



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/23819/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 13th February 2020**

**Decision & Reasons
Promulgated
On 4th March 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**JAI KUMARI THAPA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moriarty of Counsel instructed by Everest Law Solicitors

For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Lucas promulgated on 2 July 2019, in which the Appellant's appeal against the decision to refuse her Entry Clearance to the United Kingdom dated 17 September 2018 was dismissed.

2. The Appellant is a national of Nepal, born in 1981, who applied for Entry clearance to the United Kingdom alongside her mother, on the basis of her late father's service as a Gurkha.
3. The Respondent refused the application the basis that the Appellant did not meet the requirements as an adult dependent relative under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules, nor did she meet the requirements in the Annex K of IDI Chapter 15 section 2A 13.2, as amended. The reasons for the refusal under the Immigration Rules given were that the Appellant was a fit and capable adult who was able to look after herself; there was a lack of details of financial commitments in Nepal; financial support from the Appellant's mother could continue and there were no exceptional circumstances. The Appellant did not fall within the provisions of the IDI because these did not extend to any provision for adult children of an ex-Gurkha widow. The Respondent did not find any exceptional compassionate circumstances, noting that the Appellant had other adult siblings in Nepal who could provide support if needed following her mother's choice to apply for settlement in the United Kingdom. The Respondent was not satisfied that the Appellant had established family life with her mother over and above that between an adult child and their parent, nor that there was "real" or "committed" or "effective" support from the Appellant's mother; such that Article 8 of the European Convention on Human Rights was not engaged.
4. Judge Lucas dismissed the appeal in a decision promulgated on 2 July 2019 on human rights grounds. The Tribunal set out the unchallenged evidence of the Appellant, her mother and cousin and the burden of proof. The totality of the findings on the appeal are contained in the following three paragraphs:

"19. The mother of the Appellant came to the UK as recently as October 2008 [sic 2018]. The Rules permit her to settle in the UK as the wife of a former British Soldier and rightly so. The Rules do not, however, extend to the adult child of a widow. The mother of the Appellant was aware of that when she chose to separate herself from the Appellant by coming to settle in the UK. She could remain in Nepal with the Appellant but chose not to do so.

20. The Appellant is now 38 years of age. She has adult siblings living in Nepal. It is said that the mother of the Appellant is dependent upon her because of her hearing difficulties. However, she lives and chose to live UK with her niece. The latter is clearly therefore coping with the day-to-day particular needs of the mother of the Appellant.

21. The fact is that the Appellant is close to the age of 40. She has a close family to turn to in Nepal. There is nothing in this case that is exceptional or shows that the understandable bonds between the Appellant and her mother are over and above those which are expected. The fact is that the mother of the Appellant

chose to settle in the UK irrespective of the ability of this Appellant to do so as the adult child of the widow of the British soldier. She would have remained with the Appellant in Nepal and her other children. It is relevant that they are married as this does not cut the family bond between them."

The appeal

5. The Appellant appeals on five grounds, although in essence, the main three grounds all challenge the First-tier Tribunal's findings on the basis that there has not been a proper fact specific assessment as to whether family life is engaged for the purposes of Article 8 of the European Convention on Human Rights and irrelevant considerations, primarily that the Appellant's siblings are married, have been taken into account.
6. At the oral hearing, Mr Moriarty adopted the written grounds of appeal and noted that the fourth and fifth grounds in relation to typographical errors in the decision and the short hearing and decision were not necessarily distinct errors of law but were indicative of the lack of detailed assessment and care given to the determination of this appeal. In relation to the main grounds of appeal, it was submitted that the decision simply fails to grapple with the steps required for assessment under Article 8 of the European Convention on Human Rights and on the facts of this case, if there was a finding that family life is engaged, the proportionality exercise would ultimately be in the Appellant's favour because of the historic injustice caused to Gurkhas and their family members from previous immigration policy. It has never been suggested that there are any other contrary factors which would tip the balance the other way.
7. In relation to family life, following the decisions in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Rai v Entry Clearance Officer [2017] EWCA Civ 320, Mr Moriarty submitted that there only needs to be real or effective or committed support to show that family life exists and therefore Article 8(1) of the European Convention on Human Rights is engaged. On the unchallenged evidence before the First-tier Tribunal, that threshold has been met. It was not accurate for the First-tier Tribunal to refer to the Appellant's mother choosing to settle in the United Kingdom away from the Appellant in circumstances where they both made a joint application for entry clearance with the Appellant's mother's application being granted with a very limited period of time for her to use her entry clearance. Further, there is a relevant difference between the situation of the Appellant and her siblings, who are married and have formed separate independent family units. Finally, the First-tier Tribunal were required to factor in the likelihood of the family unit having come to the United Kingdom together previously if the policy had been in place sooner, of which there was evidence in this case.
8. On behalf of the Respondent, Ms Cunha submitted that the proper test as to whether family life is engaged in this case was in practical terms reflected in the findings in paragraph 21 of the decision, which provided

implicit, albeit not express reliance on Kugathas. It was submitted that in any event, the evidence before the First-tier Tribunal was limited to records of very recent phone conversations after the Appellant's mother's arrival in the United Kingdom and a lack of evidence of the financial circumstances of the Appellant and her mother, a matter which was directly challenged by the Entry Clearance Officer. It was further suggested that the community in Nepal who told the Appellant and her mother about the opportunity to settle in the United Kingdom would have also advised them that more detailed evidence, in particular of their financial circumstances, would be required.

9. Overall it was submitted that the evidence of the relationship between the Appellant and her mother did not go beyond normal emotional ties and there was a lack of evidence that the Appellant was dependent on her, rather than the Appellant's mother being dependent on the Appellant due to her hearing difficulty, as shown by the mother's current dependency on the Appellant's cousin in the United Kingdom. It was however accepted that for the purposes of establishing family life, dependency does not have to be only one way and can be on either parent or adult child and it was further accepted that there was no need to establish incapacity or any other reason as to why an adult child was unable to support themselves, such that dependency could be by choice rather than need for the purposes of Article 8.
10. If, contrary to the Respondent's submissions on the existence of family life, Article 8(1) was engaged on the facts of this case, it was accepted on behalf of the Respondent that when undertaking the proportionality balancing exercise under Article 8(2) the historic injustice would outweigh the public interest in the refusal of entry clearance.

Findings and reasons

11. I find that the First-tier Tribunal materially erred in law in its approach to the assessment of the facts in the context of a human rights appeal concerning Gurkha family members. Although, as apparently accepted by the Appellant, there is recognition that she does not meet the requirements of the Immigration Rules, the First-tier Tribunal thereafter makes no structured assessment under Article 8, first of whether family life is engaged at all, and if it is, ultimately ending with the proportionality balancing exercise.
12. The First-tier Tribunal does not set out anywhere in the decision the relevant questions to be addressed nor the applicable law and there is no express reference to the decisions in Kugathas, Rai, or Ghising & others (Gurkhas/BOC's: Historic Wrong; weight) [2013] UKUT 567 (IAC) which together set out the correct approach and relevant considerations for an appeal such as the present one. It cannot be said on a rational reading of the decision that paragraph 21 contains an implicit reference to the test in Kugathas for whether family life is engaged, given the reference to the

Appellant's mother choosing to settle in the United Kingdom and the irrelevance of the Appellants siblings being married.

13. As above and highlighted in submissions by Mr Moriarty, the Appellant and her mother both applied for entry clearance together and there is nothing to suggest in any event that the question of whether family life existed in Nepal and continues to exist between the Appellant and her mother could be answered by whether the Appellant's mother chose to settle elsewhere or not. Further, the Appellant's position is clearly different to that of her siblings in Nepal, who have all married and live in separate family units, contrary to the Appellant who has always lived at home, is unmarried, has never been employed and has always been financially and emotionally supported by her parents. The unchallenged evidence before the First-tier Tribunal shows evidence of dependency between the Appellant and her mother in both directions, with emotional support provided both ways, financial support to the Appellant and practical support to the Appellant's mother. Only the latter has been interrupted by the Appellant's mother's move to the United Kingdom following her grant of entry clearance. There is evidence of continuing frequent contact and support between the Appellant and her mother.
14. In these circumstances, the First-tier Tribunal has materially erred in law in failing to make proper findings in a structured way of whether Article 8 of the European Convention on Human Rights is engaged at all, and thereafter failing to follow the usual five stage approach in ending with the assessment of proportionality. These errors are self-evidently material to the outcome of the appeal and as such it is necessary to set aside the decision of the First-tier Tribunal.
15. As indicated to the parties at the oral hearing, if I found an error of law, I would proceed to remake the appeal on the evidence before the First-tier Tribunal. I make the following findings of fact. The Appellant is a single adult whose late father was a Gurkha and who would have, together with her mother, settled in the United Kingdom as a family unit if they had had the opportunity to do so following her father's service (as set out in the written statements before the First-tier Tribunal).
16. Although an adult, the Appellant has always lived with her parents, latterly with her mother in Nepal following her father's death and has always been financially and emotionally supported by them. She has never been employed, nor lead an independent life outside of the family home. On this basis I find, in accordance with the tests in Kugathas and Rai, that there is dependency over and above the normal bonds between and adults child and the parent, involving real, committed and effective support, from the Appellant's mother to the Appellant (and to an extent, vice versa) such that family life existed in Nepal for purposes of engaging Article 8(1) of the European Convention on Human Rights.
17. That family life has not been broken or terminated by the Appellant's mother's move to the United Kingdom following the grant of her

application for Entry Clearance and continues to subsist to the date of hearing before me. It was always the intention of the Appellant and her mother to settle in the United Kingdom together, with one moving before the other by reason of circumstances of the immigration decisions rather than any specific choice to move separately. There is evidence of ongoing frequent contact and continuing emotional support between the Appellant and her mother. In terms of financial support, the Entry Clearance Officer did not challenge the lack of evidence of the Appellant's mother leaving her with 70,000 NRP, together with paying for the accommodation in Nepal and food supplies, nor the intention of the Appellant's mother to continue financial support, using in particular the Appellant's father's army pension. The only point noted by the Entry Clearance Officer was a lack of evidence of financial outgoings of the Appellant in the context of the assessment of the adult dependent relative rules in Appendix FM. In these circumstances the evidence establishes ongoing financial and emotional support despite the Appellant's mother's residence in the United Kingdom. Article 8(1) therefore continues to be engaged and family life continues to exist.

18. In the circumstances, the Respondent accepts that the appeal should be allowed on human rights grounds as ultimately the proportionality balancing exercise is in the Appellant's favour with the historic injustice outweighing the public interest in immigration control. There are no contrary factors to suggest otherwise in this case. I therefore re-make the decision under appeal to allow it on human rights grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and re-make it as follows.

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed
2020



Date 14th February

Upper Tribunal Judge Jackson