



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10239/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 25 November 2020

Decision & Reasons Promulgated
On 7 December 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER

Appellant

and

CHHAM BAHADUR RANA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the respondent: Mr M West, counsel, instructed by Everest Solicitors

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. The Entry Clearance Officer (“the appellant”) has been granted permission to appeal against the decision of Judge of the First-tier Tribunal Mehta (“the judge”), promulgated on 14 April 2020, allowing the human rights appeal of Mr Chham Bahadur Rana (“the respondent”) against the appellant’s decision dated 7 May 2019 refusing the respondent’s human rights claim in the form of a refusal of entry clearance.
2. The respondent is a national of Nepal born on 20 February 1983. He is the son of an ex-Gurkha and, on 20 February 2019, applied for entry clearance to settle in the UK as an adult child of an ex-Gurkha. The appellant refused the application noting that the respondent did not meet the requirements of the Secretary of State’s discretionary policy for Gurkhas and their family members and that the refusal of entry clearance would not breach Article 8 ECHR. The appellant noted, *inter alia*, that the respondent was 36 years old at the date of his application, that his father entered the UK on 12 January 2010 and his mother on 29 May 2011, that he had been married (although divorced at the date of the application), and that he had 4 children. The appellant rejected the respondent’s claim that he was unemployed and emotionally and financially dependent on his father, and concluded that the respondent had lived independently, was capable of working and had formed his own family unit. The respondent appealed the appellant’s decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

3. There was no Presenting Officer at the hearing before the judge. The respondent provided bundles of documents that included statements from himself and from his father, evidence of money transfers from the father to the respondent, evidence of visits made by the respondent’s parents to Nepal and evidence of communication between the respondent and his parents. Both the respondent’s mother and father adopted their statements at the hearing. Mr West (who also appeared for the respondent at the ‘error of law’ hearing) provided a skeleton argument and made submissions on the respondent’s behalf.
4. In his decision the judge carefully set out [3] the basis for the appellant’s refusal of entry clearance and treated the Reasons for Refusal Letter as the appellant’s written submissions [5] and that he considered any obvious points that could be made in favour of the appellant’s position. The judge indicated that he had considered all the evidence before him and that if he did not specifically mention certain evidence or a particular submission, it did not mean that it had not been considered and given appropriate weight [15]. The judge accurately set out the relevant burden and standard of proof and the legal principles to be applied when considering whether Article 8 family life had been established between adult children and their parents [13] – [27]. In so doing the judge made reference to and set out extracts from a number of relevant authorities including

Razgar [2004] UKHL 27, **Kugathas** [2003] EWCA Civ 31, **Singh v SSHD** [2015] EWCA Civ 630, **Ghising (family life-adults-Gurkha policy) Nepal** [2012] UKUT 160, **Rai v ECO** [2017] EWCA Civ 320 and **Pun & Anr (Nepal) v SSHD** [2017] EWCA Civ 2106.

5. The judge then considered whether Article 8 family life existed between the respondent and his parents. The judge found the witnesses consistent and credible in relation to the historic living arrangements, noting that the respondent married at the age of 16 and lived in his parents' house with his wife prior to his parents coming to the UK, and that he and his wife and children continued to live in his parents' home until his wife left following their separation [29]. At [31] the judge considered whether there was real, effective, and committed support between the respondent and his parents. from [31] (a) to [31] (d) the judge considered in detail the evidence before him and concluded that there was ongoing financial dependency between the respondent and his parents, that the respondent continued to live in his father's family home, that there was in continued to be regular and frequent contact between the respondent and his parents and that the respondent's parents regularly visited him in Nepal. At [32] the judge reminded himself that the question of whether family life exists under Article 8 (1) ECHR was a question of fact and that the evidence demonstrated real emotional support and committed financial dependency.
6. Having satisfied himself that Article 8 (1) protected family life did exist between the respondent and his parents, the judge considered whether the refusal of entry clearance was proportionate under Article 8 (2). At [34] the judge noted the evidence from the respondent's father and accepted that, but for the historic wrong (established in **Gurung** [2013] EWCA Civ 8) the respondent's father would have settled in the UK earlier and that he would have fought the respondent to the UK with him. At [35] the judge considered and applied the case of **Ghising** and found that, there were no matters over and above the public interest in maintaining a firm immigration policy that outweighed the historic wrong, that the respondent's father had at all times been lawfully resident in the UK, and that the refusal of entry clearance constituted a disproportionate interference with the respondent's Article 8 rights. The appeal was allowed.

The challenge to the judge's decision

7. The grounds of appeal contend, firstly, that family life under Article 8 (1) ECHR did not exist as the respondent had a family of 4 children and the judge erred in law in finding that family life had been established to the **Kugathas** [2003] EWCA Civ 31 standard, and secondly, that even if there was family life, the judges proportionality assessment was unlawful because he failed to take into account the respondent's dependents.

8. In her oral submissions Ms Isherwood submitted that the judge's decision did not reflect the factual matrix before him as the respondent had established his own family unit and the judge failed to grapple with the appellant's position that the respondent had lived independently. In respect of the proportionality assessment Ms Isherwood reiterated the contention in the grounds of appeal that no assessment had been made of the respondent's other family members when determining whether the historic injustice outweighed the public interest considerations.

Discussion

9. The first ground of appeal challenges the judge's conclusion that family life, as understood and protected by Article 8 ECHR, existed between the respondent and his parents given that the respondent had been married and had four children. It is therefore instructive to consider the authorities relating to family life relationship between adults.
10. **Kugathas** [2003] EWCA Civ 31 concerned the relationship between adult children and their parents. At [14], Sedley LJ cited with approval the report of the Commission in **S v United Kingdom** (1984) 40 DR 196 at [198]:

"Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults ... would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."
11. Sedley LJ considered the issue of dependency at [17]:

"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."
12. When considering the material factors that constitute the "irreducible minimum" of what constitutes family life Arden LJ stated, at [24]:

"There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life."
13. And at [25] Arden LJ stated:

"Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties ...

Such ties might exist if the appellant were dependent on his family or vice versa."

14. In **Uddin v SSHD** [2020] EWCA Civ 338, having considered **Kugathas**, the Senior President of Tribunals stated, at [31]:

"Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact, a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed."
15. Careful consideration must be given to the particular circumstances of each case, and the situations in which an Article 8 family life relationship exists may be highly fact-sensitive (**Uddin**, at [32]).
16. In the present appeal the judge had before him evidence that the respondent had always lived with his parents, even after getting married (statements from the respondent and his parents). No issue has been taken with these findings. The judge also had before him evidence (including an Unemployment Certificate dated 10 February 2019 issued by the Galkot Municipality in Nepal and the statements from the respondent and his father) that the respondent, who lived in a rural part of Nepal, was unemployed and that, although he had worked as a seasonal labourer, that income had been insufficient to support the family in terms of food and accommodation. At [31(a)] the judge considered in detail the documentary evidence showing continuous financial support provided by the respondent's father including the regular remittance of funds and documents relating to the father's pension. The judge found the respondent's parents to be credible witnesses and there was nothing in the evidence before the judge to suggest otherwise. In his covering letter accompanying his entry clearance application the respondent said he had not previously appreciated the importance of education and only had a School Leaving Certificate qualification. Based on this evidence the judge was undoubtedly entitled to conclude that there was on-going financial dependency.
17. At [31 (c) & (d)] the judge found there was consistent and credible evidence of regular and frequent contact between the respondent and his parents by reference to the statements and the evidence of telephone communication and frequent visits to Nepal by the respondent's parents. The judge properly directed himself in respect of the appropriate legal test for the establishment of family life and it is abundantly clear from a holistic consideration of the judge's decision that he fully appreciated the need for dependency between the Gurkha and his adult child in order to establish Article 8 protected family life (e.g. [27]).
18. To the extent that the appellant contends that the judge failed to grapple with the fact that the respondent had been married and had four children, and the appellant's view that the respondent had consequently established an independent family life, I reject this. The judge was demonstrably aware of the

relevant factual matrix. The judge specifically referred to the respondent's marriage and his children ([3], [29]), and the respondent's circumstances were also clear from the witness statements and the other documentary evidence that the judge indicated he had considered even if not referred to [15]. It is necessarily and irresistibly clear from the judgement, read as a whole, that the judge was aware of but rejected the appellant's view that, because the respondent had been married and had 4 children, he had established an independent family life such that he no longer had an Article 8 protected family life relationship with his parents.

19. Whilst having a spouse and children is clearly relevant when assessing whether an independent family life has been established, it cannot be determinative. It is important that decision-makers do not adopt an overly Anglocentric approach when assessing Article 8 family life relationships. In many countries families may live in multigenerational households that include married adult children who themselves have children but where, for a variety of possible reasons, the adult children do not work and are financially dependent on their parents, who provide the accommodation, in order to meet their everyday needs and those of their families. As has been made clear from all the authorities (see **Uddin** for one of the most recent pronouncements) the situations in which an Article 8 family life relationship exists will be highly facts specific and will always depend on the particular facts.
20. In **Mukarkar v SSHD** [2006] EWCA Civ 1045 (at [40]), and more recently in **AA (Nigeria) v SSHD** [2020] EWCA Civ 1296 at [41]), the Court of Appeal emphasised that it is not permissible for a Tribunal to interfere with a decision merely because it would have reached a different conclusion. On the evidence before the judge there was little to indicate that the respondent had ever lived independently outside the family home provided by his parents or that he was ever financially independent of his parents. The judge lawfully applied the **Kugathas** principles and reached a conclusion rationally open to him based on his specific factual findings.
21. There is no merit in the second ground of appeal. The judge was aware that a balancing exercise was required, despite the significant weight that would attach to the historic wrong, and noted the absence of any significant countervailing public interest factors. There were no issues, for example, relating to criminality or bad character or poor immigration history. The judge did not treat the historic wrong as being determinative. Nor was it necessary for the judge to have regard to the appellant's children as they had not made applications for entry clearance and were not seeking to enter the UK. If the children do, in the future, make entry clearance applications those applications will no doubt be considered on their merits in accordance with the immigration rules and Article 8 ECHR principles. But in determining whether the refusal of entry clearance to the respondent was proportionate there was no reason or basis to speculate as to any future, lawful application by children, and it is difficult to see how any future applications that meet the requirements of the

immigration rules or Article 8 principles could be held to add weight to the public interest considerations.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law.

The Secretary of State for the Home Department's appeal is dismissed

D. Blum

27 November 2020

Signed
Upper Tribunal Judge Blum

Date