Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26993/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th September 2018	**On 4th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR SUBBA GHALEY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr S Shepherd instructed N C Brothers & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Nepal whose date of birth is 22nd August 1990, appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer of 7th October 2016 to refuse his application for entry clearance as the adult dependent child of his mother, the Sponsor, who is the widow of his late father who was an ex-Gurkha soldier. First-tier Tribunal Judge Rowlands dismissed the appeal in a

decision promulgated on 5th June 2018. The Appellant appeals to this Tribunal with permission granted by Judge Hollingworth on 12th July 2018.

2. The background to this appeal is that the Appellant's father was a Gurkha soldier who died on 11th November 2004. The Appellant and the Sponsor applied for entry clearance in 2009. It appears that the Sponsor was issued with a settlement visa on 23rd March 2010 and entered the UK after that. The Appellant initially applied to join the Sponsor in the UK on 10th February 2014, that application was refused but an appeal against that was allowed to the extent that it should be reconsidered by the Entry Clearance Officer as the decision was not in accordance with the law. The reconsidered decision was made on 7th October 2016 and it is the subject of this appeal.

3. At the hearing in the First-tier Tribunal the judge noted at paragraph 14 that both sides accepted that the Appellant cannot succeed under the Immigration Rules because of the death of his father. Accordingly the issue was whether the refusal of the application amounted to an unlawful interference with the rights of the Appellant and his mother to family life [14]. The judge made findings of fact which are not disputed. These are primarily set out at paragraph 13. The Appellant's father retired from service in 1982 having served for over fifteen years. The Appellant applied to come to the UK in 2009 along with his mother but his application was refused. It is noted that he lives alone in Pokhara and has done since April 2009. He attended university between 2012 and 2015 having attended school in Pokhara before that. The judge accepted that the Sponsor has been sending money since 2013 and accepted that, although there was no documentary evidence of other payments, the Sponsor used a system of remittance payments and money had been sent from the Sponsor to the Appellant since the Sponsor came to the UK. The judge accepted that the Sponsor is in employment and there is appropriate accommodation for the Appellant should he be allowed to enter the UK. The Sponsor has visited Nepal twice since leaving there in 2012 and 2016. The Appellant had an accident some time in around 2014 or 2015 which meant that he was bedridden for some time [13].

4. On the basis of these findings the judge went on to consider whether family life exists between the Appellant and his mother such that Article 8 would be engaged by this refusal [17]. The judge concluded on the basis of the evidence that the Appellant and the Sponsor do not have a relationship such that Article 8 would be engaged by the refusal [18]. The judge went on to consider the alternative basis whether the decision was proportionate if they did have an ongoing family life. The judge took into account the historic injustice and said that he was not satisfied that there is evidence to show that the Appellant's father "would ever have taken or intended to take his family over to the UK particularly taking into account that he had an elder child by his first marriage who still lives in Nepal. There is no evidence of his intention ever to do so". The judge weighed against the injustice the factors in Section 117B and concluded that the decision was proportionate.

Error of law

5. There are two Grounds of Appeal challenging this decision. The first ground contends that the judge failed to properly apply the decision of **Rai v ECO [2017] EWCA Civ 320** and Article 8 of the ECHR. It is contended that the judge erred in his finding that there is no family life between the Appellant and the Sponsor. It is contended that the judge erred at paragraph 17 where he focused too much on the separation of the Appellant and his mother and the fact that the Appellant chose to study. It is contended that the decision to study elsewhere would not necessarily defeat the Article 8 claim. In his submissions Mr Shepherd did not dispute the factual analysis made by the judge but contended that on the facts found this does not amount to a separation and does not defeat Article 8(1) in light of the other findings which had been made. On the other hand Mr Clarke contended that the grounds disclose a misunderstanding in relation to **Rai** and the case law. He contended that the issue of independence and therefore Article 8 family life is critical to how the judge looks at the facts. In his submission the judge took into account all relevant factors before reaching the decision that family life had not been established.

6. Both parties relied on the decision in **Rai** and in particular to paragraphs 38 and 39 of that decision. At paragraphs 38 and 39 the Court of Appeal stated as follows:

> "38. Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach.
>
> 39. The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "… not compulsory but … voluntarily undertaken …" (paragraph 20), "… having made the choice to come to the [United Kingdom]" (paragraph 21), "… the willingness of the parents to leave …" (paragraph 23), and "… their voluntary leaving of Nepal and leaving the Appellant …" (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case, which was 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, notwithstanding their having left Nepal when they did."

7. Essentially the conclusion of the Court of Appeal is that the real issue under Article 8(1) is whether as a matter of fact the Appellant had demonstrated that he had a family life with his mother which had existed at the time of her departure to settle in the United Kingdom and had endured beyond it notwithstanding her having left Nepal when they did.

8. The assessment of a family life between adults were set out by the Court of Appeal in the case of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31** where the court stated at paragraph 16 and 17:-

> "16. Nevertheless, there are repeated dicta which point to the continuing relevance of the passade which I have quoted from S v United Kingdom. In Marckx v Belgium [1979] 2 EHRR 330, a decision of the full Court, at paragraph 31 the adjectives "real" and "normal" were used to characterise family life if it was to come within Article 8. In Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471 paragraph 63, again a decision of the Court, the phrase "committed relationship" was used. In Beldjoudi v France [1992] 14 EHRR 801, a decision of the Commission which went on to be upheld by the Court, at paragraph 55 the phrase "real and effective family ties" was used.
>
> 17. Mr Gill says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense. But 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 in my view the irreducible minimum of what family life implies. It may be that, for a time in Germany, that minimum was reached, as between the appellant and his family there; but that time has gone."

9. Effectively what the Court of Appeal said there is that there should be demonstration of real committed or effective support between adults to establish family life.

10. I also note the decision in **PT (Sri Lanka) v Entry Clearance Officer Chennai [2016] EWCA Civ 612** the Court of Appeal there considered the issue of Article 8 family life between adults and sets out all of the relevant jurisprudence. It is noted in the extract from the decision in **Ghising v Secretary of State for the Home Department [2012] UKUT 00160** where, at paragraph 62, the Upper Tribunal noted that the different outcomes in cases with superficially similarly features emphasises that the issue under Article 8(1) is highly fact-sensitive. Each case should be analysed on its own facts to decide whether or not family life exists within the meaning of Article 8(1).

11. The Court of Appeal also referred to the case of **Singh v Secretary of State for the Home Department [2015] EWCA Civ 630** where it was noted that in the case of adults in the context of immigration control there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 and that

> "It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living

independently of his parents may well not have a family life for the purposes of Article 8."

12. Mr Shepherd submitted that the judge focused unduly on the fact that the Appellant lived separately from his mother before she left Nepal as well as other factors including the fact that she did not return to Nepal when he had a car accident. He referred to the fact that the evidence showed that the Sponsor had visited Nepal and sent money to her son was relevant and that the judge had failed to properly apply the guidance in **Rai**.

13. It appears to me that the judge took into account quite a number of factors before reaching the decision in relation to Article 8(1). The judge took into account the oral evidence of the Sponsor (which has not been challenged) where, as noted at paragraph 5 of the decision, she said that the Appellant had been renting a room separately from the Sponsor since April 2009 before she came to the UK and he had been living separately from her. The judge referred to this at paragraph 17 where he said that the evidence shows that the Appellant moved to Pokhara in 2009 and that he did so to pursue or continue to pursue his secondary education. The judge said "I do not accept that he only did so because she was coming to the United Kingdom and they were effectively being split up by a decision made them". This was a conclusion open to the judge on the evidence. It appears that the Appellant went to Pokhara in 2009 when aged 18 or 19 to continue with his education.

14. The judge also took into account that the Appellant finished his schooling in 2010 but remained in Pokhara despite working on the family home at a time when he could have returned to the family farm which was not sold until 2012 but he chose not to do this. This led the judge to conclude that by then he was independent from the family. In fact the judge noted that the Appellant did not go to university for two years after finishing school. This too was a conclusion open to the judge on the basis of the evidence.

15. The judge also took into account the fact that the Appellant was in a car crash in 2014/15 and was incapacitated but managed without a visit or help from his mother or having to return to live with any of his siblings. The judge took this as further evidence of the Appellant's independence. Again I consider that this was a conclusion open to the judge on the basis of that evidence.

16. The judge also considered the evidence of remittances at paragraph 18 and, although the judge accepted that the Sponsor sent money since she came to the UK [13], at paragraph 18 the judge found that "the evidence tends to show that he may have had some financial assistance from her but much, if not all, of the money was being sent to pay off the loan she had taken out to pay for her move to the United Kingdom and his university fees". It is clear that this too was an important factor for the judge in assessing whether the Appellant was independent of his mother and the extent to which she was financially supporting him.

17. I find that the judge did exactly what the guidance at paragraph 39 of **Rai** suggests which was to consider the factual situation in deciding whether the Appellant had a family life with his mother at the time of her departure to settle in the UK and which had endured beyond that. The judge reached conclusions open to him on the evidence in relation to the existence of family life within Article 8.

18. It was accepted by Mr Shepherd that ground 2 only comes into play if I accepted that there was an error in relation to ground 1. I accept that in consideration of proportionality at paragraph 19 the judge failed to take account of evidence in the witness statements from the Appellant and Sponsor which indicates (at paragraph 12 of her witness statement) that her husband had always intended to settle in the UK and at paragraph 4 of the Appellant's witness statement that he was given to understand from the Sponsor that his father would have settled in the UK with all the family after his retirement if he was permitted to do so. I accept that this was a material error in relation to the proportionality assessment. However, given that I have found that there is no material error in relation to the assessment under Article 8(1), any error in relation to the proportionality assessment (which was an alternative finding in any event) is not material to the decision under Article 8.

19. In these circumstances I find that the judge did not make any material error of law in the approach to Article 8.

Notice of Decision

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

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 28th September 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed therefore there can be no fee award.

Signed Date: 28th September 2018

Deputy Upper Tribunal Judge Grimes