Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11220/2018
HU/11223/2018
HU/11219/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th August 2019	**On 4th September 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR SAGAR KAMI
MR SURAJ SING KAMI
MISS LAXMI KUMARI KAMI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms V Easty, instructed by Howe & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against a decision of First-tier Tribunal Judge A M Black, promulgated on 23rd April 2019, in which she dismissed their appeal against the refusal of entry clearance to join their mother the widow of a former Gurkha solider who is settled in the UK. That entry clearance decision was dated 10th April 2018.

2. The application for permission to appeal was made on three grounds.

3. Ground 1 advanced that there was an application of an unlawful test in the determination of whether family life existed between the appellants and their parents. When rejecting family life between the appellants and the mother in the UK, the judge found at paragraphs 36 and 38 that she was unable to find the remitted funds constituted "real and effective support" bearing in mind the funds were given to all four siblings and at paragraph 38 that "what the funds remitted by the sponsor are, whilst useful to the appellants, not a significant part of their income taking into account their circumstances".

4. The appellants contended that the applicable authority was **Rai v Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320,** where the court reviewed the proper approach to be taken to the assessment of family life. At paragraph 17 **Rai** referred to **Kugathas** such that if dependency was read down as meaning "support" and if one adds "real" or "committed" or "effective" to the words of "support" then it represents the irreducible minimum of what that family life implies. It was clear from **Rai** that the requirement was real or effective or committed not real and effective. The adjectives are alternatives and by requiring the descriptive as being conjunctive the judge unlawfully added a gloss to the Article 8 test.

5. Ground 2 maintained that there was an unstainable finding as to the extent of the financial support. The judge acknowledged that the appellants received support in the form of their accommodation but stated "however the land was purchased with charitable funds given to the family as a whole to provide them with accommodation and to enable them to grow vegetables for themselves" [paragraph 33 of the sponsor's witness statement]. They were not, thus, found to be dependant on their mother for the provision of accommodation [paragraph 30]. The judge added that the amount she had been told that the three men earned per day but she had not been told of their average monthly or weekly income. Nor had she been told of the amount of their expenses or the proportion of the siblings' income which was provided by the sponsor. The appellants lived in the family home which on the evidence was purchased using charitable funds donated to the family. The judge found at

> "35. *Another gap in the evidence relates to the earnings of the three men of the household, including the first and second appellants. I have been told the amount the three men earn per day and that they do not pay tax but I have not been told their average monthly or weekly income. Nor have I been told the amount of their expenses or the proportion of the siblings' income which is provided by the sponsor. The appellants live in the family home which, on the evidence, was purchased using charitable funds donated to the family. The appellants do not pay rent. Their outgoings are fairly modest, particularly as they grow their own vegetables. While I accept that the earnings of the three men are meagre and arise from part-time work, as and when it is available, the evidence does not demonstrate that the sponsor's remittances (which are sent for the use of the four siblings, not merely the appellants) constitute a significant part of their income."*

6. The judge at paragraph 46 overall found that she was unable to find the sponsor's financial contribution to the appellant's maintenance and the provision of accommodation by way of the family home was sufficient to demonstrate a bond which was over and above the norm for a mother and her adult children whose ages ranged between 32 and 38 years [46].

7. It was asserted that the judge had misdirected herself with regards to the accommodation. It was the land which had been purchased for the family by a charity and not the accommodation and no reference had been made to the charity having purchased the appellant's accommodation.

8. Further, in concluding that the sponsor's support did not constitute a significant part of the appellant's income, the judge failed to properly make reasoned finding. It was accepted that only two members of the household were working (paragraph 26 of the determination) and that they were earning approximately £1.50 per day. It was equally accepted at paragraph 33 that the sponsor provided approximately £80 per month. On proper calculation, even if the team members of the household worked every day of each month their collective income would have amounted to £90 per month. It was thus apparent that the sponsor's contribution was approximately half of the appellant's monthly income.

9. Ground 3 took issue with the judge's approach to the right of the appellants to enter the UK on article 8 grounds. At paragraphs 49 to 51 of the determination, the judge concluded that given the mother's polygamous marriage until the death of the sister the appellants' father would not have been permitted to bring the mother to the UK on his discharge. Entry Clearance would have been granted to the sponsor's sister not the sponsor. It was submitted that the judge erred in the alternative finding because there was no suggestion that the sponsor's polygamous marriage was not lawful in Nepal at the time and it followed pursuant to the principle of lex loci and celebrationis that the sponsor's marriage was lawful. These issues were not addressed in the refusal permission.

Permission to appeal

10. Permission to appeal was granted on the basis that it was arguable that the judge based her assessment on whether real, committed or affective support was provided by the sponsor on an erroneous factual premise. The judge made a mistake as to the material fact which arguably resulted in unfairness to the appellants and infected the overall conclusion as to the depth and quality of the relationship between the appellants and sponsor. Arguably the judge made an assumption about which of the sponsor's late husband's two wives would apply for entry clearance and failed to take into consideration the principle of lex loci and celebrationis. Ground 1 was considered to have less merit that permission was granted on all grounds.

The hearing

11. At the hearing before me Mr Melvin apologised for the lack of Rule 24 decision but considered that the judge was entitled to conclude that there was no family life. The

mother had been in the UK for five years and there was no evidence of her return. Three of the four adults were working and that the finding of family life was not warranted. The case had been lawfully considered and that there is no evidence regarding the standard of living.

Analysis

12. I find there was an error of law in the assessment of the family life. It was accepted by the judge that the family had lived together until the mother had come to the UK four years previously. The assessment of the family life involved an error in assessment of the financial support. It is clear from paragraph 17 of **Rai** which references **Kugathas** that if dependency is read down as meaning "support" in the personal sense and if one added echoing Strasbourg's jurisprudence "real" or "committed" or "effective" to the word "support" then it represents the irreducible minimum of what family life implies. As Ms Easty submitted there is not a higher hurdle to evidence family life. The judge added a gloss by applying the test conjunctively.

13. The appellants in this case are near relatives of the mother with whom they lived until as recently as four years ago and of whom all remain single. It was further accepted by the judge that the mother was saving up for the application fees for the appellants rather than to spend the money visiting them and this did not undermine the family life.

14. There is no presumption of family life but the financial contribution was, as regards ground 2 of the appeal, erroneously assessed. No mention in the witness statement was made by the sponsor to the accommodation being provided by a charity. It was the family home. Mr Melvin submitted that there were no deeds in relation to this accommodation but that was not a matter which was taken by the judge, who merely stated that it had been provided by the charity which had not been the case and contrary to the sponsor's witness statement. there was clear evidence of significant financial contribution and that

15. As set out in **Rai** at paragraph 19 "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant factors of a particular case." In some instances an adult child who does not have a partner may establish he has family life with his parents; "it all depends on the facts". There must be an accurate assessment of those facts, however, and in view of the finding by the judge, which noted contrary to Mr Melvin's submission, that in fact only two of the appellants were working not three, that needed to be factored in. As pointed out in the grounds if the judge accepted that two appellants were working for £1.50 a day, the contribution from the mother of £90 per month was a significant contribution.

16. I consider that the errors identified in grounds 1 and 2 are made out and that proper assessment should be so undertaken. On ground 3, as Ms Easty pointed out, this was not an issue taken in the refusal of entry clearance and the appellants were not disputed to be the children of the deceased Gurkha and would be able to benefit from the historical injustice on the basis of family life. Whether or not the ex-Gurkha

father had more than one wife, the fact is these are still his children and would be able to benefit from the historic injustice. Even if he would not have been permitted to bring the appellant's mother to the UK they were still his children. Contrary to **Jitendra Rai** the judge also appeared to apply Section 117 of the 2002 Act finding that this outweighed the degree of interference in this family's protected rights.

17. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

No anonymity direction is made.

Signed *Helen Rimington* Date 22nd August 2019

Upper Tribunal Judge Rimington