



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2023-002523

First-tier Tribunal No:
HU/55768/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

10th January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

USHA GURUNG
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M. Moriarty, Counsel instructed by Everest Law Solicitors Ltd.

For the Respondent: Mr N. Wain, Senior Home Office Presenting Officer

Heard at Field House on 19 December 2023

DECISION AND REASONS

Introduction

1. This is the substantive remaking decision of the Appellant's appeal against the Respondent's decision to refuse her application for entry clearance made on 26 July 2022. This decision must be read with my earlier error of

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law decision dated 24 November 2023 in which I set aside the decision of First-tier Tribunal Judge Beg, promulgated on 10 May 2023.

The relevant background

2. There is no dispute about the relevant factual background and so I can deal with it briefly:
 - a. The Appellant's Sponsor (and father), Mr Jit Bahadur Gurung, was discharged from the British Army brigade of Gurkhas on 21 April 1968 having served for 14 years.
 - b. On 13 February 2022, the Appellant, two of her siblings as well as her parents made applications for entry clearance on the basis of the Sponsor's former service in the British Army. The applications of the other parties were all granted but the Appellant was refused on 26 July 2022.

The reasons for refusal

3. In the refusal, the Respondent made the following points:
 - a. The Appellant was 44 years old at the date of the application and had provided no evidence that she is unable to care for herself on a daily basis.
 - b. The Appellant had also provided limited details as to her personal circumstances in Nepal.
 - c. The application was therefore refused by reference to the Adult Dependent Relative route in Appendix FM of the Immigration Rules.
 - d. The Respondent also refused by reference to the adult child of a Gurkha discharged prior to 1 July 1997 policy.
 - e. The Respondent went on to reject the claim of family life between the Appellant and the Sponsor under Article 8(1) ECHR.
 - f. The Respondent also appears to have suggested that there were no exceptional circumstances in the appeal (in the alternative) due to the Sponsor deciding to relocate and settle in the United Kingdom in 2022.

The remaking hearing

4. The Sponsor was the only witness and attended the hearing centre in Field House. The proceedings were interpreted to the Sponsor via the Tribunal's Nepalese interpreter and there were no difficulties in linguistic understanding.
5. Due to the Appellant's age (he was 81 years old at the date of the hearing) and his obvious difficulties with his memory, I decided to treat the Sponsor as a vulnerable witness. I was careful to explain the nature of the proceedings to the Sponsor in clear terms and, as I will deal with later, I was also careful to spend time assisting him in recalling the contents of his second witness statement (dated 14 December 2023).

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6. I am satisfied that the Tribunal took all reasonable measures to assist the Sponsor in properly understanding the proceedings including the questions asked of him.
7. Preliminarily Mr Moriarty raised an issue in respect of the preserved findings which had been maintained at §39 of my error of law decision. In that paragraph, I preserved Judge Beg's finding that the Appellant does not live in the family home in Nepal but lives with a family friend in another village. I also preserved the Judge's finding that the Appellant receives some financial assistance from the Sponsor as well as additional assistance from her siblings in the UK.
8. Mr Moriarty asked that the Upper Tribunal admit the updated and consolidated Appellant's bundle (uploaded on 14 December 2023) which included witness statements from the Appellant and the Sponsor providing more detail as to the Appellant's place of residence. In a nutshell both witnesses state that the Appellant has always lived in the family home in Nepal and that the Judge's earlier finding (preserved by myself at §39 of the error of law decision) was predicated upon a misunderstanding of the families residential history in Nepal.
9. Mr Wain objected to the Upper Tribunal admitting the bundle because it had only been uploaded a few days before the remaking hearing and also asserted that the Tribunal should not depart from the preserved finding in respect of the Appellant's place of residence on the basis that the Upper Tribunal had already found that this particular finding was not tainted by the material errors of law otherwise identified.
10. In firstly assessing the late production of the consolidated, updated bundle by applying rule 15(2A) of the Upper Tribunal Procedure Rules, I took into account the Sponsor's vulnerability and the Appellant's residence in Nepal. I ultimately decided to admit the Appellant's consolidated bundle dated 14 December 2023; Mr Wayne submitted that the Respondent was not in fact prejudiced and did not request an adjournment.
11. In respect of the Tribunal's power to depart from a previously preserved finding I conclude that there is no legal provision which in fact prevents the Upper Tribunal from doing so as long as there is good reason and there is no unfairness caused to the other party.
12. In respect of the Sponsor's ability to recall and give oral evidence, I should record that in evidence in chief, the Sponsor said that he did not recall providing his solicitors with a second witness statement in December 2023.
13. Mr Moriarty attempted to jog the Sponsor's memory by rephrasing the question but without any real success.
14. Therefore in order to assist the Sponsor, bearing in mind his age and vulnerability as I have already described, I asked the Tribunal's interpreter to

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translate each paragraph of the second witness statement to the Sponsor. I explained to the Sponsor on a number of occasions that the purpose of doing this was to allow him (after each paragraph had been translated) to indicate if he was satisfied that it was an accurate reflection of his account. Initially the Sponsor did interpose his own evidence as the interpreter was translating the witness statement to him in a relatively conversational way but after some further explanation I am satisfied that the Sponsor understood that what was being read back to him was a record in English of his own words as given to Everest Law Solicitors Limited.

15. Ideally, Everest Law would have provided their own interpreter to assist counsel before the hearing and therefore significant time would not have been spent taking the Sponsor through his statement, however I record that Mr Moriarty and Mr Wain were both satisfied that the Sponsor had confirmed that the entirety of the second witness statement reflected his own evidence.
16. I should record that I am grateful to Mr Wain, Mr Moriarty and especially the Upper Tribunal's Nepalese interpreter in assisting the Sponsor in being able to participate in the proceedings before me.
17. The Sponsor was carefully cross-examined by Mr Wain in a way which respected his obvious vulnerabilities and I have kept my own note of the oral evidence. At the end of the hearing I heard oral submissions from both representatives and I reserved my judgment.

Findings and reasons

18. In light of the impact of binding Court of Appeal authority on Gurkha Article 8 ECHR appeals, the relatively narrow question before the Upper Tribunal is whether the Appellant enjoys an Article 8(1) family life with her Sponsor despite the fact that she is an adult and that she lives in Nepal whilst the Sponsor resides in the UK.
19. In assessing whether or not there is an Article 8(1) family life in this case, I have applied the Court of Appeal's guidance in Mobeen v Secretary of State for the Home Department [2021] EWCA Civ 886, ("Mobeen") :

"45. Whether or not family life exists is a fact-sensitive enquiry which requires a careful assessment of all the relevant facts in the round. Thus it is important not to be overly prescriptive as to what is required and comparison with the outcomes on the facts in different cases is unlikely to be of any material assistance.

46. However, the case law establishes clearly that love and affection between family members are not of themselves sufficient. There has to be something more. Normal emotional ties will not usually be enough; further elements of emotional and/or financial dependency are necessary, albeit that there is no requirement to prove exceptional dependency. The formal relationship(s) between the relevant parties will

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be relevant, although ultimately it is the substance and not the form of the relationship(s) that matters. The existence of effective, real or committed support is an indicator of family life. Co-habitation is generally a strong pointer towards the existence of family life. The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions. Indeed, in a case where the focus is on the parent, the issue is the extent of the dependency of the older relative on the younger ones in the UK and whether or not that dependency creates something more than the normal emotional ties.

47. The ultimate question has been described as being whether or not this is a case of "effective, real or committed support" (see AU at [40]) or whether there is "the real existence in practice of close personal ties" (see Singh 1 at [20])."

20. Firstly, in respect of the Appellant's place of residence I have already explained that I do not accept that there is an absolute legal barrier to the Upper Tribunal departing from a preserved finding in an earlier error of law decision. In my view, as long as the general principles of fairness are respected, the Upper Tribunal can depart from such a finding as long as there is good reason to do so. Such an approach also means that the Upper Tribunal is not barred from carrying out a fact sensitive assessment at the date of hearing when remaking a decision.
21. I should also note that Mr Wain did not challenge the evidence in the Appellant's or Sponsor's second witness statement as to why some of the Nepalese documentary evidence provided by the Appellant gives a different address to that of the Sponsor's family home in Nepal.
22. In effect, the Appellant's evidence at paragraph 5 of her second witness statement, is that the difference in respect of the letter from her previous school and from the ward office arises because the administrative governing area where she previously lived changed to a municipality and that the family had not changed the permanent address recorded with the local authorities after moving as a family unit to Chichila.
23. In the absence of challenge to the consistent evidence of the Appellant and the Sponsor, I find that the evidence does now establish at the date of hearing that the Appellant resides in the family home in Nepal and that she has always lived in her parent's place of residence. In any event, I also accept Mr Moriarty's argument that the essential assessment of the Upper Tribunal is to look at the nature of the support rather than whether or not the Appellant is residing in the family home (albeit that this could still be relevant).
24. Secondly, whilst the other preserved finding is that the Appellant also receives financial support from her two siblings in the UK, I find that this does not materially undermine the relevance of the Sponsor sending some financial funds to the Appellant. In focusing on the nature and intensity of

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the relationship between the Appellant and the Sponsor I find that the sending of funds from the UK to Nepal by the Sponsor is indicative, in this case, of a family life which goes beyond normal emotional ties as I explain below.

25. In terms of the nature of the contact and the emotional dimension of the support, I find that there is a discrepancy between the oral evidence of the Sponsor in the hearing of contact twice a week (with the help of their other daughter Subita) and the witness statement evidence of contact every day.
26. In light of the Sponsor's very clear vulnerabilities and his difficulty in recollection, I am prepared to accept that this discrepancy is not a material one, in other words I conclude that this is not indicative of the Sponsor and Appellant lying about the frequency and significance of their telephone contact.
27. In my view it matters not that the Appellant's sister in the UK manages the calls between the Sponsor and the Appellant and equally, it is not important that the Appellant's sister also uses those calls to connect with the Appellant.
28. I also accept the evidence that the Appellant does not have her own bank account, is single and is unemployed. I also accept that she has only had relatively limited education in Nepal and has never had an independent life.
29. On the basis of the consistent evidence of the Appellant and the Sponsor, I find that the Appellant did have a relationship amounting to more than normal emotional ties with her parents and that she was living with them in Nepal before they travelled to settle in the United Kingdom.
30. There is plainly no force whatsoever in the Respondent's reasoning in the refusal which suggests that the Sponsor's decision to relocate to the United Kingdom was the real interference in this case and that this undermined the claim to in Article 8(1) family life. Binding authority, such as Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ, ("Rai") indicates that people such as the Sponsor, who had long been unable to settle in the United Kingdom due to earlier discriminatory policies, are entitled to take the benefit of the long delayed grant of Indefinite Leave to Enter and that this in itself is not a reason for finding against the claim to an Article 8(1) family life.
31. I therefore conclude that the nature of the communication between the Sponsor and the Appellant is a highly emotive one and I fully accept that the Appellant is particularly concerned about her parents now that they are elderly. It is of course true that two of the Sponsor's other adult children were granted entry clearance with the Sponsor and his wife at the same time but nonetheless that does not undermine the significance of the emotional connection between the Appellant and the Sponsor. Ultimately in my view each family relationship is different and the nature of the support

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which the Appellant can give to the Sponsor (and vice versa) is likely to have different characteristics to that of the other adult children.

32. Therefore, bringing all of this together and applying the Court of Appeal's guidance in Mobeen, I find that the Appellant has established that the nature of her relationship with her Sponsor, at the date of hearing, amounts to real or effective or committed support and therefore does constitute family life for the purposes of Article 8(1).

33. In light of authorities such as Rai, and in the absence of any particular additional public interest factors for refusing entry clearance, the Appellant's success in establishing Article 8(1) family life with her Sponsor and what is known about the broad impact of the historic injustice in Gurkha cases means that the Appellant has established that the decision to refuse her entry clearance leads to unjustifiably harsh consequences and is therefore disproportionate under Article 8(2) ECHR.

Notice of Decision

34. The Appellant's Article 8 ECHR appeal is allowed.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 January 2024