Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13257/2019
HU/13259/2019

THE IMMIGRATION ACTS

Heard remotely via video (Teams)	**Decision & Reasons Promulgated**
On 2 July 2021	**On 15 July 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

CHANDRA BAHADUR RAI
NABIN RAI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellants: Ms D Revill, Counsel, instructed by Everest Law Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Microsoft Teams. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. These are appeals against the decision of Judge of the First-tier Tribunal Minhas ("the judge") promulgated on 15 October 2020 in which she dismissed the human rights appeals of Chandra Bahadur Rai ("the 1st appellant") and Nabin Rai ("the 2nd appellant") against decisions of the respondent dated 5 July 2019 refusing their human rights claims (in the form of applications for entry clearances to join their father in the UK).

2. Both appellants are male nationals of Nepal. The 1st appellant was born on 24 January 1976 and the 2nd appellant was born on 4 May 1982. On 3 April 2019 they applied for entry clearance to join their father, Parsuram Rai ("the sponsor"), a former Gurkha soldier who was discharged from the army prior to 1 July 1997 (he was discharged on 18 February 1971 after 8 years service). The sponsor and his spouse (who is the mother of the 2nd appellant and the step-mother of the 1st appellant) were granted Indefinite Leave to Enter (ILE) the UK in September 2016 and entered the UK in October 2016 pursuant to the grant of ILE. The appellants' applications were made outside of the immigration rules and outside the terms of the respondent's policy on Gurkhas, the latest version of which was published on 22 October 2018.

3. Although the respondent accepted in the appealed decisions that the appellants may have received financial assistance from their sponsor and that they were in contact with him, the respondent was not satisfied that either of the appellants were genuinely dependent either financially or emotionally on their sponsor. The respondent was not satisfied that family life existed between the appellants and their sponsor for the purposes of Article 8 ECHR.

4. The appellants appealed the respondent's decisions to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

5. In addition to the respondent's bundle of documents the judge had before her a bundle of documents prepared by the appellants' legal representatives that included brief statements from the appellants, statements from the sponsor and his spouse, money transfer receipts showing funds remitted by the sponsor to the appellants, several Nepal Telecom call history documents relating to the 1st appellant, screenshots of Viber calls relating to the sponsor, and photographs of several calling cards. The judge heard oral evidence from the sponsor and his spouse.

6. Having summarised the evidence before her and having set out in some detail the submissions from both legal representatives, the judge accurately directed herself as to the appropriate burden and standard of proof and identified the relevant legal authorities and decisions relating to Article 8 family life

relationships between adult children and their parents, with particular reference to the cases involving Gurkhas. These included Kugathas v SSHD [2003] EWCA Civ 31 ("Kugathas"), Rai v Entry Clearance Officer [2017] EWCA Civ 320 ("Rai"), Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) ("Ghising"), Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 ("Rai") and Pun v SSHD [2017] EWCA Civ 2106 ("Pun").

7. In the section of her decision headed "Findings and Reasons" the judge set out her reasons for finding that there was no family life for Article 8 purposes between the appellants and their sponsor either at the time the sponsor and his spouse left Nepal in 2016 or at the date of the hearing.

8. At [18] the judge noted that the 1st appellant was 43 years old and that the 2nd appellant was 36 years old at the time of their applications. The judge noted the evidence from the sponsor that the property in which the family had resided when the sponsor left Nepal, and in which the appellants continued to occupy together with their two other siblings, was owned by a landlord who provided the accommodation in exchange for food and farming work and occasionally money. The judge found that the appellants did not rely on their sponsor for their accommodation.

9. At [19] the judge referred to the evidence from the appellants and their sponsor and his spouse to the effect that the appellants undertake farming work and other casual labouring work. The judge acknowledged remittances of funds by the sponsor to the appellant in March, April, May, July and December 2019 and in January, July and September 2020. The judge noted the sponsor's claim that he started sending money to the appellants in 2017 but that this assertion was not corroborated by any documentary evidence. The judge stated:

> "I find the appellants can obtain employment and are not reliant on the sponsor for their daily needs as the evidence is, they work in exchange for food, accommodation and money. I find the sponsor is assisting the appellants financially. The evidence does not lead me to conclude that assistance has been ongoing since 2016/2017. There is no evidence before me as to the living costs of the appellant or to what extent the money sent by the sponsor is relied upon. The sums are sent sporadically and in my view is [sic] they are used as 'top up' to the monies or payment in kind the appellants receive in Nepal rather than real, effective or committed support from the sponsor. I find if the monies were not sent by the sponsor, the appellants would continue to work for their accommodation and food."

10. At [20] the judge noted the absence of documentary evidence in support of the sponsor's claim that a loan of 1 lakh "from a relative in Nepal" was obtained in order to provide for the appellants until the sponsor was able to send money from the UK, and that the sponsor and his spouse had given evidence that they had no other family in Nepal other than their children, and that neither appellant referred to financial support from any other family members in their

statements. The judge found that the sponsor did not make any arrangements to financially assist the appellants upon his departure from Nepal. The judge concluded that this undermined the claim to family life "… as the appellants were not in receipt of real, committed or effective support from the sponsor upon his departure from Nepal."

11. At [21] the judge noted that the evidence of contact between the sponsor and the appellants was limited to 2019/20. The judge was not assisted by the copies of telephone cards as they did not indicate who was called, and there was no evidence before the judge of a telephone number that belonged to either appellant. the list of telephone records did not disclose who the calls were made to. The judge stated that, if he accepted the calls were made to the appellants, the evidence was restricted to 2019/20, a period after the applications were made, and undermined the claim of the existence of an Article 8 family life relationship. The judge indicated that she had no doubt that, as the family claimed to have lived together before the sponsor and his spouse arrived in the UK, they did share emotional ties, but the telephone calls evidenced the usual emotional ties between adult children and their parents.

12. At [23] the judge stated:

> "there is little in the way of corroborating evidence in this appeal. The independent evidence confirms money transfers in 2019/20 and regular contact with unknown persons in Nepal in 2019/20. I have found the appellants are not reliant on the sponsor, either at the point of departure from Nepal or presently, for accommodation, food or money. In the absence of any evidence as to the income and outgoings of the appellants and the sporadic nature of the payments, I find the monies provided by the sponsor are 'top up' to their earnings in Nepal not real, committed or effective support."

13. At [24] the judge found that the appellants and the sponsor did not enjoy family life in October 2016. The judge acknowledged that the appellants were unmarried and remained in the 'family home', but this did not lead her to conclude that there was family life between the appellants and the sponsor in October 2016.

14. At [25] the judge stated:

> "I then consider whether there is any family life in the present. The appellants are aged 43 and 36 years at the date of application. They continue to be reliant on their own endeavours for accommodation and food. There is no suggestion they are in ill-health or otherwise unable to work and support themselves. I have found the sponsor provides them with sporadic 'top up 'monies and there is no evidence the appellants are reliant on this 'top up', I find the monies provided by the sponsor do not amount to real, committed or effective support nor are the appellants reliant upon the sponsor. I find the appellants are living separately and independently of their parents. There is evidence of regular contact with Nepal. However, in the context of the sponsor and his wife arriving in the United

> Kingdom in their advancing years, with little English and a limited social network, I find this contact amounts to no more than the usual ties between adult children and their parents. I acknowledge the sponsor and his wife likely miss their children as stated, but in my view, this is the usual emotional ties between adult children and their parents rather than family life. I find, if there is reliance, it is the sponsor and his wife who are reliant on their connection with the appellants and Nepal rather than the appellants in any way being reliant on sponsor and his wife."

15. The judge concluded that there was no family life, as understood by Article 8(1), between the appellants and the sponsor and his spouse. In these circumstances the judge did not consider there was any need to assess the issue of proportionality, which was relevant to the Article 8(2) proportionality assessment. The appeals were dismissed.

The challenge to the judge's decision

16. The appellants challenge the decision on four grounds, all of which were amplified by Ms Revill in her written and oral submissions. The first ground challenges the judge's finding that there was no family life between the appellants and the sponsor at the time the sponsor and his spouse left Nepal in October 2016. The judge's finding that the accommodation was provided by the landlord and not the sponsor, and his finding that there was no "provision", financial or otherwise, made by the sponsor in respect of the appellants, were not requirements for the existence of Article 8 family life. All that was required was support that was real, effective, or committed. Although such support may be in the form of money or accommodation, it could equally be emotional and/or practical support. Given that the judge did not dispute that the appellants and their sponsor were all living together as a family unit until the sponsor and his spouse left Nepal, and in light of the relevant authorities, including Uddin v SSHD [2020] EWCA Civ 338 ("Uddin") the judge's finding was unsustainable and she failed to give adequate reasons for concluding that family life did not exist at the point when the sponsor left for the UK. The respondent's concession (set out in her written submissions dated 16 December 2020) that, whilst the first ground was made out, it was not material, should be rejected on the basis that the existence of family life at the point of departure from Nepal was the starting point for the assessment as to whether family life existed at the date of the hearing. The judge therefore approached the assessment from the wrong starting point and this undermined the reliability of her findings.

17. The second ground contends that the judge, despite making various references to "real, effective or committed support", in practice equated this with a need for the appellants to show that they were 'reliant' on the sponsor as a matter of necessity, that is, that they could not survive without his assistance. This was a misdirection as there was no legal requirement for the appellants to have to rely on the sponsor out of necessity. A requirement for reliance of necessity

erroneously elevated the threshold family life under Article 8(1). There was no need for the appellants to show that they were incapable of working themselves, or that they would be unable to survive without the money sent by the sponsor. Reference was made to paragraph 14 of Patel, which was reiterated at paragraph 17 of Rai. The judge was wrong to hold the absence of reliance against the appellants when determining the existence of Article 8 family life.

18. The 3rd ground contends that the judge erred in law by disregarding the possibility that the appellants' parents may be 'reliant' on them. At [25] the judge found that if there was reliance, on was the sponsor and his spouse who were reliant on the appellant and not the other way round. The judge's failure to appreciate that support can flow in both directions (i.e. the appellants being dependent (in the Kugathas sense) on their parents or the parents being dependent on the appellants) constituted a material legal error. The judge's use of the term "if there us reliance" in [25] was part of the reasoning in respect of the reference in the previous sentence to "usual emotional ties."

19. The 4th ground challenges the judge's failure to undertake the Article 8(2) proportionality assessment in light of her other legal errors in the assessment of the existence of family life under Article 8(1). It was accepted by both parties that the failure of the judge to undertake a proportionality assessment would only become relevant if one or more of the other grounds was established, and those grounds were material.

20. In her written submissions the respondent accepted that the judge erred in law in her assessment of the existence of family life at the point of the sponsor's departure from Nepal, but submitted that this error was not material. At the error of law hearing Mr Whitwell did not seek to go behind this concession. The respondent maintained that the judge considered all the evidence before her, that she made factual findings that were rationally open to her, that she applied the correct legal test in respect of her findings and that she was entitled to conclude that there was no Article 8 family life between the sponsor and his spouse and the appellants at the time of the judge's decision.

Discussion

21. At [14] of Kugathas, Sedley LJ cited with approval the report of the Commission in **S v United Kingdom** (1984) 40 DR 196 at [198]:

> "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults … would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

22. Sedley LJ considered the issue of dependency at [17]:

> "But 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 in my view the irreducible minimum of what family life implies."

23. When considering the material factors that comprise the "irreducible minimum" of what constitutes family life Arden LJ stated, at [24]:

> "There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such 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."

24. And at [25] Arden LJ stated:

> "Because there is no presumption of family life, in my judgment 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 … Such ties might exist if the appellant were dependent on his family or vice versa."

25. In **Uddin v SSHD** [2020] EWCA Civ 338, having considered **Kugathas**, the Senior President of Tribunals stated, at [31]:

> "Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact, a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed."

26. Careful consideration must therefore be given to the particular circumstances of each case, and the situations in which an Article 8 family life relationship exists may be highly fact-sensitive (**Uddin**, at [32]).

27. It is apparent from the judge's decision, particularly the section where she sets out the appropriate legal test and supporting authorities, that the judge was aware that, in order to establish family life as understood in Article 8(1) ECHR, there had to be, as an irreducible minimum, support that was real or effective or committed.

28. In her written submissions dated 16 December 2020 the respondent conceded that the judge erred at [24] of her decision when concluding that family life did not exist at the point of the sponsor's departure from Nepal given that they all resided together as a single family unit, notwithstanding the appellants' ages. This concession was maintained by Mr Whitwell at the 'error of law' hearing. The respondent however maintains this error was not material as the judge nevertheless considered whether family life existed at the date of the hearing

and found that it did not. The appellants accept that it was necessary for them to show that Article 8 family life continued at the date of the judge's decision (Rai, at [42]) but maintain that the judge's error affected her assessment of the existence of family life at the time of the hearing as she did not begin at the correct starting place.

29. I am not persuaded that any error of law in the judge's assessment of the existence of family life at the date of the sponsor's departure from Nepal materially affected her subsequent assessment of the existence of family life at the time of the hearing and her decision. The judge was required to considered whether family life existed at the time of the hearing. Over 2 ½ years passed between the time the sponsor and his spouse left Nepal and the appellants' applications for entry clearance, and nearly 4 years had passed until the date of the hearing. The judge rejected the sponsor's evidence that he took a loan from a relative in Nepal in order to financially support the appellants until he could send them money directly from the UK. This finding of fact was not challenged. The judge noted the absence of any evidence of money remitted by the sponsor to the appellants prior to 2019, and the absence of documentary evidence of communication between the appellants and the sponsor prior to 2019. Even if the judge should have taken as her 'starting point' the fact that there was family life at the point of the sponsor's departure, this does not materially colour her assessment of the existence of family life at the time of the hearing or establish any legal presumption that family life would have continued. The judge was required to consider all material facts at the date of the hearing, an undertaking that she complied with (see, e.g. [25]). A great deal can change in terms of a relationship over a period of almost 4 years (from the departure of the sponsor and his spouse from Nepal in October 2016 to the hearing of the appeals in September 2020) and the assessment of the existence of family life at the date of the hearing is essentially a separate exercise from the assessment of such family life at the point of departure. In these circumstances I am not persuaded that any failure by the judge in respect of her starting point to the assessment of the existence of family life at the date of the hearing materially undermined or rendered unsafe that assessment.

30. In respect of the 2nd ground of appeal, the appellants rely on an observation by Sedley LJ at [14] of Patel 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". For his part Mr Whitwell accepted that dependency of necessity is not a requirement for the establishment of a family life relationship. I agree. There is nothing in the authorities considered above equating dependency of necessity (in the sense that the support is required in order for the person being supported to meet their essential needs) with support that is real or effective or committed, which is required to establish, as a minimum, the existence of Article 8 family life. I am

not however persuaded that the judge fell into the error of conflating the two concepts.

31. The judge demonstrably had in mind the correct legal test for establishing a family relationship as understood in Article 8(1) ECHR. The judge does find that the appellants are not reliant on the sponsor for their accommodation or their daily needs (e.g. at [18] and [19]) but these are factual findings made in the context of the judge's assessment of all the evidence before her. The fact that such findings are made does not mean that the judge has misapplied the Kugathas test. At [19] the judge specifically considered the financial assistance provided by the sponsor but noted that there was no evidence that that assistance had been ongoing since 2016/2017 and that, in the absence of any evidence as to the appellants' living costs and given the sporadic nature of the funds that were remitted, the monies were used as a 'top up' rather than being real, effective or committed support. The judge specifically considered the money remitted by the sponsor and concluded that, in the absence of any evidence as to the income and outgoings of the appellants, the funds provided by the sponsor did not amount to real, effective or committed support (at [23]). This was a conclusion rationally open to the judge on the basis of the evidence before her. At [25] the judge again found that the monies provided by the sponsor did not amount to real, committed or effective support, "… nor are the appellants reliant on the sponsor" (my emphasis). The judge has distinguished reliance from the provision of support that is real, committed or effective. This undermines the contention that the judge equated the Kugathas test with a requirement that dependency of necessity be established. The judge also considered the evidence of the regular contact between the appellants and the sponsor and his spouse but that, given the ages of the appellants and the fact that the appellants were living separately and independently of their parents (at [25]), this contact only disclosed the existence of "the usual emotional ties between adult children and their parents" (at [21] and[25]). This again was a conclusion rationally open to the judge based on the evidence before her and for the reasons she gave. I am not persuaded this ground is made out.

32. In respect of the 3rd ground of appeal, I accept that the judge appeared to fail to appreciate that reliance, for the purposes of Article 8, can go both ways and that, to the extent that she considered that an Article 8 relationship could only be established if it was shown that the appellants were reliant on the sponsor and not the other way round, she erred in law. But this was an alternative finding, the judge having already found that the relationships between the appellants and the sponsor and his spouse did not disclose anything more than the "usual emotional ties" between adult children and their parents. This much is clear from the final sentence of [25]. The judge states, "I find, if there is reliance…" (my emphasis). It is satisfactorily clear from the use of the conditional clause and the content of the previous sentence that the judge was satisfied that the contact between the appellants and the sponsor and his spouse simply did not amount to anything more than the normal emotional ties one

would expect between adult children and their parents. I am consequently satisfied that any error was not material.

33. Given that I have found no material legal error in respect of the judge's assessment of the existence of family life, her failure to then undertake a proportionality assessment can have no material bearing on her final decision.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law.

The appeal is dismissed.

D.Blum 7 July 2021

Signed Date
Upper Tribunal Judge Blum