



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003456

First-tier Tribunal No: HU/52410/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

2nd November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

MS TARA GHALE
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms E. Atas, counsel, instructed by Bond Adams LLP
For the Respondent: Ms S. McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 16 October 2023

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Nepal who seeks to be reunited with her father, a former member of the Brigade of Gurkhas, in the UK on the grounds that they enjoy family life together, within the meaning of Article 8 ECHR. By a decision dated 15 November 2021, the Respondent refused her application and, by a decision promulgated on 28 March 2023 (“the Decision”), First-tier Tribunal Judge Mailer (“the Judge”) dismissed her appeal. By permission granted by the First-tier Tribunal (“the FTT”) on 18 August 2023, she now appeals the Decision to this Tribunal.
2. No anonymity order was sought in this appeal and, in light of the importance of open justice, there does not appear to me to be any good reason for one to be imposed.

The Decision of the FTT

3. The operative part of the FTT's Decision start at para. 50. The Judge reminded himself of the well-known authorities of Razgar [2004] UKHL 27 and the approach set out therein to determining an Article 8 appeal. In particular, in para. 54, the Judge noted that there is no presumption of family life between adults and their parents. He noted para.24 of Kugathas [2003] EWCA Civ 311, noting that family life is not established in those circumstances unless something more exists than normal emotional ties, such as if an appellant is dependent on the family or vice versa. The Judge at para. 55 noted that this involves identifying 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 she had resided in the past, and the forms of contact maintained with the other members of the family with whom she claims to have a family life. At para.56, the Judge cited Sedley LJ at para.17 of Kugathas, who noted that the irreducible minimum of what family life implies is real, committed or effective personal support.
4. At para.57 the Judge considered Singh [2015] EWCA Civ 630, noting that there was no requirement for exceptionality, but that the love and affection between an adult and her parents will not of itself justify a finding of family life; there has to be something more.
5. The Judge's findings start at para.60. They are, in summary, as follows:
 - a. Prior to her father leaving Nepal for the UK in 2011, the Appellant had lived with him and her mother in the same household. She was 28 leaves old at that time and they had lived together in the same household for about eight years.
 - b. The Appellant's father had returned to Nepal for his holidays since coming to the UK and to see his daughters. He left money with the Appellant on each occasion he visited. He had recently been in Nepal for about three months.
 - c. The Appellant's father was also supporting his 27-year-old daughter, Sushila, who lives in the village separately with her mother.
 - d. When funds were sent to Nepal it was given to the Appellant who passes money on to Sushila.
 - e. The Appellant's father had asserted that he sent money through a friend, Mr Prakash Gurung, since about 2018. This appears however to have been rejected, on the basis that this was not mentioned by the Appellant's father in his witness statement and "there is no evidence produced from Mr Gurung substantiating Mr Ghale's assertion. Nor has any reason or explanation been given as to why Mr Gurung has not made any statement, nor why he did not attend the hearing to give evidence."
 - f. Although the Appellant's father left Nepal in 2011, he did not send any money to the appellant or other family members between 2011 and 2018 as he had to save during that period. He said however that he put some money in his Nepalese account, to which the Appellant had access and the debit card for which she used during this period. There was however no evidence of this.
 - g. There was no evidence substantiating the Appellant's father's assertion that the Appellant does not have any skills to make a living on her own or to get employment. The Appellant is healthy and has undertaken a sewing course. She has not explained why she is unable to become self-

- employed or find employment in any suitable job for which she is capable. There was no evidence that she had sought employment or was incapable of obtaining suitable employment.
- h. There was no dispute that the Appellant's father had visited Nepal in 2012, 2014, 2015 twice in 2018, and again in 2020 and 2022. The Judge accepted that these were likely to be in order to spend time with the Appellant and her sister.
 - i. The Judge accepted that the Appellant maintained regular telephone contact with her father, there was no evidence as to the nature and content of their communication. There was no evidence of mutual emotional support between them.
 - j. There was no evidence produced as to the Appellant's personal circumstances, including her day-to-day life in Nepal, including of her friends or relationships. She maintains contact with her mother there and her sister, with whom she lives.
 - k. There was no evidence that either the Appellant or her father suffer from any medical condition impeding the Appellant's capacity to work or requiring her father to have the Appellant's care and assistance.
 - l. The Judge considered that it was not in any way unusual for persons in the Appellant's father's position to send money back to their home country for their children. Nor were the evidence of visits or intermittent financial remittances sufficient to show real, committed or effective support between the Appellant and her father.
 - m. Having considered the evidence as a whole, the Judge was satisfied that notwithstanding the Appellant's father's financial remittances to her, his regular visits to her and her sister in Nepal and his regular telephone calls to her, the Appellant has continued to live her own life in Nepal. The relationship between the Appellant and her father does not go beyond the usual love and affection between adult children and their parents and accordingly Article 8 ECHR was not engaged.

Appeal to the Upper Tribunal

6. The Appellant sought permission to appeal on the following three grounds:
 - a. Ground 1: the Judge had failed to have regard to material evidence, namely the witness statement of the Appellant's father's friend, Mr Gurung;
 - b. Ground 2: the Judge applied either too high or the wrong threshold for establishing family life for the purposes of Article 8, or took into account irrelevant matters in considering that the Appellant could work;
 - c. Ground 3: the Judge failed to consider whether the Appellant and her father had family life at the point at which he left Nepal and then to consider whether it had endured.
7. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Buchanan on 18 August 2023, who considered that all three grounds were arguable.
8. There was no rule 24 response from the Respondent.

Material error of law

Ground 1: Mr Gurung's witness statement

9. Ms McKenzie on behalf of the Respondent candidly accepted that there was a witness statement from Mr Gurung in the bundle before the FTT and that the Judge had made an error of law in failing to appreciate its existence and therefore take it into account. Her position however was that when one looks at that witness statement, this error is immaterial.
10. Ms Atas' submission was that the perceived lack of a witness statement fed into the Judge's consideration of the Appellant's father's credibility and that it was therefore material.
11. The witness statement of Mr Gurung in this case is sufficiently short that it merits setting out in full. It stated as follows:
 - "1. I am an Ex Gurkha soldier. I know [the Appellant's father] as a fellow Ex Gurkha soldier.
 2. Mr Ghale gave me £385.00 on Feb 2013 to be given to his daughter Miss Tara Ghale. I took that money from him in GBP cash. I gave instructions to my relatives in Nepal to take RS 50,000 in cash and hand deliver it to Tara.
 3. I did that for Mr Ghale two times between 2012 and 2013. The last time I did that was on Nov 2014.
 4. Should you require more information, please do not hesitate to contact me.
 5. I confirm that the contents of this statement are true."
12. The test for immateriality is a high one. I must be satisfied that the FTT would inevitably have reached the same conclusion had it appreciated that there was a witness statement from Mr Gurung and taken it into account: Detamu v SSHD [2006] EWCA Civ 604 at [14] and [18].
13. In many cases it is not possible to say with sufficient certainty how a Judge would have been affected by evidence which they omitted to take into account, had they done so. In this case however I am satisfied that the taking into account of this witness statement could not have made any difference to the outcome of the appeal. This is because in my judgment it is inevitable that the FTT would have placed no weight on it, or, at best, such little weight that it could not possibly have made any difference. This is because:
 - a. The statement is itself internally inconsistent. Para. 3 says that money was passed to the Appellant twice, but then gives three examples.
 - b. The statement is unclear as to whether the description of the process adopted in para. 2 was the same on each of the two (or three) occasions when Mr Gurung acted as a conduit for the transfer of funds between the Appellant's father and the Appellant.
 - c. The statement is inconsistent with the evidence given by the Appellant's father, that Mr Gurung had passed money to the Appellant since 2018 and that he had not sent money prior to 2018.
 - d. In those circumstances, and in particular without the benefit of hearing from Mr Gurung, the FTT would not have been in a position to find that Mr Gurung's limited evidence was reliable.
 - e. Moreover, the issue that this goes to, namely the remittances that the Appellant's father provided to the Appellant, is one on which the FTT broadly found in favour of the Appellant. The Judge accepted that there were remittances. It is only the extent of those remittances that this could have affected. On no view could the Judge have found that these

additional remittances tipped the balance of the Appellant's relationship with her father from one that does not to one that does engage Article 8.

14. I accordingly reject Ground 1.

Grounds 2-3: The test for family life

15. Grounds 2 and 3 are essentially different facets of the same argument, that the FTT applied the wrong legal test for determining whether Article 8 ECHR was engaged. It is therefore convenient to address them together.

16. It is important when considering grounds of this sort to have well in mind that it is probable that in understanding and applying the law in their specialised field, specialist tribunals will probably have got it right and that their decisions should accordingly be respected unless it is quite clear that they have misdirected themselves in law: AH (Sudan) v SSHD [2007] UKHL 49; [2008] 1 AC 678 at [30].

17. It is well established that the test for Article 8 family life in the Kugathas sense is one of effective, real or committed support and that there is no requirement to prove exceptional dependency: see Uddin v SSHD [2020] EWCA Civ 338; [2020] 1 WLR 1562 at [40(i)]. The FTT referred to these principles expressly in paras. 56 and 57. The question then is whether, notwithstanding this correct self-direction, that test has been applied.

18. Dealing first with Ground 3, name the Appellant's submission that the FTT misapplied the test in not asking whether family life was established before the Appellant's father came to the UK and has endured since, I do not consider that this has any merit. The Appellant relies on para. 39 of Rai v ECO [2017] EWCA Civ 320 that "But that [i.e. the way the UT had reasoned the case] was not to confront 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." I do not consider that Lindblom LJ in that passage was intending to lay down any sort of additional test of general application. Rather, he was responding to the UT's reasoning in that case, which had been to rely heavily on the fact that the appellant's parents in that case had voluntarily left the appellant in Nepal. The point he was making was that the fact that they had voluntarily left their daughter in Nepal did not mean that there was no family life between them. As all the cases make clear, whether there is family life is a question of fact to be assessed as at the date of the hearing before the FTT and, plainly, considering whether an appellant had a family life and whether it has endured, may be a helpful way of establishing that fact, but it is not necessary to do so and it is not an error of law if a decision-maker does not approach the question of family life in that way.

19. Turning to Ground 2, the Appellant's submission is that the fact that the Appellant could find work in Nepal was taken as material to the finding that there was no family life, but there is no requirement to show financial dependency to establish that Article 8 is engaged. However, while it is correct that it is not necessary to show financial dependency to establish family life within the meaning of Article 8, the degree to which an adult child lead is living independently on his or her parent may well be a relevant factor: see Singh v SSHD [2015] EWCA Civ 630; [2016] Imm AR 1 at [24] (final sentence). The FTT did

not, in my judgment, elevate the extent of the Appellant's independence into a dispositive reason why there could not be family life within the meaning of Article 8. Rather, it considered this, as it was entitled to do, as a factor in deciding whether there was, as a matter of fact, real, effective and/or committed support.

20. As Lord Dyson MR emphasised when giving the judgment of the Court of Appeal in R (Gurung) v SSHD [2013] EWCA Civ 8; [2013] 1 WLR 2546, 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 my judgment the FTT undertook the requisite careful consideration of the facts and came to a conclusion which was open to it without committing any error of law. I therefore reject Grounds 2 and 3.

21. The appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and shall stand.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2023