a comprehensive analysis of the Immigration Rules. The Judge also made detailed findings as to the policy guidance, at [51]-[82]. The findings made for the purpose of the Immigration Rules and the policy guidance are not determinative of the question as to whether there is family life between the Appellant and his father. Those findings are not sufficient to hold that there is no family life for the purpose of Article 8.

11. The Judge, at [91], added:

“In view of the Appellant’s manifest failure to meet several of the requirements of that special provision, most notably, his inability to demonstrate emotional and financial dependence on his father [see above], I consider his circumstances are incapable of engaging Article 8(1).”

12. There is no requirement to prove exceptional emotional and financial dependency in order to establish that there is family life for the purpose of Article 8. The Appellant’s failure to meet the requirements of the Immigration Rules and the policy guidance does not automatically mean that there is no family life. The Judge acknowledged, at [87], that the Appellant has received some financial and emotional support from his father. There is, however, no

consideration as to whether the support is effective, real and committed.

13. The Judge, at [94], held:

“In applying the above principles to the present case, I am satisfied that refusing the Appellant’s application does not result in a flagrant denial of Article 8 rights to either the Appellant, his sponsor/father, his mother, or his adult siblings. In so finding, I am satisfied his relatives can continue visiting him in Nepal and/or continue communicating him via remote means. Whilst there was some suggestion in oral evidence that the Appellant’s parents would be precluded from so doing, there is no discernible documentary evidence before this Tribunal, medical or otherwise, capable of corroborating these belated assertions.”

14. This paragraph is under the heading “Article 8(1)” in the Judge’s decision. These matters are not really relevant to the question posed by Article 8(1), which is all about the engagement of the right to respect for private and family life. In any event, there is no test of “flagrant denial” either under Article 8(1) or under Article 8(2).

15. It is well-settled, as emphasised in *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801 [2008] 2 All ER 28, at [28], and *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5 [2009] Imm AR 436, at [22], that the threshold for engagement of Article 8 is low. It merely requires more than a technical or inconsequential interference with one of the protected rights. There is nothing in the Judge’s decision that indicates that this low threshold was appreciated and applied.

16. It follows that, in my judgement, the Judge erred in law in holding that there was no family life between the Appellant and his father for the purpose of Article 8.

17. The Judge, at [95], decided the issue of proportionality in a single sentence. The Judge found that there was no disproportionate interference under Article 8(2) simply on the basis of the finding that there was no family life in this case under Article 8(1). In the circumstances, the Judge’s assessment of the issue of proportionality cannot stand.

18. I entirely accept that I should not rush to find an error of law in the Judge’s decision merely because I might have reached a different conclusion on the facts or expressed it differently. Where a relevant point is not expressly mentioned, it does not necessarily mean that it has been disregarded altogether. It should not be assumed too readily that a judge erred in law just because not every step in the reasoning is fully set out. Experienced judges in this specialised field are to be taken to be aware of the relevant authorities and to be seeking to

apply them without needing to refer to them specifically. In this instance, for the reason set out above, I am satisfied that the Judge's decision is materially wrong in law.

Conclusion

19. For all these reasons, I find that the Judge erred on a point of law in dismissing the Appellant's appeal and the error was material to the outcome. I set aside the Judge's decision in relation Article 8. I apply the guidance in *AB (preserved FtT findings; Wisniewski principles) Iraq* [2020] UKUT 268 (IAC) and conclude that no findings of fact are to be preserved.
20. Having regard to paragraph 7.2 of the Senior President's Practice Statement for the Immigration and Asylum Chambers, and the extent of the fact-finding which is required, I remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than First-tier Tribunal Judge Hatton.
21. The Appellant accepts, as Mr West made it plain, that he is unable to meet the requirements in the Immigration Rules and the policy guidance. The issue for the First-tier Tribunal on remittal is whether the Entry Clearance Officer's decision is incompatible with Article 8.

Decision

22. The First-tier Tribunal's decision is set aside and the appeal is remitted to the First-tier Tribunal for a fresh hearing.

Anonymity

23. In my judgement, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the overriding objective, an anonymity order is not justified in the circumstances of this case. I make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Zane Malik KC
**Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 17 October 2023**