Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/27598/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th August 2018	**On 01st October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR SAMSON RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - MANILA

Respondent

Representation:

For the Appellant: Mr G Lee, Counsel instructed by Kesar & Co Solicitors
For the Respondent: Ms Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nepal whose date of birth is 1st October 1988. He made application for entry clearance as the dependant relative of a settled person; his father being an ex-Gurkha discharged from service prior to 1st July 1997. On 27th January 2017 a decision was made to refuse the application and the appellant appealed. On 16th October 2017 the appellant's appeal was heard by Judge of the First-tier Tribunal Malcolm sitting at Hatton Cross. Judge Malcolm dismissed the appeal finding that family life was not engaged for the purposes of Article 8 ECHR.

2. Not content with that decision, by Notice dated 27th November 2017 the appellant sought permission to appeal to the Upper Tribunal. First-tier Tribunal Judge

Robertson, in a decision dated 13th December 2017, refused permission finding that the grounds lacked arguable merit. A renewed application was made dated 4th January 2018. On 19th February 2018 Upper Tribunal Judge Rintoul refused permission, principally on the basis that it was open to the judge to find that the appellant had made a life for himself in Australia, and for the reasons set out in the Decision and Reasons of Judge Malcolm.

3. Application was then made to the High Court by way of judicial review. The effect of that was that on 20th June 2018 the Vice-President of the Upper Tribunal granted permission, thus the matter comes before me.

4. The grounds submit that the judge erred in finding that there was insufficient evidence of family life and indeed it was suggested that Judge Malcolm fell into error in the same way as was identified on the part of the decision maker in the case of **Rai -v- Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320**. In the grounds Mr Lee pointed to the contact which the appellant had with his parents by telephone, WhatsApp, and video calling, as well as the monthly support in the region of £600-700, accepted by the judge, that was sent to the appellant each month.

5. The second ground attacks the decision of Judge Malcolm on the basis that Judge Malcolm did not make explicit in her findings, but did make it implicit in her treatment of the appeal, that she accepted the appellant's submission that but for the historic injustice (in relation to Ghurkha family members) his father would have come to the United Kingdom earlier and the appellant would have been entitled to join him. It was in that context that it was submitted, in the grounds, that the judge's comments regarding the appellant's choice to live in Australia was to be seen. Again, reference is made to the case of **Rai** and the error identified in that case wherein the Upper Tribunal Judge had repeatedly referred to the appellant's parents having chosen to settle in the United Kingdom leaving the appellant in the family home in Nepal.

6. The leading case is that of **Rai [2017] EWCA Civ 320**. The material facts of that case were that the Gurkha father and his wife remained in Nepal from 1971 until their settlement in the United Kingdom in 2010. At the time of the Gurkha father's discharge from the army in 1971 he had two children born in 1969 and 1971. Those other children lived in Nepal and Malaysia respectively. Thereafter the father and mother had four further children with the appellant, the youngest, being born on 1st January 1986. Of those four children the eldest, born in 1975, lived in Malaysia, the second, born in 1979, lived in India, and the third, born in 1982, lived in Dharan, Nepal. The appellant in that case, born in 1986, lived in the family home in Nepal.

7. The Court of Appeal considered the authorities beginning with **Kugathas [2003] EWCA 31**, **Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567**, **Ghising (family life – adults – Gurkha policy) [2012] UKUT, Gurung [2013] 1 WLR 2546 and Singh -v- Secretary of State for the Home Department [2015] EWCA Civ 630**.

8. The important question for a decision maker which emerges from the case of **Rai** is whether "real" or "committed" or "effective" support was shown to exist. What is

also important to recognise, and which is consistently emphasised in the case of **Rai** is that cases such as the instant case are fact-sensitive. There are a number of factors that one might look to, including the emotional impact of separation. However, as I have already sought to emphasise, repeating the words of Lord Dyson MR in **Gurung**, "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".

9. Pointing to paragraph 36 of the case of **Rai** in which reference again was made to **Kugathas** and "real", "committed" or "effective", it was said by Lindblom LJ that there was, it seemed to him, ample and undisputed evidence on which the Upper Tribunal Judge "*could* have based a finding that such 'support' was present in the appellant's case". I note that the words "should" or "must" are not used consistent of course with cases turning on their own facts.

10. Mr Lee sought to persuade me that the judge in the instant appeal had sought some exceptional factor and had elevated the test to too high a level falling into the same error as identified in the case of **Rai**.

11. At paragraph 82 of the decision Judge Malcolm had stated as follows:

> "*It was submitted by Mr Lee that the test for family life is whether there is support (which support has to be real, committed or effective) and that if so then Article 8 is engaged. The appellant quite clearly has established a life for himself in Australia and whilst evidence was given of regular contact with his parents I was not satisfied that this was anything other than the level of contact which would be expected between family members living in different countries. Also, as detailed, I do not consider that financial support alone is sufficient to meet the test of real, effective or committed support when considered against the background of the appellant's circumstances of his lengthy separation from his parents and the financial support which they have provided throughout his life. I consider that the evidence in this case supports the view that this is a family who are in contact, where financial support is given to a family member who is living, working and studying in a different country.*"

12. I was then invited to consider paragraph 36 in the case of **Rai** which reads as follows:

> "*As Ms Patry submitted, it was clearly open to the Upper Tribunal judge to have regard to the appellant's dependence, both financial and emotional, on his parents. This was, plainly, a relevant and necessary consideration in his assessment (see the judgment of the court in Gurung, at paragraph 50). If, however, the concept to which the decision-maker will generally need to pay attention is 'support' – which means, as Sedley L.J. put it in Kugathas, 'support' which is 'real' or 'committed' or 'effective' – there was, it seems to me, ample and undisputed evidence on which the Upper Tribunal judge could have based a finding that such 'support' was present in the appellant's case. He found, however, that the appellant had a 'reliance upon his parents for income that does not place him in any particular unusual category either within this country or internationally' … and no 'indication on balance of a dependency beyond the normal family ties and the financial dependency' … These findings, Mr Jesurum submitted, suggest that he was looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional,*

feature in the appellant's dependence upon his parents as a necessary determinant of the existence of his family life with them. Mr Jesurum submitted that this approach was too exacting, and inappropriate. It seems to reflect the earlier reference, in paragraph 18 of the determination, to the requirement for 'some compelling or exceptional circumstances inherent within [an applicant's] own case'. In any event, Mr Jesurum submitted, it elevated the threshold of 'support' that is 'real' or 'committed' or 'effective' too high. It cannot be reconciled with the jurisprudence – including the Court of Appeal's decision in Kugathas – as reviewed by the Upper Tribunal in Ghising (family life – adults – Gurkha policy) (in paragraphs 50 to 62 of its determination), with the endorsement of this court in Gurung (in paragraph 46 of the judgment of the court). It represents, Mr Jesurum contended, a misdirection which vitiates the Upper Tribunal judge's decision."

13. Mr Lee goes on in his grounds to point to the fact that the Court of Appeal found that those submissions "had force". Mr Lee goes on at paragraph 6 of his grounds the key point to further examples in which he submits that the judge at first instance was looking for additional factors, thereby elevating the test.

14. The second ground of appeal was not advanced with the same degree of enthusiasm as the first, i.e. that the judge appears to have accepted that the Gurkha father would have come to the United Kingdom earlier had his son been entitled to join him.

15. The level of financial support sent each month is of course a relevant factor to be considered, and the judge took those into account. However, I remind myself that the Court of Appeal in **Rai** was pointing to what *could be* sufficient to enable a judge to find family life, but the judgment was not prescripted. It is important that a judge takes an holistic view of the evidence. The judge properly directed herself. Not only did she judge set out Mr Lee's submissions, and I refer in particular to paragraph 57 of the Decision and Reasons, and to the historic injustice, or at least the recognition of it at paragraph 53, but then set those factors in context against other factors at paragraph 80.

16. The facts of the case of **Rai** are, as Upper Tribunal Judge Rintoul pointed out in refusing permission, somewhat different from the instant case in which it was the appellant who left Nepal to go to Australia before his parents came to the United Kingdom. At the time when the Gurkha father of the appellant had come to the United Kingdom, family life was already being enjoyed apart.

17. It is to be remembered there is a distinction between the first and second tests in **Razgar [2004] UKHL 27**. The first test is whether the proposed removal (though the same principles apply in entry clearance) amounts to an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life. The second test is: if so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

18. The fact that there is some private or family life is not sufficient. It has to be family life and/or private life, deserving of respect sufficient to engage the operation of Article 8.

19. Mr Lee drew my attention to the fact that in the findings of Judge Malcolm it was accepted that the appellant was in regular contact with his parents, evidenced by the documents provided, and that there was financial support given by the sponsor and his wife to the appellant.

20. That the Appellant is the son of a Ghurka, without more, cannot be sufficient to succeed. I appreciate that that was not being argued but it is a point that I feel needs to be made in this appeal because it leads to the next point, which emerges from the authorities and that is that it must be established that family life existed at the time when it is said "but for" the historical wrong" and at the time of consideration of the appeal, family and private life deserving of respect (in the legal sense) existed or exists as the case may be. The Tribunal should not elevate the standard or look for some exceptional factors; indeed, to do so would arguably negate the impact of the historical wrong. Against the factors the question for me is not whether I might have come to a different view but, given that the case is fact-sensitive, was it open to the judge to come to a view that the family and private life, such as they were, did not engage Article 8.

21. The appellant left for Australia before his parents left for the United Kingdom. It was open to the judge in my view to find that having gone to Australia he chose to remain there, and whilst in the case of **Rai** the court was critical of the Upper Tribunal placing too much reliance on what they found to be a choice, it was open to Judge Malcolm, in my judgment, to take account of the fact that the appellant and his father had not met, even though the Gurkha father spent eleven months of his time in Hong Kong; that neither of them had met since 2007; and that the appellant's parents did not know sufficient about what the appellant was doing or studying in Australia; that the evidence of the appellant's father was that he had "no idea whether his son had many friends in Australia" (paragraph 13) and was unable to give details of the work which his son was undertaking. Significantly at paragraph 28 the evidence was that for most of his life, from the age of 5, the appellant had been away from home and family, although this was for the sole purpose of attaining a better education. I note however that prior to moving to Australia the appellant completed his entire education from year 1 to 12 in India, attending three different schools. The evidence in my view meant that is was open to Judge Malcolm to come to the view that the appellant was living and leading an independent life from his parents, which is essentially what the judge found.

22. For the avoidance of doubt, I find no basis for the premise in the second ground that the Judge found sufficient family life to engage article 8 by the acceptance that monies were sent. Whilst such might be evidence sufficient for the first Razgar test, it was open to the Judge after consideration of all the evidence to find that the second test was not satisfied. Whilst the judge did not express herself in that way, it is clear that that was the approach to the appeal.

Notice of Decision

23. In the circumstances the appeal is dismissed and the decision of the First-tier Tribunal is affirmed.

24. No anonymity direction is made.

Signed **Date: 26 September 2018**

Deputy Upper Tribunal Judge Zucker