IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005643
HU/54286/2022;
IA/10912/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

Nani Maya Gurung
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr R Jesurum, instructed by Everest Law Solicitors
For the Respondent: Mr S Walker, Home Officer Presenting Officer

Heard at Field House on 22 March 2023

DECISION AND REASONS

1. The appellant is a citizen of Nepal born on 25th May 1983. She appeals, with permission, against a decision of First-tier Tribunal Judge Seelhof ("the judge") promulgated on 14th September 2022 which dismissed the appellant's appeal. She had appealed against a decision of the Entry Clearance Officer, dated 8th February 2021 refusing her application dated 10th December 2020 for entry clearance and her human rights claim as the adult dependant of her father, ("the sponsor"), who is a former member of the Brigade of Gurkhas.

2. Following dismissal of the appellant's appeal her representatives filed grounds for permission to appeal asserting the judge materially erred in law because of

   (i) an error in approach to the factual evidence and thus the approach to Article 8(2)

   (ii) an error in approach to the appellant's family life and Article 8(1)

3. Ground (i); the grounds cited Gurung and Ors R (on the application of) v Secretary of State [2013] EWCA Civ 8 where it was held

   > ''*but for' the historic injustice he [the sponsor] would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now…'*.

4. The grounds contended that the judge was factually wrong at [29] when stating that the mother '*did not address this [the causal nexus] in her statement*' as to the sponsor's intention at the time. The father sponsor was sick at the time of the hearing, but the mother (sponsor's wife) attended and moreover specifically stated in her witness statement at [11] that her husband always wanted to settle in the UK but '*that policy was not available when he was discharged from the army. If the policy were available, he would have happily accepted that. He would have raised our family here in the UK.'* The judge did not take this into account.

5. Additionally the judge remarked at [22] that he did not attach any adverse weight to the decision of the sponsor not to give evidence due to his unfortunate ill health (stroke and cancer diagnosis) but clearly held it against the sponsor at [29] when the judge commenting on the lack of evidence as to the desire to settle in the UK. As a result, the judge's finding at [42] was flawed. That the appellant could not afford to apply to come at the same time as her parents was an irrelevant factor, as per [41] of Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320**.** The mother gave evidence that the sponsor did not have money to include the appellant in their application when they came to the **United** Kingdom in 2019.

6. In terms of ground (ii), as the judge recorded the appellant started having problems in her marriage between 2018 and 2019. In line with Rai, the question was whether family life was in existence at the date of departure of the sponsor and whether it endured and subsisted now. The judge found family life had '*resumed*' since the appellant was forced to leave the matrimonial home in October 2019. That suggested family life previously. The judge found at [26] the appellant was still living in her marital home in October 2019 and had

family life then but had no family life in March 2019 which was only six months earlier. The judge failed to give reasons as to why family life had resumed only six months later if it had not been in existence earlier. The judge found the appellant *currently* received genuine effective and committed support but failed to give reasons why there was no family life at the point of departure.

7. At the hearing Mr Jesurum relied on the written grounds. The approach to the 'but for' test was flawed. He submitted that family life was evident.

8. Mr Walker acknowledged that there was an error of law in approach to Article 8(2). He also accepted that the judge had found family life between sponsor and appellant had resumed following the marriage and that the finding of the timing of family life was decisive in the appeal.

Analysis

9. We consider ground (ii) in relation to family life first as this is central to the appeal.

10. In Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320 Lindblom LJ when considering family life 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".*
>
> *...*
>
> *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'.

At [39] – [40] it was held in Jitendra Rai:

> *'… the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.*

40. The same may be said of the Upper Tribunal judge's comment that "[there] is no evidence presented as to why the Appellant alone of the six children appears to have remained both within the family home and without employment" (paragraph 22). Even if this was a fair reflection of the evidence explaining how it had

> *come about that the appellant was now the only child of the family in the family home – which I do not think it was – it does not go to the question of whether, as a matter of fact, the appellant himself still enjoyed a family life with his parents – even if his siblings did not.'*

11. When assessing family life, there is no requirement for the financial or emotional dependency which constitutes family life to reach an extraordinary or exceptional level. Additionally, what may constitute an extant family life falls well short of what constitutes dependency, and that reciprocal dependency is relevant to the extent that parents may come to rely upon their children.

12. In this case, the evidence submitted in support of the appellant's family life were the witness statements, the financial remittances and substantial evidence of contact between the appellant and her parents and divorce papers. Whilst the appellant initially had a husband and children, she separated/divorced from the husband on or around the time the sponsor came to the UK and the ex-husband has custody of the 2 children. In their witness statements, the appellant refers to difficulties in the marriage which occurred in 2018 and the sponsor refers to those difficulties in 2019 the year in which the sponsor left Nepal. When making his findings the judge merely stated

> *'35. Home Office policy on the historic injustice indicates that a decision maker needs to be satisfied that the former Gurkha would have applied to settle in the UK on discharge and that the dependent children would have been born or raised in the UK. The Appellant's father has not been able to give a statement which confirms that.*
>
> *36. I have considered article 8 in the context of the normal Razgar approach. I have accepted that there is currently family life between the Appellant and her Sponsor and her mother however that is family life that was formed at a time that they were living in different countries. I am satisfied that the family life did not exist at the point at which the Sponsor left Nepal'.*

13. The judge said no more about the family life at the date of departure. In particular, the judge did not focus on the evidence in relation to that period and appears not to have asked himself whether "real" or "committed" or "effective" support was shown to exist in this case at the date of departure in the light of the guidance given in **Rai**. Bearing in mind only six months after the departure, the judge found family life, we consider there to be inadequate engagement with the evidence in relation to family life and as a result inadequate reasoning given for finding no family life at the date the sponsor's departure only six months earlier. The threshold is not an especially

high one for engagement of family life, and on balance the appellant has established that Article 8(1) is engaged. The judge failed to undertake the requisite careful consideration of all the relevant facts of the appellant's case at the sponsor's departure. The judge stated that family life had been formed when in different countries but the initial error in considering family life, as set out above, undermines this conclusion; family life can continue whilst living apart, bearing in mind the historic injustice. For these reasons we find an error of law.

14. In relation to ground (ii) and the causal nexus and whether 'but for' the historic injustice the appellant would have entered at an earlier stage, Elias LJ in AP India [2015] EWCA Civ 8 at [37] considered that the test should not be applied too rigorously and stated as follows:

> '*In my judgment, the courts should not in this context be unduly rigorous in the application of the causation test, given that its significance is to redress this historic injustice. I think there would be manifest unfairness to conclude that the absence of express evidence on the causation point should defeat the claim'.*

15. We accept that the judge was factually wrong at [29] when considering the causal nexus and whether the sponsor would have moved to the UK earlier. The judge stated, '*there was no evidence from the sponsor or from the appellant's mother as to what they might have done'*. The judge, however, did not factor in that the sponsor was sick at the time of the hearing. The mother (sponsor's wife) attended and moreover specifically stated in her witness statement at [11] that if the policy had been available at the time [when the appellant was a minor] they would have raised their children in the UK.

16. Owing to the errors identified above which are material, we find that the judge erred in the approach to the assessment of family life under article 8(1) and to the proportionality exercise in article 8(2) and we set the decision aside.

17. Both representatives submitted that in the event we found an error of law the matter should be reheard by the Upper Tribunal and only very limited submissions were made on the re-hearing. The sponsor's wife had attended the hearing and gave oral evidence before the First-tier Tribunal which we note. The sponsor himself had suffered a stroke and sadly, suffers, with cancer and was unable to attend. No oral evidence was given to the Upper Tribunal.

18. On balance, from the documentation, we accept more likely than not, that family life does currently exist. There is evidence of contact, the witness statements and remittances. We accept the remittances show payments from 2020. The sponsor's bank account with Standard Chartered in Nepal also shows withdrawals from the account which are consistent with the appellant relying on her

sponsor. The ingredients for effective support over and above normal emotional ties were demonstrated.

19. Turning to whether there was family life when the sponsor left for UK, we note the appellant stated in her witness statement that she was having problems in her marriage between 2018 and 2019. That is recorded in her witness statement. As there are divorce documents dating shortly after this, we accept this evidence. The ex-husband has custody of the 2 children. From at least the time she was banished by her ex-husband from the house her parents sent her money to pay for rent and to cover her living costs. The ECO also noted in the decision that she received some financial support. Her final divorce order was dated 2nd November 2020. It is clear, however, that the appellant was sent remittances prior to this date which indicates a level of financial support even when the appellant was still technically married. The Dharan sub Metropolitan City document dated 1st October 2020 (and which predates the divorce certificate) verifies that the appellant was receiving the support of her parents. The Sponsor father also left his ATM card for his Nepalese pension when he left Nepal in 2019 (paragraph 8 of appellant's witness statement).

20. The appellant's application form dated 2020 notes that she had lived in a rented room and at the same address for 2 years. Her parents stated they paid for the rent. It is clear from the documentation that she does not work and we accept that she relies on her parents for financial support. In reality, it is most unlikely that family life would have commenced merely at the point of actual divorce and that in view of the difficulties and evident loss of children, the appellant would have relied more on her parents prior to the actual divorce. The test does not demand some extraordinary or exceptional feature but a sufficient degree of financial support and emotional dependence which we find is present and that constitutes family life. We find the support from the Sponsor to the appellant 'committed' and 'real'. We accept that on balance it is likely that the appellant had family life with the sponsor in 2019 at the point on which he came to the United Kingdom.

21. Turning to proportionality in relation to Article 8(2), it is clear from the evidence of the mother that it would have been the sponsor's intention to apply **to** settle in the United Kingdom with his children, including the appellant, when he was discharged from the Gurkha Brigade but for the lack of policy on settlement. The witness statement of the sponsor mother confirms that the sponsor did not know about the change of policy until 2015 and thereafter made enquiries to ~~re~~**re**move to the UK which was accomplished within a reasonable period of time. If it can be shown that, but for the historic injustice, the sponsor would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for

holding that it is proportionate to permit the adult child to join his family now. We accept that is the case here.

22. Significant weight must be attached to the historic injustice which will normally be enough to cause the proportionality balance to fall in the appellant's favour: see Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC) paragraphs 59 to 60. Exceptional circumstances are not required, and it is for the Secretary of State to justify a decision to refuse leave to enter or remain in the United Kingdom when the only countervailing consideration is the public interest in maintaining a firm immigration policy. The requirement to take into account historic injustice is entailed in striking a fair balance as held in **Rai**. In relation to the Section 117A and B of the Nationality, Immigration and Asylum Act 2002 the provisions do not affect the outcome of the appeal because in view of the historic injustice underlying the case such considerations would make no difference to the outcome. No issues were taken with any form of criminality within the documentation, and none were taken by Mr Walker on the remaking.

23. Taking into account considerations on family life and proportionality we allow the appeal.

Notice of Decision

The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and allow the appellant's appeal.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber