



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001922

First-tier Tribunal No:
HU/00134/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 20th of February 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**DIL MAYA LIMBU
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr West, counsel instructed by Gurkha solicitors
For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on 19 January 2024

DECISION AND REASONS

1. In a decision and reasons dated 25 September 2023 I found an error of law in the decision of the First tier Tribunal, set that decision aside and adjourned the appeal for a resumed hearing before the Upper Tribunal, confined to the question of whether article 8(1) of ECHR is engaged. That decision is appended.
2. At the resumed hearing I heard evidence from the Sponsor, Mr Dil Kumar who confirmed the contents of his witness statement. He was then cross-examined by Mr Parvar as to whether he had formed a separate family unit to the Appellant when he married his second wife in 2011. He said that his current wife stayed with his daughter for approximately 2.5 years before she joined him in the United Kingdom.

3. Mr Parvar asked a number of questions about the Sponsor's remittances to his daughter and implied that the money transfer receipts were not authentic, but this appeared to be based on a misapprehension regarding the agents' signatures, which varied depending on where the Sponsor sent the money from eg small shop, pawnbroker etc. The Sponsor stated that his daughter used the money he sent for groceries and medication and it was about £50 a month. The Sponsor confirmed that they communicated via viber but he had damaged his phone and so did not have screenshots prior to December 2020. He confirmed that there was no internet access in the family home in Nepal but his daughter used the neighbour's internet to send messages via viber. The Sponsor stated that he also used calling cards to speak to his daughter given that the internet connection in Nepal is not reliable. He said that she was not working and was suffering from depression.
4. In answer to my questions, the Sponsor stated that his most recent visits to Nepal were from February 2022 to March 2022 and from January 2023 to March 2023. The photo he submitted was of his wife with his daughter and this had been taken on the most recent visit. He confirmed that his daughter is living on her own and there are no extended family members in the area, although he has a son and a daughter in Kathmandu, which is far from the family home. He said he spoke to his daughter every day, sometimes twice a day. The Sponsor said he had met his daughter's husband once only after they had married and that it was a love marriage and not arranged. The Sponsor said that the relationship between his daughter and his wife was good and that they were close and spoke to each other on the phone separately from him.
5. In submissions, Mr Parvar submitted that whether the Appellant lived with her father and stepmother until they came to the UK does not determine whether family life is engaged at the date of hearing. He submitted there were substantial and notable gaps in the timeline and vague evidence on the part of the Appellant as to when she was married. Mr Parvar submitted that it was the SSHD's position that the allegations of physical and mental abuse by her former husband are a fabrication and no evidence has been provided. He submitted that there is a lack of a coherent explanation as to how they met and the Sponsor lacked knowledge as to how the relationship came into existence, which cast doubt on the closeness he claimed to have with the Appellant.
6. Mr Parvar further submitted that the Appellant is suffering from a moderate depressive disorder which is not something that necessarily has to flow from abuse and can exist independently as it was a very common health issue that could be diagnosed for a

number of reasons. He also pointed out that there was no evidence of ownership of the property but if what the Sponsor says is true it should be readily available that he truly owns the property. If the Sponsor has been untruthful then there is a range of possibilities but in all likelihood the Appellant is paying rent. Mr Parvar further submitted that in all likelihood the Appellant is in employment in Nepal.

7. With regard to the money transfer receipts, Mr Parvar submitted that he had never heard of *Hundi* and no background evidence had been provided about them. He submitted that the Sponsor has only said this to protect himself from scrutiny of money transfer receipts sent prior to Western Union and he has not, in fact, been submitting money through *Hundi*. Mr Parvar submitted that there is no evidence of pin codes or receipts. Mr Parvar submitted that, even with money being sent to Nepal through Western Union, the difficulty with the Appellant's case is that she has pursued a false narrative regarding her husband and it is for the Appellant to show real, effective and committed support and there is no up to date witness statement from her. He submitted that the conversations over viber all post date the refusal decision and that the Sponsor was quite evasive when it came to this particular point, when he said that his mobile broke and he could not produce evidence from before the refusal, but the Appellant could have provided evidence from her own mobile and in the absence of that evidence there is little credibility to the Sponsor's claim.
8. Mr Parvar submitted that just because continuing emotional ties are normal in Nepal and Nepalese culture it cannot be assumed this is the state of affairs and it is still the Appellant's responsibility to prove through credible evidence that there is real, committed and effective support. He submitted that the test is not met in light of these issues and it cannot be true that the Appellant is dependent out of necessity.
9. In his submissions, Mr West sought to rely on the skeleton argument. He submitted that the appeal concerned Article 8(1) *simpliciter* which was a modest threshold ie. real, committed or effective support and it is disjunctive. The refusal decision sought evidence of dependency *cf. Kugathas* [2003] EWCA Civ 31 at [17] and *Rai* [2017] EWCA Civ 320 at [17] that dependency was read down as real. The refusal accepts at [23] of main bundle that the Appellant receives financial assistance from the Sponsor and that they remain in contact, but that the Appellant is not financially and emotionally dependent on her father. In his submission this misapplies the law.
10. Mr West acknowledged that reliance was placed on post decision evidence but at the point of decision it was accepted the

parties are in contact and he submitted the Upper Tribunal should accept the Sponsor's evidence about the loss of his mobile phone and that I should find the Sponsor credible. He pointed out that matters not *prima facie* helpful to the appeal have been disclosed eg the Appellant's marriage which had been properly and fully disclosed and the Sponsor was not prepared to withhold difficult points which was demonstrative of him coming with open hands to the Tribunal. Mr West submitted that the Sponsor's evidence has emerged relatively unscathed and the broad thrust of the case is consistent with his evidence. Mr West drew attention to his military service record at page 53 and that he had been under the auspices of the British military who, after observation of 15 years, opined that the Sponsor was loyal and honest. There was no reason to doubt his record of exemplary military service and his evidence can have weight attached to it for these reasons.

11. Mr West submitted that all the hallmarks of typical evidence one might expect - money being sent, living in the family home, communications evidence, evidence of visits - was present. He submitted that the money transfer receipts should be considered to the civil standard and the issue is whether it is more probable than not that the money being sent is utilised for support e.g. groceries and medication. Mr West stated that the Appellant is living in the family home owned by the sponsor; that the ECO did not take any issue with that and the Presenting Officer only took issue with this today and whilst he accepted there was no evidence on the point, it was not in dispute earlier and should have been so the parties would have had the opportunity to deal with this point. Mr West submitted that there was nothing surprising and unusual and that the Sponsor should be believed as he has said so all along and given his address. Mr West drew attention the judgments in AP India [2015] EWCA Civ 89 at [45] per McCombe LJ and Uddin [2020] EWCA Civ 338 at [40] (iii) that continued cohabitation is suggestive of real, committed and effective support. He submitted that living in the family home constitutes both financial and emotional support as the Appellant is not paying rent and is living in the home she has always lived in.
12. As to the Appellant's circumstances, Mr West submitted that there is a difference between being separated and being divorced. The Appellant was formally divorced in 2019 and there is often a big gap between separation and formal divorce and nothing inconsistent about this evidence. The Appellant left her husband fairly shortly after being married and is now divorced and the point is that she moved back into the family home. It is not suggested she received a pay-off from the divorce and she never had any independence in the first place. She has no assets. She was still back and forth between ex husband's home and her father's home even when living away. Mr West submitted that there was no reason why article 8 cannot be

re-engaged and her marriage and subsequent divorce are not fatal to this appeal. Rai at [39] makes clear that the key question is whether the relationship has subsisted or endured since the sponsor came to the UK and the Appellant has been back living in her father's home since 2019. Thus family life has been re-established if it was interrupted. The remittances cover a 5 year period and whilst he appreciated there was no evidence about *Hundi* Mr West pointed out that this is a traditional money transfer agency and I should accept the Sponsor's evidence about money transfers as he has provided Western Union receipts.

13. On balance, Mr West submitted that the Appellant is not working and there is no reason to disbelieve the Sponsor's evidence about this. He submitted that one cannot look through a western lens but rather the conditions in Nepal and support must be looked at in the context of Nepal being an impoverished country. The family home is not in one of the more developed parts of Nepal. As Nepal is highly patriarchal and men are the breadwinners judicial notice should be taken of that. There is evidence of remissions and frequent contact. The Sponsor is an elderly gentlemen who is a pensioner on modest social security but he spends large sums flying half way across the world to see his daughter, which is clear evidence of emotional support. Mr West submitted that there is more than ample evidence to meet the threshold.
14. Mr West submitted in respect of article 8(2) that Gurung [2013] 1 WLR 2546 at [42] contextualises article 8(1) and that, but for historic injustice, this Appellant's life circumstances might have been immeasurably different and she may have been born British. The Sponsor has provided service to the British crown and this meant that the Sponsor was serving the Crown oftentimes abroad which would have served to the detriment of his own family life. He would have spent long stints of time away from his family. This appeal is all about whether he gets to be reunited with his family and it is perhaps ironic that the ECO seeks to maintain separation within the family unit.

Decision and reasons

15. At the outset of the hearing Mr West helpfully emailed copies of a supplementary bundle and a "latest" supplementary bundle comprising money transfer receipts, communication logs from viber from 2021-2023, a copy of the Sponsor's passport showing visits to Nepal from 19 January to 9 March 2023 and family photographs of the Sponsor, his wife and his daughter, the Appellant, in Nepal. Mr West was obliged to do this because the Appellant's solicitors failed to lodge the updating evidence in line with the directions of the PRJ which caused delay in starting the hearing. It cannot be assumed that evidence will be admitted late and solicitors need to comply

with directions to lodge evidence upon which they wish to rely in a timely manner and at least 10 working days before a hearing.

16. 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."

17. In light of the oral and documentary evidence before me I make the following findings of fact:
- (i) The Sponsor has been providing the Appellant with financial support since at least 2019 as is evidenced by the Western Union money transfer receipts for £50 a month which are contained in the original Appellant's bundle and the updating supplementary bundles. I do not accept Mr Parvar's submission that these receipts are not authentic because it is clear that the signature of the agent on each receipt varies depending on where the money is sent from in the UK;
 - (ii) For the avoidance of doubt, I accept that the Sponsor has also utilised a *Hundi* or traditional money transfer agency and I take judicial notice of the fact that these organisations exist throughout Asia, although nothing turns on this as such given the clear evidence of the Western Union money transfer receipts over a number of years;
 - (iii) The Sponsor and Appellant are in regular contact through viber, as is evidenced by the call logs set out in both bundles and copies of calling cards set out at pages 88-90 of the Appellant's bundle;
 - (iv) There is evidence in the sponsor's passport of visits to Nepal in 2022 and 2023 and I accept the photographs show that he

visited his daughter, the Appellant and that this was the purpose of his visits;

- (v) The Sponsor is a credible witness who I find gave credible evidence before the Upper Tribunal. I place weight on his military service record at AB 53 which stated on the occasion of his discharge in 1986 that he was a *“loyal, honest, hard-working and well-disciplined soldier.”* Nothing that he said was implausible or at odds with the documentary evidence.

18. In light of all the evidence, both oral and documentary, I find that there is family life between the Sponsor and the Appellant, who has lived in the family home all her life apart from during her short-lived marriage, which ended in divorce in 2019. I consider that it has been demonstrated on the balance of probabilities that there is real, effective and committed support of the Appellant by her father and Sponsor; that family life existed at the time that the Sponsor and his (second) wife left Nepal in 2011 and that it has endured since that time.

19. It follows that, having found Article 8 was engaged, applying *Ghising* [2013] UKUT 00567 (IAC) 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 and it is necessary to factor in the historic injustice aspect to the proportionality assessment. In terms of the statutory public interest considerations, I find that the Appellant and Sponsor formed their family life prior to the Sponsor’s arrival in the UK and since the Appellant is not in the UK the issue of any unlawful or precarious stay does not arise. Whilst the Appellant is not financially independent, because she is dependent upon her father and she does not speak English, I do not find that these factors outweigh the historic injustice when undertaking the proportionality exercise not least because she can study, work and learn English once she is admitted to the United Kingdom.

20. For the reasons set out above, the appeal is allowed.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

15 February 2024