Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09902/2019

THE IMMIGRATION ACTS

Heard in Person at Field House	**Decision & Reasons Promulgated**
On 25 June 2021	**On 1 March 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR SANTOSH KUMAR RUCHEL
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Jaisri, Counsel, instructed by Sam Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of the respondent made on 25 July 2019 to refuse him entry clearance and to refuse his human rights claim. His appeal against that decision was dismissed by the First-tier Tribunal for the reasons set out in a decision promulgated on 4 February 2020. For the reasons set out in a decision of 23 October 2020, a copy of which is attached, that decision was set aside.

The Hearing

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2. I heard evidence from the appellant's father, Mr Udi Sarki ("the sponsor"). I also heard submissions from both representatives. In addition I had before me the following:-

   (i) Respondent's bundle;

   (ii) bundle prepared for the hearing before the First-tier Tribunal;

   (iii) a supplementary bundle;

   (iv) skeleton argument from Mr Jaisri (prepared for the First-tier Tribunal).

3. The sponsor adopted his witness statement, confirming that since the last hearing he had been back to Nepal in 2020 for some twenty days. He said he had gone to his village to see the appellant. It takes two days' travel from Kathmandu to the home village, he had spent all the time in the home village and had brought stuff to take to his son in Pokhara. He confirmed that he had only sent three remittances to Nepal in the last years as he had taken 2.5 lakh rupees for him whilst he was there. He said that due to COVID it was not possible to send money so easily.

4. The sponsor said he maintained contact with his son via phone using the Lebara provider and he confirmed that the screenshots at A11 in the bundle, he accepted that these were screenshots of text messages and that he converses two to three times a week to know about his situation, asking about how he was doing.

5. In cross-examination the sponsor said that there had not been any new witness statement from the appellant since February 2019 as one had been submitted before. He said there was no change in circumstances.

6. The sponsor said owing to the appellant's lack of education it was hard to find a job but that it was not mentioned to him what type he was looking for. He was unable to explain why there were no translations of the text messages.

7. He accepted that he had provided in the supplementary bundle photocopies of calling cards from Lebara but the lawyer had only provided eight of them. He said that a £5 card might last for 25 minutes or so and he also used the cards to call local numbers.

8. The sponsor said that he had a son and two daughters who live outside the United Kingdom, the daughters living in Hong Kong. He said that he has grandchildren but, asked if he used the card to call his son and grandchildren said that they live separately so he only calls when necessary. He said that he visits them when they go to Nepal, the last time being in 2020. Asked if there is a reason why he did not keep in contact with his children and grandchildren that they are independent.

9. Asked about his daughters, he said that they call him from Hong Kong, so he does not use his cards.

10. The sponsor said that the appellant does have friends in Nepal. Asked what he could tell the court about them, he said that sometimes they visit him and sometimes he visits them. He was unable to tell us which friends he had visited in the last couple of weeks. He said that he probably has a girlfriend but he was not sure, he was not sure how serious it was. He said that in Nepalese cultures children struggle to tell their parents about girlfriends.

11. Asked how he supports his son emotionally, he said that the appellant is alone in his house and sometimes he talks to him about money matters and he tells him how to manage money issues and things like that. Asked if the real reason that he wanted the appellant to come was to help him and his wife, not to preserve any particular family relationship, he said that it was for that reason. In re-examination he said that it was also for emotional support.

12. In response to my questions he said that he normally calls his son rather than sending a message although he accepted that the screenshots appear to show messages from a mobile phone messaging app.

Submissions

13. Mr Clarke relied on the respondent's decisions, submitting that the issue here was whether there was real and effective support as indicated in Rai v ECO, New Delhi [2017] EWCA Civ 320 at [39]. He considered that it was more likely than not that there was family life until the appellant's siblings came to the United Kingdom in 2016, they stayed all in the same house at that point but that the issue was what had happened since then. He drew my attention to the fact that there was nothing in the last eighteen months to indicate financial dependence but that it was evident that the sponsor did not know very much about the son, indicating the lack of emotional support and there is also a distinct lack of the content of any contact.

14. Mr Jaisri submitted that there was evidence of financial and emotional support. He submitted that it was a reasonable inference to make that family life had continued since 2016 and that the emotional support and dependency was real, committed and effective. He submitted that they had lived together until 2014 and that the subsequent elapsed time was not sufficient such that the family life would have ceased to subsist. He drew my attention to the frequency of visits and that it could be inferred from the contact and that there was real and committed evidence as set out in the statement in support of the application (A53).

The Law

15. It is accepted that the appellant does not meet the requirements of the Immigration Rules. This case is argued solely on the basis that the refusal of entry clearance to the appellant is contrary to his rights pursuant to

Article 8(1) of the Human Rights Convention. Accordingly, I must take into account Section 117B of the 2002 Act.

16. As was noted in Rai v ECO, New Delhi [2017] EWCA Civ 320, legal principles are not controversial as regards whether Article 8 is engaged. The Court of Appeal said this:-

> 17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "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 … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant 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". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "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". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".
>
> 18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments 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", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):
>
> > "61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".
>
> The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):
>
> > "49. 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"."
>
> 19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".
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> 20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):
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> > "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."

17. Given Mr Clarke’s concession, I am satisfied that family life did continue to exist until at least 2016. The question then arises whether, in addition to the financial support which I accept, as shown by the money remittances and the evidence of the sponsor this has continued. I accept that there would be difficulty at present owing to COVID in sending money and that there would be difficulty in the appellant travelling to a town to obtain from a bank any cash sent to him.

18. What is, however, remarkable about this case is the lack of any statement from the appellant other than the statement made in support of his application. The letter reads as follows:

> “My parents have seven children and I am the fourth child of the lot. Of my older siblings, my two sisters are settled in Hong Kong and brother is married and settled in Nepal. My parents were granted settlement in the UK

> and first travelled there on 11 May 2014. Later, all three of my younger siblings joined them in the UK. Now, I am left all alone in my parents' old house in Parbat district. I am educated only up to lower secondary level after which I could not go to continue further. My low academic qualification has been a great obstacle to my being able to support myself. As it is in Nepal there are limited job opportunities, it is all the more difficult an unqualified person to find work. I remain unemployed till date. I have been living under my parents, full and financial support and I am completely dependent on them both financially and emotionally. Being all alone in Nepal, I miss family immensely.
>
> My parents send me money to cover my expenses here in Nepal and also visit me almost every year (mother is in Nepal till 26 February), living away from them is taking an emotional toll on me. I miss my parents' company and guidance and would like to join them as soon as possible. If I am granted a settlement visa, I would also like to obtain a suitable qualification in the UK so that I will one day be able to support myself as well as my father.
>
> …
>
> Since my parents' departure to the UK, I have been deprived of a family life and wish to be together with them as soon as possible. While I look forward to their company, care and support, I also equally feel that I should spend more time with them since they are getting older day by day. I therefore wish to be available in their old age to extend all required support to them like they have supported me throughout my life."

19. What this does not do is set out the detail or content of any emotional support that is offered. I consider it reasonable to expect, if emotional support is provided, that what this means, and illustrations of what is said, that is that the content of the emotional support would be explained by the appellant and/or the sponsor.

20. When asked the sponsor was only able to talk about discussions about money, knew little about the appellant's friends, did not name them and said nothing about them other than that sometimes spend time in each other's houses. I accept that there continue to be telephone calls between the sponsor and the appellant but there is little evidence of what they discussed and even allowing for the fact that Nepali single people might not discuss relationships with their parents, the evidence about whether there is a girlfriend or not is lacking in any detail.

21. In essence, the evidence of the content of any emotional support add little to the bare assertion that support is provided and I do not consider that it is in the circumstances reasonable to infer emotional support from, for example, telephone calls made. The existence of telephone cards is of little assistance in showing how frequently calls are made, given that they provide only evidence that somebody bought the cards. I have not been provided with translations of the screenshots of messages which I am told come from the appellant's mobile phone but which indicate that his father is able to communicate to him in some ways by text message. It is, however, possible to discern from the screenshots that the messages are relatively short and infrequent. Given also that they record that the

sponsor attempted to make video calls to the appellant, I would have expected there to be some indication of whether this did occur and again what was discussed.

22. I accept that there is financial support still provided, but viewing the evidence as a whole, I find that I am not satisfied, certainly at the date of decision, that there continued to exist a family life in the terms meant in **Rai** given the lack of sufficient evidence of real, effective or committed emotional support. I find nothing in the evidence, which is even more limited in the period since then, that family life exists.

23. Accordingly, I am not satisfied that family life exists between the appellant and the sponsor or his mother and accordingly the appeal falls to be dismissed as I am not satisfied that article 8 family life is engaged.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing the appeal.

3. No anonymity direction is made.

Signed Date 16 July 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION

Approval for Promulgation

IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09902/2019

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing
At Field House
On 23 October 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SANTOSH KUMAR RUCHEL
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Rothwell promulgated on 4 February 2020, dismissing his appeal under the Nationality, Immigration and Asylum Act 2002 against a decision of the respondent made on 25 July 2019 to refuse entry clearance and his human rights claim.

2. The appellant is a citizen of Nepal, born on 31 May 1981. He sought leave to enter the United Kingdom as the adult dependent child of a retired Gurkha. The appellant's father was a Gurkha between 1956 and 1981; his

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and his wife (the appellant's mother) obtained settlement visas and came to the United Kingdom in 2014. They have two daughters and a sone who live in the United Kingdom, also with settlement visas; two other daughters are settled in Hong Kong and another son, Kesnarayan, lives with his family in Pokhara, Nepal.

3. The appellant's case is that he has retained a family life with his parents and that, bearing in mind the historic injustice done to Gurkhas, it was disproportionate to refuse him leave to enter the United Kingdom to join his parents.

4. The respondent considered that the appellant did not fall within the discretionary policy, or the Immigration Rules, nor was it accepted that there was a family life with the appellant's parents over and above that between an adult child and his parents, shown by the parents' move to the United Kingdom in 2014.

5. On appeal, the judge heard evidence from the appellant's father. She also had a bundle of material before her by the appellant's representatives.

6. The judge noted [26] that the only issue was whether the appellant has a family life with his father. She found, directing herself [28] in line with Rai v ECO [2017] EWCA Civ 320, that he did not. She accepted [29] that he is currently financially dependent on his parents but that it was normal for relatives back home to be supported by those who have migrated. She considered that family life goes beyond mere financial support, that there was only a vague mention of emotional support from the appellant [30] and that although accepting that the appellant is in contact with his family, that is normal for families where relatives have decided to move overseas, and in the light of the other evidence does not show there is family life between the appellant and his parents [31].

7. On that basis she dismissed the appeal.

8. The appellant sought permission to appeal on the grounds that the judge had erred:

   (i) In her assessment of the evidence of family life in the light of Rai in not taking account of family life still existing in 2016 between the sponsor and his other three children, the appellant at that point living in the family home with his brothers and sisters, the sponsor's commitment to his children leading to the delay in his settlement until 2014 having been able so to do since 2009;

   (ii) In not explaining at [31] and [32] why being in contact by telephone did not amount to family life;

   (iii) In failing to determine whether the facts amounted to "real", "committed" or "effective support".

9. On 18 May 2020 First-tier Tribunal Judge Lever granted permission to appeal

10. On 30 July 2020 Upper Tribunal Judge Norton-Taylor gave directions which provided amongst other matters:

> 2. I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:
>
> (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so
>
> (b) whether that decision should be set aside.
>
> 3. The issue in this appeal is relatively straightforward, namely whether the judge erred in law when concluding that there was no family life between the appellant and his father (the sponsor). The grounds of appeal area concise and the grant of permission is clearly expressed.
>
> 4. I therefore make the following DIRECTIONS:
>
> (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);
>
> (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;
>
> (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.
>
> (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.
>
> 5. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

11. On 3 September 2020, the respondent made submission to the effect the grounds are without merit, the judge having properly directed herself [27] to the assessment of historical family life ad the point of separation as well as at the date of hearing; gave clear reasons for finding some of the evidence unsatisfactory with regard to the frequency of telephone contact, that absence of translations of messages, and that evidence as to the appellant seeking work; and, that the judge had not erred in concluding that despite contact and financial dependency, there was no family life, that being primarily a matter for the judge.

12. The appellant has made no submissions. The only communication has been the return of a Short notice of Hearing form

13. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to

the views of the parties. Bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly. Neither party has objected to this, and I am satisfied that in the particular circumstances of this case that it would be correct to make a decision being made in the absence of a hearing.

14. It is of note that the appellant's younger siblings with whom he lived until 2016 were born in 1986, 1991 and 1992. They were, therefore, plainly adults in 2016. They were granted entry clearance to the United Kingdom. They would, I accept, appear to have been under 30 but there are no findings as to whether, as there should have been following Rai at [42], as to whether there was family life when the parents left; and, in this case, the position of the other siblings would have been relevant. That there was family life between the sponsor and the appellant in the past does not appear to be in doubt, but there is no finding as to when it ceased despite this experienced judge noting the issue at [27] a paragraph which does not read easily and appears to have some words missing. This, unfortunately, makes the judge's self-direction as to family life unclear.

15. While it is clear that the judge did not accept the evidence as to how often the appellant and sponsor are in contact, and her reasons for that are sustainable, it is not clear why she found the evidence that the appellant's father and mother provide emotional support to be vague; unlike for example something more concrete like the number or length of visits, it is not easy to articulate and account is not taken of the telephone calls or visits in this. The judge did take account of the visits to Nepal but omits the detail that the father stayed with the appellant.

16. What the judge does not do is explain why the accepted financial support, along with the telephone calls and visits and emotional support, is not real, committed or effective support. While it is correct that telephone contact is not determinative, and there may be many reasons for visits to a former home country, equally such things may have multiple purposes, including maintenance of family ties.

17. Taking all of these factors into account, I consider that all three of the grounds are made out, and thus, the decision involved the making of an error of law and must be set aside. I consider that there is, however, no reason why the appeal should be remitted to the First-tier Tribunal. It will be retained in the Upper Tribunal. The findings as to financial support are retained, but it will be necessary to remake the other findings, not least as the situation may well have changed in the year between the hearing and any new hearing.

Notice of Decision & Directions

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2. The appeal will be remade in the Upper Tribunal on a date to be fixed.

3. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal can and should be held face-to-face on a date to be fixed as it may be necessary to have further oral evidence via a court interpreter.

4. Any party wishing to adduce further evidence must serve it at least 10 working days before the next hearing, accompanied by an application made pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 explaining why it should be permitted

Signed Date 2 November 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul