



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: UI-2023-001551
HU/55437/2022

THE IMMIGRATION ACTS

**Heard at Field House
On 7 July 2023**

**Decision & Reasons Issued
On 6 August 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MS MANBUJHA GURUNG
(ANONYMITY ORDER NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms D. Revill, counsel instructed by Everest Law Solicitors

For the Respondent: Ms A. Everett, senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal, born on 16.11.86. Her father, a former Gurkha, Mr Lal Bahadar Gurung, settled in the UK on 29 July 2011, by which time the Appellant was over the age of 18. On 10 February 2022, the Appellant applied for entry clearance as the adult dependent child of her father. This application was refused in a decision dated 25 July 2022 on *inter alia* the basis that the Appellant

had not demonstrated real, committed or effective support from her parents and that article 8 was not engaged.

2. The Appellant appealed against this decision and her appeal came before FtTJ Moffatt for hearing on 2 March 2023. At the hearing the Sponsor was unwell in bed but his wife, the Appellant's mother, gave evidence remotely via an interpreter. The Appellant's brother also gave evidence. Neither were cross-examined by the Respondent.
3. In a decision and reasons promulgated on 20 March 2023, the Judge dismissed the appeal. She accepted that the Appellant had been in receipt of her father's pension only from 1 February 2021 but only one remittance slip had been provided which may pre-date payments into the Appellant's bank account prior to this time. She found that she was unable to draw the inference that the Appellant is dependent on her father and that her ties went beyond what would be expected between adult children and their parents and thus family life was not established.
4. An application for permission to appeal to the Upper Tribunal was made, in time, on the basis that:
 - (i) The Judge applied the wrong test, which was not one of dependency but in light of Ghising [2013] UKUT 567 (IAC) the test is whether there is real and effective and/or committed support: Rai v ECO [2017] EWCA Civ 320 at [36];
 - (ii) with regard to the screenshots of video calls with "Baba Aama" this is dad/mum and the failure by the Judge to ask or ascertain the context was unfair: Maheshwaran [2002] EWCA Civ 173 per Schiemann LJ.
5. Permission to appeal was granted by FtTJ Athwal on 10 May 2023 on the basis that it was arguable that the Judge failed to consider family life in accordance with the decision in Rai (op cit) as there was no reference to it nor to the test for family life.

Hearing

6. At the hearing before the Upper Tribunal, Ms Revill reiterated her grounds of appeal, particularly that the test for family life for adult relatives is real, effective and committed support, but this appears nowhere in the decision at all either in the Judge's self-direction or findings and the test the Judge wrongly says she was asked to consider was that set out in Kugathas [2003] EWCA Civ 31. She submitted that the Judge had applied the wrong test, in applying an elevated threshold for dependency, which was not a pre-requisite

for family life, which was the key issue in the appeal and that this was a material error of law.

7. In respect of the second ground of appeal, which concerns the discrete issue of the Judge's findings on contact between the Appellant and her parents, there was no cross examination and in submissions the Respondent's representatives simply relied on the refusal letter. Despite that and the fact that both witnesses, the Appellant's mother and her brother, referred to contact with the Appellant and the context of this was addressed in submissions, the Judge cast doubt on this. Ms Revill submitted that the documentary evidence was not impugned in evidence and the Judge should have raised any concerns with her as the Appellant's representative, as it was clearly relevant. Ms Revill submitted that either cumulatively or separately the Judge had made a material error of law.
8. In her submissions, Ms Everett pragmatically conceded that there had been a material error of law; that the Judge has imported a higher test for family life and that she did not address her mind to the question of whether there was real, effective committed support.
9. In light of Ms Everett's helpful concession, I indicated that I found a material error of law for the reasons set out in the grounds of appeal and having sought their views, the parties indicated that I could proceed to re-make the decision without the need for further evidence.

Decision and reasons

10. The key issue is whether there is family life between the Appellant and her parents, who have been residing in the United Kingdom since 29 July 2011. At that time the Appellant was 26 years old and thus did not qualify as a dependent.
11. The Respondent's position, as set out in the refusal decision of 25 July 2022, is that whilst it was accepted that the Appellant may receive financial assistance from her father, she has not demonstrated that she is genuinely dependent on him. The Respondent was satisfied that she is able to look after herself and has not demonstrated that any financial assistance she currently receives cannot continue nor that she cannot continue to reside in Nepal. The Respondent was not satisfied that the Appellant demonstrated that she is eligible for settlement as the adult child of a Gurkha discharged prior to 1 July 1997 because of her age (over 30) and because she has been living apart from her parents for more than 2 years at the date of application. The Respondent also applied the judgments in Gurung [2013] EWCA Civ 8 and Ghising [2013] UKUT 00567 (IAC) but was satisfied that the reasons for

refusal outweigh the consideration of historical injustice. The Respondent maintained this position at appeal, albeit no cross examination took place nor submissions made in addition to those set out in the refusal decision: [17] and [18] of the FtT decision refers.

12. The uncontroverted evidence is that the Appellant lives alone in the family home in Amdanda, Lamjung and is unemployed, because there are no employment opportunities and that she is unmarried. She lives in a rural areas four hours by bus from the main town. She has siblings who live in Kathmandu and a brother, Bhupal who lives in Duipiple, one hour away. She grows vegetables and has chickens and a goat. She says in her witness statement that she is heavily reliant on her parents and is in receipt of her father's British army pension of 50,000 nepali rupees, which is equivalent to approximately £289 a month. It is unclear when she started receiving this amount as the evidence only shows receipt into a bank account since 1 February 2021. Her parents and brother visited her in 2020, after the Appellant's brother was granted ILR. They also visited her from 12 January to 22 February 2023. This is evidenced by the booking form and family photographs of the visit at AB 36-38 and 83-86.
13. In her witness statement, the Appellant's mother states that her husband requires full time care and that he cannot manage without support and that she is also in a wheelchair. They are cared for by their son, Bijaya and their grandson. The Appellant's mother says that she communicates regularly with the Appellant on the Viber application and that she is very upset and sad not being able to have the Appellant here by her side. When they lived together, the Appellant was her "helping hand" and assisted her with shopping, in the kitchen, banking and other official duties. She is their youngest child, they are close to her and she has always relied upon them. The Appellant's mother is illiterate and has never attended school. The Appellant knows some English.
14. The Appellant's mother also explains why they did not seek settlement for the Appellant earlier, which is because they were told by Gurkha friends that she was ineligible because she was over 18 and they did not know there was a new policy for children up to the age of 30 and only discovered this when their neighbour's children, who are older than the Appellant, joined them.
15. In his statement, the Appellant's brother, Bijaya, states that his mother finds it difficult that the Appellant is left behind and is very emotional and disturbed. They speak to her at least 3 times a week and often daily. This is evidenced by screenshots at AB 87-130. His father, despite his memory issues, worries about her and says it is

his responsibility to look after her and provide for her welfare until she marries.

16. I accept this evidence, which has not been challenged by the Respondent. The question is whether it meets the tests set out in the jurisprudence. In *Ghising and others (Gurkhas/BOCs - historic wrong - weight)* [2013] UKUT 567 (IAC) the Upper Tribunal found at [13] that:

"where Article 8 was engaged and before [sic] the historic wrong the Appellant would have been settled in the UK long ago this would ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State consists solely of the public interest in maintaining a firm immigration policy"

17. In *Rai* [2017] EWCA Civ 320 the Court of Appeal at [7] set out the history of the statement of changes to the Rules and policies in relation to the dependents of former Gurkhas and reviewed the authorities, including *Kugathas* [2003] EWCA Civ 31; *R ota Gurung* [2013] 1 WLR 2546; *Ghising* [2013] UKUT 567 (IAC) and *Singh* [2015] EWCA Civ 630. Lindholm LJ held at [36]:

"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."

And at [39]:

"the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did."

18. I have no difficulty in finding that the Appellant had family life with her parents at the time they left Nepal in 2011 because she was living with them and had always lived with them and was clearly dependent upon them. The question is whether family life has endured in the intervening 13 years. The evidence, which is uncontroverted, is that the Appellant is financially dependent on her parents and receives her father's army pension. She has no other source of income but to a limited extent lives off the land attached to the family home in Nepal. She remains unmarried and essentially her circumstances have not changed since the departure of her parents. The evidence also indicates that she is in very regular

contact with her mother in particular, by way of *Viber* calls and she also speaks to her father and brother.

19. It is clear from the authorities from *Kugathas (op cit)* onwards, that dependency, which should be interpreted as real, effective or committed support, is required. I find that dependency is established on the facts and evidence in this case in that the Appellant is financially and emotionally dependent on her parents; her father provides her with effective financial support and her mother provides emotional support.
20. It follows that, having found Article 8 was engaged, applying *Ghising (op cit)* the proportionality assessment should be resolved in the Appellant's favour, given the matters relied on by the Secretary of State consist solely of the public interest in maintaining a firm immigration policy. For the purposes of the statutory public interest considerations, I find that the Appellant speaks English and she would be financially independent in that she would, at least initially and until she finds employment, continue to be supported by her father rather than by any additional recourse to public funds.
21. For the reasons set out above, I set aside the decision of First tier Tribunal Judge Moffat and re-make the decision, allowing the appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman
2023

17 July