



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-002363
First-tier Tribunal No:
HU/54071/2022
LH/01190/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SHILA DEWAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr M Kashif, Bond Adams LLP Solicitors

For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 19 July 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Nepal. Her appeal against the respondent's decision of 7 June 2022 to refuse her application for entry clearance to the UK as the adult dependent child of her mother, who is the widow of a former Gurkha soldier, was dismissed by First-tier Tribunal Judge Wilding ("Judge Wilding") for reasons set out in a decision dated 3 March 2023.
2. The appellant claims the finding made by Judge Wilding at paragraph [23] of the decision that the appellant was living together with her

husband and that they were enjoying family life together in 2019, is based on an erroneous reading of the evidence before First-tier Tribunal Judge Thew previously. It is said that the evidence before Judge Wilding was that the appellant had been separated from her husband and she had been living at her mother's house for 8 or 9 years. The appellant claims that in considering the evidence of the appellant's mother, Judge Wilding failed to consider the fact that the appellant's mother is 82 years old with deteriorating health and that may explain the lack of clarity in her oral evidence. The appellant claims that the evidence before the FtT was that it is more likely than not that the family life the appellant has with her mother, had resumed and that the appellant's dependence upon her mother was identical to that of her sister Chandra Dewan. The appellant claims she has never worked in Nepal and that the evidence before the FtT established she was living with her mother before her mother left Nepal. The financial dependence has, it is said, continued.

3. Permission to appeal was granted by First-tier Tribunal Judge Dixon on 3 July 2023.

THE HEARING OF THE APPEAL BEFORE ME

4. On behalf of the appellant, Mr Kashif adopts the grounds of appeal. He drew my attention to the decision of FtT Judge Thew ("Judge Thew") promulgated on 27 August 2019 (HU/23702/2018). The appellant in that appeal was the appellant's sister, Chandra Dewan. The evidence before Judge Thew regarding the family is summarised at paragraph [14] as follows:

"In her statement of 8 August 2019 the appellant's mother said that all of their savings had been used up with her husband's treatment. She said that 6 of her children were married but the appellant and one son, Prem Chandra were unmarried. This is in contrast to the appellant's statement which names only four siblings Bishnu, Sita, Balika and Shila as married with their own families. Both statements said that the appellant, the son Prem Chandra and two other daughters, Nira and Mina live in the same house. Both the appellant and her mother said that an application made by Prem Chandra was pending with the Home Office and it was planned that applications would be made by Nira and Mina when there were funds available for the applications. There is therefore some inconsistency about the married status of Nira and Mina but that does not detract from the credibility of the evidence of the appellant's own circumstances which is unchallenged evidence before me." (*my emphasis*)

5. The reference in the decision of Judge Thew to the "appellant's mother" is a reference the sponsor in this appeal, who is also the appellant's mother. The appellant in the appeal before Judge Thew was, as I have said, the appellant's sister. The evidence of the appellant's mother and her sister in the appeal before Judge Thew in August 2019 was that the

appellant was married. There appears to have been some inconsistency in the evidence regarding the marital status of two of the appellant's siblings (Nira and Mina) but there was no suggestion at all, that the appellant was no longer married or that she had returned to live with her mother or was living with any of her siblings.

6. Mr Kashif refers to paragraph [23] of the decision of Judge Wilding:

“Turning to the alternative submission, that since her divorce in 2020 the appellant has rekindled a family life for the purpose of Article 8. I find that the evidence before me does not on balance demonstrate emotional ties beyond the norm. This is in part because of the discrepancies identified above where it is said the appellant's mother have (*sic*) established and enjoyed a family life together for a greater period than the time since she divorced. Indeed, if it is right that at the time of the 2019 determination the appellant and a husband were living together and enjoying their family life together, it is simply impossible for the appellant to have been living in her mother's house for the past 8 to 9 years.”

7. Mr Kashif submits the evidence of the appellant in her appeal before Judge Wilding was that she had been married to her husband for many years and that she has now been divorced for the past three years. The appellant was not a witness in the appeal before Judge Thew previously, and she did not know what the evidence before Judge Thew was. Mr Kashif accepts however that the appellant does not address or challenge the evidence that was before Judge Thew in her witness statement, despite being aware of that decision. When pressed, Mr Kashif was unable to explain why, even if one were to assume that the appellant's mother may have been confused in her evidence because of her age and health, the appellant's sister would not have told Judge Thew in 2019 that the appellant was married and to explain that the marriage had broken down and the appellant had returned to live with her mother.

DECISION

8. Judge Wilding summarised the appellant's case at paragraphs [6] to [9] of his decision. As far as his material to the appeal before me, he noted the appellant is 32 years old and divorced. He noted the appellant was previously married and there are two children of the marriage who are said to live with their father in Nepal. He noted, at [7], that the appellant claims that since the marriage ended, she moved back to the family home and has become once more dependent upon her mother. Judge Wilding heard evidence from the sponsor and his findings and conclusions are set out in paragraphs [12] to [29] of the decision. He recorded at [12]:

“It was common ground between the 2 representatives at the hearing that the focus of this case is squarely on the engagement of Article 8(1) of the ECHR...”

9. Judge Wilding noted, at [13], that Judge Thew found in 2019 that the appellant's sister enjoyed a family life with the same sponsor, their mother. Judge Wilding found the decision of Judge Thew to be of limited assistance because at paragraph [14] of that decision, Judge Thew noted the evidence regarding the appellant here, was that she was married with her own family. Judge Wilding considered the evidence regarding telephone calls between the appellant and sponsor and concluded that the telephone calls show little more than an unsurprising set of communications between a 32 year old and her ageing mother. That finding is not challenged. Judge Wilding also referred to the payments sent by the appellant's mother to her. At paragraph [17] of his decision, Judge Wilding said:

"The issue for me to consider is whether the evidence demonstrates, applying principles from *Kugathas v SSHD* [2003] EWCA Civ 311, shows something beyond the normal emotional ties. What that requires is evidence of "real support", such that it goes beyond normal time between adults and their parent."

10. Judge Wilding rejected the appellant's claim that her family life has continued with her mother at all material times. At paragraphs [18] and [19], Judge Wilding refers to the vague evidence before the Tribunal and the unexplained concerns regarding the chronology advanced by the appellant. In her witness statement dated 16 September 2022, the appellant said:

"3. I would request the Immigration Judge to note that I was married; however, I am now divorced. I had been separated from my husband for many years; however, I have now been divorced for the past three years. I had two children aged 17 years and 12 years from my marriage. My children reside with my husband. My children do not live with me as I cannot financially provide for them. I maintain contact with my children once a week or sometimes every two weeks. I meet them once a month. I had in my application stated that I am single; this was because I do not have any family unit of my own anymore. I am now single and dependent upon my mother for everything.

...

9. I have never had my own income to make an independent living. I was born and brought up in Nepal by my parents with my father's support. I have been living in my mother's house for the past 8-9 years as her being my only support." (*my emphasis*)

11. At paragraphs [20] and [21] of his decision, Judge Wilding said:

"20. In the statement the appellant says that she has been living at her mother's house for the past 8 or 9 years with her mother being her only support. This evidence is surprising, given that the 2019 decision of Judge Thew expressly identifies this appellant is living with her husband and live leading their own lives together.

21. Of greater significance is the lack of any explanation to reconcile the discrepancies between what was said before Judge Thew and what is said in this application. The sponsor was unclear as to when the appellant commenced living with her again, initially saying that it was 7 or 8 years ago, before then agreeing that the appellant and her husband lived together in 2019 when her daughter's appeal was heard by Judge Thew. This discrepancy was explored by Mr Khan in cross examination. At first it appeared as if the sponsor was confused as to the question being asked, expressly asking that at the time of the hearing in 2019 was the appellant living with her husband or in the family home, the sponsor's answer was that she was with her husband at their house along with their children. Given this evidence it is impossible to reconcile what is said in the appellant's witness statement."

12. In *Kugathas -v- SSHD* [2003] EWCA Civ 31, at [14], Sedley LJ cited with approval, the Commission's observation in *S v United Kingdom* (1984) 40 DR 196: "Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case.". There is no presumption that a person has a family life, and the Tribunal must consider a range of factors that are relevant. Such factors include a consideration of matters such as the family members with whom the individual has lived, identifying who the direct relatives and extended family of the appellant are, the nature of the links between them, the age of the applicants, where and with whom they have resided in the past, and the forms of contact they have maintained with the other members of the family with whom they claim to have a family life. For the reasons set out by Judge Wilding, it was undoubtedly open to him to reject, as he did at [22], the primary submission made on behalf of the appellant that the relationship between the appellant and her mother and the dependency claimed, has gone beyond the normal emotional ties and has never been severed since the appellant became an adult. The appellant does not challenge that primary finding.
13. The focus of the grounds of appeal and the submissions before me has been upon the alternative claim made by the appellant that since her divorce in 2020, the appellant has rekindled a family life with her mother for the purpose of Article 8. To that end, there was inconsistent evidence before the Tribunal. On the one hand, Judge Wilding noted that in 2019 the appellant's mother and sister had plainly claimed the appellant was married and there was no suggestion she had returned to live with her mother. In contrast, the appellant claimed she had been separated from her husband for many years and that she has been living in her mother's house for the past 8-9 years and her mother is her only source of support. The two claims are difficult to reconcile and cannot both be true. It was for Judge Wilding to make a finding and reach a conclusion on the evidence. In my judgement, Judge Wilding carefully considered all the evidence before him and it was open to him to conclude that Article 8 is not engaged for

the reasons set out at paragraphs [12] to [29]. He summarised his conclusions at paragraphs [28] and [29]:

“28. I find that the evidence before me does not establish that the appellant enjoys a family life for the purposes of Article 8 with her mother. The dependency does not go beyond the norm, and given the discrepancies identified I am not satisfied that a clear picture has been presented by the appellant as to the family circumstances. Given the discrepancies and credibility issues highlighted above, I also am concerned at the lack of corroboratory evidence in relation to the appellant’s circumstances.

29. There is no schedule of monthly expenditure, no receipts, and no bank statements from the appellant demonstrating her financial circumstances. The money transfer evidence does not in my view establish a financial dependency, and I particularly note that in her sister’s appeal in 2019 evidence was presented before the Judge as to bank statements in Nepal. As a consequence, I reject the assertion made by the appellant, not supported by documentary evidence, that she is dependent, or more exactly that she enjoys ties beyond the normal emotional ones that exist between an adult child and their parents. In all the circumstances therefore, I find that Article 8(1) is not engaged.”

14. Dependency, in the *Kugathas* sense, is a question of fact. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed. The love and affection between an adult child and parent do not of itself justify a finding of a family life. There has to be something more. Each case is fact sensitive, and the existence of family life after an individual has achieved his or her majority is a question of fact without any presumption, either positive or negative, for the purposes of Article 8. It is a question of fact whether the appellant had demonstrated that she had a family life with her mother, which had existed at the time of her departure to settle in the United Kingdom and had endured beyond it, such as to fall within the scope of Article 8.
15. On appeal, the focus must be on the way the judge performed the essence of his task. The Upper Tribunal should not overturn a judgment at first instance unless it really cannot understand the original judge's thought process when the judge was making material findings. I am left in no doubt that the findings made by Judge Wilding were findings that were properly open to him on the evidence before the FtT. The findings cannot be said to be perverse, irrational or findings that were not supported by the evidence. Having carefully considered the decision of the FtT I am satisfied that the appeal was dismissed after the judge had carefully considered the facts and circumstances of the appellant.
16. In my judgment, the appellant is unable to establish that there was a material error of law in the decision of the FtT capable of affecting the outcome, and it follows that the appeal is dismissed.

NOTICE OF DECISION

17. The appeal is dismissed.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 July 2024