IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004900
UI-2023-004901
First-tier Tribunal Nos: HU/53134/2023
(LH/02936/2023)
HU/53135/2023
(LH/02935/2023)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th of January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

(1)Bet Kumari Thapa
(2)P
(ANONYMITY ORDER MADE IN RESPECT OF SECOND APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mrs T Srindran of Counsel, instructed by Sam Solicitors
For the Respondent: Ms H Gilmor, a Senior Home Office Presenting Officer

Heard at Field House on 22 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Second Appellant, being a child, is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Second Appellant, likely to lead members of the public to identify the Second Appellant. Failure to comply with this order could amount to a contempt of court. An application can be made by the parties to vary this order.

DECISION AND REASONS

Introduction

1. This is my decision, which I have delivered orally at the hearing. The matter relates to applications for entry clearance for the purpose of settlement, whereby the Appellants seek to join their Sponsor Mr Jag Bahadur, a former Ghurkha Brigade solider, who has been granted Indefinite Leave to Remain. The Appellants are the adult daughter of the Sponsor and the Sponsor's minor grandson. The Sponsor's wife (being the First Appellant's mother and the Second Appellant's grandmother) also resides, with leave, with the Sponsor here in the United Kingdom.

The Decision of the First-tier Tribunal

2. The Appellant's appeal against the decision of the Respondent had come for hearing before First-tier Tribunal Judge C. Rose ("the judge"), sitting at the Hatton Cross Hearing Centre on 4th October 2023. The judge had considered the evidence and had come to, amongst others, the following conclusions:

   (1) In respect of whether the first Appellant was emotionally and financially dependent on her parents, the judge said the first Appellant had a close relationship with her parents and that she talks regularly with them on the telephone and that "I have no doubt that she shares her worries, concerns and stresses with her parents" but that "that the relationship between the Appellant and her parents was more than one would expect to see between parents and an adult child who were reasonably close" (that was paragraph 14 of the decision).

   (2) The First Appellant's parents provided the Appellant with a level of financial support without which she would not be able to survive and that was at paragraph 16 of the judge's decision.

   (3) At paragraph 17 the judge said "It follows that, whilst I am persuaded that the First Appellant is financially dependent upon her parents, I am not persuaded that she is emotionally dependent upon them".

   (4) At paragraph 20 the judge said:

> "Whilst I accept that the Respondent's decision does interfere in each Appellants' family life, in light of my findings regarding the First Appellant's emotional relationship with her parents and my consideration of the principles laid down in **Kugathas**, I am not persuaded that the interference is sufficient to engage Article 8."

   (5) The judge referred to the Court of Appeal's decision in **Rai v Entry Clearance Officer [2017] EWCA Civ 320** and concluded at paragraph 22 that:

> "Bearing in mind the guidance in **Rai**, based as it is on a strong line of authorities, I take the view that the First Appellant's family life with her parents is not the significant or primary life that she has. In short, I find her immediate family life consists of herself, the Second Appellant, and her sister and that the family life she has with her parents is not sufficient to engage Article 8. It follows that I do not find that either Appellant can succeed, either within or outside of the rules and the appeals fail."

The Appellant's Grounds of Appeal

3. The Appellants' grounds of appeal have not been correctly numbered and are unfortunately set out in a way which is not easy to follow but they can be summarised as follows: Firstly the judge had erred in his assessment of emotional dependency between the first Appellant and the UK Sponsor. That emotional dependency was also provided to the first Appellant's other siblings. Secondly, the first Appellant lives with her sister in Nepal and so the first Appellant derives a level of emotional support from the sister in Nepal. Third, the judge made contradictory findings in respect of dependency. Fourthly, the grounds contend that the judge's conclusions were contrary to the Court of Appeal's decision in **Rai v Entry Clearance Officer** and fifthly, the grounds also relied upon the Upper Tribunal's decision in **Ghising and others [2013] UKUT 00567 (IAC)** which stated that where Article 8 is engaged and but for the historic wrong, the Appellant would have been settled in the UK long ago and this will ordinarily determine the outcome of the Article 8 proportionality assessment in the Appellants' favour.

The Hearing Before Me

4. At the hearing today, I heard submissions first from Mrs Srindran on the behalf of the Appellants. In summary it was submitted that there was an issue because Judge Rose had accepted financial dependency. The judge's error was in relation to the assessment of the emotional dependency. There was a relationship that the first Appellant had with both parents and the judge had accepted that the first Appellant had moved back into the family home in Nepal. The judge's error was the level of contact that the Appellants had with the Sponsor. The judge had failed to balance that the other children are all married and that the mother might also have contact with her other children, even though they may be leading an independent life. But however here, the first Appellant was separated from her husband and living with another sibling and it was submitted that the judge had thereby erred.

5. Mrs Srindran took me to paragraphs 15 and 17 of the judge's decision. She said that the Court of Appeal's decision in **Kugathas** is quoted and what was required was for there to be real or, effective or committed support. Here, the first Appellant had separated from her husband a long time ago and the first Appellant's witness statement and indeed the Sponsor's evidence had set out what the first Appellant had gone through. Again, it was stressed that the support which had been provided was real, committed and effective. The assessment by the judge, it was said, was wrong and indeed at paragraph 18 the judge had accepted that the first Appellant had moved back to the family home. There was also reference to the policy in relation to the Ghurkha Brigade and in any event, said Mrs Srindran, the first Appellant would have been over the age of 18 and the historic injustice point would remain. Mrs Srindran said the crux of the issue was the assessment in relation to the emotional support and that the judge had erred in relation to the assessment.

6. It was also said, following queries from me, so I could properly understand the grounds of appeal, drafted as they were, whether it was the case that Article 8(1) was engaged or not. It was submitted that Article 8(1) was engaged and thereby the judge had materially erred.

7. I then heard from Ms Gilmor on behalf of the Entry Clearance Officer and a summary of her submissions were that although there was no Rule 24 response, the appeal was opposed. I was referred to the Court of Appeal's decision in **Rai [2017] EWCA Civ 320**, which itself referred to the decision of Sir Stanley Burnton in the Court of Appeal's judgment in **Singh v Secretary of State for the Home Department [2015] EWCA Civ 630** when his Lordship said, "The love and affection between an adult and his parents or siblings will not of itself justify a finding of family life". Ms Gilmor eloquently said that the judge was not saying that there is no relationship, what the judge was saying was that there was no sufficient relationship for the purposes of engagement and the purposes of Article 8.

8. Ms Gilmor said paragraph 22 of the judge's decision made clear that something more was required and that was lacking, thereby Article 8(1) was not engaged. Ms Gilmor said it was the Appellants' own situation and the fact that she had a child and thereby family unit which was also relevant. The judge had set these things out in some detail at paragraphs 14 to 20 of his decision and he had looked at all of the evidence and considered the hearing bundle in full and had formed a more than adequate assessment of the Appellants' circumstances. Ms Gilmor said that it may well be that the Appellants do not agree with the findings of the judge but the judge had engaged with them. At paragraph 18 the judge had made clear that there was no emotional dependence. The financial dependence did not take matters further and in any event, Ms Gilmor's said financial dependence is not enough.

9. I had explored the Appellants' grounds with Ms Gilmor during her submissions, to which Mrs Srindran had then briefly responded. Mrs Srindran's submission being that material errors of law were shown and submissions were made in respect of what the next steps might be by both parties if I were to find that there is a material error of law in the judge's decision.

Decision and Analysis in Respect of the Error of Law

10. In my judgment there is a material error of law in the judge's decision. I come this conclusion for the following reasons. Firstly, in my judgment, it is not clear what test the judge applied in assessing the dependency. Whilst I accept that the judge referred to a long extract of the Court of Appeal's judgment in **Rai v The Entry Clearance Officer**, which refers to the test as being real or committed or effective, with reference to Lord Justice Sedley's judgment in **Kugathas**, I conclude that the judge applied the wrong test. I come to this view because the judge said at paragraph 22 that he needed to be satisfied that there was "a significant family life". That is not the correct test cited in the Court of Appeal's decision.

11. Secondly, there is, in my judgment, an apparent contradiction in the findings of the judge. At paragraph 16, the judge said that the level of financial support provided was such that without it the Appellant would not be able to survive, whereas at paragraph 17 the judge said that there was no emotional dependency because *"the First Appellant derives a great deal of support from her relationship with her parents but I cannot say, on the evidence put before me, that she is dependent."*

12. In my judgment the dependency as a whole had to be considered by the judge including financial dependency and not as a linear consideration. The benefit

that the Sponsor derived was also highly relevant and had to be taken into account when assessing dependency. I accept and agree with Ms Gilmor's submission that financial dependency is not sufficient on its own but here the financial dependency was of such a high level, as the judge accepted at paragraph 16, that without it the Appellants would not even be able to survive. Indeed, in addition, the judge accepted that there was emotional dependence on the Sponsor too.

13. Thirdly, whilst the judge correctly referred at paragraph 8 of his decision to the Court of Appeal's decision in **R (on the application of Gurung and others) v Secretary of State for the Home Department [2013] ECWA Civ 8**, (paragraphs 42 and 43) he did not then apply that decision when considering Article 8. Indeed, it is clear in my judgment that the judge materially erred in law in stating at paragraphs 20 and 22 of his decision that Article 8 was not even engaged.

14. In my judgment, even on the judge's findings Article 8(1) ECHR was engaged. There was the real or effective or committed support. The first Appellant and her son were reliant on the Sponsor's financial support for food, living expenses and schooling costs. There was emotional support with the regular telephone calls and the witness statements referred to the trips made by the Sponsor and his wife to Nepal to see the Appellants. This was therefore more than the usual emotional ties of love and affection, which is often cited from the Court of Appeal's decision in **Kugathas**.

15. Whilst it is correct that the Appellants lived independently before the first Appellant divorced, the evidence is clear that the family life between the Appellants and the Sponsor was re-established, especially since the evidence clearly indicated that the Appellants had moved back into the family home in Nepal.

16. In **Gurung** the Court of Appeal had said at paragraph 42:

> "If a Gurkha can show that, but for the historic injustice, he 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. To that extent the Ghurkha and the BOC cases are similar."

17. The Court of Appeal said that the normal position is that the adult dependent relatives are expected to apply for leave to enter or remain under the relevant provisions of the Rules or under the provisions of Article 8 of the European Convention on Human Rights. It also held that the historical injustice faced by Ghurkhas who were not able to settle in the UK until 2009 should not be taken into account during the Article 8 consideration of the case, but it was not determinative. If a Ghurkha can show that but for the historic injustice he would have settled in the UK at a time when his dependant and now adult child would have been able to accompany him as a dependant child under the age of 18, then that is a strong reason for holding that it is proportionate to permit the adult child to join his family now.

18. The Upper Tribunal in **Ghising and others** said that 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 would already determine the outcome of the Article 8 proportionality assessment in the Appellants' favour where the matters relied upon by the Secretary of State or the Entry Clearance Officer consists solely of the public interest in maintaining a firm immigration policy.

19. Having concluded that there were material errors of law in the judge's decision and having canvassed with the parties the appropriate course in relation to the remaking of the decision, I had paused to reflect and I invited further submissions in respect of the remaking of the decision.

Re-Making of the Decision

20. Having reflected on the submissions, I set aside the decision of the First-tier Tribunal. I apply **AEB [2022] EWCA Civ 1512 and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC),** and I carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principle set out in Paragraph 7 of the Senior President's Practice Statement. I take into account the history of this case, the nature and extent of the findings to be made and that this appeal requires assessment of the Appellant's evidence. I conclude that it is fair and possible for me to remake the decision.

21. Ms Gilmor, having been provided with time to consider what her approach would be, made succinct and clear submissions. She referred me to the Reasons for Refusal Letter in respect of both for the first Appellant and the minor Appellant and said that they had set things out clearly and she sought to rely on those refusal letters dated the 23 February 2023.

22. Ms Gilmor said that ultimately in this case Article 8 was not engaged. That the position in relation to the evidence was that there was insufficient evidence in relation to there being real, effective and committed support. As the reasons for refusal letter explained, the matters arising in respect of historic injustice were outweighed. The application for settlement was made when the first Appellant was already an adult. The Appellants had failed to establish family life over and above that which would arise in relation to a child and adult in any event. There was nothing within the historic injustice argument which would prevent a normal life and for there to be continuous independent living in relation to the bringing up of the child. Overall, it was submitted that the position in relation to these Appellants was not such as to outweigh any Article 8 assessment and that the Article 8 decision in this case by the judge was justified and proportionate and that thereby the refusal letter suggests that the Article 8 assessment was also justified and proportionate.

23. Mrs Srindran made brief submissions in reply. There is a short period of time when the first Appellant was living in her former husband's home. Family life was re-established with the Sponsors including by receiving the financial dependency. The position was that it would be disproportionate, she said, to not permit the appeal to succeed under Article 8 and she said she relied on the earlier submissions which had been made.

24. In my judgment and without having to repeat the law which I have set out earlier in the error of law decision, it is necessary to consider the evidence which is available.

25. It is clear there are three strands to the evidence. Firstly, the financial dependency is of such an acute nature that without it the first and second Appellants would simply not survive. That is a finding which is unchallenged by the Respondent. Secondly, it is clear that although worded in the way in which it is not put as highly as dependency, the emotional relationship between the Appellants and the Sponsor and the Sponsor's wife is of a very significant nature. There are very frequent and regular communications by telephone, such that the stresses and strains, worries and concerns are discussed at length. Thirdly there have been visits by the Sponsor and his wife to Nepal to see the Appellants. The relationship is significant because the emotional bond is over and above that of mere emotional ties.

26. In my judgment there is real or effective or committed support for the Appellants by the Sponsor in accordance with the Court of Appeal's decision in **Rai**.

27. In my judgment the case law makes clear that the engagement of Article 8 in a case such as this needs at the latter stage to consider the historical injustice aspect and that is of some significance in this matter. Were it not for the restriction and inability of the Sponsor to be able to invite his daughter to come to the United Kingdom, the scenario would have been very different. As I have set out in the case law previously, when considering a combination of the Court of Appeal's decision in **Rai**, and the Upper Tribunal's decisions in **Ghising** and the Court of Appeal's decision in **Gurung**, it is clear in my judgment that Article 8 is indeed engaged.

28. What that then leaves is consideration of whether there are any public interest matters which might outweigh the considerations in relation to proportionality. I am clear that it is in the public interest to maintain a firm immigration policy.

29. Ms Gilmor again clearly and succinctly made her submissions, but nothing was advanced to suggest that there are any public interest matters which I ought to take into account over and above the serious matter of the public interest relating to the maintenance of a firm immigration policy.

30. Indeed I saw no other factors which revealed themselves from the bundles which had been provided to me either. Considering as I must, the historic injustice aspect, in my judgment it is clear that not only is there the real or effective or committed support by the UK Sponsor, there is nothing which contradicts this aspect from the assessment of proportionality from the public interest side. There is a strong reason for concluding that it is proportionate to permit the Appellant, an adult child, to join the Sponsor now in view of the historic injustice. Similarly the second Appellant a child, virtually totally reliant as he is on his mother, is thereby also able to show strong reasons for such a finding.

31. I remind myself of paragraph 42 of the judgment in **Gurung** that,

> "If a Gurkha can show that, but for the historic injustice, he 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.

32. In the circumstances, I conclude that the appeal of both Appellants succeed.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside.

I remake the decision.

I allow the Appeal of both Appellants on human rights (Article 8) grounds.

An anonymity order is made in respect of the second Appellant.

A. Mahmood

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 December 2023