IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002170
(HU/02404/2021)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 May 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Jum Prasad Gurung

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr D Strestha, Counsel instructed by Gurkha Solicitors Ltd
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 13 April 2023

DECISION AND REASONS

1. The Appellant is a national of Nepal, born on the 22nd August 1976. He appeals with permission against the decision of the First-tier Tribunal (Judge JP Groom) to dismiss his appeal on human rights grounds.

Background

2. The Appellant's father Mr Karna Bahadur Gurung was a soldier in the Brigade of Gurkhas; he enlisted in 1968 and served for 16 years before being honourably discharged on the 9th July 1984. In 2011 Mr Gurung Snr was given a visa to enter the United Kingdom with a view to settlement. He entered the UK in July 2013, and the following year was joined by his wife. He did not at that time make applications for any of his four adult children to join him, because he had been advised that this was not permitted.

3. On the 7th January 2021 the Appellant, by then aged 45, made an application to join his parents in the UK. The basis of that application was that he continues to share a 'family life' with them for the purpose of Article 8; that any decision to refuse entry clearance would amount to a lack of respect for, or interference with, that family life, and that any refusal would be disproportionate. In respect of the family life he shared with his parents, the Appellant produced money transfer receipts and evidence of continued contact. In respect of the proportionality of the decision, the Appellant relied on a statement from his father to the effect that he would have settled with his family in the UK at the time but for the 'historic injustice' of Gurkhas not being permitted to do so, notwithstanding their loyal service to the British state: but for that injustice the family would have moved here long ago, and the Appellant would have been British by birth, or alternatively by naturalisation.

4. The application for entry clearance was refused on the 30th March 2021. The decision maker directed himself to the requirements of the Immigration Rules relating to adult dependent relatives, and finding no evidence that the applicant Mr Gurung was disabled or otherwise in need of long term care, refused entry on that basis. In respect of wider Article 8 obligations the decision maker acknowledged that the applicant was the son of a Gurkha, and that evidence of financial support and continued contact had been supplied, but found this evidence to fall short of establishing that Mr Gurung was "financially and emotionally dependent upon [his] father beyond that normally expected between parent and adult child".

5. When the appeal came before the First-tier Tribunal the ECO was not represented. The Sponsor Mr Gurung Snr attended to give evidence with the assistance of a Nepalese interpreter. Having heard that evidence, and having had regard to the written material, the Tribunal found itself satisfied that the Appellant's parents had visited Nepal regularly since they came to live in the UK; the written evidence demonstrated that they were supporting their son financially; there was regular contact by telephone and messenger services. That said, the Tribunal was not satisfied that these findings supported a conclusion that there was a 'family life' here for the purpose of Article 8. There was "nothing particularly remarkable" about the annual visits to indicate that these were "anything more than a normal visit between family members". There was "little indication" as to why the Appellant could not work to support himself and was therefore reliant upon his parents. Similarly the telephone/messenger contact was "normal". Those being the findings, the appeal was dismissed.

Grounds of Appeal: Discussion and Findings

6. The first ground of appeal advanced by Mr Strestha is that the Tribunal misdirected itself when considering the financial support which it accepted the Appellant to be receiving from his parents. The Tribunal appeared to consider that only a dependency of necessity would be sufficient to engage Article 8. It was therefore asking itself the wrong question.

7. As Ms Ahmed was prepared to accept, Mr Strestha's interpretation of the Tribunal's decision is correct. See for instance at its paragraph 17:

> "There was little indication in my view as to why a 45 year old man with seemingly no disability or illness would be precluded from finding some work in an effort to financially support himself".

8. The question is whether that was a misdirection. It is in my view incumbent on a Tribunal to look at all the circumstances in the round. If, for instance, a Tribunal had found that this family had contrived to make it *appear* as if the Appellant was dependent upon his parents when in fact he was not, then that would be a matter that the Tribunal could legitimately take into account in its assessment of whether there was here "real, effective or committed support". That does not however appear to be the finding. The Tribunal accepts that the Appellant is in fact dependent upon his parents, but then diminishes the weight to be attached to that matter on the grounds that in another scenario the Appellant might be able to fend for himself. I accept Mr Strestha's submission that this was the incorrect approach. The Appellant did not have to establish that he was dependent on his parents by necessity (although that factual scenario would, it is true, strongly support a finding of family life). The Appellant had to establish that there was a bond between himself and his parents which was sufficiently strong to engage the Article. Here he had demonstrated that they support him financially. The next question for the Tribunal to ask itself was not whether he could live in any other way, but to consider why these pensioners considered it appropriate to continue to financially support their grown son. The answer to that, says Mr Strestha, is because they are a Nepali family who are separated only by operation of the immigration rules and the historical injustice perpetrated against members of that regiment. But for those matters, this was a family who would, in accordance with Nepali tradition, still be living under the same roof; any household income would be spent collectively. They support him now because they are here and he is there, and living is hard in Nepal. Those matters tended to support the contention that there is a family life here for the purpose of Article 8.

9. The second ground is that the Tribunal has impermissibly elevated the threshold to be reached in what needs to be demonstrated to show family life. The Tribunal repeatedly finds the situation of this family to be "normal"; it finds that there is "nothing particularly remarkable" in two pensioners flying half way around the world once a year. Mr Strestha submits that this too was the wrong approach: there was no requirement for this family to identify some exceptional feature of their life together. The question is simply whether there is real committed or effective support. In her reply to this ground Ms Ahmed referred to the well known dicta in Kugathas [2003] EWCA Civ 31 in which the court make clear that there will not ordinarily be a 'family life' for the purpose of Article 8 between adult relatives. Something more must be shown.

10. I accept Ms Ahmed's proposition that "ordinarily" we would not find there to be an Article 8 family life between a 45 year old man and his parents. That said, in this jurisdiction we must think carefully about what that dicta means. What is ordinary in the UK is not necessarily ordinary elsewhere. The bond between parents and their adult son in a culture where such sons will "ordinarily" remain the family home forever is not comfortably analogous to Sedley LJ's fondly thought of aunty. Until the Home Office changed its policy the expectation of this family would have been that they would all continue to live under the same roof. It is arguable that this feature alone is the "something more" looked for by the Entry Clearance Officer. The ongoing desire of the parents to financially support their son, and their continued contact with him through annual visits to Nepal and frequent telephone calls should be seen in that context: they all tend to suggest

that there continues here to be real, effective and committed support. The Court of Appeal has now repeatedly made clear that Kugathas should not be too restrictively applied: see for instance Jitendra Rai [2007] EWCA Civ 320 and Singh [2015] EWCA Civ 630 in which Stanley Burnton LJ points out that Kugathas contains no requirement of exceptionality [at paragraph 24]. It all depends on the facts. Accordingly I find that ground 2 is also made out. The Tribunal does appear to have set too high a threshold in assessing Article 8(1): there was no burden on the Appellant to demonstrate something "remarkable".

11. It follows that I need not address ground 3, which is helpful because I can say in brief that it is not made out. The substance of the challenge is that the Tribunal erred in focusing on the physical separation between the Appellant and his parents to conclude that they cannot, by virtue of this distance, be offering him practical support. Mr Strestha submits that practical support could include, for instance, financial remittances and I accept that, but I think he misreads the decision. Having already delivered its decision in respect of the financial support, telephone calls etc. the Tribunal is here simply pointing out that they cannot be offering him the kind of support one might if you lived together: I read this together with the Tribunal's reference to the Appellant not being disabled or ill, which I have already found to be an erroneous elevation of the test. Ground 3 therefore adds nothing to the appeal.

Disposal

12. The undisturbed findings of fact are that one or both of the UK sponsors returned to Nepal in 2014, 2016, 2017, 2018, 2019 and 2020, with the Appellant's mother remaining there for a much of lockdown. They speak to the Appellant on a frequent and regular basis. He continues to live in their house in Nepal. They support him financially. Before the First-tier Tribunal Mr Gurung Snr gave evidence that his son remains "practically and emotionally" dependent upon him and his wife, but as they grow older they know that they in turn will become dependent upon him. They want their son here to be able to look after them as they grow older. This evidence went unchallenged before the First-tier Tribunal and I see no reason to reject it, aligning as it does with what this specialist tribunal knows about South Asian culture and the central role in those societies of the 'joint family system'. Mr and Mrs Gurung have already got one son working abroad (in Hong Kong) and I accept that it is therefore of heightened importance to them that the other son takes on the role that would have been expected of him had the whole family remained in Nepal: to remain living under their roof and to gradually take on the responsibility of looking after them as they have looked after him. Having had regard to the guidance in Jitendra Rai I am satisfied that the Appellant has established that there is an Article 8 family life at stake here. In submissions Ms Ahmad accepted that if family life is engaged, absent any countervailing factors the weight of the historic injustice is such that the appeal would fall to be allowed. That then, is my decision.

Notice of Decision

13. The appeal is allowed.

14. There is no order for anonymity.

Upper Tribunal Judge Bruce
25th April 2023