IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01497/2020**

THE IMMIGRATION ACTS

Heard at Field House
On 28 October 2021

Decision & Reasons Promulgated
On the 17 November 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR PRALHAD GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel instructed by Everest Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 22 June 1989 whose father ("the sponsor") served in the Brigade of Gurkhas for fifteen years.

2. The sponsor moved to the UK with indefinite leave to remain in October 2010 and his wife (the appellant's mother) joined him in January 2013.

3. In July 2019 the appellant applied for entry clearance as an adult dependent child of the sponsor. On 17 December 2019 the application was refused.

4. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Manuell ("the judge"). In a decision promulgated on 12 March 2021 the judge dismissed the appeal. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

5. The central issue before the judge was whether appellant and sponsor enjoyed family life within the meaning of Article 8(1) ECHR. The judge found that they did not, and therefore that it was not necessary to consider the proportionality of refusing to grant entry clearance to the appellant.

6. The reasons given by the judge for not accepting article 8(1) was engaged are the following:

   (a) The appellant is intelligent and in good health and has "gone his own way since late adolescence".

   (b) The appellant worked abroad for three years in the field of security indicating "determination, commitment and independence, and a willingness to work abroad as his father had done".

   (c) The appellant stated that he would work in the UK if he were permitted to do so "indicating a desire and ability to work".

   (d) Given the absence of objective evidence showing a lack of available work in Nepal it was difficult to accept that the appellant had been unable to find work of some kind.

   (e) The appellant receives a contribution from his parents but has not demonstrated "real or committed dependency".

   (f) He has not lived with his parents since at least 2010 and has applied to live in the U.S. The application to the US was said by the judge to demonstrate "independence and an absence of any unusual bond".

   (g) The family is spread out geographically, with the appellant's sister living in the U.S.

   (h) There was no evidence to indicate that the appellant's relationship with his parents was significantly different to the relationship they have with his sister.

   (i) The judge stated in paragraph 20 that "the repeated claim that the appellant at the age of 32 needed his mother to prevent him falling under bad influences was not credible, to put it as neutrally as possible".

   (j) The appellant's mother is living with him presently, but would have returned to the UK much earlier had she not been prevented from doing so by the COVID-19 pandemic restrictions.

7. The judge summarised his findings in paragraph 22 where he stated:

> "Turning to the Article 8 ECHR family life claim, the Tribunal finds that the appellant is leading an independent life in Nepal, and has done so for some years. He has chosen his own way of life. The appellant's parents did not apply for the appellant to join them in the UK until recently. Hence the Tribunal finds that the refusal decision does not interfere with the Article 8 ECHR family life rights of the sponsor or the appellant. This of course does not imply that there is any absence of warmth or contact between adult child and parent. Far from it. But there is no emotional dependency: see the discussion of family life at 16 onwards of *Jitendra Rai* [2017] EWCA Civ 320. Because Article 8 ECHR family life has not been engaged the *Razgar* [2004] UKHL 27 analysis never reaches the question of proportionality and any issue of historic injustice."

8. The judge made a finding, in paragraph 15, that the evidence presented on behalf of the appellant appeared unsatisfactory and contrived. The judge stated:

> "The evidence presented to the Tribunal had a number of unsatisfactory features, creating the strong impression that it was contrived. The witness statements sought to argue the case, rather than set out the key facts relied on. No proper details were provided of the appellant's outgoings and expenditure. It was difficult to accept Mr Gurung's assertion that there was no written agreement for the flat which the appellant is said to be renting. The witness statements provided little insight if any into the emotional dependency asserted."

The Grounds of Appeal

9. There are two grounds of appeal.

10. The first ground submits that the judge applied an elevated article 8(1) threshold. In paragraph 17 of the decision the judge found that the appellant had not demonstrated "real or committed dependency". Similar language is used in paragraphs 18 and 22, where the judge stated that there was not "emotional dependency". The grounds submit that the judge erred because "dependency" is too high a threshold.

11. A further submission made in this ground is that the judge focussed on whether the appellant needed support from his parents. It is argued that whilst need for support might be relevant in a proportionality assessment under Article 8(2), it is irrelevant to the question of whether Article 8(1) is engaged.

12. The second ground of appeal submits that the judge failed to consider evidence of reciprocal ties between the appellant and his parents. I have not addressed this ground because, for the reasons set out below, I am satisfied that the judge erred as claimed in the first ground of appeal.

13. Mr Melvin's response to the first ground was that it is apparent, from reading the decision as a whole, that the judge made sustainable findings to support the conclusion that family life had not endured since the sponsor moved to the UK given, in particular, that (a) the appellant had travelled abroad for work and was

living independently; (b) he had applied to reside in the US (i.e. away from his parents); and (c) he had demonstrated the ability to fend for himself.

14. Mr Melvin also argued that the judge adequately explained why he found that the evidence in support of the appellant was contrived. He noted the lack of detail about the appellant's outgoings, the absence of a written tenancy agreement for the appellant's flat, and the lack of evidence about emotional support.

Analysis

15. The legal principles relevant to the question of whether or not Article 8 is engaged are well-established. The relevant case law was summarised by Lindblom LJ in *Rai v ECO* [2017] EWCA Civ 320 in paragraphs 17 – 20, where he stated:

> 17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "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 … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) 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".
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> 18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):
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> > "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. 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 point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. 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."

16. The case law cited above makes clear that it is not necessary, in order to establish that a relationship between a parent and adult child engages article 8(1), for there to be "dependency". Sedley LJ in *Patel* stated that the threshold fell "well short of what constitutes dependency" and in *Kugathas* he stated that the test was whether there was real, committed or effective support, as opposed to dependency. Accordingly, it does not follow from a finding that an appellant is not dependent on his parents that article 8(1) is not engaged, as only the lower threshold of real, committed or effective support needs to be established.

17. The judge accepted at paragraph 17 that "the appellant receives a contribution from his parents". This indicates that the judge accepted that the sponsor provides the appellant with at least some degree of financial support. The judge, however, did not

address whether this support was "real, committed or effective", which is the test described in *Kugathas*, but instead proceeded to state that the financial contribution did not demonstrate "dependency". The same criticism can be made of the judge's finding in paragraph 22 that there was "no emotional dependency". This finding was made after accepting that there was contact – and "warmth" – between the appellant and sponsor. The judge did not address whether the emotional connection between the appellant and sponsor, whilst not meeting the threshold of dependency, may have constituted real, committed or effective support. In my view, the findings of lack of dependency in paragraphs 17 and 22 indicate that the judge erred by applying a threshold of dependency rather than support. This error of law renders the decision unsafe such that it will need to be re-made.

18. Several findings in the decision are, in my view, ambiguous. The judge stated at paragraph 17 that it was "difficult to accept that the appellant has been unable to find work of some kind in Nepal and has simply sponged on his parents". It is unclear whether or not this is a finding that the appellant has been dishonest about not working. In paragraph 16 the judge stated that "it is difficult to see how [the appellant] would wish to be a burden to his parents by taking money from them which they can ill afford". It is unclear from this statement whether the judge found that the appellant exaggerated the extent of financial support he receives. Given the ambiguity of these findings, which on any view are material to the assessment of whether article 8 is engaged, I am of the view that the findings of fact should not be preserved. The decision will therefore need to be made afresh. Having regard to the extent of further fact-finding likely to be involved in re-making a decision, I have decided to remit the appeal to the First-tier Tribunal.

Notice of decision

19. The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The appeal is remitted to the First-tier Tribunal to be made afresh by a different judge.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan Dated: 4 November 2021