Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001963
(HU/54029/2021); IA/10413/2021

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2022

Decision & Reasons Promulgated
On 6 October 2022

Before

UPPER TRIBUNAL JUDGE PLIMMER
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

Ms LOK MAYA SUNAR
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr S Jaisri, Counsel
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal, born on 3 October 1980. She appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Wyman ("the judge"), sitting at Hatton Cross, dismissing her appeal against a decision of the respondent dated 28 June 2021 refusing her application for leave to enter the United Kingdom in order to settle with her father, Mr Top Bahadur Kami ("the sponsor").

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Background

2. The appellant was aged 40 when she made her application. She explained that the sponsor was a former member of the Brigade of Gurkhas, who was discharged from the British Army on 28 August 1972. She claimed to be living in the former family home and to be dependent on the sponsor's support.

3. The respondent entry clearance officer refused her application. Reasons are given in the notice of decision as to why the appellant could not fulfil the requirements of the Immigration Rules for entry as an adult dependent relative and why she could not meet the requirements of the respondent's discretionary policy to admit former Gurkhas and their family members ("Annex K"). The appellant does not contest those parts of the decision. The entry clearance officer also decided there was no extant family life between the appellant and the sponsor which would engage article 8 of the Human Rights Convention and, in the alternative, the decision was proportionate.

4. The appellant appealed to the First-tier Tribunal. Her appeal was heard on 29 March 2022. In a Decision and Reasons signed on 11 April 2022, the judge dismissed the appeal. Her main findings can be summarised as follows:

    - The sponsor would have applied for settlement before 2009 had he had the option to do so [56];
    - The appellant remains living in family home and she lives there with her siblings [60];
    - The appellant receives financial support of £200 per month from the sponsor, which is derived from his British Army pension [60], [66];
    - The sponsor and the appellant's mother have visited Nepal on seven occasions since 2010, when they settled in the United Kingdom, and the sponsor told the judge he tries to leave money for his children each time he visits (around £600) [62];
    - The appellant is not illiterate and she attended school from the ages of 10 to 20, although she might not have obtained any qualifications [63];
    - It was unclear why the appellant and her siblings were not working and there was no evidence of them having any disability [64];
    - There is ongoing emotional support between appellant and her parents on a regular basis but this is no different from any other parent and child who live apart [66];

- The appellant has a plot of land to grow crops for her and her siblings' own use [67]; and

- The appellant has no special health needs and has lived "independently" of her father since he came to United Kingdom [69].

5. The judge then concluded that, whilst she accepted the appellant was very close to her parents and this was reciprocated, this was "different from family life". She went on to state that the decision was proportionate.

6. Permission to appeal was granted by the First-tier Tribunal.

Hearing

7. At the hearing before us, Mr Jaisri, who had represented the appellant in the First-tier Tribunal, appeared by video link and Ms Ahmed appeared at Field House in person. The sponsor did not attend.

Error of law

8. Ms Ahmed indicated at the outset that she accepted the judge's decision was vitiated by error of law and was not sustainable. She agreed with the submission in Mr Jaisri's grounds seeking permission to appeal that the judge had erred by failing to follow the guidance set out in Rai v ECO, New Delhi [2017] EWCA Civ 320 by making findings as to whether family life existed at the time the sponsor left Nepal and then look to see whether it had survived the sponsor's absence. Nor had the judge applied the correct test of family life, which was whether there was support which was "real", "effective" and "committed" (see Kugathas v SSHD [2003] EWCA Civ 31, at [17]). The judge's comment in paragraph [69] that the sponsor had chosen to come to the United Kingdom was against the guidance in Rai. Finally, the judge's conclusion that the appellant had been living "independently" from the sponsor since 2010 did not appear to be based on the correct test of living independently, which was usually understood to involve the creation of a new family unit through, for example, marriage.

9. Ms Ahmed's analysis broadly matched our own assessment of the decision and we indicated that we were content to accept the respondent's concession that the appeal should be allowed and the judge's decision set aside. We would add the following in any event.

10. Having noted that the judge finds there was no family life at [70], she then contradicts herself at [71] stating the decision amounted to an interference with the appellant's family life of sufficient gravity to engage article 8. She then purports to make a decision on proportionality. This, we find, is confused reasoning. Furthermore, if the judge had been right to go on to consider proportionality, then it would

have been an essential element of her reasoning to give weight to the historic injustice accorded to Gurkha veterans, which factor would ordinarily be determinative. This was made clear by the Court of Appeal in Gurung & Others [2013] EWCA Civ 8 (see also Rai at [11]). The judge's brief consideration of proportionality at [71] omits any reference to this extremely important factor despite her self-direction to do so at [36].

Re-making

11. Both representatives were content for us to re-make the decision on the basis of submissions, and agreed that it was appropriate to preserve the positive findings made by the judge. Ms Ahmed highlighted two matters which she regarded as "credibility issues". These were derived from paragraphs [63] and [64] of the judge's decision in which she found the appellant was not illiterate and that she had not provided any explanation as to why she and her siblings were unemployed. Ms Ahmed said the judge was concerned by the sponsor's statement which said he supported the appellant because she could not find a job.

12. We considered paragraph 7.2. of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal. We decided to hear submissions from the representatives in order to re-make the decision ourselves without a further hearing.

13. Ms Ahmed relied on the notice of decision and the reasons for refusal contained in it. She asked us to infer from the fact the appellant had attended school that she would have worked and to make an adverse credibility finding on this point. She asked us not to accept the evidence of remittances as showing dependency and she reminded us that, in JB (India) & Ors v ECO [2009] EWCA Civ 234, the Court of Appeal considered that weekly telephone calls did not show anything beyond normal emotional ties. She asked us to re-make the appeal by dismissing it.

14. Mr Jaisri argued that the judge had accepted the oral evidence of the sponsor, save for the points about education and employment. Even these were not adverse findings, as such. The judge's comments in paragraphs [63] and [64] were essentially speculative. We should accept it had been shown the appellant was not working and whether she could or wished to work was irrelevant. He said the judge's findings on financial and emotional dependency were "wholly positive" and he highlighted the important finding that the appellant remained living in the family home with her siblings, where she previously resided with the sponsor and her mother. Mr Jaisri argued that article 8 was engaged in its family life aspect and the decision was disproportionate. He asked us to re-make the decision by allowing the appeal.

15. We reserved our decision.

Re-making the decision

16. On balance, the evidence satisfies us that the appellant would be living with her parents but for the fact her father was unable to bring her with him when he moved to the United Kingdom. We accept the reason given for the sponsor's decision to leave her behind in order to secure his own settlement status in the United Kingdom and we also accept this should not be taken to imply the appellant was living an independent life. The intervening years have not broken the very close family ties and mutual dependence which exist.

17. We base our conclusions on the clear findings made by the judge that the appellant relies on financial support from her father's pension, that she farms a small plot of land and that she is unemployed. We give weight to the clear explanation provided in the sponsor's witness statement, which does not appear to have been challenged in the First-tier Tribunal, that the appellant lives in a remote area of Nepal and it is hard to find jobs there because opportunities are very few. They are non-existent unless a person has qualifications, experience and contacts. The appellant has none of these.

18. We agree with Mr Jaisri that the fact the appellant continues to live in the sponsor's former home is significant. We bear in mind that she lives in the family homes with her unmarried siblings. We also regard the unchallenged evidence that she is able to draw her father's pension to support herself as important. We have noted the judge's concerns but consider her comments in paragraph [64] are speculative and not based on the evidence before her.

19. We accept, as did the judge, that there is emotional support provided to the appellant by the sponsor. They are "close". We accept they speak often by telephone and that the sponsor and the appellant's mother visit Nepal when they can.

20. We accept the appellant is unmarried and that, as such, she would customarily remain living with her parents until marriage. We do not consider the appellant is living an independent life. It was explained to us that references to a former marriage breaking down were erroneous.

21. We accept there is continuing real, committed and effective support provided to the appellant by the sponsor. The family ties go beyond the normal ties of love and affection between adult children and their parents. It follows that article 8 is engaged in its family life aspect.

22. The decision maintains the position whereby family life cannot realistically be enjoyed and therefore amounts to an interference of sufficient gravity to engage article 8. We turn to the question of proportionality.

23. We start by noting that it is not reasonable, in our judgement, to expect the appellants' parents to uproot themselves again and return to Nepal in order to resume family life there. Of course, they will wish to visit their country from time to time. However, it is plain that the family long held an intention to settle in the United Kingdom and that this process has not been an easy one for them. The sponsor was one of those affected by the exclusion of ex-Gurkhas from the facilities offered to other ex-Commonwealth soldiers. He has lived here for more than 11 years. It would be unreasonable at this stage of their lives to expect them to reverse the process.

24. The historic injustice aspect of this case is clearly of weighty significance. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was explained that:

> "(4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.
>
> (5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance."

25. Ms Ahmed did not rely upon any and we can see no reason at all in this case not to regard the historic injustice point as a "strong reason" for finding the appellant's exclusion from the United Kingdom a disproportionate response.

26. Since the above case was decided, Parliament has enacted sections 117A-D of the 2002 Act, which must be applied when assessing the weight to be given to the public interest. Section 117B reads in relevant part as follows:

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-
>
> (a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society. …"

27. We do not have clear information about the appellant's ability to speak English. It has been said she is illiterate, although the judge rejected this. We note the appellant stated in her application form that she speaks Nepalese and English, which would be consistent with her having received some education. We do not give subsection (2) much weight in this case.

28. We have already found the appellant is dependent on the sponsor and it is clear he would continue to support her financially if she came to the United Kingdom. We see no reason why, after a period of adjustment, she might be able to find some unskilled employment in the United Kingdom. Given the policy under which the appellant applied for entry clearance does not contain any requirement for maintenance to be shown, this element should not carry determinative weight in our assessment in any event.

29. In Rai the Court of Appeal appeared to agree with the submission that section 117B matters could not make a difference to the outcome (see [56] and [57]). No other matters have been put forward to suggest there are points favouring the respondent's view of where the balance of interests lies.

30. We find the decision amounts to a disproportionate interference with the appellant's right to family life and conclude the decision is not in accordance with section 6 of the Human Rights Act 1998. The appeal is therefore allowed.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision dismissing the appeal is set aside. The following decision is substituted:

The appellant's appeal is allowed on human rights grounds (article 8).

No anonymity direction is made.

Signed Date 31 August 2022

Deputy Upper Tribunal Judge Froom