**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/15264/2019**

**THE IMMIGRATION ACTS**

| **Heard at Field House via Skype for Business** | **Decision & Reasons Promulgated** |
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| **On 17 March 2021** | **On 22 April 2021** |

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**KABITA RAI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr M Moriarty instructed by Everest Law Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Nepal. She appealed to the First-tier Tribunal against the respondent's decision of 30 July 2019 refusing her application for entry clearance for the purpose of settlement as the adult dependant of her father who is a former Ghurkha soldier.

2. The judge accepted that if he was satisfied as to the existence of family life capable of engaging Article 8 the weight to be attributed to the "historic injustice" referred to in the authorities was likely to exceed that given to the requirements of immigration control and therefore if the

appellant succeeded in establishing family life then the proportionality issue would be resolved in her favour.

3. The judge noted the evidence. The appellant's father, the sponsor, had served with the Ghurkhas between 1967 and 1982. He had seven children including, of course, the appellant, who was born on 22 August 1985.

4. The appellant was married to Mr Dev Kumar Rai on 28 February 2008. It was an arranged marriage. Her husband was at the time living and working in Dubai. He returned to Nepal for the marriage ceremony but only remained for a short time before returning to Dubai and did not return to Nepal for several years. After the marriage the appellant went to live with her in-laws but often returned to the family home where she would complain about the treatment she received at their hands. She would sometimes stay at the family home before returning to her in-laws of her own accord.

5. In 2009 the sponsor first became aware that he and his family members might be allowed to settle in the United Kingdom and he made an application for them to do so. Having been granted visas in 2011 they, i.e. he, his wife and his two youngest daughters who were then aged under 18, came to settle in the United Kingdom in January 2012. The appellant and her sister Babita, who had been born in 1987, remained in Nepal.

6. Before coming to the United Kingdom the sponsor left some cash from a loan he had taken out for the use of his two daughters and left also two signed cheques drawn on the bank account into which his Ghurkha pension was paid. He sent a total of NPR 2 lakh in 2012 to 2013 and when he visited Nepal in 2014 he again left some money for their use. It appears that by this time the appellant was living with Babita in the family home which it was claimed was badly damaged in the 2015 earthquake and had not been properly repaired.

7. In 2017 Babita was granted a settlement visa and came to live in the United Kingdom in November of that year. This left the appellant as the only surviving member of the family unit in Nepal. In June 2018 she was divorced from her husband, effectively by consent. Following her divorce she set about making her own application to join the rest of the family in the United Kingdom. The sponsor visited her in Nepal in 2019. At the time of her application the appellant was living with a relative in Kathmandu rent free although she was required to pay for food and the sponsor said he was sending money from the United Kingdom to cover the cost.

8. The sponsor's evidence was that he and his wife had a very close relationship with the appellant. They spoke regularly by telephone via Viber. The sponsor is in poor health, not having fully recovered from a stroke, and his wife has some age related conditions. They wish to have the appellant on hand to provide them with care and to reunite the family in the United Kingdom.

9. At the hearing he said that the appellant was presently living alone at the family home, going on to state that she had then been living with his wife's brother's daughter in Kathmandu at the time of the application and had been moving between the two places. As to how often he spoke to the appellant he said it varied, maybe once a week or two weeks or a month and they talked about her wellbeing and how she was doing.

10. As to where the appellant had lived during her marriage, he said that she had lived with her in-laws but would often return to the family home when she complained about the treatment she received, particularly at the hands of her mother-in-law who would beat her. When she was asked whether her husband had remitted money from Dubai for her upkeep during the marriage her father responded in the negative stating "we looked after her", going on to say that he had sometimes given money to the appellant when she was living with her in-laws. The appellant had never been employed in Nepal. She had no health issues preventing her from taking employment, it was difficult to get jobs there and her only experience was as a housewife.

11. The judge also heard evidence from the appellant's mother who essentially confirmed what her husband had said. She said that her daughter had not had a relationship with her husband, her husband had come to Nepal in 2015, the appellant had stayed at her in-laws for only a week and during that week did not have the relationship with her husband as couples would be expected to do. Subsequently the appellant only heard from him in 2018 when the divorce was arranged.

12. The appellant's mother went on to say that they had felt the physical absence of Kabita in each passing moment in the United Kingdom and shared all their troubles with her over the phone and she would talk about how she was alone and how much she wished to be with them and had no one in Nepal to help her live and provide support. She had never lived on her own nor away from home.

13. The judge set out relevant case law including Patel [2010] EWCA Civ 17, Ghising [2012] UKUT 00160, Gurung [2013] EWCA Civ 8 and PT [2016] EWCA Civ 612. The question of whether or not Article 8 was engaged as between an adult child and his or her parents was a highly fact-sensitive matter, there was no requirement of "exceptionality", there was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. It was said in PT that the love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There had to be something more. The judge observed that one of the common themes running through the authorities was that for an adult child to establish the existence of a family life with a parent he/she must not have established an independent life or an independent family of his/her own.

14. The judge noted that the appellant was married in 2008, over a year before the prospect of settlement in the United Kingdom was even contemplated by her parents and that therefore her and her parents'

intention was that she would form an independent family of her own. It was clear from her parents' evidence that she regarded it as an obligation to reside with her husband's family, notwithstanding her complaints about the manner of her treatment and although she was accustomed to visit her own family, which the judge found to be entirely natural given that they all lived in the same village, she would return to her husband's family of her own accord.

15. With regard to the submission that by the time her family left for the United Kingdom in 2012 her marriage was to all intents and purposes at an end and the bonds that had previously existed with her parents had been re-forged and family life restored, this was at variance with the appellant's mother's evidence that when the appellant's husband returned to Nepal in 2014 to 2015 the appellant returned to her marital home for a week until she was scolded by her mother-in-law. The judge found this to indicate that whatever had gone before, the appellant regarded her family life with her husband as being extant. The judge also noted that she had not taken any steps to bring her marriage to an end until six years after her parents had gone to the United Kingdom and several years after her sister Babita had obtained her settlement visa, and only then at the behest of her husband.

16. The judge found that in the absence of documentary evidence he did not accept that the appellant was financially maintained by her parents throughout her marriage as was claimed. He found that at least prior to 2018 the appellant was in receipt of financial support from her husband. He bore in mind the limited financial resources of the sponsor, noting also the copy money transfer receipts submitted from early 2018.

17. The judge found that when the appellant married her husband she ceased to enjoy family life with her parents capable of engaging Article 8 and that when her parents came to the United Kingdom in 2012 she was a married woman and regarded herself as such, as did her parents. He found that since 2012 she had been living independently of her parents who had visited her on only two occasions. He did not accept that since that time she had been wholly or mainly financially or emotionally dependent on her parents. She was in receipt of financial support from her husband and until 2017 she had emotional support from her sister Babita. The judge also noted that there were other relatives in Nepal who were willing and able to offer support as evidenced by the fact that the appellant was living with family in Kathmandu at the time of her application.

18. With regard to the submission that family life and a relationship of dependence once lost could be re-established so as to bring an applicant within the ambit of Article 8 was not discounted as a possibility, but the judge considered that once an appellant had become independent and founded a family of his/her own, cogent evidence would be required to show that changed circumstances gave rise to genuine dependency, the more so whereas in this case the appellant and the sponsor had been living in different countries for eight years.

19. The judge regarded it as entirely natural that the appellant would now wish to be reunited with her family in the United Kingdom and vice versa but that did not amount to more than one would expect from close family members. He considered that it did not amount to dependence going beyond normal emotional ties. The evidence of the frequency and content of the telephone contact with the appellant went no further than the usual banalities which might be expected of family members living in different countries.

20. The judge noted that the appellant was a single childless woman with no health conditions which would prevent her from taking employment. She had relatives who had been willing to accommodate her in Kathmandu, and of his own experience of visiting Kathmandu which he knew to be a large city and tourist hub with many hotels and guest houses, that might provide opportunities for employment. He considered that there was no reason why she should not be able to support herself in Nepal. Remittances from the sponsor since 2018 were not evidence of dependence but simply evidence of payment of money to support her in the aftermath of her divorce, again an entirely natural thing to do.

21. Looking at the evidence in the round the judge found that he was not satisfied that the appellant was genuinely emotionally or financially dependent upon the sponsor and was not satisfied that the relationship went beyond normal familial affection. As such he found that Article 8 was not engaged as there was not family life between the appellant and her parents. Accordingly the appeal was dismissed.

22. The appellant sought and was granted permission to appeal against this decision, first on the basis that there was nothing in the case law to preclude the re-establishment of a once fractured family life, that, as had been held in Uddin [2020] EWCA Civ 338 dependency was not a term of art but a question of fact, a matter of substance not form, and that there was no need to show exceptional dependence and that family life was inherently capable of being fluid and changeable. It was argued that the judge had erred in denying the existence of family life between the appellant and the sponsor, notwithstanding the financial and emotional support which the sponsor and his wife continue to provide to her based on her previous failed attempt to form a family unit of her own, which was inconsistent with the fact-sensitive approach adopted by the Court of Appeal in Uddin. The ultimate question was whether the level of financial and emotional support currently being provided by the sponsor was “real, effective or committed” and not a question of whether the appellant was incapable of financially supporting herself. It was erroneous to consider that her lack of children, relatively good health and theoretical ability to go and live with relatives with a view to finding employment in Kathmandu were relevant to the question of whether the sponsor was as a matter of present fact providing her with support which is real or effective or committed.

23. In his submissions Mr Moriarty relied on and developed the points made in the grounds of appeal. The issues were overlapping and it was a question

of whether family life could be re-established if disengaged. The judge had accepted in principle that that might be the case but seemed to say that he might require a heightened degree of dependency for family life, and this had informed his approach to whether there was enough evidence on the facts of the case to show family life.

24. It was relevant to note that, as was said by the sponsor in his evidence, given the opportunity to do so he and his family would have migrated to the United Kingdom at the earliest opportunity. The difficulties with the decision really arose at paragraphs 61 to 64. The judge did not really grapple with the relevant issues. He set out facts that were considered to be counter-indicative at paragraph 64 including the fact that the appellant was single and childless with no health conditions and would be able to get work in Kathmandu. He questioned whether this was relevant to the question of whether her father was providing effective and committed support to her. It was not relevant to the question to be decided. It was not suggested that the judge erred in law when referring to his experience and knowledge of Kathmandu, but given the current pandemic the question of whether the appellant could get a job did not go to her father's commitment to support her. The judge at paragraph 64 accepted that there was support but said it was not evidence of dependency and it was unclear what he thought dependency was beyond that. The witness statements should be considered, showing as they did close emotional bonds and distress from separation. The evidence therefore went beyond banalities as referred to by the judge and the financial support was beyond just support.

25. In her submissions Ms Cunha referred to paragraphs 47 to 50 where the judge assessed the evidence and made points relevant to the family life issue. The question as argued by Mr Moriarty was whether the judge had insisted on a higher degree of dependency than was required in Kugathas. The judge had not said there was a higher threshold but compared the relationship the appellant had with her parents when she was married, in the assessment at paragraphs 47 and 49 and paragraph 50. The judge assessed that the relationship had been at the earlier time with the father giving support to the appellant and her sister in 2012 and 2014. The appellant had lived in the family home but that did not mean there was dependency more than normal emotional ties. If that threshold could not be met there was no evidence to show the position was different today. The appellant had not been held to a higher threshold but the judge had said that there had been family life but it was not Article 8(1). The divorce was relevant for her reasons for coming to the United Kingdom but that did not show the Kugathas threshold was met. As had been said in Rai at paragraph 17 a rounded assessment was needed and it had to be shown there was a real, committed, effective relationship. The public interest did not come into play. There was more evidence of dependency that had subsequently been provided but the judge had not just considered the past and had referred to family help from relatives in Nepal. The appellant's mother said she was dependent on the appellant and needed the additional support she provided so even if the Tribunal disagreed

about the consideration as of now it was nullified by the fact that the dependency seemed to be the other way.

26. By way of reply Mr Moriarty argued that the point was that if the judge agreed that family life could be re-established then the question of engagement with Article 8(1) should be on the same basis as for any appellant. There was no heightened test. Any co-dependency with the parents did not suggest an absence of support from the appellant's father. She was entirely reliant on her father for financial support and dependent on both parents and she could increasingly take on care for them here, and that was enough to amount to family life.

27. I reserved my decision.

28. In my view the key issue here is that relating to what the judge said at paragraph 61 of his decision and thereafter. He accepted, clearly, in my view, correctly, that family life and a relationship of dependence once lost can be re-established so as to bring a person in the position of the appellant again with the ambit of Article 8 with her parents. Clearly she had family life with her parents before her marriage and the argument before the judge was whether the relationship she now had with them amounted to family life. The key point arising from this paragraph is whether the judge imposed too high a test with regard to the evidence required to be provided to show the re-establishment of family life in circumstances such as these. Though he used the term "cogent evidence" as being required to show that the changed circumstances gave rise to genuine dependency, it is not the case in my view that he required a level of evidence going beyond what would have been required to show family life prior to her marriage. The evidence that the judge went on to consider thereafter in his decision and the test that he applied is in my view consistent with the proper test, noting also his quotation from Kugathas of the remarks of Sedley LJ. The judge did not consider that the evidence went to dependence going beyond normal emotional ties. The use of the term "banalities" was perhaps a little unfortunate, but the judge was essentially commenting on the evidence of the frequency and content of the telephone contact which the appellant had with her parents which in my view he was entitled to find went no further than the usual exchanges to be expected of family members who live in different countries. Though the use of the term "cogent" might appear that the judge applied a different test, in my view in the paragraphs subsequent to paragraph 61 he did no more than assess the evidence in the context of the correct legal tests. He was entitled to find that he was not satisfied that the relationship went beyond normal familial affection and that that was not sufficient to engage Article 8(1). Accordingly, I conclude that the judge did not err in law in his evaluation of the appellant's appeal and the appeal is accordingly dismissed.

No anonymity direction is made.

Signed Date 14 April 2021
Upper Tribunal Judge Allen