



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004365

First-tier Tribunal No: LH/00382/2023
and HU/59318/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SUNITA SHRESTHA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr J. Gazzain, Counsel, instructed by Bond Adams LLP
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

Heard at Field House on 27 August 2024

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Nepal. On 6 May 2022, she and her mother applied for entry clearance. Her mother's application was granted under discretionary arrangements for widows of former Gurkhas discharged prior to 1 July 1997 and she relocated to the UK, but by the Respondent's decision dated 19 October 2022, the Appellant's application was refused. The Appellant did not fall within the terms of the discretionary arrangements relating to adult children of a Gurkha and refusal of entry clearance was not considered to breach Article 8 ECHR.
2. The Appellant appealed to the First-tier Tribunal ("FTT") on the basis that the refusal breached her rights under Article 8 ECHR, conceding that she did not fall within the discretionary arrangements. By a decision dated 30 July 2023, the

Appellant's appeal was dismissed by the FTT. She now appeals with permission dated 20 June 2024 to this Tribunal.

3. It has not been suggested that any anonymity order should be made in this appeal, and I do not consider that there is any aspect of the appeal which would outweigh the interests of open justice.

Decision of the FTT

4. As recorded at [7] of the FTT decision, the key issue before the FTT was whether Article 8(1) was engaged. If so, the well-known historic injustice done to Gurkhas and their family members would be the determining factor with respect to proportionality and Article 8(2).
5. At [33], the FTT reminded itself that it was for the Appellant to establish, on the balance of probabilities, the factual circumstances on which she relied and that Article 8(1) was engaged. At [34], the FTT reminded itself that the threshold for the engagement of Article 8(1) is a low one. No criticism is made of these self-directions on this appeal.
6. Ultimately, the FTT concluded that the Appellant's Article 8(1) rights were not engaged. The 'findings' section of the decision is to be found at [34]-[39] of its decision. In summary they were as follows:
 - a. The outcome of the appeal turns on whether Article 8 is engaged. This is a low threshold. If it is, that is determinative as refusal would be disproportionate in light of the historic injustice perpetrated against the Brigade of Gurkhas.
 - b. This requires a factual findings as to the engagement of Article 8. That is often a straightforward exercise, but that is not the case in this appeal.
 - c. Notwithstanding the educational disadvantages experienced by the Appellant's mother and her lack of education in Nepal, she was an unimpressive witness.
 - d. The reality of this case is that the Appellant's mother, as she was permitted to do by reason of the service to this country of her late husband, exercised her right to come to the UK. It was her choice to, in effect, leave behind five female children in Nepal, but to seek to assist one of them to join her here.
 - e. The ultimate test is whether the relationship and factual circumstances are such as to reach the low threshold for Article 8(1) to be engaged. The Appellant chose to live and work in Malaysia for a period of eight years; she appears to have been successful in her receipt of earnings, in that she was able to send funds to her family members in Nepal, including her mother. The Appellant clearly had that ability and it could have been said then that there was financial dependency of the mother and four sisters upon the Appellant's remittances from Malaysia.
 - f. The Appellant returned to Nepal and a capital loan was raised for which repayment was required. It appeared that the Appellant was able to generate some income in Nepal from the apparently limited work she undertakes.
 - g. Those circumstances were said to have altered the overall circumstances of the family unit such that the Appellant is now dependent upon remittances from her mother. However, the FTT did not find that the circumstances and evidence established, even to the lower threshold that

Article 8(1) was engaged. While there may be financial remittances, as there were in the past from the Appellant when she resided and earned income in Malaysia, these circumstances do not engage Article 8(1). The mother had been in the UK for a relatively short period. Insufficient detail was provided overall.

Appeal to the Upper Tribunal

Grounds

7. The Appellant sought permission to appeal against the FTT's decision on four grounds, which can be summarised as follows:
 - a. Ground 1: The FTT failed to apply the Kugathas test to unchallenged evidence. This unchallenged evidence showed that in respect of the relationship between the Appellant and her mother there were more than normal emotional ties, having regard to the fact that this can be shown by "real support", "effective support" or "committed support". It is a misconception that, as the Judge held, for support to be demonstrative of family life it must flow from parent to child.
 - b. Ground 2: Departure from the rule in Browne v Dunn (1893) 6 R 67 (HL). If the FTT's treatment of the Appellant's mother's evidence is to be considered a wholesale rejection of her evidence, then fairness required her to be made aware of the implication that their evidence was untrue.
 - c. Ground 3: The FTT relied on immaterial considerations, namely (i) the mother's choice to voluntarily separate from the Appellant; and (ii) the relatively short period that the mother has been in the UK.
 - d. Ground 4: The FTT elevated the test for the existence of family life into one of necessity.
8. Permission to appeal was refused by the FTT, but granted on all grounds by the Upper Tribunal in a decision dated 20 June 2024.
9. The Respondent filed a response to the appeal pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It submits in summary as follows. In relation to Ground 1, it contends that on a fair reading of the FTT's decision, Kugathas was properly applied. As to Ground 2, there was no breach of the rule in Browne v Dunn. As to Ground 3, the Appellant's mother's choice to come to the UK is simply recorded as part of the background rather than the operative reasoning. The FTT did not, contrary to Ground 4, apply a test of necessity.

Analysis

Ground 1

10. By Ground 1, the Appellant submits in essence that in determining whether the Kugathas test was met various unchallenged facts were left out of account. Those were:
 - a. that the mother financially supports the Appellant;
 - b. that the Appellant is unmarried;
 - c. that the mother provides the Appellant with land upon which she grows vegetables;

- d. that she houses the Appellant;
 - e. that the Appellant has supported her mother;
 - f. that the Appellant and her mother applied for settlement in the UK at the same time;
 - g. that the mother misses the Appellant;
 - h. that the Appellant intends to support her mother on settlement in the UK; and
 - i. that the mother has remained in regular contact with the Appellant since her arrival in the UK.
11. Mr Gazzain also submitted that these unchallenged facts on any rational view were demonstrative of family life, applying Kugathas, such that the conclusion that family life was not engaged was not one rationally open to the Tribunal and/or led to the necessary inference that these matters had not been taken into account.
12. I am unable to accept that the Judge left these matters out of account in applying Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, [2003] INLR 170. It is not necessary and may be unhelpful for a judge to refer to every detail in a case: Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC). This is particularly so in relation to facts not in issue. In any event, unless there is compelling reason to the contrary I am bound to assume that a trial judge has taken the whole of the evidence into consideration: Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2(iii)]. Financial support provided to the Appellant by her mother is referred to in [38] of the FTT's decision. That the Appellant is unmarried formed part of the Appellant's counsel's submissions, as recorded by the Judge at [31]. I have no reason to doubt the FTT considered that as part of those submissions. The mother is recorded by the FTT in [16] as having confirmed that the Appellant was living in the family home in Nepal rent free. Again, there is no basis for me considering that this was then left out of account by the FTT in reaching its conclusions. The FTT considered the Appellant's previous support of the mother at [38]. Contact between the mother and the Appellant is referred to in [14], [15],[26] and [30] of the FTT decision. In respect of the other matters relied on, whilst not referred to expressly in the FTT's decision, there is in my judgment no reason, still less a compelling one, to depart from the assumption that the FTT took them into account.
13. Further, I do not accept that these unchallenged matters, taken together, necessarily demonstrate more than normal emotional ties between the Appellant and her mother, such that either the decision to the contrary was perverse, or that an inference should be drawn that they were left out of account. As Ms Cunha submitted on behalf of the Respondent, they are individually and cumulatively all matters capable of being consistent with there being *normal* emotional ties between a mother and her adult daughter.
14. The Appellant submitted further in the Grounds ([7]-[8]) that the FTT erred in treating the Appellant's support while in Malaysia to her mother and family in Nepal as, not just irrelevant to, but apparently disprobative of, the existence of Article 8 family life. This is said to be flawed on the basis that the FTT considered that, for support to be demonstrative of family life, it must flow from the parent to their offspring. With respect, that mischaracterises the FTT's reasoning and ignores the case which the Appellant advanced before the FTT. The FTT did not suggest that support had to flow from mother to daughter. Rather, it was the Appellant's case that it did so, and that this gave rise to family life for the

purposes of Article 8. The Appellant did not suggest that there was Article 8 family life because the mother was dependent on the Appellant's finances. The fact that, as suggested by the FTT, there have been periods when the mother may be said to have been dependent on the Appellant does not mean that the Appellant's case that she is now dependent on her mother is made out. The relevance of the remittances from the Appellant while she was living and working in Malaysia to her mother was, rather, that they were highly indicative of the Appellant as someone capable of living a life independent of her mother. Moreover, given that the FTT did not conclude that the Appellant's mother was dependent (in the Kugathas sense) on the Appellant either at the time she left Nepal for the UK or, more importantly, on the day of the hearing before the FTT, it is difficult to see how this could be material to the outcome of the appeal.

15. Ground 1 therefore fails.

Ground 2

16. In my judgment, Ground 2 is based on a false premise. On a fair reading of the decision there was no wholesale rejection of the Appellant's mother's evidence. The FTT considered the mother to be an unimpressive witness. That does not mean that her evidence was rejected or disbelieved. A natural reading of this in its context in my view is that FTT felt unable to attach much weight to it. That is axiomatically something which the FTT was entitled to do and not something on which cross-examination is required. In any event, the FTT's analysis did not proceed on the basis that the Appellant's mother's evidence was incorrect. Indeed, it is fair to say that there was little disagreement as to the facts. As such the rule in Browne v Dunn does not apply. Ground 2 therefore also fails.

Ground 3

17. By Ground 3, the Appellant submits that the FTT took into account two irrelevant matters: the mother's voluntary choice to separate from the Appellant and the short period of time that the mother had been in the UK.

18. As to the mother's decision to voluntarily relocate to the UK, there are two answers to this submission.

19. First, it seems to me tolerably clear that, as submitted in the Respondent's rule 24 response, the FTT noted the Appellant's mother's choice to relocate to the UK in [36] as part of the background rather than as part of its assessment of whether the test for the engagement of Article 8 is made out. That starts in [37]. That paragraph starts with the FTT's reiteration of the test it is going to apply and then goes on to consider the issues which in the FTT's view are of importance to that issue. This was therefore in my judgment not a matter which the FTT took into account in reaching its conclusion about whether the Appellant and her mother enjoy family life for the purposes of Article 8.

20. Second, assuming contrary to the above that the FTT did take into account the mother's voluntary relocation, I do not accept that this is *irrelevant* as a matter of law and therefore an error of law to have done so. Assessed with all the other evidence in a case, in my judgment the decision to move to the UK leaving adult family members abroad can be indicative of (I put it no higher) whether there exist more than normal emotional ties between them. It is very unlikely ever to be dispositive, and I accept that, as it is put in [13] of the grounds of appeal, "it is

an error to focus *exclusively* on the choice to separate without taking into account the practical and financial realities involved” [italics mine]. I also accept that the choice of a parent to leave their adult child may often not be a matter to which, in light of the other more direct evidence available as to the nature of the relationship between a parent and adult child, much weight can be given. That does not however mean that it is irrelevant as a matter of law.

21. The Appellant’s reliance on Rai v ECO [2017] EWCA Civ 320 at [38] in support of the proposition that this factor is irrelevant as a matter of law is, in my view, misplaced. Rai was a case in which the Upper Tribunal had focused on the decision voluntarily by the parents without their adult child *to the exclusion of* the other family circumstances demonstrative of a family life when the parents departed Nepal and which had endured beyond it. That was the error of law. Here, by contrast, the FTT did consider the family circumstances, in particular the financial remittances sent by the mother and the fact that the Appellant had lived and worked in Malaysia for a number of years, independently from her mother and other family members in Nepal, as well as the other matters set out in [10] above.
22. As to the FTT’s comment at the end of its Findings section (at [39]) that “[t]he sponsor has been here for a relatively short period. Insufficient detail was provided overall”, I accept that, read in isolation this is a little Delphic, but, as the Grounds accept, this needs to be seen in context. That context includes both the reference to financial remittances that preceded it (“There may indeed be financial remittances, as there were in the past from the appellant when she resided and earned income in Malaysia...”) and the Respondent’s submissions that were made to which this aspect of the FTT’s decision is, in my judgment, plainly its response. These are contained in [24] and read, “The appellant had not shown that the relationship here was over and above a normal parent to adult child relationship... Some financial receipts have been provided, but they are very limited... On what exactly is money spent by the appellant?” In context, it seems to me clear that the FTT was here expressing agreement with the Respondent’s submission that the remittances were limited, in the sense that there were not many of them, because the mother had “been here for a relatively short period.” That is not in my view meant as a criticism of the evidence, rather, it is simply a description of the limited nature of the evidence of financial dependence available on which the FTT had to make its assessment. The “insufficient detail” by contrast, is a criticism that the evidence of what the remittances were used for was thin, as the Respondent had submitted, and led to the conclusion that the Appellant had not established through them that there was financial dependence on her mother in the Kugathas sense. Properly understood in context, neither the short period of the mother’s presence in the UK nor the insufficient detail were legally irrelevant to the decision.
23. Ground 3 accordingly fails.

Ground 4

24. By Ground 4 the Appellant submits that the FTT applied a necessity test. There did not seem to be any dispute that, if that were so, that would amount to an error of law.
25. In assessing this ground I must assume, unless I detect an express misdirection, or unless I am confident, from the FTT’s express reasoning, that the FTT’s

decision must be based on an implicit misdirection, that the FTT, as a specialist tribunal, knows, and has applied, the relevant law: ASO (Iraq) v Secretary of State for the Home Department [2023] EWCA Civ 1282 at [41].

26. The Appellant relies on the following passage in [37] of the FTT's decision as demonstrating that the FTT applied such a test: "The appellant chose to live and work in Malaysia for a period of eight years. She appears to have been successful in her receipt of earnings to the extent that she was able to send funds to her family members in Nepal, including to the sponsor, then residing in the country. The appellant clearly had the ability and it could be said that then there was financial dependency of the sponsor and four of her children upon the remittance forwarded from Malaysia by the appellant."
27. I am unable to detect any application of a necessity test in this passage. The fact that the Appellant was able to live and work wholly independently of her mother was plainly relevant to whether there could be said to exist elements of dependence by the Appellant on her mother, or whether the Appellant's mother provides the Appellant with real, effective or committed support. That is, of course, not the end of the analysis, as the Appellant moved back to Nepal and ceased her work in Malaysia, but in the absence of some relevant change in circumstances the Appellant's ability to travel to a foreign country and successfully obtain work there is plainly relevant to whether she can be said to be dependent - in the Kugathas sense - on her mother. In my judgment, there is nothing inconsistent between the Kugathas test for the engagement of Article 8(1) between a parent and an adult child and the Judge's reasoning in this passage, either expressly or implicitly.
28. Ground 4 therefore also fails and the appeal must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law and shall stand.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 September 2024