IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004184

First-tier Tribunal Nos: HU/56107/2022
LH/00236/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

Rita Gurung
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel; instructed by Everest Law Limited
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 20 November 2023

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Rothwell promulgated on 21st June 2023 dismissing the Appellant's appeal against the refusal of leave to enter as a dependent relative of a former Ghurkha soldier outside the Immigration Rules based on Article 8 and compassionate circumstances. The decision was promulgated on 21st June 2023.

2. The Appellant applied for permission to appeal on two grounds, namely that:

    (1) the judge applied an incorrect test in imposing a requirement of dependency in order to engage family life with her parents; and/or

    (2) the judge failed to have regard to material matters when considering evidence of emotional support, thus establishing family life between the Appellant and her parents.

© CROWN COPYRIGHT 2023

3. Permission to appeal was granted by Upper Tribunal Judge Reeds in the following terms:

> "1. It is arguable as the grounds contend, that the FtTJ applied the wrong test when assessing whether there was family life between the appellant and the sponsor by focusing on the issue of dependency, the FtTJ having found that the appellant lived an independent life and had supported herself. It is arguable that the focus on dependency and not what the support said about the underlying relationship imported a higher threshold or in the alternative led to the FtTJ applying the wrong test when assessing whether there was family life at the date of the hearing.
>
> 2. Whilst ground 2 seeks to challenge the lack of consideration as to contact between the parties, the FtTJ did accept that the parties were in contact with each other. However, the grounds refer to specific evidence that was given by the parties which may arguably give a different view of the evidence and impact on the factual findings made as to whether family life existed in the sense of the provision of emotional support.
>
> 3. For those reasons permission is granted."

4. At the conclusion of the hearing I reserved my decision, which I now give. I do find that the decision demonstrates material errors of law, such that it should be set aside in its entirety.

5. In respect of the first ground and the argument that the Judge wrongly imposed a requirement of dependency, the grounds accept that the correct approach is that set out in *Rai v Entry Clearance Officer* [2017] EWCA Civ 320 at [36] which approves the test set down in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31. I pause to note that Judge Rothwell did indeed mention the correct standard at paragraph 24 of her decision, however as the grounds go on to note, although the word dependency is used in the *Kugathas*, it requires reading down as opposed to treatment in its normal, literal terms. With that in mind, I remind myself of Lord Justice Sedley's judgment in *Kugathas* which sets out the relevant test at [17]:

> "…. none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense. 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".

6. Thus, one can discern that financial dependency is not a prerequisite to family life being engaged. It is further noteworthy that financial, emotional and any other form of support need only be real, committed or effective in order to demonstrate the minimum level of dependency required to demonstrate family life exists and it financial support is not an absolute requirement *per se*. Returning to the judge's decision, it is noteworthy that the judge assesses the financial support from the Sponsor to the Appellant with some care at paragraphs 24 to 28. However, the focus in these paragraphs appears to be more upon whether or not the Appellant was living an independent life and was able to

support herself, which is not a prerequisite. Instead, the implications of the financial support that does exist and whether that support was real, effective or committed and therefore indicated the existence of family life between the Sponsor and Appellant, was not considered. The assessment of whether this support was real, effective or committed was material to the assessment of family life as the Appellant is a divorcee and, as the judge accepted, the Sponsor supports the Appellant now because of her financial situation.

7. I am fortified in my view as, at paragraph 30 when considering the financial support received by the Appellant, the judge explicitly finds as follows: "I do not find that this support is such that goes beyond normal ties between adult relatives, and that like many relatives who have gone overseas he sends money home". Whilst it is true that a great many families who live apart send money from a sponsoring relative to a dependent in the country of origin, this practice is not invariably so such that it is a normalised practice carried out by adult relatives in different countries. In my view, this finding if accepted as the new 'normality' that family members practice invariably practice raises a risk that adult family members will not be able to show family life exists unless this practice is already carried out and they are required to show something that goes beyond even this. In any event, this finding inadvertently raises the bar for what financial support must exist as it is implicit that this practice of transferring money between adult relatives is impliedly "normal" whereas this is inconsistent with Kugathas in stating that there is "no absolute requirement of dependency". Indeed, it has not been established by higher authority nor as a matter of judicial notice that it is not "normal" for a parent to send financial support to their adult child in a third country. Therefore, in my view, the judge has *inadvertently* erred in finding that the evidence of money transfers is impliedly a normal tie between a parent and adult child and something beyond that is expected in order to demonstrate family life exists. I therefore find that the judge has erred in respect of Ground 1.

8. Turning to Ground 2 and the argument that the judge failed to have regard to material evidence concerning emotional support between the sponsoring parents and child, I further find that the judge may have inadvertently overlooked this evidence in determining this matter as there is only brief consideration of the contact and communication between the Sponsors and Appellant in paragraphs 29 to 32 of the decision. The grounds note that the judge failed to take into account the Sponsor's and the Appellant's witness statements (at paragraph 5 of the Appellant's witness statement and paragraphs 10 and 11 of the Sponsor's witness statement). I am exercised by the content of paragraphs 10 and 11 of the Sponsor's witness statement, which collectively disclose that (i) the parent and child are very close, (ii) have become closer with the passing of time, (iii) speak to each other almost every day, (iv) the parents travel to visit the Appellant in Nepal whenever possible (albeit that they cannot visit her for longer than 28 days as this would jeopardise their receipt of pension credits), and (v) the parents discuss that they are edging towards the end of their lives and that they need their daughter with them in the UK to feel safe, and to watch over one another. Given this, and given that the parents were able to spend time with the Appellant child in February to October 2020, and again in April 2023; the level of visits at their advancing age as well as the evidence of mutual emotional support speaks to an inadvertent omission in considering whether the evidence cumulatively could have engaged Article 8 and whether the evidence of

emotional support is real, effective or committed. Therefore I find that the judge has erred in respect of this ground also.

9. I therefore find that the judge has materially erred for the above reasons such that the decision should be set aside in its entirety.

Notice of Decision

10. The Appellant's appeal is allowed.

11. The appeal is to be remitted to the First-tier Tribunal to be heard *de novo* by any judge other than First-tier Tribunal Judge Rothwell.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

06th of December 2023