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

**Case No.: UI-2023-003152**
**First-tier Tribunal No:**
**HU/56065/2022**
**LH/00131/2023**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 10 January 2025**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**MINA KUMARI RAI**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellant: Mr M West, Counsel instructed by Everest Law Sols Ltd
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

**At Field House on 30 September 2024**

## DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of First-tier Tribunal Judge Courtney promulgated on 28 April 2023 ("the Decision"). By the Decision, Judge Courtney dismissed the appellant's appeal against the decision of an Entry Clearance Officer made on 26 July 2022 to refuse her application made on 14 February 2022, when she was 42 years of age, for entry clearance to the UK as an adult dependent relative of her mother and sponsor, who is a widow of a former member of the Brigade of Gurkhas.

2. The background to the appeal is that the appellant's father was discharged from the Brigade of Gurkhas in May 1963. He died on 28 May

1994 when the appellant was aged 14. The appellant married at the age of 22 and had three children with her husband. They divorced on 31 October 2021. Their three children remained in the custody of their father and the appellant returned to live with the sponsor. The sponsor entered the UK on 10 December 2019 leaving behind her children. Three of the sponsor's daughters arrived in the UK in 2021 after their respective appeals were allowed by the First-tier Tribunal leaving the appellant and sister living in the family home in Nepal. Another sister resides in Katmandu. The appellant said that she was dependent on the sponsor for emotional and financial support and that the sponsor, who was aged 80, was dependent on her for emotional support.

3. In the refusal decision, the respondent relied upon the fact that the appellant could not meet her policy for entry as an adult child of a former Gurkha; she had not demonstrated that she required long-term personal care, and nor had she demonstrated that she was financially and emotionally dependent upon the sponsor beyond that normally expected between a parent and one of their adult children. So, it was not demonstrated that Article 8 was engaged.

4. Even if it was to be accepted that refusal might be an interference with established family and private life, the refusal was proportionate as any historical injustice had not prevented the appellant from leading a normal life.

## The Decision of the First-tier Tribunal

5. Before the Judge the appellant's representative accepted that she could not meet the requirements of the respondent's policy or any provision of the Immigration Rules. The sole issue in the appeal was whether the refusal breached the appellant's rights under Article 8 ECHR. The Judge heard evidence from the sponsor. In the Decision at paras [16]–[19] the Judge noted several anomalies in the evidence of the sponsor and the appellant relating to the date the appellant left her matrimonial home and returned to live with the sponsor. The Judge found that the appellant was ejected from the matrimonial home on 6 October 2021 as set out in a Divorce Order issued by a District Judge. The Judge identified nonetheless that the central question that required an answer was whether family life was re-established between the appellant and sponsor since 6 October 2021 [20].

6. The Judge found that while there was an obvious family connection between the appellant and the sponsor, the appellant resided with her older sister in Nepal and they supported each other. On the other hand, the sponsor resided with her three single adult daughters in the UK. The Judge could not foresee any reason to believe therefore that the appellant and the sponsor were emotionally co-dependent [24]. Further, there was no evidence the sponsor had visited the appellant despite the lifting of travel bans since February 2021 [25].

7. At para [26] the Judge found the appellant lives in the family home with her sister, however, this was not itself sufficient, and further found there was no evidence of funds being transferred from the sponsor's bank account in Nepal by her eldest daughter in Katmandu to the appellant and sister [27]. The Judge further noted that the evidence of the sponsor remitting funds to the appellant from the UK was confined to three remittance receipts dated after the respondent's decision [28]. Accordingly, the Judge concluded that the level of financial support that had been evidenced was insufficient to constitute "real", "committed" or "effective" support and thus found there was no family life between the appellant and sponsor to engage the low threshold of family life for the purposes of Article 8(1) ECHR [29]-[30].

## The Grounds of Appeal

8. The renewed grounds of appeal to this Tribunal assert in a single ground of appeal that the Judge failed to properly consider the evidence resulting in a flawed assessment of whether Article 8(1) was engaged.

## The Error of Law Hearing in the Upper Tribunal

9. Permission to appeal was granted by Upper Tribunal Judge Bulpitt, and accordingly the appeal came before me to determine whether an error of law was made out. After hearing from the representatives, I reserved my decision. Regrettably, this has been delayed due to some periods of ill-health.

## Discussion and Conclusions

10. Before turning to my analysis of this case, I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *Volpi & another v Volpi* [2022] EWCA Civ 464 at [2].

11. I do not recite the parties' submissions except where it is necessary to explain my decision.

12. The primary issue in this appeal was whether family life existed between the appellant and the sponsor within the meaning of Article 8 (1) ECHR. In other words, was Article 8 (1) *simpliciter* engaged. In determining that issue, the Judge was required to make an evaluative assessment of the evidence and reach a reasoned conclusion on the evidence before her at the date of hearing.

13. Paras 10-12 of the grounds take issue with the Judge preferring the date recorded in the Divorce Order (October 2021), as the date the appellant moved into the family home, as opposed to an earlier date given by the appellant and sponsor in evidence. Whilst the grounds criticise the Judge's finding by reference to the evidence of the appellant and sponsor, the grounds do not identify an error of law and amount to no more than a

quarrel with the Judge's factual findings which were open to her on the evidence. Mr West accepted as much.

14. What led to the grant of permission, however, was the complaint that the Judge applied too high a threshold in holding that family life was not engaged for the purposes of Article 8(1) when she found at [29] that "… the level of financial support that [was] evidenced [did] not constitute ''real", "committed" or "effective" support such as to found a claim of dependency".

15. The test in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 applies in cases where it is claimed that a family life exists between an adult child and his surviving parent(s), or between other adult family members. The test has been the subject of discussion in several leading authorities. In *Rai* [2017] EWCA Civ 320, Lindblom LJ, summarised the authorities on the issue of family life in a case such as this in these terms, at [17 and 19]:

> "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". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are 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 he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … 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…
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> …Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* [*R. (on the application of Gurung and others) v Secretary of State for the Home Department* [2013] 1 WLR 2546] (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'."
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> (my emphasis)

16. The applicable law is indeed, 'not controversial'. In reaching a conclusion as to whether family life existed (and thus whether Article 8(1) was engaged) the Judge was required to consider whether, in addition to the normal ties of love and emotion, there was real, committed, or effective support. If there was, 'dependency' was established and with it, family life. The test does not require an applicant to demonstrate that financial dependence is borne out of necessity and/or that an emotional interdependency exists between the applicant and the sponsoring family member(s). As the Upper Tribunal made clear in *Ghising and others [2013] UKUT 00567* at paragraph 56, there is no requirement for evidence of exceptional dependency.

17. The Judge identified the relevant authorities and cited them at some length at [9], [13], [14] and [15] and therein referred to the test of "real, or committed or effective support". However, reference to the test is insufficient if the decision is inconsistent with its application. On my reading of the Decision, I am not convinced by Mr Wain's submission that the Judge did not apply an elevated threshold at [29]. I agree with Mr West that by confining her consideration to the level of financial support at [29] the Judge misdirected herself when in *Patel and others v ECO, Mumbai* [2010] EWCA Civ 17 Sedley L.J. said that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … 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". Whilst Mr Wain rightly pointed out that the Judge cited *Patel* at [14], I am not convinced that the Judge correctly applied that dicta at [29], or indeed at [24], where the Judge found the evidence did not establish the existence of either emotional or financial dependency. I agree with Mr West that the Judge appeared to elevate the threshold for engagement of Article 8 (1) to one of dependency and in doing so was requiring evidence of exceptional dependency.

18. Bound up together with the Judge's misapplication of the relevant legal principles is her approach to the evidence. I did not understand Mr Wain to dispute that in determining whether family life exists in a case concerning adult relatives of this kind, the issue is unlikely to be determined by a single factor, but rather requires an assessment of a set of cumulative factors. Mr West submits that material elements of the appellant's case were inadequately considered by the Judge, and that these factors were relevant to the question of whether family life exists between the appellant and the sponsor. I agree with Mr West that the undisputed evidence of the sponsor's provision of accommodation to the appellant was relevant to the question of whether Article 8(1) was engaged and whilst the Judge rightly recognised that this could not itself satisfy the test as a stand-alone factor (at [26]), is it not clear why, this together with the level of support that was evidenced was not sufficient to satisfy the modest threshold under Article 8(1) (see: *Mobeen* [2021] EWCA Civ 886) at [46]).

19. The court in *Rai* made clear at [19] by reference to *Gurung* that "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". I am satisfied that the Judge did not adequately consider all the relevant facts in this case as required and her approach to the evidence was thereby flawed.

20. On any reasonable view, I do not see how it can be said that the judge's flawed approach to the law and evidence has not had an impact on her assessment of the evidence overall. In the circumstances, it is not necessary to deal with the remaining points raised in the grounds. To conclude, the errors of law, and which can be characterised both as a misdirection in law and a failure to adequately to consider material facts are made out. This is sufficient to vitiate the decision. The decision of the First-tier Tribunal is set aside.

21. I have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.

22. I consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and I therefore remit the appeal to the First-tier Tribunal.

## Notice of Decision

**The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.**

**This appeal is remitted to the First-tier Tribunal for a fresh hearing before any Judge apart from Judge Courtney.**

## Anonymity

The First-tier Tribunal did not make an anonymity order in favour of the appellant, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

R Bagral
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
20 December 2024