IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06642/2019**

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 9th October 2020	**On 30th October 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS HOM SUBA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Balroop, Counsel instructed by Everest Law Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals against a decision of First-tier Tribunal Judge Hussain promulgated on 14th April 2020. The appeal was heard on 15th January 2020. The appellant asserts that the First-tier Tribunal made errors of law and fact which are material in nature and which I outline below.

The appellant was born on 31st December 1975 and is a Nepalese national and she applied for entry clearance to join her father, Mr Dal Bahadur Gurung, a former Gurkha soldier. On 19th February 2019 her application was

refused and she brought her appeal against the refusal which First-tier Tribunal Judge Hussain dismissed.

The appellant's parents were granted indefinite leave to enter the United Kingdom on 7th February 2011 and her parents entered the United Kingdom on 7th May 2011. They visited Nepal every year since they arrived in the United Kingdom. The Entry Clearance Officer's decision was recorded by the judge with the following observations.

The respondent applied the discretionary policy for Gurkhas discharged before 1st July 1997 and their family members, which was that the applicant should have been between the ages of 18 and 30, whereas the appellant was in fact 42 years, 10 months and 6 days old. Further, they should not normally have lived apart from the sponsor for more than two years at the date of application or at any time unless the family unit was maintained albeit the applicant lived away, for example at boarding school, college or university.

From the passport copiesOn the appellant had visited Nepal regularly since migrating to the United Kingdom and that the appellant was living apart from her sponsors as a direct result of them migrating to the UK rather than as a result of being away from the family unit as a consequence of education. There was no suggestion that the appellant lived at university. There was no evidence that any care arrangements were put in place by her sponsors before they migrated to the UK and her parents were content to leave her without making any obvious care arrangements. The appellant was in good health, educated and there were no obvious factors preventing her from working in Nepal. She has siblings who had not applied to settle.

As a result of these findings the entry clearance application was refused. The respondent considered whether paragraph EC-DR.1.1 of Appendix FM was met but she had no personal incapacity. The respondent also noted that where the appellant would have settled but for the historical injustice, proportionality should normally be decided in her favour. Her parents chose to apply for settlement when she was already an adult in the knowledge that such children do not automatically qualify for settlement. She had been living without her parents for seven years and able to live independently and had siblings not applying to settle in the United Kingdom. The effect of the historical injustice had not been such that the appellant had been prevented from leading a normal life.

Having outlined the refusal by the Entry Clearance Officer, the judge went on to make the following findings:

The appellant could not succeed under Annex K because paragraph 5 of that policy placed restriction on admission to those under 30 and the appellant was 42 years old when she made the application.

Secondly, the sole question that he had to determine was whether or not there existed family life between the appellant and her father (the

mother having sadly passed away on 26th November 2019). The judge reasoned [my underlining]:

> *"21 I am prepared to accept that before coming to this country in 2011, the appellant was part of her parent's household. I also accept that since coming here, they have returned to Nepal every year, although I am not prepared to accept that the 'sole purpose' of the visit was to spend time with the appellant and her siblings. I do, however, accept that spending time with her, would have been part of their purpose. I accept, although the evidence was not clear as it should have been, that the appellant has financially remained dependent on her parents. There is a letter from the bank, where the appellant's parents hold an account to confirm that she is an authorised signatory, able to withdraw funds and there are regular withdrawals of funds from their account, although she is not named as the withdrawer. These are factors that weigh in the appellant's favour, as does the close nature of Nepalese family life identified in the Brief Note on Gurkha family from Kaylan Bakhta.*
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> *22 However, against these factors are firstly and, in my view, most significantly, the fact that the appellant was aged over 42 years on the date of the application. In my view, even taking into account closeness and inter-dependency existing between family members in Nepalese society, there must come a point when an adult child will cease to be a dependent member of her family. In this case, the appellant is able bodied. There is no reason why she should not find a source of income for herself. Equally, there is no reason why she should not form a relationship (if she wishes to) and live independently of her parents. Her age and lack of any obvious factors as to her continued dependency on her family is in my view factors that weighs against her.*
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> *23 I note that when coming to this country, the sponsors did not make any special arrangement, signifying particular vulnerability of the appellant remaining behind without her parents. The appellant's testimony is that she and her two siblings all remain unmarried and continue to live in her family home. This does bring the question as to why it is that the appellant alone is seeking to join her parents and not the other two? No explanation has been put forward as to why, since coming here in 2011, the sponsors have not invited the appellant to join them. The absence of such an effort indicates to me that the appellant may well be*

enjoying some independence of living, even though she continues to remain in her parent's house.

24 I do have regard to the fact that the appellant's father in this country is elderly and has his own care needs, which the appellant is keen to meet. I also take into account the point made by the appellant's counsel in his skeleton argument about mutuality of dependence; by this, I think he was referring to the support the appellant gave her parents during their visits to Nepal. However, it is an inevitable consequence of migration that families are split apart, resulting in the break-up of the otherwise closeness and ability to provide such support, in this case to an elderly father, as one would give, if continuing to live in an extended family setup."

The judge concluded that the appellant did not as a matter of law have family life with her father. That determination was appealed to the Upper Tribunal.

Grounds for permission to appeal

Ground (i) The judge failed to properly assess Article 8.

The grounds for permission for appeal set out that the test for the Tribunal in assessing Article 8(1) was whether as a matter of fact the appellant had demonstrated she had family life with her parents which existed at the time of their departure to settle in the United Kingdom and that family life had endured beyond it notwithstanding their having left Nepal when they did, further to paragraph 36 of **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**.

The test was whether the family life existed between the appellant and the sponsors before they left Nepal and whether it continued. The judge accepted that she was part of her parents' household before coming to the UK and thus only the second stage of the test applied. The appellant was still living in her family home, had not formed her own family and there was a strong presumption of family life which the judge failed to take into account. The judge went on to accept that the appellant remained financially dependent on her parents and in the light of **Rai** this was clearly real, effective or committed financial support.

The judge went on to consider irrelevant matters that she should be able to find a source of income for herself or form a relationship. At the time the appellant was unemployed and has always been and remained unemployed and financially supported by her parents, which was real and committed support.

The judge also took into account that there were three other children in Nepal living in the family home without an attempt to join the parents but it should be noted that the cost of an application is approximately US-$2,000

and the sponsors are pensioners and their children unemployed. It should be clear why only one application was made. Further, the respondent only allowed adult children to apply in January 2015 but only if they were under 30 years at the time of the application. The appellant was over 40 years in 2015. The fact that those who were over 40 years old could apply and be granted leave did not filter through until later. It was irrational for the First-tier Tribunal to rely on those facts adversely.

Ground (ii)

In the second ground of appeal it was asserted that the First-tier Tribunal had not pointed to matters over and above firm immigration policy or criminal behaviour such that public interest outweighed the historic injustice, in line with **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) (Nepal) [2013] UKUT 56**.

At the hearing before me Mr Balroop referred to the decision, drawing attention to the acceptance by the judge that the appellant had remained financially dependent on her parents and for factors that weighed in her favour. He did, however, point out that at paragraph 22 the judge concentrated on the future and speculated and referred to irrelevant factors by stating:

> *"There must come a point when an adult child will cease to be a dependent member of her family. In this case, the appellant is able-bodied. There is no reason why she should not find a source of income for herself. Equally, there is no reason why she should not form a relationship (if she wishes to) and live independently of her parents. Her age and lack of any obvious factors as to her continued dependency on her family is in my view factors that weighs against her (sic)."*

The judge also referred to her two siblings who remained unmarried and continued to live in the family home, which brought into question as to why the appellant alone was seeking entry clearance. Mr Balroop submitted that this question was not aired in court, but it was evidently extremely expensive to make applications.

Mr Jarvis agreed that the Entry Clearance Officer may have difficulties in defending the decision although he disagreed that mere financial dependence was sufficient to found a family life and an emotional component was required.

I find, on the grounds articulated in the application for permission to appeal, that there was a material error of law. The judge considered irrelevant matters that the appellant should be able to find a source of income for herself or form a relationship. That was a matter of speculation and not relevant to the existence of family life at the time he was required to consider. The judge also failed to take into account that at the time the parents made their applications to come to the UK children over the age of 30 were not permitted to apply. Had the parents been able to make an application between the point of the father's discharge in 1969 and prior

to the question of historical injustice being rectified the appellant would have been a minor.

I therefore set aside the conclusion and set aside the findings from paragraph 22 onwards. I retain the findings at paragraph 22.

Both parties agreed that if I found an error of law the matter should be redecided before me on the basis of authorities such as **Kugathas v Secretary of State for the Home Department** [2003] EWCA Civ 31; [2003] INLR 31, **Rai** and **Singh v Secretary of State** [2015] EWCA Civ 630 which held 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(i). In **Patel and others v Entry Clearance Officer, Mumbai** [2010] EWCA Civ 17, Sedley L.J. held at paragraph 14 that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right". Family life is not to be construed too restrictively.

Mr Jarvis submitted that there should be real and committed support and there needed to be both financial and emotional support as per **R (on the application of Gurung & Ors) v Secretary of State for the Home Department [2013] EWCA Civ 8.**

The approach to the principles in relation to the existence of family life were explored by the Upper Tribunal in **Ghising [2012] UKUT 00161 (IAC)** and the approach in relation to family life was endorsed by the Court of Appeal in **R (on the application of Gurung & Ors) v Secretary of State for the Home Department [2013] EWCA Civ 8** (although the Court of Appeal disapproved the Upper Tribunal's approach to the weight attributed to historical injustice)**.**

The correct question that the judge needed to ask was whether the support between the appellant and sponsor was "real", "effective" or "committed" as set out in **Rai** at paragraph 17. Whether it was a need of choice, whole or partial, replaceable or not arguably related to proportionality, not matters which went to Article 8(1) as to whether family life was engaged. Further, it is not necessary to look for something extraordinary or exceptional featuring the appellant's dependence upon her parents or in this case now her father. That elevated the threshold of support that was real or committed or effective to too high a bar. The case of **Kugathas** has set out the elements that are to be considered when determining family life. Equally, **Rai** has pointed to the critical elements of whether a family life was in existence when the family sponsors left for the United Kingdom, and, whether that family life had endured.

The findings of the First-tier Tribunal Judge at paragraph 21 which I retain indicate that the appellant was part of her parents' household, living with them and supported by them when they came to this country in 2011. At

that point it was not possible for the appellant to join her parents as she was an adult and at that point over the age of 30. She nonetheless had a family life with them. She lived in their household and was supported by them. She continues to be supported by the father. The finding on the closeness of the Nepalese family life is a factor in favour of family life. The binding case law of **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567** and **Gurung & Ors [2013] EWCA Civ 8** established only in 2013 that historic wrong was key in assessing proportionality.

I accept that the appellant could not succeed under Annex K as found by the judge at paragraph 17, which is the policy devised by the Secretary of State to deal with overaged dependants of former Gurkhas and places a restriction on admission to those between the ages of 18 and under 30 at the date of the application. At the date of application, the appellant, having been born in 1975, was in fact 42.

I have accepted, on the findings, that the appellant had family life with her mother and father on their departure to the United Kingdom and I am prepared to accept on the basis of the findings made by the judge at paragraph 21 that she continues to be dependent financially on her father. Whether or not she can find a job (she has not to date) or form another relationship is speculation and not relevant to the assessment of existing family life. The appellant may have a relationship with her siblings, but they do not support her financially. It is notable that the appellant also remains in the family home. I accept that there is emotional closeness between the appellant and her father, noting the correspondence in the bundle and that the parents returned to Nepal every year. That the sole purpose of the visit was not just to spend time with the appellant and her siblings does not undermine the nature of family life which I find continuing between the appellant and her one remaining parent.

The fact that the appellant lives with her two siblings who also remain unmarried does not negate the family life of the sponsor with her father and the fact that his wife has sadly demised may well have increased the closeness between the appellant and her father, who has increasing care needs and which the appellant is keen to meet and I take note of the mutuality of dependence.

As such, I find that the crux of this case was whether there were more than the normal emotional ties as set out in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31** and find that there were at the date of the father's departure from Nepal and those ties have endured.

Having found that there was family life between the appellant and her father, I move to consider the Article 8(2) considerations in the light of **R (on the application of Gurung & Ors) v Secretary of State for the Home Department [2013] EWCA Civ 8**. In that case the Court of Appeal found that historic injustice faced by Gurkhas who were not able to settle in the

UK until 2009 should be taken into account during the Article 8 consideration and although it may not be determinative

> *"If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now."*

Having taken all relevant factors into account, I find that there are no public interest considerations to counter the application (none have been raised) and I allow the appeal on the basis that the appellant had family life with her parents when they moved to the United Kingdom and continues to have family life with her father up until the date of application and decision.

Notice of Decision

The appeal is allowed on Article 8 grounds.

No anonymity direction is made.

Signed Helen Rimington Date 26th October 2020

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award bearing in mind the complexity of the matter.

Signed Helen Rimington Date 26th October 2020

Upper Tribunal Judge Rimington