Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01637/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 29 June 2021 **On 8 March 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR SHREE PRASAD WANEM LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Ms N Nnamani, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal. His date of birth is 28 May 1978. He appeals against the decision of the Entry Clearance Officer (ECO) made on 22 November 2019 to refuse his application for entry clearance as an adult dependant of his father (the Sponsor), who is a former Gurkha soldier.

2. The Appellant's appeal was dismissed by the First-tier Tribunal (Judge Swinnerton) in a decision dated 28 February 2021 (promulgated on 2 February 2021).

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3. Permission to appeal was granted to the Appellant by the First-tier Tribunal (Judge Welsh) on 23 March 2021. Thus, the matter came before me to determine whether Judge Swinnerton erred in law.

The background

4. The Appellant was aged 42 at the date of the hearing. He was aged 41 at the time he made the application for entry clearance. Thirteen years prior to the application the Sponsor and the Appellant's mother had left Nepal. The Appellant has not resided with them since then. The Sponsor was at the date of the hearing before the First-tier Tribunal aged 72. The Sponsor and the Appellant's mother have five children, three of whom reside in the UK. The Appellant and his sister live in Nepal.

The Decision of the First-tier Tribunal

5. There was no witness statement from the Appellant. At the hearing the judge heard evidence from the Sponsor. The Sponsor was cross-examined by the Presenting Officer . The Secretary of State relied on credibility issues.

6. The judge made a number of positive findings. He accepted that the Appellant was unmarried, that he has no children and that he has not formed his own family unit. He accepted that the Appellant remains in contact with his parents. They have contact every week or two and this is usually by phone. The judge accepted that the Sponsor has made six trips to Nepal since 2006 and on those occasions the Sponsor "would likely have given monies to the Appellant" (para 27). The judge made the following findings. (He refers to the Sponsor, by name, Mr Limbu):-

> "27. It is clear also that Mr Limbu has made six trips back to Nepal since 2006. I am prepared to accept that, on those occasions, Mr Limbu would most likely have given monies to the Appellant whilst back in Nepal. That said, and with respect to the Appellant being financial dependent upon the Sponsor, the evidence given at the hearing and by Mr Limbu was that he had provided for the Appellant financially since 2006 and that this was done by means of sending monies via friends and family visiting Nepal and by using an informal and now banned system on transferring monies called Hundi. No documentary evidence at all was provided in relation to friends and family taking monies to the Appellant in Nepal on behalf of Mr Limbu or of any monies sent by Mr Limbu to the Appellant via Hundi.
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> 28. Mr Limbu stated that he had sent monies by way of transfer for at least twelve or eighteen months prior to the date of the application and that remittances demonstrating that had been provided but had not been returned to him. The whereabouts of such remittances is not known but, even if Mr Limbu had sent monies by money transfer to the Appellant for the twelve to eighteen months prior to the date of the application, that would only date back until about mid-2018. I do not accept that the Appellant has been financially dependent upon his father since

2006 based upon the fairly scant documentary evidence provided in that respect.

29. In relation to the studies undertaken by the Appellant, the evidence of Mr Limbu is that, apart from the Appellant completing his school leaving certificate on a private basis when aged about 32 or 33, the Appellant has not worked or otherwise studied in the 30 years since he left school aged 12 or 13. I was not provided with any evidence as to the state of the labour market in Nepal and I make no comment at all in that respect. I do, though, have some difficulty in accepting that the Appellant has spent such a length of time without working or providing for himself financially.

30. The Appellant has now been living apart from his father and mother for almost fifteen years. He continues to live in the family home in the northern part of Nepal where he has always lived. One of his sisters lived with him until about three years ago. She now lives in Kathmandu and the Appellant maintains contact with her. The maternal uncle and paternal uncle of the Appellant and their families also live in Nepal. Taking account of all the circumstances in this case, I am not satisfied that there exists emotional dependency between the Sponsor and the Appellant over and above the normal emotional ties. I am not therefore satisfied that the family life exists or that Article 8 is engaged."

The Grounds of Appeal

7. The grounds of appeal are insufficiently particularised. I have identified the first ground as a complaint that the judge did not apply the correct test when considering family life with reference to Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Rai v Entry Clearance Officer [2017] EWCA Civ 320 and Ghising & Ors (Ghurkhas – BOCs - historic wrong - weight) [2013] UKUT 567. The more recent case of Uddin v The Secretary of State for the Home Department [2020] EWCA Civ 338 is also relied on, specifically paragraph 40. The thrust of the complaint is that the judge did not apply the correct test which is real, effective or committed support.

8. The second ground that I can identify from the grounds is that there is a contradiction in the judge's findings. The judge made positive findings in respect of the Appellant, however, he did not accept that the Appellant had been financially supported by the Sponsor since 2006. In respect of this finding the judge was "obliged to adequately explain why the Sponsor's evidence was not credible". To support the assertion that there is an inconsistency in the findings the judge accepted that the Sponsor had been to Nepal six times when he gave money to the Appellant.

The Law

9. In the case of Rai Lindblom LJ set out the legal principles relevant to family life between parents and adult children and stated as follows:-

"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’.

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):

> ‘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.'"

10. In the more recent case of Uddin the then Senior President of Tribunals, Ryder LJ, considered family life between parents and adult children in the context of a foster care relationship. He stated as follows:-

> "26. *Kugathas* describes the requirements for proving family life between adults in the context of immigration control. At paragraph [14], Sedley LJ cited with approval the report of the Commission in *S v United Kingdom* at [198]:
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> > '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.'

27. At paragraph [16], the court referred to other European authorities which point to the enduring relevance of the passage above:

> ‘In *Marckx v Belgium* [1979] 2 EHRR 330, a decision of the full Court, at paragraph 31 the adjectives ‘real’ and ‘normal’ were used to characterise family life if it was to come within Article 8. In *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471 paragraph 63, again a decision of the Court, the phrase ‘committed relationship’ was used. In *Beljoudi v France* [1992] 14 EHRR 801, a decision of the Commission which went on to be upheld by the Court, at paragraph 55 the phrase ‘real and effective family ties’ was used.’

28. Importantly, at paragraph [17], the court considered whether the authorities describe a requirement of dependency in order to establish family life. Sedley LJ made it clear that this is right in the economic sense. However, he continued:

> ‘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.’

29. The court added, for completeness, at paragraph [18], that it is probable that the natural tie between parent and infant is a ‘special case’ which may in some cases supersede any need for a demonstrable measure of support.

30. What might then be the material factors that constitute the irreducible minimum of what constitutes family life? At paragraph [24] of *Kugathas* Arden LJ provides instructive assistance:

> ‘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.’

From this, Arden LJ reasons at paragraph [25] that:

> ‘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.’

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.

32. Subsequent case law has built upon but not detracted from *Kugathas*. In *Ghising* [2012] UKUT 00160 (IAC), Lang J sitting with Upper Tribunal Judge Jordan in the UT considered the authorities since *Kugathas*. They observed that family life between adult children and their birth parents will readily be found without evidence of exceptional dependence. In so far as it has been suggested that *Kugathas* had ever described a rigid test of exceptional dependency, this was dispelled and I respectfully agree with their conclusion that each case is fact sensitive.

33. *Kugathas* was a case in which the appellant had, many years previously, cohabited with his birth parents. This is so with many of the other case examples that counsel has drawn to our attention. The Secretary of State submits that this fact is an underlying assumption that denotes the true ambit of the authorities: namely, that the principle as described is a presumption limited to the formal relationship of a birth family.

35. The next question is whether the attainment of majority, that is to say the point at which a young person reaches his or her 18th birthday, has any relevant effect upon the existence of a family life. That question is settled. In *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630, [2016] ImmAR 1, Sir Stanley Burnton, with whom the rest of the court agreed, held at paragraph [24] that:

> '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 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.'

36. The existence of family life after a young person has achieved his or her majority is a question of fact. There is no presumption, either positive or negative, for the purposes of Article 8. Continued cohabitation will be a highly material factor to be taken into account and while not determinative, a young adult still cohabiting with a family beyond the attainment of majority is likely to be indicative of the continued bonds of effective, real or committed support that underpin a family life.

37. In so far as it is necessary to support the domestic case law that is binding on this court, the principle is also well embedded in ECHR case law. In *Anayo v Germany* (2012) 55 EHRR 5, [2011] 1 FLR 1883 at [56] the Strasbourg court determined that 'as a rule, cohabitation is a requirement for a relationship amounting to family life'.

38. In *Kopf and Liberda v Austria* App no. 1598/06 [2012] 1 FCR 526 the ECHR reiterated at [35] the notion expressed in *Anayo* that 'family life' under Article 8 is not confined to marriage-based relationships and 'may encompass other de facto 'family' ties.' The court continued:

> 'The existence or non-existence of 'family life' for the purposes of art 8 is essentially a question of fact depending

on the real existence in practice of close personal ties (see *K v Finland* [2001] 2 FCR 673, [2001] 2 FLR 707 at para 150). Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties' (see *Kroon v Netherlands* (1994) 19 EHRR 263 at para 30).'

On the facts of *Kopf*, it was the applicant foster parents' 'genuine concern for [the child's] well-being and that an emotional link between [the child] and the applicants similar to the one between parents and children had started to develop' that grounded the court's finding, at [37], that the relationship 'falls within the notion of family life within the meaning of art 8(1).'

....

40. Accordingly, the following principles can be described from the authorities:

i. The test for the establishment of Article 8 family life in the *Kugathas* sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.

ii. The test for family life within the foster care context is no different to that of birth families: the court or tribunal looks to the substance of the relationship and no significant determinative weight is to be given to the formal commerciality of a foster arrangement. It is simply a factual question to be considered, if relevant, alongside all others.

iii. The continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life."

Oral Submissions

11. Ms Nnamani agreed that the grant of permission identifies the three grounds of appeal.

12. The grant of permission reads as follows:

"I conclude that it is arguable that:-

1. The findings of fact about the nature and degree of contact between the Sponsor and the Appellant are inconsistent with the judge's conclusion about whether family life exists;

2. Insufficient reasons were given for the rejection of the evidence of the Appellant and his witnesses in relation to the extent and duration of financial support;

3. The judge failed to take account of an important factor in the assessment of financial support, namely that the Appellant lives rent-free in the home of the Sponsor."

13. Ms Nnamani submitted that the judge failed to apply the principles in Ghising, Rai and Uddin. He made inconsistent and contradictory findings. The judge accepted that the Sponsor was credible in respect of many aspects of his evidence, namely the level of contact and frequent trips to Nepal and of some financial support. The judge does not say what evidence he accepted. The judge did not say that he did not believe the witness. The judge should have found that the Sponsor was credible. The Sponsor gave oral evidence and it was incumbent on the judge to say whether or not he believed his evidence. There was evidence of financial support since 2006. The judge did not take into account that the Appellant lives in the Sponsor's family home and this amounted to financial support. The judge failed to apply those findings and apply the relevant test.

14. Mr Kotas submitted that at paragraph 30 the judge took into account that the Appellant lives in the family home. There was simply no need for him to say that he was living rent-free. The judge took into account all relevant circumstances. The positive findings made by the judge are not dispositive of whether or not family life existed so as to engage Article 8(1). The decision discloses no contradictory findings. The judge drew together all the strands and looked at the evidence in the round. The grounds amount to a disagreement with the conclusions of the judge.

15. In response, Ms Nnamani submitted that the judge did not apply the Kugathas principle, he did not consider whether family life existed when the Sponsor left Nepal and whether it continued. She accepted that there was no rationality challenge in the grounds. She submitted that even if the Appellant had not worked for a long period of time this was not relevant to whether or not he was dependent on the Sponsor.

Conclusions

16. There was no witness statement from the Appellant. The judge recorded the evidence of the Sponsor at paragraphs 12 – 14. There is no challenge to the record of the Sponsor's evidence. In respect of the test to be applied, the judge did not set out the law in the decision. However, he recorded the relevant case law relied on by the ECO (at paragraph 5).

17. The judge at paragraph 30 stated that he was not satisfied "that there exists emotional dependency between the Sponsor and the Appellant over and above the normal emotional ties". This is clearly a reference to Sedley LJ citing with approval the report of the Commission in S v United Kingdom ,with regard to the relationships that acquire the protection of Article 8 (1), in Kugathas at paragraph 14. It is, however, not correctly set out by the judge. The report stated that relationships between parents and adult children would not necessarily acquire the protection of Article 8 (1) without "evidence of further elements of dependency, involving more than the normal emotional ties." At paragraph 17 of his judgment Sedley LJ said:

> "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".

18. The judge did not make reference to real or committed or effective support. In order to consider whether the judge did apply the right test, and there is no error of substance in the decision, I turn to the findings of fact. There is no contradiction in the findings made by the judge. The judge made a number of positive findings; however, he did not accept the Sponsor's evidence in its entirety. The judge was entitled to take this approach to the unsupported evidence. A proper reading of the decision discloses that the judge did not accept the evidence of the Sponsor because it was insufficient to discharge the burden of proof on the Appellant. The evidence was unsupported. The judge at paragraph 27 refers to there being no documentary evidence to support the assertion that the Sponsor had provided for the Appellant since 2006. The judge found that the evidence was "fairly scant". There is no contradiction in the judge having found insufficient evidence to support dependency from 2006 and at the same time accepting that the Sponsor would have given the Appellant money when he visited Nepal. The judge did not accept his evidence of financial dependency in the light of the lack of support. This finding was open to the judge and is adequately reasoned. The findings were open to the judge on the evidence as was the overall conclusion.

19. The judge applied a test with reference to Kugathas, but he did not set it out_properly. However, I am satisfied that he applied the correct test. He did not focus on only emotional support (with reference to the test he set out). He considered all the evidence of financial and emotional support and made findings that were open to him on the evidence. Having taken into account the findings and the overall conclusion, I am satisfied that any error in setting out the test is one of form and not substance. The judge had regard to all the material evidence and properly considered the nature and extent of the dependency.

20. In any event, considering what Sedley LJ said at paragraph 17 of Kugathas, it is unarguable that the Appellant could satisfy the test on the evidence before the judge. There was some evidence of financial support, but this was not sufficient to amount to dependency. There was evidence of telephone contact, but there was no "evidence of further elements of dependency, involving more than the normal emotional ties" between an adult child and parents. The judge was aware that the Appellant was living in the family home; however, all these factors together with the Appellant being single and having not formed an independent family unit, could not in my view satisfy the test. If I were to remake the decision, I would reach the same conclusion.

21. For all the above reasons, the decision of the judge to dismiss the appeal under Article 8 is maintained.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed Joanna McWilliam Date 20 July 2021

Upper Tribunal Judge McWilliam