Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04558/2016
HU/04561/2016

THE IMMIGRATION ACTS

Heard at Field House
On 30th January 2018

Decision & Reasons Promulgated
On 1st March 2018

Before

THE HONOURABLE MR JUSTICE WARBY
UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TEK KUMAR GARBUJA PUN (FIRST APPELLANT)
MISS PUN MANMAYA GARBUJA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondents: Mr Dieu, instructed by NC Brothers & Co Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this decision we shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Pun and Miss Garbuja Pun, as the appellants and the Secretary of State as the respondent.

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2. The appellants are nationals of Nepal and have each appealed against the respondent's decision made on 22nd January 2016 to refuse them entry clearance to the United Kingdom as the children of Mrs Chanamati, their mother and sponsor.

3. The applicants were born on 20th June 1986 and 7th January 1989 respectively and are now 31 and 29 years old. The appellants were born in Nepal and have lived there all their lives. Their father served in the Ghurkhas from 1964 to 1969 and following his discharge from the army returned to Nepal where he worked as a labourer, and helped with farming. During their marriage the sponsor and Mr Pun had six children, all of whom live in Nepal. Sadly, Mr Pun died in 1989 and the sponsor continued to live in Nepal after her husband's death. She came to the United Kingdom in November 2011 following the decision to allow former Ghurkhas and their dependants to settle, and she has lived here ever since. By the time the concession was introduced in 2015, her older children were too old to benefit from the concession. Following a new concession, the appellants applied to come to the United Kingdom. On the sponsor's account, Mr Pun would have come to the United Kingdom after he left the army had the option been open to him.

4. Following a detailed recitation of the facts and her findings, First-tier Tribunal Judge O'Hagan found that a family life existed between the sponsor and the appellants and in the light of **Gurung v SSHD [2013] EWCA Civ 8** and **Ghising (Ghurkhas BOCs - historic wrong-weight) [2013] UKUT 00567** allowed the appeal on human rights grounds under Article 8, ECHR.

Grounds of appeal

5. The Secretary of State applied for permission to appeal against that decision asserting in effect three grounds

   (i) material misdirection of law. The First-tier Tribunal Judge had found the appellants to be dependent upon their mother "emotionally, financially and practically" paragraph 11, although does not appear to have had any regard for the evidence of financial remittances made to the appellants or any evidence of communication such as phone cards, of text messages and the mother's own testimony was that she speaks on the phone with the appellants weekly or fortnightly. It was submitted that this limited evidence did not demonstrate emotional dependence to the **Kugathas** standard. The Entry Clearance Officer did not dispute that some family life existed between the appellant and his sponsors, simply that the evidence did not show elements of dependency beyond the normal emotional ties between adults. It could be considered fairly normal for all adult children to speak with their parents on the phone once a week. There had to be something more. As set out in **AAO and the Entry Clearance Officer [2011] EWCA Civ 840**, paragraph 35

   > *"As for the position of parents and adult children it is established that family life will not normally exist between them within the meaning of Article 8 at all in the absence of further elements of dependency which go beyond normal emotional ties"*

(ii) the judge did not appear to have considered that the mother was on benefits in the United Kingdom and although she may be able to afford some support to the appellants in Nepal where the cost of living was lower that would not be the same in the United Kingdom. The judge had no regard for Section 117B and no findings were made on whether the appellants could speak English or maintain financial independence in the United Kingdom; and

(iii) the judge accepted the mother's assertion that the husband, were it not for the historical injustice of Ghurkha settlement policy, would have come to the UK on his retirement and significant weight was given to that assertion; the judge went on to find in favour of the appellants based entirely on this finding; and as such the judge had failed to make a balanced proportionality assessment.

6. Permission to appeal was granted by First-tier Tribunal Judge Mark Davies, stating that "it is arguable that the judge's conclusions in finding that a family life existed between the appellants and their sponsor is flawed taking into account the guidance given in the case of **Kugathas**".

Legal Policy and Context

7. The applicable principles are well established and were recently reviewed and restated in **Rai (Jitendra) v Entry Clearance Officer** [2017] EWCA Civ 320. Some key points are that:

(1) the burden of proof lies on the Appellant, to show that a family life protected under the European Convention on Human Rights is engaged on the balance of probabilities. The Secretary of State must show that the decision is proportionate;

(2) it is not enough to show the normal emotional ties that would be expected between a parent and their adult child; something more must be shown: **Kugathas and the Secretary of State for the Home Department [2003] EWCA Civ 31**. Sedley said in paragraph 17 of his judgment that

> *"If dependency is read down as meaning 'support', in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support' then it represents … the irreducible minimum of what family life implies"*

(3) one factor that is relevant, though not determinative, is whether the adult child has formed a family of his or her own, **Gurung and the Secretary of State for the Home Department [2013] EWCA Civ 8**;

(4) the judgments in **Kugathas** should not necessarily be read too restrictively;

(5) in the end, the assessment is a holistic one and ultimately as per Lord Dyson MR in **Guring** "[it] all depends on the facts". There should be a careful consideration of the facts in the case;

(6) as Sir Stanley Burnton said in **Singh and the Secretary of State for the Home Department [2015] EWCA Civ 630**

> *"There is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 … the love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There has to be something more."*

The Judge's decision

8. The judge in his/her decision set out the key points why the respondent or Entry Clearance Officer had essentially refused the application. The appellants did not fall within the ambit of the policy and the refusal did not breach the duties arising under Section 8 of the European Convention on Human Rights albeit regard was had to the guidance set out in **Gurung and Others [2013] EWCA Civ 8** and **Ghising (Gurkhas BOCs historic wrong weight) [2013] UKUT 0056**.

9. The judge also recorded that at the hearing she ensured that the sponsor had read the evidence in her statement through the assistance of the court interpreter.

10. The evidence elicited was as follows

    (i) the sponsor had visited Nepal since being in the United Kingdom three times for three months each time;

    (ii) she maintains contact with the children by telephone. She calls them once a week and sometimes every two weeks. Some calls are longer and some shorter. She does not keep in touch by any other means;

    (iii) the sponsor came to the United Kingdom because she was having financial problems in Nepal;

    (iv) she has four sons and two daughters all of whom live in Nepal. She had applied for only two because they were the ones under the age of 30. She was unsure of their level of education but thought they might have studied to grade 7;

    (v) the sponsor explains they did not work but they did help on a neighbour's farm for which they were paid in food. She last visited almost a year ago and they were in good health.

11. The judge identified in his/her analysis, findings and conclusions that the first issue the appellants had to establish was whether they enjoyed family and/or private life in the United Kingdom in order to engage Article 8(1). The judge cited **Jitendra (Rai v Entry Clearance Officer [2017] EWCA Civ 320)** and specifically cited paragraph 42 as follows

> "42. *Those circumstances of the appellant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted*

> *then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1)."*

12. At paragraph 25, the judge identified that it was not in dispute that the appellants and their sponsor were biologically related and noted that the question was whether "there was anything that goes beyond that". The judge then set out the following findings:

> "26. *Before the sponsor came to the United Kingdom in 2011, she and the appellants lived together in the same household. The appellants have never married, and have never worked, save for casual work helping out on a farm for which they were paid in food rather than money. I find that they had formed no independent life of their own at the time when the sponsor left. Notwithstanding their respective ages, they remained dependent on their mother, emotionally, financially and practically. I am satisfied that there was family life between them at that time. That view is reinforced by the fact that the sponsor continued living in Nepal until mid-2011, despite having been in a position to come to the United Kingdom sooner, because she wanted to stay with her children. She said, and I accept, that she did not want to leave them; need drove her to do so because she had no money.*
>
> 27. *The question is whether that has continued through until the present time. The strongest point in favour of the respondent's view that it has not is the fact that the appellants and the sponsor have lived apart in different countries since 2011. That is a factor that weighs on the respondent's side in the assessment. I turn to consider the factors which favour the appellants' case that they have had continuing family life. The appellants' circumstances in Nepal have remained unchanged in that they have neither married nor formed an independent family life of their own. They remain financially dependent on the sponsor. I note Ms Akhtar's argument that the degree of financial dependence could not be so great because the only income that the sponsor has is from welfare benefits, and she cannot provide much support from that given that the money paid is sufficient for one person only. The difficulty with that argument is that it overlooks the difference in the value of money between a relatively wealth country such as this, and a poor country such as Nepal. The sponsor has visited her children three times since coming to the United Kingdom, staying for three months each time. That is a relatively high number of lengthy visits. I accept she could not have spent more time there without prejudicing her benefit entitlement. Her evidence concerning telephone contact suggests a more modest degree of contact, but the phone records indicate that the actual level of contact is higher than she herself recalled to me.*
>
> 28. *Having considered the evidence as a whole, I am satisfied that this is a case in which there is the "something more" described by Sir Stanley Burnton in* **Singh v SSHD [2015] EWCA Civ 630**. *In my view, it is sufficient to support a finding of continuing family life at, and beyond, the point of engagement of article 8(1). I am also satisfied that the respondent's decision interferes with the right to respect for family life at and beyond the threshold of engagement for article 8(1)."*

Submissions

13. At the hearing before us, Mr Avery conceded that the central issue and real challenge in this appeal was whether the judge had made sufficient findings to establish family life under the European Convention on Human Rights. He did not quibble with the judge's assessment of the law. The question was whether there was family life

between the sponsor and the appellants in Nepal. Nothing showed that the judge grappled with the real test, and he pointed out that there were no statements made by either of the appellants included in the bundle.

14. Mr Dieu referred to the money transfer receipts which were included in the bundle to show the financial support afforded by the sponsor to the appellants, and referred us to paragraph 10 of the sponsor's witness statement. The sponsor confirmed that she was supporting her sons; neither of her sons had work in Nepal. He submitted there was a careful analysis of the law and that the judge had applied this. He submitted that the respondent had taken issue with the depth of evidence to show family life, and it was not a high threshold. The quality of the evidence was sufficient. He argued that even if it was the case that there were no statements from the children it was enough to take the evidence from the sponsor.

15. Mr Avery in response pointed out that there was no 'lower standard of proof' and historic injustice did not "bite" until the protected Article 8 right was shown to exist. There must be established an 'Article 8 right' from the outset.

16. We identified that there was a reference within the decision of the judge, at paragraph 19 to the witness statements of the appellants. The judge had this to say

> "19. *'As is inevitably the case in considering an application for entry clearance, it was not possible for me to hear from the appellants themselves. They are in Nepal, awaiting my decision as to whether they can enter the United Kingdom. I have, however, had the opportunity to read their witness statements, to hear from the Sponsor, and to hear from Counsel acting for them'.*"

At this point in the hearing we put the matter back so that Mr Dieu could establish whether witness statements had indeed been filed, because they were not evident from the index of documentation filed before the First-tier Tribunal and had not been filed as further evidence for the hearing before the Upper Tribunal.

17. After a short recess, Mr Dieu confirmed that there was no indication that the solicitors, whom he had contacted, had filed witness statements on behalf of the appellants. He surmised that it was possible that the appellants may have submitted or tendered statements to the Entry Clearance Officer, but that these had not been provided.

<u>Analysis, Findings and Conclusion</u>

18. At the hearing, we asked Mr Dieu and Mr Avery whether, should we be minded to find a material error of law and remake the decision, there was any further evidence to be submitted. We note that the standard directions had been served, such that any further evidence should, pursuant to Rule 15(2)(a), have been sent by the parties ten working days prior to the hearing at the latest. The directions were issued to the parties on 17th January 2018.

19. As we have indicated, Mr Avery abandoned his challenge in relation to the second and third grounds and concentrated on whether sufficient findings were made in

respect of family life. The judge in her analysis, findings and conclusions, appeared to have relied on witness statements from the appellants which were not in existence. That to our mind is a clear error of law because not only did the judge proceed on an erroneous factual basis, but she appeared to take into account evidence which was not available which must have had a bearing on the finding regarding family life.

20. We therefore remake the decision.

21. The legal principles are, as we have identified above clearly sent out **Rai (Jitendra)** and **Kugathas v UK [2003] EWCA 31**. Paragraphs 17 and 18 of **Rai** neatly encapsulate the law, confirm that there is no presumption of family life, and expand as follows:

> *"[17] the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or vice versa", but it was "not … essential that the members of the family should be in the same country"."*

22. The appellants made their applications for settlement on 18th January 2016, when they were 29 and 27 years of age respectively. The evidence from the sponsor was that they had lived with their mother until 2011, when she came to the United Kingdom. They have four other siblings who live in Nepal and who are older than them.

23. We accept that there was family life between them prior to the sponsor leaving Nepal in mid-2011. The question is whether they have continued to maintain a family life with the sponsor, and have formed no independent lives of their own since the sponsor left. We place little weight on the fact that the sponsor voluntarily left Nepal because, as she states, her circumstances were such that she needed to relocate for welfare benefits. We do note the argument made in the First-tier Tribunal, that the remittances sent to the appellants must be limited because the only income the sponsor has is from a meagre pension and her welfare benefits, which would limit the extent of the financial support she might provide to her children. However, as the judge pointed out in the First-tier Tribunal decision, that overlooks the difference in the value of money between a relatively wealthy country such as the United Kingdom and a poorer country such as Nepal.

24. We have considered the documentation supplied, in the form of remittances and note the limited remittances that have been provided. There appeared to be eighteen remittances, commencing in March 2015. There were two remittances on 2nd March 2015, each for approximately £31, two on 3rd April 2015 each for approximately £31, two on 5th May 2015 each for approximately £20, two on 8th July 2015 for approximately £20, two on 4th September 2015 for approximately £19, one on 5th September 2015 for approximately £20, one on 5th October 2015 for approximately

£20, two on 8th January 2016 for approximately £33, and two on 7th March 2016 for approximately £23, one on 1st December 2016 for approximately £32, and one on 10th May 2017 for £300. There was no further evidence of financial remittances placed before us. In particular, we notice a gap in the remittances between March 2016 and December 2016. That undermines the suggestion of sustained financial assistance.

25. We have taken into account the statement of the sponsor, and assume in favour of the appellants that her reference to her sons, as opposed to a daughter and son, is an error in interpretation. She states at paragraph 13 that her "sons" have only been able to work as labourers but the work is not regular and was also poorly paid. It would appear that in her evidence to the judge at the First-tier Tribunal she advised the appellants were paid with food.

26. We note the call log, showing a variety of calls to Nepal and a preponderance of certain telephone numbers. Some of the calls last for a matter of seconds. Most are voice calls, and the calls range from 12th January 2016 to 8th June 2017. We note that the judge recorded that the appellants' evidence concerning telephone contact "*suggests a more modest degree of contact, but the phone records indicate that the actual level of contact is higher than she herself recalled to me*" although we note that there were a variety of telephone numbers included in the record.

27. We appreciate that the sponsor speaks to her family in Nepal on a regular basis and we accept that the sponsor has visited the appellants and all her family in Nepal on three occasions, owing to the airline tickets in support.

28. What we cannot reconcile with the appellants' case, however, is the lack of witness statements from the appellants themselves. To show and demonstrate the very basic element of family life beyond the normal emotional ties between adults we would conclude that there would indeed be witness statements made by the appellants to show their attachment to and level of dependence on their mother. In the absence of these statements which we did draw to the attention of the representatives, we are not satisfied that family life has been established. This is an appeal by the appellants themselves and, albeit we have carefully considered the statement of the sponsor and the evidence produced, we conclude that it is not enough – on the facts of this case - to adduce evidence from the sponsor that a family life exists. There needs to be some form of acknowledgement of dependence from the appellants. That is not evident from their applications. We have also concluded that in the financial remittances there is an extensive gap between March and December 2016.

29. We therefore find that the appellants have failed to establish a family life that needs to be assessed in the context of the historic injustice. The 'historic wrong' will ordinarily determine the proportionality assessment, where the respondent only relies on the immigration policy as a legitimate aim. **Gurung** confirms that where the respondent is relying only on the public interest, then the weight to be given to the historic injustice would normally require a decision in the appellants' favour.

30. That however is not the whole picture here, and we have to consider not only the proportionality exercise in the absence of the historic injustice consideration, but also s 117 of the Nationality Immigration and Asylum Act 2002 as follows.

> *'117B Article 8: public interest considerations applicable in all cases*
>
> *(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *…'*

31. It is clear that the appellants would be entirely financially dependent on the sponsor who is already in receipt of public benefits. Nor is there any indication that the appellants can speak English. Indeed, they did not submit statements or any other indication that they had any facility with the English language. That needs to be taken into account in striking the balance.

32. We take into account the evident connection between the sponsor and her children and her rights under **Beoku-Betts v SSHD** [2008] UKHL 39 but we conclude that the status quo may continue, and it is open to the sponsor to keep in touch via modern methods and through visits, as she has previously done. The appellants have their siblings in Nepal whom, no doubt, the sponsor will wish to visit.

33. We are not persuaded that any private life exists in this instance and even if it does, as identified by the Court of Appeal in **Pun v SSHD** [2017] EWCA Civ 2106, historic injustice would be given even less weight in private life cases. The appellants have their siblings in Nepal, they have some very limited support from the sponsor in the United Kingdom, and again Section 117B(1) would weigh heavily against them in their appeal.

34. Following the guidance in **Huang v SSHD** [2007] UKHL 11, we were not persuaded that taking full account of all considerations, the decision of the Entry Clearance Officer prejudiced the family life of the appellants in a manner sufficiently serious to amount to a breach of their Article 8 rights.

35. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007.

Order

The appeals of Mr Pun and Miss Garbuja Pun are dismissed

No anonymity direction is made.

Signed Helen Rimington Date 23rd February 2018

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed Helen Rimington Dated 23rd February 2018

Upper Tribunal Judge Rimington