



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004183

First-tier Tribunal Nos: HU/60176/2023
LH/03595/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 January 2025

Before

UPPER TRIBUNAL JUDGE KHAN
DEPUTY UPPER TRIBUNAL JUDGE ANZANI

Between

NAR BAHADUR TAMANG
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West, Counsel instructed by Gurkha Solicitors Ltd
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 16 December 2024

DECISION AND REASONS

Introduction

1. This is an oral decision given in the appeal brought by the appellant, a citizen of Nepal. He made an application on 9 June 2023 seeking entry clearance to settle in the United Kingdom as a dependent adult child of Mr Birkha Bahadur Tamang (his father and sponsor) under Article 8 of the European Convention on Human Rights (ECHR) and Appendix FM (paragraph EC-DR.1.1.) and Annex K IDI Chapter 15 Sec 2A of the Immigration Rules.
2. The sponsor is a former Gurkha soldier who settled in the United Kingdom on 2 July 2018. At the time of his application, the appellant was aged 39 years old and was still living in the sponsor's house in Nepal with his sister. The appellant was married in 2020 and divorced in 2022.

3. The respondent refused the application for entry clearance on 19 July 2023. The appellant appealed the respondent's refusal of entry clearance on human rights grounds to the First-tier Tribunal. His appeal was dismissed on 30 May 2024 by First-tier Tribunal Judge Taylor. It is this decision which is now challenged by the appellant.

Decision of the First-tier Tribunal

4. The First-tier Tribunal heard evidence from the sponsor who attended in person. He said the appellant married in 2012 and together with this wife lived in the sponsor's house. They had no children which caused a number of arguments. This resulted in his daughter-in-law moving out of the house. They separated for 2-3 years prior to finally divorcing in 2022. The appellant remained in the family house after his wife left. He was single and dependent on the sponsor.
5. The sponsor stated that he and the appellant had always lived together as a family unit and since 2018, had remained in contact using phone and social media. Without his financial support, sent via money transfers to the appellant, he would be unable to support himself. The sponsor and his wife had visited Nepal many times staying together in the family home, for about a month or more at a time, and would leave money for the appellant and his siblings expenses.
6. The sponsor said that due to a lack of work in Nepal, the appellant went to Qatar for work between 14 May 2019 until 9 October 2020. However, due to the meagre sum he was paid, he was not able to send much money back to Nepal.
7. The First-tier Tribunal's key findings are to be found at [13] to [17]. The judge noted it was not disputed that the appellant would be unable to meet the requirements of Appendix FM as a dependant relative or the requirements of Annex K of IDI Chapter 15, as the Annex required the appellant to be between the age of 18 and 30 years (he was 39 years old at the date of his application). The appeal therefore fell to be decided outside the Immigration Rules on the basis of Article 8 ECHR and the case law of Gurung [2013] ECWA Civ 8; Kugathas [2003] Civ 31; Ghising [2013] UKUT 567 and Rai v Entry Clearance Officer [2017] EWCA Civ 320.
8. In the context of family life, the judge found at [15] that he was satisfied this was met prior to the sponsor moving to the UK. He went on to state '*...I am required to focus on the position as at the date of the decision. Applying the case of Rai, in Gurkha cases, the family life does not cease when the sponsor travels to the UK, so long as he continues to support the appellant, and the appellant does not live an independent life*'.
9. At [16] the judge further stated '*The appellant may have returned to Nepal in October 2020 but by this time he had spent a year and half clearly not in the household or a dependant of the sponsor, and a married man, with his spouse as his next of kin. By the time of the application he was aged 39.....while I accept the strong guidance of the case law ...the family life which may have existed prior to the sponsor coming to the UK in 2018, came to an end in 2019 when the appellant went to live in Qatar. The appellant may well have returned to the family home, but it would stretch credulity to suggest that a married man who left the family home to work abroad, may restart family life as a child of the family, at the age of almost 40, if he returns at the end of a work engagement.*

Family life cannot be considered a variable status depending on the appellant's work commitments throughout his life. I am not satisfied that the appellant has demonstrated the required family life for the purposes of Article 8 ECHR at the time of the application.

10. In respect of financial support, the judge acknowledged at [12] that the respondent had accepted the sponsor provided financial support. He further found at [17] that any funds sent back to Nepal by the appellant during his time in Qatar must have been intended for the other family members or his wife, but not for the sponsor, as he had already left for the UK. Accordingly, no two-way dependency with the sponsor was established.
11. It is against this background that the appellant appeals to the Upper Tribunal.

Grounds of Appeal

12. The grounds of appeal put forward by Mr West who appears today on behalf of the appellant are twofold:

Ground 1: has several strands but at its core asserts that the judge arguably misdirected himself in law regarding Article 8 in his reasoning at paragraph [15] when he stated, in applying the case of Rai in Gurkha cases, family life does not cease when the sponsor travels to the UK so long as he continues to support the applicant *and the appellant does not live an independent life*.

The appellant submits this is not the case law of Rai; at paragraph 17 of Rai the Court of Appeal upheld the test as laid down in the Kugathas decision of 2003 which simply required that there need be 'real or committed or effective support'. The judge misdirected himself by wrongly finding that in order for Article 8 ECHR to be engaged there need be continued support and the appellant must not be leading an independent life.

Further, in respect of the finding at [16] that the appellant went to work in Qatar and that it would stretch credulity to suggest that a married man who left the family home to work abroad may restart family life as a child of the family at the age of 40, if he returns from the end of a work engagement, the appellant submits the finding is unsustainable in light of the correct approach to family life as per Suroj Rana v Entry Clearance Officer [unreported decision of the Upper Tribunal dated 28 May 2024] [UI-2022-006545]. At [17] the decision states '*as a matter of law, there was no requirement in an Article 8 case involving adults to demonstrate continuous (in the sense of unbroken) family life. A break in family life would potentially be relevant in the factual assessment but was not fatal*'.

Lastly, the appellant submits that the judge incorrectly determined the appeal looking at the facts at the date of the decision (at [15]) when the Tribunal should have been considering the facts as of the date of the hearing (28 May 2024) given it was an Article 8 appeal; had the First-tier Tribunal correctly considered the facts at the date of the hearing (28 May 2024), as opposed to the date of the respondent's decision (July 2023), the facts were arguably stronger; the appellant's marital relationship had been over for 5 years by the time of the hearing as they had separated 2-3 years prior to their divorce in 2022, from around 2019. In this regard, the judge was factually incorrect at [15] when he stated that the ex-wife '*had a separate family unit until 2022*'.

Ground 2: asserts that the judge failed to take into account the financial remittances sent by the sponsor to the appellant in his findings and reasoning in terms of the proportionality test.

13. Permission to appeal on both grounds was granted by Upper Tribunal Judge Hoffman on 3 October 2024. In relation to ground 1, he was satisfied that ground 1 was arguable and that the judge had failed to have proper regard to the test in Raj. It was also unclear whether the judge had considered the facts at the date of the hearing or at the date of the application. In terms of ground 2 which dealt with the remittance receipts, he was less convinced of the merits.
14. No Rule 24 was filed by the respondent.

Discussion and Analysis

15. We have not set out the submissions of either party. However, our analysis of the case reflects the submissions they made. We wish to express our gratitude for the high quality of the submissions.
16. Turning to ground 1, although there are several discrete strands to this ground, the key issue turns on the interpretation of Raj, the effect of the appellant's work absence in Qatar on the continuation of family life with the sponsor, and the correct date for the consideration/assessment of the facts.
17. In respect of the correct timing for consideration of the facts concerning an Article 8 appeal, the appellant submits the judge should have considered the facts of the case as of the date of the hearing (28 May 2024), as opposed to the date of the application (9 June 2023) or the date of the respondent's decision (19 July 2023). Had the judge taken this approach, the facts demonstrating the re-kindling/resumption of family life between the sponsor and the appellant were arguably stronger by reason of approximately one additional year of support.
18. In our view, although the judge references at [15] that he must focus on the date of the *decision* it is unclear exactly on which date he considers/assesses the facts. That is evident from the face of the judge's decision. It is relevant because it goes to the question of a resumption of family life between the sponsor and the appellant on his return from Qatar.
19. The judge said at [16] that the appellant went to Qatar for work, he left the family home in May 2019 to work in Qatar and did not return until October 2020. Following his return the judge makes it abundantly clear that he takes the view there was no resumption, rekindling, re-engagement of family life as this would stretch 'credulity'.
20. It is therefore clear from the decision that the judge did not consider that family life was resumed when the appellant returned from Qatar in October 2020, notwithstanding that the appellant returned to live in the sponsor's home and was receiving financial support. It would appear that from October 2020 to the date of the hearing on 28 May 2024, the judge did not take into account any support provided by the sponsor as he considered this had ended when the appellant left for Qatar in May 2019.
21. We find several legal points are pertinent here. The first issue relates to the correct date for the facts to be assessed. We have been referred to the decision

of **Rai v Entry Clearance Officer** at [39]. This states “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*”.

22. We find there are two timing periods in the decision of Rai at [39]. The first period refers to whether family life existed at the point of departure. On the current facts, the judge accepts that family life did exist up to the point of departure; at [25] he said “*While I may be satisfied that the appellant and his parents enjoyed family life in Nepal before they moved to the UK*”. The second period in Rai at [39] goes on to say “*and had endured beyond it*” which in the current context must be taken to mean until the date of the hearing, not the date of the application or the respondent’s decision.
23. We find the failure to assess the facts at the correct date, namely, the date of the hearing was a misdirection which constitutes a material error of law which led to the judge failing to consider the possibility of a resumption of support to the appellant by the sponsor following his return from Qatar.
24. Turning to the next contested issue in ground one, the judge states at [15] “*Applying the case of Rai, in Gurkha cases, the family life does not cease when the sponsor travels to the UK, so long as he continues to support the appellant, and the appellant does not live an independent life*”. The appellant argues that the judge misdirected himself by wrongly finding that in order for Article 8 ECHR to be engaged there need be continued support and the appellant must not be leading an independent life.
25. Having had regard to the decision in Rai, we find there is no additional requirement that the appellant does not live an independent life. It is not part of the decision in Rai, nor of Kugathas. The judge clearly misdirected himself in law by adding an additional requirement which does not exist. We find this amounts to a material error of law that has infected the judge’s assessment of facts when considering the continuation of family life.
26. We come next to the last part of ground one, which is whether a resumption of family life was possible following the appellant’s return from Qatar. The judge did not consider this question because at [16] he said it would ‘stretch credulity’ to even consider such a possibility.
27. Before us, Mr West referred to the unreported decision of Suroj Rana v Entry Clearance Officer. We are prepared to allow this unreported case to be cited as it meets the conditions set out in paragraph 11.2 of the Senior President of Tribunals, Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, published on 18 December 2018.
28. This unreported decision held at [17] ‘*as a matter of law, there was no requirement in an Article 8 case involving adults to demonstrate continuous (in the sense of unbroken) family life. A break in family life would potentially be relevant in the factual assessment but was not fatal*’.
29. The case therefore makes it clear there is no automatic break in family life. Relying on the earlier decision of Shushma Shrestha issued on 9 February 2024 in its reasoning, the Upper Tribunal concluded as a matter of law there was no requirement in an Article 8 case involving adults to demonstrate continuous in

the sense of an unbroken family life. A break in family life would potentially be relevant in the factual assessment but was not fatal and that is the critical point of the case.

30. We find the judge was in error by adopting the strict view that the appellant's work break in Qatar was fatal to continuing family life when it was only to be treated as a matter relevant in the factual assessment of family life. The judge clearly misdirected himself as to the law and the facts. We find this amounts to a material error of law.
31. Pulling all the relevant matters together concerning ground one, we find the judge's decision involved the making of three material errors of law which infected his reasoning and the appeal outcome.
32. We turn to deal with ground 2 very briefly. This ground relates to the failure of the judge to consider remittances sent by the sponsor to the appellant. Mr West submits that an Article 8 assessment is a very fact-sensitive assessment; see Uddin v Secretary of State for the Home Department [2020] EWCA Civ 338 at [32], and therefore the judge was required to weigh all of the factors in favour of the appellant and to set out his reasoning. The complaint is that the judge did not set out his reasons for not mentioning the remittances.
33. Having looked at the decision as a whole, we take the view the judge did consider the remittances (at [12]) where he acknowledged that the respondent accepted the sponsor had provided financial support; and again at [15] where he rejected the notion of a two-way dependency with the sponsor. The judge's decision is reasonable in its consideration of financial remittances. We do not find that the judge's consideration of remittances involved the making of a material error of law. In reaching this decision, we remind ourselves that there is no requirement for the First-tier Tribunal to rehearse every detail or issue and that appellate courts should be slow to infer that a relevant point has not been taken into account merely because it is not expressly mentioned: see: MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49.
34. We allow the appeal on ground one and dismiss ground two. We set aside the decision of First-tier Tribunal Judge Taylor. Having heard submissions from the respective parties, we are satisfied that this case should be remitted to the First-tier Tribunal to be heard afresh. There are no preserved findings, save for the respondent's acceptance and the judge's finding that family life does exist between the sponsor and the appellant as of the date of the sponsor's departure to the UK.

Notice of Decision

35. The decision of the First-tier Tribunal involved the making of several material errors of law and is set aside. The case is remitted to the First-tier Tribunal to be reheard afresh by a different judge with no preserved findings other than those specifically mentioned at paragraph 34 above.

K.A.Khan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Appeal Number: UI-2024-004183
First-tier Tribunal Numbers: HU/60176/2023
LH/03595/2024

2 January 2025