Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000092
HU/06944/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2022	**On 14 September 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

MISS MINA RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr R. Rai, Counsel instructed by Sam Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 9 June 2021, First-tier Tribunal Judge Moon ("the judge") dismissed the appeal brought by the appellant, a citizen of Nepal born on 25 January 1982, against a decision of the respondent dated 20 February 2020 to refuse her human rights claim made under the auspices of an application for entry clearance. The appeal had been brought under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant now appeals to this tribunal

against the judge's decision with the permission of Upper Tribunal Judge Kamara.

Factual background

2. The appellant's father is a former Gurkha soldier. We shall call him "the sponsor". He resides in this country with indefinite leave to remain. By an application dated 17 January 2020, the appellant applied for leave to enter the United Kingdom as his dependent. She currently resides in Nepal with her mother, who is said to have a number of physical disabilities, and her two brothers, Bum and Bhim. There are four other siblings who are married and live elsewhere in Nepal.

3. The basis of the appellant's application to the respondent, and her case before the judge, was that she was dependent upon her father for emotional and financial support. She does not work, and no work is available to her in Nepal. On 9 December 2018, the appellant's sister, Anita, was granted entry clearance under Annex K to the Immigration Rules. She met the criteria as she was under 30 years of age at the time. The appellant's case was that her father planned in due course to sponsor the entry of her mother and her two brothers. He could not afford to do so at the moment, however, and so had focused on the appellant's entry clearance alone.

4. The application was refused under the adult dependent relatives' rules contained in Appendix FM of the Immigration Rules. The respondent did not accept that the emotional ties between the appellant and the sponsor went beyond those that would be expected between a parent and adult child. There was no "real", "committed", or "effective" support provided by the sponsor for the appellant.

The decision of the First-tier Tribunal

5. The hearing before the judge took place on 25 May 2021 at Hatton Cross. The sponsor attended. The appellant was represented by Mr S. Jaisri, of counsel.

6. The judge's substantive findings commence under the heading "Employment". Although she accepted that it may be "more difficult" to find work in Nepal than in the UK, she rejected the appellant's case that she would not be able to find any work in Nepal at all. The sponsor has three other children in Nepal who were managing to support themselves. They had presumably found work. The sponsor had not explained why his married adult children had been able to obtain qualifications and work experience, while his unmarried children had not. See [28] to [32].

7. The judge addressed the emotional support between the appellant and the sponsor at [33] to [40]. The judge accepted that the sponsor had made a number of return visits to Nepal between January 2016 and December 2019. She accepted that the pandemic had prevented travel since then.

8. The appellant had relied on some telephone records in various formats between herself and her father. Relying on telephone cards and phone

records the appellant had adduced, the judge accepted that the appellant and sponsor had made some telephone calls to each other, in the context of the sponsor contacting his wife and children in the country. Large numbers of the calls had been made for short periods on the same day, however. That troubled the judge, as it would be unusual: [34]. At [39], the judge found that it would be difficult to hold a meaningful conversation in such short periods. She rejected the sponsor's explanation that he would hold lots of short conversations with the appellant over the course of a day. The judge concluded the paragraph stating:

> "It is difficult to see what emotional support can be provided in such short calls."

She added at [40]:

> "In relation to emotional support, I accept that there is frequent telephone contact as it has been presented to the tribunal, I do not find that such contact amounts to evidence of elements of dependency going beyond the normal emotional ties that exist between an adult and parent."

9. At [41] to [50], the judge analysed the appellant's evidence that the sponsor had lived with her before his departure for the United Kingdom. Having set out the documentary and oral evidence of the sponsor upon which the appellant relied, the judge concluded at [49] that the appellant had not been living with the sponsor immediately before he left Nepal. The sponsor's name had not featured on the appellant's tenancy agreement, and the evidence concerning the number of rooms that had been rented was inconsistent. The judge considered that, if the sponsor had been responsible for supporting the appellant financially, his name would have featured on the agreement. He had been in Nepal at the time, on the appellant's case, the agreement had been signed.

10. The judge addressed financial dependency at [51 to [62]. The judge said that she was "unable" to find that the sponsor was paying the appellant's rent between 2015 and 2020. She rejected the appellant's case that she was supported by her father's Gurkha pension, which was paid directly into his Nepalese bank account; the appellant had not set out how much she receives, and the frequency of the payments was not clear. Although there were some receipts confirming money transfers from the sponsor in favour of the appellant, the judge found that there were a relatively small number: [56].

11. Part of the appellant's case was that she had stayed in a town called Bhaktapur while she made her application for entry clearance, as it was closer to Kathmandu. The judge found that the sponsor's evidence was inconsistent with that of the appellant in this respect (see [58]), and that he knew surprisingly little about her day to day living arrangements, which he would if he were supporting her financially, as they claimed: [61]. The judge accepted that the sponsor provides some financial support for the appellant, but insufficient evidence had been provided to demonstrate that there was a situation of financial dependency: [62].

12. Finally, the judge found that Anita's 2018 application form for entry clearance was inconsistent with the sponsor's witness statement. In 2018, Anita claimed to be single. In the sponsor's witness statement, he wrote that she is married: see paragraph 22 of his statement dated 20 April 2021. That inconsistency damaged the sponsor's credibility.

13. The judge reached her global findings on the appeal at [69]:

> "Considering the evidence as a whole and applying the factors set out by Arden LJ in *Kugathas* specifically, identifying the near relatives and considering the links between them. I have taken into account that this appellant[,] who is now aged 39[,] has been living in a separate country from their father for almost 6 years in which time she has the support of her brothers, she is therefore not alone in Nepal. Based upon a combination of this, my findings in relation to the credibility of the sponsor's evidence and in relation to financial and emotional dependency and [sic] I conclude that I am unable to find that there are elements of dependency going beyond the normal emotional ties that would usually exist between adult children and their parents. I therefore find there is no family life and say Article 8 is not engaged."

Since Article 8(1) was not engaged, the judge did not consider Article 8(2) or the proportionality of refusal.

Grounds of appeal

14. The appellant advances three grounds of appeal. First, the judge failed to apply *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 in light of *Rai* [2017] EWCA Civ 320, concerning the existence of Article 8 "family life" between adult relatives. Secondly, the judge erred by failing to ascribe significance to the sponsor's intention to apply to bring his wife and sons to live in the United Kingdom in due course. They had not done so for financial reasons, not because they did not enjoy "family life" together. Thirdly, the judge had taken into account irrelevant factors, by looking to other family members to whom the appellant could turn for support, contrary to *Rai* at [42].

Submissions

15. Mr Rai submitted that the judge ignored the evidence of the appellant and sponsor that the sponsor's wife and unmarried sons are planning to apply for entry clearance as soon as the sponsor can afford it. The gravamen of Mr Rai's submissions was that the judge adopted an overly restrictive approach to *Kugathas*, applied in light of *Rai*.

16. For the respondent, there was no rule 24 response. Ms Everett relied on the judge's unchallenged findings of fact and submitted that *Kugathas* and *Rai*, when applied to those findings, entitled her to dismiss the appeal for the reasons she gave.

The law

17. Article 8 of the European Convention on Human Rights ("the ECHR") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

18. The leading authority on "family life" between adult relatives for the purposes of Article 8(1) is *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31. At [17], Sedley LJ said, discussing the jurisprudence of the European Court of Human Rights in relation to "dependency", 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 in my view the irreducible minimum of what family life implies."

19. At [24] and [25], Arden LJ identified some practical features of what such dependency may look like in practice:

> "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.
>
> 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: see *S v United Kingdom* (1984) 40 DR 196 and *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or *vice versa*."

20. In *Rai*, Lindblom LJ, with whom the other members of the Court agreed, summarised the authorities on the issue in these terms, at [19]:

> "Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* [*R. (on the application of Gurung and others) v Secretary of State for the Home Department* [2013] 1 WLR 2546] (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'."

21. Since Mr Rai of counsel relied on the following extracts of *Rai,* we quote them here too. See [36]:

> "As Ms Patry [counsel for the Secretary of State] submitted, it was clearly open to the Upper Tribunal judge to have regard to the appellant's dependence, both financial and emotional, on his parents. This was, plainly, a relevant and necessary consideration in his assessment (see the judgment of the court in *Gurung*, at paragraph 50). If, however, the concept to which the decision-maker will generally need to pay attention is 'support' – which means, as Sedley L.J. put it in *Kugathas*, 'support' which is 'real' or 'committed' or 'effective' – there was, it seems to me, ample and undisputed evidence on which the Upper Tribunal judge could have based a finding that such "support" was present in the appellant's case. "

22. And [42]:

> "Those circumstances of the appellant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1). Even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal judge properly addressed it."

Discussion

23. In our judgment, it is nothing to the point that the judge did not ascribe significance to the stated intention of the remaining unmarried sons of the sponsor, and his wife, subsequently to apply for entry clearance. The judge reached extensive unchallenged findings of fact, which we have outlined above and will return to below, that the appellant's in-country circumstances did not amount to a situation of "dependence" for the purposes of Article 8(1) ECHR. That the sponsor's additional family members may, in due course, plan to apply for entry clearance to join the sponsor does not take matters further, in light of the judge's findings of fact.

24. Mr Rai's reliance upon [42] of *Rai* is misplaced. In our judgment, [42] of *Rai* is not authority for the proposition that the stated intention for family reunification on the part of the remaining family members will always provide the foundation for Article 8 family life between adult family members. Rather, it was the case-specific application of the broader point, quoted at [19], that "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."

25. In the decision under challenge in *Rai*, the appellant had left Nepal for the UK on his own, leaving other family members behind. In the decision under appeal, a deputy judge of this tribunal had emphasised the willingness of the father to leave his remaining family in Nepal as being indicative of there being no "family life", and had failed to engage with (i) the question of whether "family life" existed before the father's departure, and (ii) the evidence that the only reason the father left first was because the remaining family members could not afford to travel with him at the same time. While we accept that the appellant's case before the judge in these proceedings was that neither she nor the rest of the family had been able to afford to travel with her father, that is not a factor which, in isolation, would be capable of establishing the presence of "family life" between them in light of the remaining findings of fact reached by the judge in this case.

26. We accept that in *Rai*, the Court of Appeal quoted a finding in *Ghising (family life – adults – Gurkha policy)* [2012] UKUT 160 (IAC) in which this tribunal accepted at [56] 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." That is not to say, however, that the judge in these proceedings applied *Kugathas* too restrictively, and it is notable that Mr Rai's submissions did not engage with the detail of *Kugathas* by reference to the judge's findings and analysis.

27. The examples given by Lang J in *Ghising* of a more liberal approach to adult dependency on the part of the Strasboug court related to scenarios which, on the judge's unchallenged findings, simply have not arisen in these proceedings. For example, at [57], the tribunal addressed the recognition that family life may continue between parent and child even after the child has attained majority: see *Etti-Adegbola v Secretary of State for the Home Department* [2009] EWCA Civ 1319, per Pill LJ at [23]; per Arden LJ at [35]. At [58], the tribunal referred to *Secretary of State for the Home Department v HK (Turkey)* [2010] EWCA Civ 583, in which Sir Scott Baker held that family life did not "suddenly cut off" for a young man still living with his parents upon attaining the age of majority. At [59], the tribunal referred to *RP (Zimbabwe) & Anor v Secretary of State for the Home Department* [2008] EWCA Civ 825 which concerned a 23 year old appellant who had lived with her parents her entire life. While in those cases, it may be said that a literal application of *Kugathas* would lead to errors, it is clear that the judge's findings of fact in these proceedings preclude the more benevolent approach to family life that Mr Rai submits the judge should have adopted.

28. On the basis of the judge's unchallenged findings of fact in these proceedings, Article 8 did not exist at the point of the sponsor's departure and did not exist at the time of the hearing before the First-tier Tribunal. It

is very difficult to see how the judge had any option open to her other than to dismiss the appeal. She reached the following unchallenged findings:

a. First, that the sponsor had not demonstrated why his married children had been able to obtain relevant qualifications and work experience in Nepal, and his unmarried children had not. This is relevant because it went to the issue of the 39 year old appellant's dependence upon the sponsor, and her in-country circumstances. The less she was able to cope on her own, the stronger her claimed dependence upon the sponsor would be.

b. Secondly, that the appellant was not emotionally dependent upon the sponsor: [40]. This unchallenged finding went to the core of the *Kugathas* criteria to demonstrate the presence of "family life" for Article 8 ECHR purposes. We have addressed above why the judge did not err in her application of *Kugathas* and *Rai* when reaching that conclusion.

c. Thirdly, that the appellant and sponsor had not lived together before the sponsor's departure from Nepal, as claimed, and the sponsor knew very little of the appellant's living arrangements. These findings underline the inability of the appellant to demonstrate that Article 8 is engaged on a family life basis.

d. Fourthly, that, although the sponsor had sent some remittances to the appellant, there was no evidence of financial dependency by the appellant upon the sponsor. This unchallenged finding also went to the core of the *Kugathas* criteria to demonstrate the presence of "family life" for Article 8 ECHR purposes.

e. Fifthly, that Anita's claimed circumstances upon applying for entry clearance as the dependent of the sponsor appeared to differ from those outlined in the sponsor's witness statement. The judge was entitled to ascribe significance to these discrepancies, as they went to the sponsor's overall credibility. The judge was entitled to approach the evidence in that way.

29. Taken together, these unchallenged findings were fatal to the appellant's case that family life existed between her and the sponsor. Contrary to Mr Rai's submissions, the judge did not misapply *Rai*. Her operative reasoning at [69] was the culmination of her earlier findings of fact. Those findings were open to her on the evidence she heard. Since on the judge's findings Article 8(1) was not engaged, it followed that she was bound to dismiss this appeal, as are we.

30. This appeal is dismissed.

Postscript

31. We should record that the grounds of appeal to the Upper Tribunal suggested that the sponsor had sadly died. Mr Rai confirmed to us that that was an error.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

This appeal is dismissed.

No anonymity direction is made.

Signed Stephen H Smith Date 1 August 2022

Upper Tribunal Judge Stephen Smith