IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002697;
UI-2023-002699
First-tier Tribunal No: HU/53852/2022;
HU/53853/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31 October 2023

Before
UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

MIN BAHADUR GURUNG
NETRA KUMAR GURUNG
(NO ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr E Wilford, Counsel instructed by Howe & Co, Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on Thursday 19 October 2023

DECISION AND REASONS

BACKGROUND

1. The Appellants are two brothers, nationals of Nepal and the children of Mr Hom Bahadur Gurung ("the Sponsor") who is a Gurkha veteran living in the UK. They appeal against the decision of First-tier Tribunal Judge C A S O'Garro dated 21 March 2023 ("the Decision") dismissing the Appellants' appeals against the Respondent's decisions dated 27 May 2022, refusing the Appellants' human rights claims (under Article 8 ECHR). The Appellants' claims were made in the context of

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applications to join the Sponsor in the UK. It is also relevant to note that the Appellants had previous appeals on the same basis refused by a decision of First-tier Tribunal Judge O'Hagan promulgated on 23 May 2017 ("the First Appeal Decision") and First-tier Tribunal Judge K R Moore promulgated on 5 March 2020 "the Second Appeal Decision").

2. The Appellants were aged 34 and 31 years as at the date of the applications which led to the decisions under appeal on this occasion. It is accepted that they do not meet the eligibility criteria to enter under the Respondent's policy for adult children of Gurkha veterans due to their age. Their claims can only be that refusal of entry is a disproportionate interference with their right to respect for their family life with the Sponsor. It is also common ground that the only issue is whether family life exists between the Appellants and the Sponsor. If it does, refusal of entry clearance in such cases would be likely to be disproportionate. If, however, no family life exists, the issue of proportionality does not arise.

3. This case is perhaps somewhat unusual in that the Sponsor did not live with the Appellants before he came to the UK. He worked in Hong Kong from two years after his retirement from the army (and therefore from 1997) until 2010 when he came to the UK. The Appellants have therefore never lived with the Sponsor after 1997 (when they would still have been minors). They lived with their mother in Nepal, but she sadly died in 2005 and the Sponsor re-married. His second wife came to the UK with him. At the time when the Sponsor entered the UK in 2010, the Appellants were both young adults.

4. In the First Appeal Decision and Second Appeal Decision, the respective First-tier Tribunal Judges found that there was no family life between the Appellants and the Sponsor when the latter came to the UK in 2010 ([31] of the First Appeal Decision and [24] of the Second Appeal Decision). Judge O'Garro found, contrary to those earlier findings, that there was family life at that time ([50] of the Decision). No challenge is made to that finding by the Respondent. Judge O'Garro found however that family life had not continued thereafter for the reasons set out at [51] to [60] of the Decision.

5. The Appellants appeal the Decision on two pleaded grounds which can be broadly summarised as follows:

   Ground one: the Judge misdirected herself as to the law which applies in such cases.
   Ground two: flowing from that, the Judge failed to apply the relevant legal principles and case-law.

6. Permission to appeal was refused by First-tier Tribunal Judge Hollings-Tenant on 2 June 2023 in the following terms so far as relevant:

   > "..2. The grounds assert that the Judge erred in law by misdirecting herself with regards to the applicable test as to whether family life exists within the meaning of

> Article 8(1) of the ECHR. It is argued the Judge focused on a need for dependency and failed to consider the financial support provided. However, the Judge directs herself as to relevant authorities, including Kugathas v SSHD [2013] EWCA Civ 31 and Rai v ECO [2017] EWCA Civ 320, and it is sufficiently clear that she properly considered relevant factors before reaching findings open to her on the evidence presented. She was entitled to find that the Appellants had failed to establish they enjoyed family life with their Sponsor beyond that which may ordinarily be expected between adults and their parents, particularly given the lack of evidence as to their personal circumstances in Nepal (see paragraph [52]).
> 3. The grounds amount to little more than a disagreement with the Judge's findings and do not disclose an arguable error of law. Permission to appeal is refused."

7. Following renewal of the application to this Tribunal, permission was granted by Upper Tribunal Judge Owens on 31 August 2023 on the basis that it was "arguable that the judge has misapplied the law on real or effective or committed support" and that all grounds were therefore arguable.

8. The matters come before me to decide whether the Decision contains an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the error would not affect the outcome, I would not set aside the Decision. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

9. I had before me a core bundle of documents relating to the appeal, the Appellants' bundles ([AB/xx]) and Respondent's bundle before the First-tier Tribunal, the Respondent's review and the Appellants' skeleton argument before the First-tier Tribunal. Mr Wilford also provided me with a skeleton argument for the hearing before me which sought to expand upon the pleaded grounds (of which he was not the author). I also had a rule 24 response from the Respondent dated 21 September 2023 seeking to uphold the Decision for the reasons therein set out.

10. Having heard submissions from Mr Wilford and from Ms Isherwood, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

11. The Judge's findings have to be considered holistically. As such and because the reasoning is relatively short (as to which no criticism is intended), I set the relevant paragraphs out in full:

> "51. The next issue for me to determine, is whether family life subsisted after the sponsor came to the United Kingdom. I accept that the sponsor sends money from the United Kingdom to the appellants. I take judicial notice that Nepal is a poor country and for this reason, it is usual for family members who travel abroad to work, sends [sic] money home to family members in Nepal and therefore it cannot be assumed

without more that the money the sponsor sent suggests a bond over and above that usually expected from the relationship between adult parents and their children.

52. There is little evidence of the appellants' circumstances in Nepal for me to assess whether the appellants needs [sic] financial support to meet their essential living needs. The Tribunal is told that the appellants are unmarried and unemployed but nothing is said about how the appellants at the age they are now, spends [sic] their day-to-day life in Nepal. Nothing is said about the friends they have there, or how they occupy their time during the day, if they are not working. Therefore, without cogent evidence of the appellants' circumstances in Nepal, I therefore do not accept that the financial assistance the appellants receives [sic] from the sponsor can be regarded as being sent to meet their living needs leading to a conclusion, without more, of 'real', or 'committed' or 'effective' support.

53. I have not overlooked the fact that the appellants are said to be living in the family home which belongs to the sponsor and Ms Jaja asserts that is a financial benefit but I find their fact takes the matter no further, without knowing more about the appellants' personal circumstances.

54. One of the critical issue [sic] for me to determine, is whether there is sufficient emotional dependency, by the appellants on their sponsor or visa-versa [sic], to justify the conclusion that there is family life.

55. I remind myself that the appellants are now 36 and 33 years old. The appellants and their sponsors have lived apart for many years and in normal circumstances it would be unusual for such grown adults to be emotionally dependent on their sponsor (even taking account of cultural differences) without some psychological reason, which I was not provided with.

56. I have taken into account the sponsor's visits to Nepal but in the thirteen years he has lived in the United Kingdom, the sponsor on his own evidence, has only been to Nepal five times.

57. Bearing in mind the appellants' ages and the years they and their sponsor have lived apart, I would expect that the appellants is [sic] more likely to turn to each other for emotional support rather than their sponsor. Similarly, I would expect the sponsor to turn to his spouse for emotional support rather than the appellants. In fact the sponsor said as much, at paragraph 43 of his first statement, where he pointed out how supportive his partner is.

58. I find that although the appellants and their sponsor have remained in contact with each other, and the usual emotional bonds between a parent and an adult child may be present, I am not satisfied, on the evidence before me, that the emotional dependency is more than what would be expected between a parent and an adult child.

59. I am reminded of what Sir Stanley Burnton stated in Singh v SSHD [2015] EWCA Civ 630, 'there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 …The love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There has to be something more.'

60. The burden is on the appellants to prove their case, that is, to show that the relationship between them and their sponsor is something more than normal emotional ties between a parent and adult child. I do not accept that the appellants have established that they have family life with his [sic] sponsoring father."

12. Ground one asserts a misdirection in law. As Ms Isherwood pointed out, the Judge has had regard to Rai (Jitendra) v Entry Clearance Officer [2017] EWCA Civ 320

("Rai"), Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 ("Kugathas") and Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 ("Singh") (see [31] to [33] of the Decision). It is not asserted that those do not constitute the relevant case-law nor that the Judge was not entitled to rely on those cases.

13. Instead, the argument in ground one appears to be that the Judge has misapplied the case-law by finding that there is a need for dependency. It is suggested that the need for dependency is in the alternative to "real" or "committed" or "effective" support. In the pleaded grounds of appeal, the author (not Mr Wilford) relies on what is said at [17] in Rai which is itself a citation from Patel and others v Entry Clearance Officer, (Mumbai) [2010] EWCA Civ 17 at [14] as follows:

> "You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – 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. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2)."
> [my emphasis]

14. I have there underlined the part of the passage on which the Appellants rely. That has to be read in context. In Rai itself, the Court of Appeal did not suggest that this passage was out of kilter with the other case-law which all makes clear that whether there is family life depends on the facts and in relation to the bond between parents and adult children requires more than the usual ties to give rise to family life under Article 8(1).

15. As I understood Mr Wilford's skeleton argument, he puts the Appellants' case slightly differently. He accepts that the tests of dependence on the one hand and real, effective or committed support on the other are not in the alternative but are a single test. However, he says that dependence and/or support does not encapsulate a requirement to show need. I therefore deal with the Appellants' argument on the basis put forward both in the grounds and by Mr Wilford.

16. First, I accept as Mr Wilford submitted that the reference in Rai to "'support' which is 'real' or 'committed' or 'effective'" is disjunctive and not conjunctive. However, that misses the point. What is required is "support". The link between that word and the need for dependence is self-evident when one reads the remainder of [36] of the judgment in Rai. As was there said, "dependence …was, plainly, a relevant and necessary consideration in [the] assessment".

17. Second, that flows also from Kugathas from which the "'real', or 'committed' or 'effective'" support test emanates. In fact, what is said at [17] of the judgment in Kugathas is a complete answer to the Appellants' argument as pleaded in this case:

> "Mr Gill says that none of this amounts to an absolute requirement of dependency. That is clearly right in the economic sense. 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…"

18. Third, as I have already noted, Mr Wilford sought to expand upon this ground in his skeleton argument on the basis that the support need not arise out of necessity – choice would be sufficient. He seeks to draw an analogy with the limb of Article 8 ECHR which protects a home even if that is a holiday home relying on the Strasbourg case of Demades v Turkey (2003) (16219/90). Having read that decision, I do not find it of assistance. Contrary to Mr Wilford's submission (as I understood it), it was not concerned with the interpretation of the applicant's private life and where he chose to have his home but whether the word "home" in Article 8(1) should be given a wide or narrow meaning and a conclusion that this word was to be interpreted on the facts. Since the test for where family life exists between adults is itself based on decisions of the European Court of Human Rights (see [14] to [18] of the judgment in Kugathas and [9] to [16] of the judgment in Singh), the analogy which the Appellants seek to draw is misconceived.

19. Mr Wilford also sought to support his submission by positing a situation which he said would amount to family life. He suggested that if he had an adult child, living abroad and earning a good salary in a professional capacity but to whom he sent money on a regular basis because he chose to do so, that would give rise to a family life. It seemed to me (if I understood this submission correctly) that this undermines rather than supports his argument. In the situation which he put forward, I can see no basis upon which a finding of family life could be made.

20. For the foregoing reasons, the first ground is not made out. The correct legal test was the one which the Judge directed herself to apply, namely that whether family life exists requires consideration of the interdependency between the Appellants and the Sponsor, both financially and emotionally. Whether one terms the test to be of dependence or support, both infer and incorporate a requirement that the person who is dependent on another or looks to that other person for support needs it.

21. This then leads on to the second ground concerning the application of that test.

22. It is asserted that the Judge erred by requiring the Appellants to show the need for the Sponsor's financial support. I have already dealt with that argument. Evidence only of remittances was therefore without more not enough. The Appellants had to show that the Sponsor was providing them with support, which was real, effective or committed. That involves a consideration of whether they need the money which is sent in order to support them financially.

23. Mr Wilford submitted that in circumstances where the Appellants are unemployed and unmarried, the sending of remittances would suffice. There is no evidence of any other form of income. Returning to the example he posited ([19] above), the sending of money would not evidence support. However, Mr Wilford said that in this case it would be enough because the Appellants have, on their evidence and that of the Sponsor, no other source of income.

24. I accept as Mr Wilford submitted, that the Judge did not make a finding that the Sponsor's evidence was not credible. However, the Appellants' submission on this point ignores that the burden of showing that the Appellants are supported financially by the Sponsor lies with the Appellants. The point made by the Judge at [52] of the Decision is that there was "little evidence of the appellants' circumstances in Nepal". The Judge accepted that the Sponsor was sending money to the Appellants ([42] of the Decision) but was entitled to find that this was not sufficient evidence. It was not for the Judge to speculate as to other potential sources of income, but she was entitled to find that the Appellants had not satisfied their burden of proof.

25. Moreover, the issue was whether the support is real, effective or committed. Without evidence of the Appellants' needs, the Judge was entitled to find as she did at [52] of the Decision that the test was not satisfied. If the Appellants submit that "real" means "genuine" in this context (as I understood Mr Wilford to say at one point), I reject that submission. "Real" has to be read in the context of the other adjectives applied to the support. It has to be support that makes some difference. This reinforces the point that the Appellants had to show a need for such financial assistance as the Sponsor is giving.

26. Mr Wilford in his skeleton argument raised an issue also in relation to what is said at [51] of the Decision concerning cultural norms. He submitted that this was an irrelevant consideration. However, I do not read that as being part of the assessment of the facts of these particular cases, but a recitation of the background context against which those facts needed to be assessed. What the Judge is there considering is whether the fact of remittances alone is sufficient to show dependency. She rejects that submission for the reasons given at [52] of the Decision which, as I have said, discloses no error of law.

27. Moving on to [53] of the Decision, Mr Wilford submitted that it was difficult to understand why the fact of the Appellants living in the family home was said to "take the matter no further". He submitted that this is a financial benefit and is therefore relevant to the issue of support. However, the Judge rejects this evidence for the same reasons as given at [52] of the Decision; there is limited evidence from the Appellants about their circumstances to show their need for such support. The Judge was therefore entitled to find that the Appellants continuing to live in the family home could make no difference without evidence as to their circumstances.

28. The Appellants' case in relation to emotional dependence is even more difficult to sustain.

29. The factors raised at [55] of the Decision are clearly relevant ones. The Appellants had to show that there are more than the usual emotional ties between adult child and parent. I do not read the reference to "psychological reason" in this paragraph as indicating that the Judge was applying any hard or fast rule. She is simply making the comment that what is required is more than the usual emotional ties which may be difficult absent evidence of some unusual circumstance.

30. In relation to [57] of the Decision, whilst I accept Mr Wilford's submission that an individual can look to more than one person for emotional support, it was for the Appellants to show that they are emotionally dependent on the Sponsor and/or vice versa.

31. When asked to direct me to evidence regarding emotional ties, the best Mr Wilford could do was to refer to the Sponsor's first witness statement at [47] ([AB/12]) that the Sponsor consoles the Appellants when he leaves them after visits that the "pain of separation will soon be over". There are assertions here and elsewhere in the evidence that the family is close knit and that the Appellants and Sponsor are emotionally interdependent. There are also assertions that they miss each other. There is some evidence of (infrequent) visits and some evidence of contact by phone. However, none of that evidence discloses emotional ties beyond the norm. It would be normal for parents and adult children to miss each other if they are living apart. It is normal for parents to console adult children in difficult times. Visits and telephone contact would be expected. None of that shows more than the usual emotional ties. The Judge was entitled so to find.

32. It follows from the foregoing that the second ground is not made out.

CONCLUSION

33. For those reasons, I conclude that the Appellants have failed to show that there is an error of law in the Decision. I therefore uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge C A S O'Garro dated 21 March 2023 does not contain a material error of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

L K Smith

Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
20 October 2023