



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
OA/22137/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

**Heard at: Field House
On: 2 March 2015**

**Promulgated
On: 13 April 2015**

Before

Deputy Upper Tribunal judge Mailer

Between

**MR YOGENDRA MOHARA
NO ANONYMITY DIRECTION MADE**

Appellant

and

ENTRY CLEARANCE OFFICER: NEW DELHI

Respondent

Representation

For the Appellant: Mr C Howells, of counsel (instructed by NC Brothers and Co)

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

DETERMINATION AND REASONS

- 1.** The appellant appeals with permission against the decision of First-tier Tribunal Judge Nixon, who dismissed the appellant's appeal against the respondent's decision dated 22 November 2014, refusing his application for entry clearance to the UK for settlement as a dependent adult son of a former Gurkha soldier.

- 2.** Permission was granted on the basis that it was arguable that the Judge erred in her approach to the question of whether family life was established.
- 3.** The appellant claimed before the First-tier Tribunal that he had no other family in Nepal. His brother was settled in the UK, having successfully appealed against the refusal of his application.
- 4.** The appellant was totally reliant financially on his father, and was living in rented accommodation paid for by him. He had no wife or children in Nepal. Until his parents came to the UK he had always lived with them.
- 5.** The appellant could not meet the requirements under the Immigration Rules and confined his appeal to Article 8 grounds. The evidence contained in the witness statements was not challenged.
- 6.** The Judge found at paragraph 14(4) of the determination that the appellant was financially dependent on his father. However, that was qualified on the basis that such financial dependency is expected in Nepalese culture and did not indicate any particular dependency.
- 7.** At paragraph 14(7), the Judge stated that the critical issue was whether the appellant had shown that there is “sufficient emotional dependency” on his parents to justify the conclusion that they enjoy family life. She found that he had failed to show this. Whilst the appellant was financially dependent on his father, she found that although the usual emotional bonds between parents and child are present, the requisite degree of emotional dependency is absent. He had therefore failed to show that family life, pursuant to Article 8, was engaged.
- 8.** Mr Howells on behalf of the appellant submitted that the qualification of the appellant's financial dependency on the basis that this is expected in Nepalese culture was 'irrational and unreasonable'. There was no basis for the finding that this is a cultural expectation, and in any event, this did not undermine its probative value in relation to the question of dependency.
- 9.** Further, the finding at paragraph 14(7) artificially isolated the issue of emotional dependency from the evidence of financial dependency and the other factors, including the fact that the appellant had always lived in a family home and had not formed an independent life.
- 10.** The Judge wrongly set the bar for emotional dependency too high, treating this single issue as the sole determinative factor when assessing whether family life exists. He asked somewhat rhetorically, that if the bond between parent and child is not enough, what exactly would be enough in this regard?
- 11.** He submitted that the proper approach as to whether an adult dependent child can establish that they enjoy family life with their parents, has been clarified since the decision in Kugathas [2003] EWCA Civ 31 in the decision of the Upper Tribunal in Ghising (Family Life - Adults - Gurkha Policy)

Nepal [2012] UKUT 160 (IAC). It was accepted that Kugathas had been interpreted too restrictively in the past. The critical question is whether the adult child has formed their own independent life and/or whether they remain part of their parents' family unit, together with the practical, emotional and financial dependence that usually brings.

- 12.** He also relied on the approach approved by Lord Dyson MR in Gurung [2013] EWCA Civ 8 at 45-46. It depends on the facts as to whether or not an adult child still resides with his parents for the purposes of establishing family life.
- 13.** A period of separation does not necessarily split the family unit. The Gurkha settlement policy presupposed that the Gurkha himself had come to the UK alone initially to make the application for settlement and therefore presupposed a period of separation of the family unit.
- 14.** Ms Everett submitted that this case, like others, was fact dependent. There was nothing in the Judge's reasoning to indicate that the wrong test was applied. She contended that the sponsor had been in the UK since 2009 and that the appellant was leading an independent life in Nepal. She accepted however after it was drawn to her attention, that the correct date as to when the sponsor first arrived in the UK, was in 2011, and accordingly they had been living together as a family unit for a period of 18 months only and not several years.
- 15.** Mr Howells submitted that family life in fact continued to exist in Nepal when the mother remained there until she came in 2011 and family life has not been severed since then.

Assessment

- 16.** I find that the First-tier Tribunal Judge has not adequately engaged with relevant jurisprudence and has not applied the current legal approach relevant to the issue of whether family life in this case existed between the appellant and his family in the UK, including his mother, father and brother.
- 17.** The correct approach has been to move on from the earlier case law requiring that it be demonstrated that something more than the usual normal emotional ties existed.
- 18.** The authorities relating to the nature of family life under Article 8 (1) were fully considered and analysed in Ghising, supra, from paragraphs 41 onwards. There was in particular reference to Kugathas v SSHD [2003] EWCA Civ 31. It was noted that in that case, Sedley LJ accepted the submission that "dependency" was not limited to economic dependency. He added: "...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.” The Court also referred to the comments of Arden L.J., at paragraphs 24-25.

- 19.** It was thus accepted in Ghising that the judgements 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.
- 20.** The Tribunal referred to a number of cases (from paragraph 57 onwards) in which it has been recognised that family life may continue between parent and child even after the child has attained his majority. Regard was also had to RB (Zimbabwe) and another v SSHD [2008] EWCA Civ 825, at paragraph 6, where Sedley LJ stated that it would be “unreal” to dispute that the 23 year old appellant enjoyed family life with her parents when she “had lived pretty well continuously with her parents and siblings all her life.” The Court of Appeal also found that the second appellant, who was 25 years old, enjoyed family life with his parents since he was “economically and emotionally... a member of his immediate family, all of whom – that is his parents and two sisters – are now lawfully resident here.”
- 21.** The Tribunal also had regard to AA v UK (Application no 8000/08) at paragraph 61, referring to the conclusion at paragraph 49, that an examination of the Court's case law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own can be regarded as having “family life”.
- 22.** The headnote in Ghising, supra, is to the effect that a review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists within the meaning of Article 8(1). While some generalisations are possible, each case is fact sensitive.
- 23.** I find that there has been a measure of artificiality in isolating the issue of emotional dependency from the evidence of financial dependency and other factors. That includes the undisputed fact that the appellant had always lived in the family home and as yet had not formed any independent life. The evidence relating to the appellant's circumstances were set out in witness statements from both the appellant and his sponsor. There had been no challenge to that evidence relied on by the appellant.
- 24.** The above approach was approved by Lord Dyson MR in Gurung, supra, where he recognised as a matter of law that where an adult child still resides with their parents and has not yet founded a family of his own, this may establish family life. It all depends on the facts.

- 25.** In the circumstances, I find that the decision of the First-tier Tribunal involved the making of a material error on a point of law. I accordingly set aside the determination and re-make it.
- 26.** In the appellant's witness statement dated 23 July 2014, he stated that he was dependent on his father for support. His brother's appeal had been allowed. I was informed that his brother had also appealed as an adult dependant in the UK. He had come to the UK on a student visa and made his application for settlement prior to the expiry of his leave.
- 27.** The appellant is a student at a college in Kathmandu. He has some outstanding examinations to sit.
- 28.** His accommodation, which he is renting, is paid for by his father. Without this financial support he would not be able to study or live on his own in Nepal. There are no facilities that assist people of his age to become independent.
- 29.** The reason his father did not apply for him to join him earlier in the UK as his dependant was as a result of poor advice by a Nepalese lawyer who informed him that as he was over the age of 18, his application would not succeed. His father was advised to travel to the UK first to ensure that he is "well settled there" before making the application for his son to join him.
- 30.** He is completely dependent on his father. When he is not studying, he spends his father's money. He has access to his father's pension payments in Nepal which he uses if and when the need arises. His father regularly sends him money via transfer agencies.
- 31.** He will not be able to find suitable employment in Nepal. The caste system plays a very important role in that regard. Nepal is one of the poorest countries in the world.
- 32.** After his father retired from the Army, he stayed in Nepal. On completion of a work contract in 1996 in Hong Kong, he returned to Nepal to be with the family. They all lived as a family unit until 2011 when both his father and mother had by then migrated to the UK.
- 33.** He has no other relatives in Nepal to whom he can turn for emotional or financial assistance.
- 34.** He is emotionally dependent on his parents as he is the youngest son. He has never lived apart from them and they have always looked after him. He has no family of his own. He has nobody else to turn to for such support and company. He has never had a girlfriend or any other relationship and his emotional dependency on his parents still continues.
- 35.** His father visited him in August 2012 as he was missing him. He stayed for about three weeks and then returned to the UK because of work commitments.

- 36.** Although his father's house is in Dharan, he has no friends or family members to return to there.
- 37.** He was born in Hong Kong whilst his father was serving in the Army. Had his father been given the opportunity to settle after his service, he would have taken that opportunity for the appellant's future and today they would be living as one family.
- 38.** His family is well settled in the UK. His father is employed. He is able to maintain and accommodate him without recourse to public funds.
- 39.** They are a very close family and have always intended to live together as before. They continue to speak to each other on a regular basis.
- 40.** The appellant's father's witness statement dated 23 July 2014 confirms the contents of the appellant's statement.
- 41.** Had he been given the option to live in the UK when he retired from the British Army, he would have taken that chance. That would have allowed his children to live in a society where they would benefit from a real potential to prosper in life. The appellant would only have been six years old when he retired from the army. He was however not allowed to settle in the UK until he was 18 years old.
- 42.** He asserts that it is not correct that his son is independent of him simply because he is over 18 years old. He has no other source of income. He has never worked for a living. He has never been independent.
- 43.** In deciding whether the family life continued to exist since 2011, I have had regard to the approach as set out in Ghising, supra, in this regard. A period of separation does not necessarily split the family unit. In Ghising, a period of over two and a half years did not have the effect of splitting the family unit as the dependency continued during that period and they resumed living together when they were able to.
- 44.** As noted in the appellant's skeleton, Tomlinson LJ recognised in UG (Nepal) [2012] EWCA Civ 58, that the Gurkha settlement policy presupposed that the Gurkha himself had come to the UK alone initially to make the application for settlement and therefore presupposed a period of separation of the family unit.
- 45.** I was also informed that the appellant remained living with his mother until she came to the UK in 2011. His father had come to the UK in 2010 - ahead of his mother. Their other son also came in 2011. That son was 26 years old when he came. The appellant's brother came on a Tier 4 student visa in 2011 which expired in 2013. His mother came about a month later. Prior to his mother's arrival in the UK in 2011, the appellant continued living with her in the same house as part of the family unit.

46. Having regard to the unchallenged evidence, I find that the appellant has shown on the balance of probabilities that he has remained emotionally attached to his parents and they remain a close family.
47. I find from the evidence that the appellant has not formed a family of his own which can be regarded as family life. Moreover, he has not formed his own independent life. He continues to be supported both economically and emotionally by his family. He has remained and continues to remain a part of his parents' family unit. That has resulted in practical, emotional and financial dependence arising from that unit.
48. The fact that he has been separated for about 18 months has not in the circumstances had the effect of splitting the family unit. Both financial as well as emotional support including telephone calls between them has regularly persisted. Moreover, the sponsor has visited the appellant in Nepal on occasion. The family relationships have thus not been severed.
49. The historic injustice and its consequences carry significant weight when assessing proportionality. This reduces the potency of the public interest in maintaining a firm immigration policy. There are no countervailing factors outweighing the matters relied on by the appellant.

Decision

The appeal is allowed.

No anonymity direction is made.

Signed

Date 31 March 2015

Deputy Upper Tribunal Judge Mailer