Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001198; HU/07555/2020

UI-2021-001199; HU/07557/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Monday 6 June 2022	**On Monday 8 August 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS BRINDA DEVI GURUNG
MR SANTOK GURUNG

Appellants

and

ENTRY CLEARANCE OFFICER

Respondents

Representation:
For the Appellant: Mr D Balroop, Counsel instructed by Everest solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against the decision of First-tier Tribunal Judge K Swinnerton promulgated on 17 June 2021 ("the Decision"), dismissing the Appellants' appeals against the Respondent's decisions dated 19 and 20 August 2020 refusing their human rights claims (under Article 8 ECHR).

2. The human rights claims were made in the context of an application for the Appellants to settle with their parents in the UK. Their father (hereafter "the Sponsor") is a Gurkha veteran. He lives in the UK. His wife, the Appellants' mother, also has the right to remain in the UK but returned to Nepal in 2017 to live with the Appellants. The Appellants are currently aged 41 and 38 years respectively. However, they claim that they have never worked in Nepal, that they remain living in the family home and that they rely on support from the Sponsor. Their case is that, since the Sponsor provides them with "real, effective and committed" support, and based on the case law relating to Gurkha cases, they are entitled to come to the UK to live.

3. The Judge accepted that there was evidence of financial support, albeit much related to the period close to the Appellants' applications being made. He accepted that there was regular contact between the Sponsor and the Appellants. However, he did not accept that the support was "real, effective or committed" and did not accept that the Appellants enjoy family live with the Sponsor. He therefore concluded that Article 8(1) ECHR was not engaged. He dismissed the appeals.

4. The Appellants appeal on two grounds. Both relate to the Judge's findings in relation to the existence of family life. The Appellants rely on the case of Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 ("Rai"). They submit that the test is whether there is real, effective and committed support and that "there is no need for some extraordinary or exceptional feature in the Appellant's dependence". They also rely on the case of Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17 ("Patel") as authority for the proposition that "what may constitute an extant family life falls well short of what constitutes dependency".

5. The overarching ground that the Judge has failed properly to assess Article 8(1) ECHR is broken down into two distinct errors. It is said that the Judge failed to consider that the Appellants remain living in the family home. That is said to be a relevant consideration in relation to whether the Appellants have formed their own family life (by reference to the case of Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 -"Singh").

6. The second error relates to financial support. It is said that the Judge failed properly to assess the evidence about the extent and duration of the financial support provided. The Appellants take issue with the Judge's findings about cash withdrawals from a Nepalese bank account in the joint names of the Sponsor and his wife (the Appellants' mother). It is asserted that on the balance of probabilities, it is the Sponsor's wife who is making the withdrawals and the Sponsor's evidence was that she then gives the money to the children. It is said that this evidence was not disputed and shows that the Sponsor has been providing financial support to the Appellants since at least 2017. Reliance is also placed on the Sponsor providing the Appellants with accommodation.

7. Permission to appeal was refused by First-tier Tribunal Judge Povey on 7 October 2021 in the following terms so far as relevant:

> "... 2. The Appellants sought entry clearance on the basis of their family life with their father, a former soldier in the Regiment of Gurkhas. The Judge found that there was insufficient evidence of support for the Appellants from their father which met the threshold of real, effective or committed (such that Article 8(1) of the ECHR was engaged). In reaching that conclusion, the Judge set out his reasons at [11] to [21] of the judgment. The first ground criticises the Judge for not having proper regard to the fact that the Appellants continue to reside in the family home. However, the ground is misconceived. The Appellants have not been living in the family home, as envisaged by the case law relied upon. Rather, they have been living in a home owned by their parents. The Judge was entitled to have regard to the fact that the Appellants have not lived in the same house as both parents from 2009 until 2017 (when their mother returned to Nepal). The second ground takes issue with the Judge's analysis of the financial evidence. The key finding was at [16], that there was no evidence of regular financial support *'for an extended period of time'.* This was consistent with the Judge's observation that the joint account bank statements only evidenced withdrawals in 2020 and the money transfer evidence only covered *the second half of 2019 and 'the first few months of 2020'* (at [16]). Given those findings, which were not challenged, it was open to the Judge to conclude that there was insufficient evidence to support a finding of extant family life.
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> 3. For those reasons, the grounds did not disclose arguable errors of law and permission to appeal is refused."

8. On renewal on essentially the same grounds, permission to appeal was granted by Upper Tribunal Judge Owens on the basis that it was "arguable that the judge erred in her [sic] assessment of whether there was real, effective or committed support between the sponsor and the appellants". She concluded that all grounds were arguable.

9. I had before me a core bundle of documents relating to this appeal, the Respondent's bundle for each Appellant ([RB1/xx] denotes documents relating to First Appellant and [RB2/xx] documents relating to Second Appellant), the Appellants' bundle before the First-tier Tribunal (hereafter referred to as [AB/xx]) and the Appellants' skeleton argument before the First-tier Tribunal. I also had an additional bundle filed on 1 June 2022 pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Since that bundle contains evidence updating the position since the Decision, those documents cannot be relevant to whether there is an error of law in the Decision (as Mr Balroop accepted) and I do not therefore need to refer to them.

10. The matter comes before me to determine whether there is an error of law in the Decision. If I so conclude, I must consider whether to set aside the Decision in consequence and, if I do so, go on to re-make the decision or remit the appeal to the First-tier Tribunal for that purpose. Having heard

oral submissions from Mr Balroop and Mr Tufan I indicated that I would reserve my decision and issue that in writing which I now turn to do.

DISCUSSION

11. I begin with the Decision itself. The Judge set out at [5] and [6] of the Decision the evidence given by the Sponsor. The Appellants and their mother remain living in Nepal and could not have given oral evidence without permission from FCDO (which was not sought). The Appellants and their mother provided written statements but could not be cross-examined on them. The Sponsor was cross-examined, in particular in relation to the circumstances of the Appellants and the financial support provided.

12. Having set out at [11] of the Decision the evidence which was not disputed (relating to the relationship between the Appellants and Sponsor, the Sponsor's position as a Gurkha veteran and that the Appellants' mother had returned to Nepal in 2017), the Judge turned to consider the other evidence.

13. As the Judge (correctly) observed at [14] of the Decision, the "key test ..is whether or not there is support between the Appellants and the sponsor that is real, effective or committed". He directed himself to the case of Rai. Thereafter, at [15] to [18] of the Decision, the Judge assessed the evidence against that test in the following terms:

> "15. The evidence provided was that neither of the Appellants have ever worked at any time and that this is due to their not having been educated beyond the level of having obtained the school leaving certificate and also due to the high rate of unemployment in Nepal and the resultant lack of opportunity for the Appellants to find work in Nepal. I have not been provided with any evidence relating to the labour market in Nepal and I therefore make no comment on the difficulties involved in looking for work in Nepal or the scope for finding work in Nepal.
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> 16. With respect to any financial support provided by the sponsor to the Appellants, it is accepted by the Respondent that the sponsor has provided some financial assistance to the Appellants. That is evidenced by money transfer documentation which relates to transfers having been made by the sponsor to the Appellants in the second half of 2019 and the first few months of 2020. Based upon the evidence provided, I accept that the sponsor has provided financial assistance to the Appellants although the money transfer documentation provided relates to a period close in time to the date when the applications were made by the Appellants. The bank statements provided detail cash withdrawals during 2020 but do not detail who has made the withdrawals. No evidence has been provided to demonstrate that the sponsor has been providing regular financial support to the Appellants for an extended period of time.

> 17. I accept that there is regular and normal contact between the sponsor and the Appellants, particularly as the sponsor's wife has now returned to the family home in Nepal as evidenced by the documentation demonstrating communication in the bundle of the Appellants.
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> 18. The sponsor and his wife lived together in the UK and apart from their two children for 8 years from 2009 until 2017 prior to the sponsor's wife returning to Nepal in 2017. During that time, the Appellants would have been living together in the family home and away from both their parents. I accept that the sponsor and his wife returned to Nepal to visit their children during that time but the Appellants, nonetheless, would have had to adapt to living without the presence of their parents and to living with each other and to have done so over a period of many years."

14. Having assessed the evidence, the Judge reached his conclusion at [19] of the Decision about the "key test". He "[did] not accept that there is support between the sponsor and the Appellants that is real, effective or committed". Thereafter, at [21] of the Decision, the Judge formed his conclusion whether Article 8(1) was engaged in the following terms:

> "The Appellants have been living apart from the sponsor for 12 years. They also lived apart from their mother for 8 years between 2009 and 2017 until she returned to Nepal in 2017. The first Appellant is aged 40 and the second Appellant is aged 37. They continue to live in the family home in Nepal where they have always lived. The lived together and have done so for the past 12 years apart from the last four years when their mother has also lived with them. Taking account of all the circumstances in this case, I am not satisfied that there exist emotional ties between the sponsor and the Appellants over and above the normal emotional ties. I am not therefore satisfied that family life exists or that Article 8 is engaged."

15. The Appellants take issue with the conclusion at [19] of the Decision. As Mr Tufan pointed out, that is the crux of the challenge. The Appellants accept that the Judge set out the correct test. They do not say that the conclusion is perverse or not open to the Judge (as Mr Balroop confirmed orally). Their challenge is based on the Judge's findings on the evidence. I therefore turn to deal with each of the two grounds separately.

16. I deal first with the fact that the Appellants live in the "family home". That is said to be important as it is an indication both that the Appellants have not formed their own family life and that the Sponsor is providing the requisite support by furnishing the Appellants with that accommodation.

17. On the first point, I concur with Judge Povey that the Appellants' ground is misconceived. What is said in Rai about the importance of the appellant continuing to live in the family home read in context relates to whether the Appellant continued to form part of the family unit formed of himself and his parents, including the Gurkha veteran sponsor (see in particular [41] of the judgment). The comments are made not in relation to the family home in terms of the bricks and mortar property but whether the appellant

continued to enjoy family life with his parents even after their departure because he continued to remain in the same property and had not "left home" (to put it colloquially). There is no special significance to be attached to the fact that the Appellants in this case continued to live in a house owned by their parents.

18. I accept that the fact that the Appellants continue to be accommodated in a property owned by their parents may be part and parcel of the support which they are given. There are however several difficulties with the challenge in that regard. First, there is limited evidence about the ownership of the property or the terms under which the Appellants occupy it. The Sponsor refers to it as his house ([§2] at [AB/5]). His wife similarly refers to it in her statement as their house. However, the Appellants make no mention of the basis on which they live there.

19. Even assuming that the Appellants do not pay anything towards their accommodation, there is no evidence indicating that the Sponsor makes any payment towards accommodation. If he owns the house outright (as might appear to be the case on the evidence), then the Appellants may well not pay for their accommodation. However, neither they nor their parents say anything in their statements about this accommodation or that it forms part of the support which the Sponsor provides.

20. Further, and in any event, it cannot be said that the Judge ignored the evidence on either basis. He mentions a number of times that the Appellants live in the family home. However, as the reasoning at [18] makes clear, the crucial question is whether the living arrangements amount to family life between the Appellants and the Sponsor. The Judge concluded that there was no longer family life due to the lengthy period of separation of the Appellants from their parents, in particular the Sponsor. This is not a case as Rai where the application to settle was made shortly after the appellant's parents had left Nepal.

21. Finally, on this ground, as the case law makes clear, each case is fact sensitive. The Appellants' challenge is only that the Judge failed to take into account or properly assess the facts. The Judge did take account of the fact that the Appellants continued to live in the family home (in terms of the property owned by their parents). However, he concluded that they did so independently of their parents and therefore that did not constitute family life. That was a finding open to the Judge on the evidence before him. Ground one does not disclose any error.

22. I turn then to the evidence concerning financial support. The documentary evidence appears as follows:

    [RB2/D56]: Nepalese bank statement showing one withdrawal by the Appellants' mother on 10 June 2019 of approx. £1900

    [RB2/D103]: money transfer to Second Appellant of £103 on 9 March 2020

[RB2/D106-108]: money transfers to Second Appellant of approx. £90 on 12 February 2020, approx. £95 on 9 January 2020 and approx. £92 on 10 November 2019

[RB2/D111 (replicated at [D115] and [RB1/D73 and D79])]: money transfer to Second Appellant of £100 on 10 February 2020

[RB2/D116 (replicated at [RB1/D71 and D74])]: money transfer to Second Appellant of £103 on 7 November 2019

[RB1/D72 (replicated at [RB1/D75])]: money transfer to First Appellant of £100 on 10 February 2020

[RB1/D78 (replicated at [D80])]: money transfer to First Appellant of £103 on 7 November 2019

[RB1/D105]: money transfer of approx. £95 to First Appellant on 9 January 2020 [RB1/D107]: money transfer of approx. £92 to First Appellant on 8 November 2019 [RB/D108]: money transfer of approx. £90 to First Appellant on 12 February 2020.

23. The Appellants' bundle contains a statement of the Nepalese joint bank account for the period January to December 2020 ([AB/83-85]) which shows only three cash withdrawals (without stating who made the withdrawals) in July 2020 (approx. £4175), September 2020 (approx. £1118) and November 2020 (approx. £835).

24. At [AB/86-89] appear a further four money transfers of approx. £90, £92, £92 and £90 to the Second Appellant on 15 October 2019, 10 November 2019, 9 January 2020 and 12 February 2020 (which replicate some of those in the Respondent's bundles). Also at [AB/90-98] are further money transfers (most of which are largely illegible) showing payments to the Second Appellant of £106 on 10 March 2020, £103 to Second Appellant on 9 March 2020, £103 to First Appellant on 9 March 2020, £100 to First Appellant (date illegible), £103 to Second Appellant (date illegible), £53 to First Appellant on 6 November 2020, £53 to Second Appellant on same date, £53 to First Appellant on a date in December 2020 and £53 to Second Appellant apparently on the same date.

25. In short, therefore, the evidence regarding cash withdrawals is limited to the period June 2019 to November 2020. Only one of the four withdrawals is evidenced as to the person withdrawing the money. The Appellants say that the Judge should have accepted evidence that the withdrawals were made by their mother. However, her written statement at [AB/9] that she withdraws money every month to give to her children for household expenses and pocket money is inconsistent with the documents. The Judge was in any event entitled to note that the evidence was mainly limited to 2020.

26. In relation to money transfers, the earliest of the documents is October 2019. That is consistent with what the Judge says about those at [16] of

the Decision. The evidence in the written statements is vague. The Sponsor says at [§6] ([AB/6]) that he used to give pension money to his children during visits and sent "small amount of money to them from the UK". He refers to withdrawals from the joint account since 2017 but does not say how the Appellants were funding themselves before his wife returned to Nepal. His wife says nothing about providing funds prior to her return to Nepal. Her evidence suggests generally that she and the Sponsor were not well off (they had to borrow money to go to Nepal in 2009 and found it expensive to speak to the Appellants on the phone). Neither Appellant provides any detail of regular financial support. The Second Appellant refers to the cash withdrawals said to have been made by his mother and money sent from the UK "from time to time" ([§5] at [AB/4]). He does not say how the Appellants funded or indeed fund their monthly household expenses of £275 prior to their mother's arrival or indeed since (as the documents do not show regular withdrawals even from 2017).

27. It is evident from what is said at [15] and [16] of the Decision that the Judge did not accept at face value the evidence that the Appellants are reliant on the Sponsor for their support nor that the support has been or is consistent. As he concludes in the final sentence of [16] of the Decision (and as is consistent with the documentary evidence as summarised above), "[n]o evidence has been provided to demonstrate that the sponsor has been providing regular financial support to the Appellants for an extended period of time". There is no error in that conclusion.

28. The Judge was entitled to reach the conclusion he did about what the evidence showed. Whilst there was some financial support, it was not shown to be regular or over a long period. The Appellants had been living apart from their parents for a lengthy period, albeit in a house apparently owned by their parents. The Judge also considered the evidence of contact which he accepted was "regular and normal". Insofar as Mr Balroop suggested that financial support of itself is sufficient, I reject that submission. As the Court of Appeal made clear in Rai, it is a combination of factors which make up family life. In any event, as I have already pointed out, the evidence does not (contrary to what is suggested in the grounds) show that there have been consistent payments of support over five years. The Sponsor may well have been receiving pension for five years, but the evidence is deficient if it is intended to show that the Appellants have been receiving money from that source for that period. Even if dependency is relevant (as the Court of Appeal suggests in Patel), the evidence in this case falls far short of showing such dependency. More importantly, Judge Swinnerton was entitled to reach the conclusion that it did not.

29. Finally, as the case law to which both parties referred makes clear, the enquiry whether there is family life is an inherently fact sensitive assessment. The principles which inform it are best summarised by the Court of Appeal in Singh as follows:

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

30. The Judge applied that test. He considered the relevant evidence, made findings which were open to him and reached a conclusion consistent with those findings. There is no error of law disclosed in the Decision.

CONCLUSION

31. The Appellants have failed to establish that the Decision contains an error of law. Accordingly, I uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

DECISION

The Decision of First-tier Tribunal Judge K Swinnerton promulgated on 17 June 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 26 June 2022