Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12438/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 27 September 2019

Decision & Reasons Promulgated
On 9 October 2019

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

KAMAL BAHADUR PUN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Nnamani, instructed by Howe & Co Solicitors
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal, born on 28 September 1979. He has been given permission to appeal against the decision of First-tier Tribunal Judge Wylie dismissing his appeal against the respondent's decision to refuse his application for entry clearance.

2. The appellant applied for entry clearance to settle in the UK as the adult dependant relative of his mother, the widow of an ex-Gurkha soldier. The respondent considered that the appellant did not meet the requirements of paragraph EC-DR.1.1 of Appendix FM of the immigration rules and that the Home Office policy in Annex K, IDI Chapter 15, section 2A 13.2 did not apply to adult children of ex-Ghurka widows. The respondent went on to

consider Article 8 of the ECHR but concluded that there was no established family life between the appellant and his mother and that, in any event, any family life that did exist could continue in Nepal. The application was refused on 27 April 2018.

3. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Wylie on 29 April 2019. The judge noted the evidence that the appellant was the fifth born of seven children, of whom the eldest sister was British and lived in the UK, two other older sisters and a younger sister were married and lived with their families in Pokhara, an older brother was married and lived with his family in Beni, Nepal, and a younger brother was married and working in Korea. The appellant was living on his own in the family home in Myagdi village in Nepal. His parents went to live in Hong Kong in 1997 with their eldest daughter and the appellant, aged 17 at the time, remained in Nepal with his two younger siblings who were aged 16 and 14. His father died on 3 October 2001 and his mother remained in Hong Kong where she had settled status. His mother applied for settlement to the UK and returned to Nepal during the application process, then returned to Hong Kong and then moved to the UK with her daughter on 7 July 2012. Contrary to a reference in the refusal letter the appellant had never lived and worked in Kuwait but used to work in restaurants in Pokhara and Kathmandu. He did not currently work and could not find employment and he was supported financially by the sponsor, his mother, who sent him about £200 or £300 a month and also sometimes gave money to friends to give to him. His mother had visited him in Nepal about three times since being in the UK, the most recent in 2017. The appellant claimed to be financially and emotionally dependent upon his mother.

4. The judge noted that the appellant had not lived with his parents since they went to live in Hong Kong, apart from a period in 2011/12 when the sponsor was in Nepal pursuing her application for settlement in the UK. Whilst the sponsor claimed that that period was a year, the judge noted that the dates in her passport showed that she was in Nepal from 20 September 2011 until December 2011 and travelled to the UK from Hong Kong in July 2012. The judge did not accept the appellant's claim that he had no contact with his brother in Beni as the sponsor's evidence was that the appellant went there every month to collect provisions, as it was the nearest town to the family home. The judge considered the sponsor's claim to have visited the appellant on the last occasion in 2017, but also noted the evidence that she was unwell during that visit and was treated in Pokhara where her daughters lived, rather than a hospital nearer to the family home where the appellant lived. The judge noted that the remittances paid by the sponsor to the appellant between November 2015 and March 2019 were sent to a recipient in Pokhara rather than Myagdi and also noted that the sponsor's evidence of the purpose of the remittances was confused and inconsistent.

5. The judge noted that there was no evidence of financial dependency before 2015 and in the years when the sponsor was in Hong Kong and the appellant was in Nepal. There was no evidence of the claimed daily contact. The judge concluded that the appellant had lived more or less independently since 1997 and, whilst there may well be a close link between the appellant and the sponsor, they could not be said to enjoy family life together. The judge considered that the sponsor enjoyed family life with her daughter who was living in the UK with her but not with the appellant. Accordingly she concluded that

Article 8 was not engaged. The judge went on to make findings in the alternative, finding that the appellant was not emotionally dependent upon the sponsor, that he had lived apart from his mother for many years, that he had failed to meet most of the provisions of the guidance and that the historic wrong did not outweigh the other factors she had to consider. The judge accordingly found that the refusal of entry clearance was proportionate and she dismissed the appeal.

6. Permission to appeal to the Upper Tribunal was sought by the appellant on the grounds that the judge had failed to apply the principles in Ghising & Ors (Ghurkhas/BOCs : historic wrong; weight) (Nepal) [2013] UKUT 567 when considering proportionality where Article 8 was engaged; and that the judge had failed properly to consider all the evidence and to make properly reasoned findings in regard to family life and had failed to consider the evidence of real and committed support in line with Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320.

7. Permission was granted on 5 August 2019.

Appeal Hearing

8. Ms Nnamani clarified that the main challenge was to the judge's assessment of family life. She submitted that the judge had failed to consider the appellant's relationship with his mother in line with the principles in Kugathas, as considered in Ghising and Rai. The judge's findings were inconsistent, as she found that there was a close tie between the appellant and sponsor but then concluded that there was no family life. The judge failed to grapple with the evidence of real and committed financial or other support. The judge therefore erred in her assessment of family life. If it was accepted that family life had been established, the second ground relating to proportionality fell away as the appeal had to be allowed.

9. Ms Bassi accepted that the appeal should be allowed if it was found that family life had been established. However, she defended the judge's assessment of family life. She submitted that the judge had taken account of the relevant case law and was entitled to find that the appellant had been leading an independent life since 1997 and that there was no family life.

10. Ms Nnamani, in response, submitted that the judge ought to have sought clarification on points which led to her findings on family life, such as the fact that the medical evidence showing the sponsor's treatment in Pokhara could be explained by the appellant's village being isolated and lacking the relevant treatment. There was evidence of frequent telephone contact. The appellant had produced evidence of financial support going back to 2015 and it was unreasonable of the judge to expect evidence going further back.

Consideration and findings

11. The focus of this challenge is on the judge's assessment of family life, since the parties agree that in the event it was accepted that family life had been established so as to engage Article 8, the decision to refuse entry clearance would be disproportionate.

12. I do not agree with Ms Nnamani, however, that the judge erred in law in her approach to, and assessment of family life. Neither do I agree with her submission that the judge failed to apply the principles in Kugathas, Ghising and Rai. As those cases made clear, and as the judge confirmed at [35], the assessment of family life was fact-sensitive and depended upon the facts of the individual case. The judge gave full and detailed consideration to the facts of the case which were plainly very different to the circumstances in Rai.

13. At [39] of the judgment in Rai the Court of Appeal identified the real issue in Article 8(1) as: "*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.*" In the appellant's case the judge considered as relevant the fact that the appellant had lived apart from his parents since 1997 and that the only time he claimed to have lived with his mother since that time was for the three months when she returned to Nepal from Hong Kong for the purpose of awaiting the processing of her visa application for the UK. The judge was perfectly entitled to consider that that was a significant factor in assessing the appellant's overall dependence upon his mother.

14. Likewise the judge was entitled to take account of other matters arising from the evidence, such as the fact that the appellant's mother received her medical treatment in Pokhara, where her daughters lived, that the beneficiaries of the remittances was an address in Pokhara rather than the family home where it was said that the appellant was residing, that the sponsor's evidence about the purpose of one of the remittances was inconsistent and that the evidence of telephone calls and messaging was unclear and indeterminate. The judge was not required to put each and every concern to the sponsor but was entitled to draw the conclusions that she did from the evidence. Having given full and detailed consideration to all the evidence, both documentary and oral, and having properly considered the nature and extent of the support given by the sponsor to the appellant, the judge was fully and properly entitled to reach the conclusion that the appellant had, aside from some evidence of financial support from his mother, been living more or less independently since 1997. The judge considered that conclusion in the light of the findings in Ghising and properly concluded that the evidence did not demonstrate that there was family life between the appellant his mother. I do not agree with Ms Nnamani that the judge's reference to a close link and close relationship between the appellant and the sponsor is contradictory to his finding that they did not enjoy family life. The judge clearly explained the difference between the two findings and there is nothing contradictory in her conclusions in that regard.

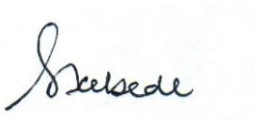
15. For all of these reasons I find no merit in the appellant's grounds of challenge. The grounds are essentially a disagreement with the judge's decision and I fail to see why

permission was granted in the first place. The judge's decision took account of all the evidence, was fully and cogently reasoned and was entirely and properly open to her on the evidence before her.

16. Accordingly I find no errors of law in the judge's decision. I uphold the decision.

DECISION

17. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.



Signed
Upper Tribunal Judge Kebede Dated: 2 October 2019