



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03887/2020

THE IMMIGRATION ACTS

Heard on: 7th July 2021
At: Manchester Civil Justice Centre (remote hearing)

Decision & Reasons Promulgated
On 23 July 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Chop Bahadur Thapa
(no anonymity direction made)

Appellant

and

Entry Clearance Officer

Respondent

For the Appellant: Mr Kumar, Counsel instructed by UK Migration Lawyers Ltd
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal born on the 23rd April 1982. He appeals with permission against the decision of the First-tier Tribunal (Judge French) to dismiss his appeal against refusal of a 'human rights claim' viz an application for entry clearance to settle in the UK as the adult child of a former Gurkha soldier and his surviving widow.
2. The Appellant's relevant personal history is as follows. His father was Nil Bhadur Thapa (born on the 30th October 1935). Mr Thapa served in the Gurkha

regiment between 1953 and 1968. He died on the 9th January 2000, having never been granted settlement in this country. The Appellant's mother is Man Maya Thapa, who has lived in the UK since 2014. She was given entry clearance under what were then termed the 'discretionary arrangements for the widows of Gurkhas'. On the 25th November 2019 the Appellant made an application for entry clearance to join his mother.

3. His application was refused on the 14th June 2020. The letter, surely incomprehensible to anyone but its author, essentially made two points. First, that the Appellant could not qualify under any of the relevant rules or published discretionary policies that pertain to Gurkha family members, nor under the standard 'adult dependent relative' paragraphs of the rules. Second, that his application could not succeed on Article 8 grounds because he had not established that he shared a 'family life' with his mother. Although he claimed to be financially dependent upon her this was not a dependency of necessity. The Appellant is a fit and healthy adult who has a number of siblings living in Nepal to whom he could turn for support if support was required. He had not therefore demonstrated that he had "more than the normal emotional ties" to his mother.
4. The First-tier Tribunal sets out in its decision the respective written arguments advanced in the ECO's decision and the grounds of appeal: it is in this section that the Tribunal mentions legal authority such as Kugathas v Secretary of State for the Home Department [2003] ECWA Civ 31 and Ghising and Others [2013] UKUT 00567 (IAC). The Tribunal's conclusions are set out in the final two paragraphs of its decision. At paragraph 12 it notes the submissions made by the Appellant's representative in respect of the historic injustice perpetrated against soldiers of the Gurkha regiment but directs itself that this "is not in itself decisive". The Tribunal continues:

"It seems to me that it is critical to determine whether the Appellant is genuinely dependent on the sponsor for his essential needs. It is my view that there were inconsistencies in the evidence such as to undermine credibility. There has been no explanation of why the Appellant was unable to find work in Nepal. He said that he had applied for work but did not say how many times or what the jobs were. Specifically there was no explanation of why he was any more vulnerable and in need of support than his siblings..."

The decision here embarks on an analysis of Mrs Thapa's finances before continuing:

"Aside from these issues I have also taken into account the Article 8 argument about right to family life. However the sponsor had chosen to come to the UK on her own in 2014. I was referred to the sponsor's passport, but the only visa stamps which were legible showed there

had been visits back to Nepal in January 2017 and September 2018. This did not demonstrate that the sponsor and Appellant were a close family unit”.

5. Finding no “compelling reasons” to allow the appeal, the Tribunal dismissed it.
6. The First-tier Tribunal granted the Appellant permission to appeal to this Tribunal on the 10th March 2021. In doing so First-tier Tribunal Neville helpfully distilled the discursive and repetitive grounds as follows:
 - i) It was arguable that the Judge failed to make clear findings, or offer adequate reasoning, in respect of whether there was a family life between mother and son. It is arguable that the Tribunal misdirected itself in requiring a financial dependency of necessity;
 - ii) The Judge failed to make clear findings on, or to appropriately direct himself to, the relevant caselaw addressing the particular situation of, and historical injustice faced by, Gurkha families.

Discussion and Findings

7. The parties before me agreed I need not embark on a lengthy analysis of cases such as Kugathas and Ghising, since the Court of Appeal has already done it for me, in the case of Jitendra Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320. Jitendra Rai was, like this Appellant, the adult son of a Gurkha veteran who sought entry clearance to the UK *inter alia* on the grounds that had his father been able to settle in this country upon his retirement from service, as it is now agreed by parliament that he should have been, then the Appellant, and indeed his siblings, would have been born British. The Upper Tribunal had dismissed Rai’s case on grounds remarkably similar to the reasoning employed by Judge French in the present case. It was reasoned that Rai’s parents had elected to come to this country and leave their adult children in Nepal, it could not be said that any financial dependency was borne of necessity since there was no reasonable explanation as to why Rai was not employed, and nor could it be said that this was an obvious nullification of Article 8 family life, since Rai had siblings who remained in Nepal with him.
8. Reviewing the uncontroversial legal principles, the Court of Appeal held as follows. First, that Kugathas has been too restrictively applied in the past and ought to now be read in line with developments from the domestic and Strasbourg courts: Ghising (family life -adults-Gurkha policy) [2012] UKUT 160 (IAC) and Guring [2013] 1 WLR 2546 applied. The question of whether an individual enjoys family life is ultimately one of fact. The Court cited with

approval the following passage from Sir Stanley Burnton's judgment in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630:

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.

9. There is then no presumption against family life with an adult child, nor is there any requirement of exceptionality. The question is simply whether, on the facts, a family life exists.
10. In this case the Appellant and his mother both gave evidence to the effect that she has always been close to him, and that he has never left the family home to start an independent life. So it was that once they had saved sufficient money to make an application for a child to join her, it was him that was the obvious choice. The Appellant's mother averred that she misses her son a lot and maintains regular, if not daily, contact with him. She has visited him three times since she came to live in the UK. As an elderly widow she is concerned about facing the end of her life on her own and would like the support of the Appellant. None of that evidence appears to feature in the First-tier Tribunal's analysis about whether there is a family life here. The analysis instead focuses almost exclusively on whether there is a financial dependency, which as the Court of Appeal has repeatedly stressed, is not the test. I am therefore satisfied that the First-tier Tribunal erred in its approach to whether there was a family life. It should have conducted a holistic assessment, and treated financial dependency simply as one facet of whether that family life existed. Such a dependency can only serve as evidence of a family life: it cannot create it. Nor was there any requirement of exceptionality, as the Tribunal appeared to understand the test to be.
11. It follows that I need not address any further grounds, although I recognise that Mr Kumar is right when he says that the Tribunal appears to have misunderstood the financial evidence, incorrectly assuming as it did that Mrs Thapa was paying her own rent when in fact that expense is met by housing benefit. I would add that the Tribunal's focus on the choices made by this

family – of mother to migrate to the UK, and of son to remain her financial dependent – are arguably irrelevant considerations in light of the decision in Rai which at [§43] identifies the “perhaps crucial” point as being the fact that this Gurkha and his family would have all applied to come to the United Kingdom together had they been able to do so at the relevant time.

Decision and Directions

12. The decision of the First-tier Tribunal is set aside for error of law.
13. The decision in the appeal is to be remade by a Judge of the First-tier Tribunal other than Mr French.
14. There is no order for anonymity.

Upper Tribunal Judge Bruce
7th July 2021