Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-002781
HU/06638/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th October 2022	**On 4th December 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR LOK BAHADUR GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER –SHEFFIELD

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel instructed by Everest Law Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Stedman promulgated on 14th January 2022 which dismissed the appellant's appeal. The appellant had appealed against a decision of the Entry Clearance Officer, Sheffield dated 18th February 2020 refusing his human rights claim. The appellant made an application on 8th January 2020 for entry clearance as the adult dependant of his father, Mr M Bhuwansing Gurung ("the sponsor"), who is a former Gurkha soldier

discharged before 1997 and whom was granted a settlement visa in the UK in August 2011.

2. The appellant is a 51 year old single male living in Parbat, Nepal in his father's home and between March 2015 and May 2018 he lived and worked in Saudi Arabia.

3. The respondent found there was no evidence the appellant could not live independently or that there were exceptional circumstances and the appellant had not demonstrated that he was emotionally and financially dependent on his father beyond that normally expected between a parent and an adult child. He had not demonstrated real, committed or effective support from his parents.

4. The grounds for permission to appeal asserted that there was (i) a misdirection of law and (ii) a failure to consider the reciprocal ties.

5. The grounds acknowledge that the judge correctly identified at [18] that it was necessary to consider whether Article 8(1) was engaged. Although it was found the appellant lived in his parents' home with his two sisters, the judge rejected an existence of family life. The judge reasoned the presence of the sisters did not preclude the existence of family life with the parents but found the evidence pointed to a normal relationship between a man in his early 50s and his parents, although to quantify what was "normal", given the cultural differences, was difficult. The judge accepted that the appellant remained "in touch" with the parents and cared for them but stated he, the judge, must consider what was "real, effective and committed support" at [23] and found it "very significant that the appellant was able to work for three years in Saudi Arabia".

6. The grounds specified as follows:

(1) Misdirection of law

7. The judge arguably misdirected himself by requiring "real, effective and committed support" at [23]. The test was not cumulative. Secondly, he directed himself that the features required must be more than quantitatively "normal".

(i) Real, effective ***and*** committed support

8. The judge cited the test incorrectly as a cumulative test and although that was a subtle error which could be irrelevant, in this case, because the critical issue was whether Article 8 was engaged at all, it was of importance and the judge had found elements of support were in place but was looking for something 'additional'. The use of the family home was plainly real support and although it was not committed because, as the judge there held, of the three year period in Saudi Arabia it was arguable that it did not also need to be "committed" and therefore the error was material.

(ii) Requiring more than quantitatively normal

9. The judge appeared to be pre-occupied at [22] with what was 'normal', given the cross-cultural differences, suggesting a search for something not statistically normal. That misunderstood the test arguably and Arden LJ, as she then was, held in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31** at [25] that family life will not exist unless "something more exists than normal emotional ties".

10. Sedley LJ in **Kugathas** at [17] held, it is the support that elevates "normal" ties in the sense of "mere" or "ordinary" emotional ties into ones protected by Article 8.

11. There is no need for the support to be uncommon. Speaking to one's parents every day was arguably rare. There was no authority for the proposition that support must be of need and **Patel v Secretary of State [2010] EWCA Civ 17** held that protected family life fell well short of dependency. As made clear in **Rai v Secretary of State [2017] EWCA Civ 320** at [36], the concept to which the judge must pay attention is "support".

(2) Failing to consider reciprocal ties

12. Secondly, the judge appeared to concentrate entirely on the appellant and what he received from the parents. When considering Article 8 family life the judge should consider reciprocal ties. Historic injustice cases were arguably about the parents, not only the children because they were forced to choose between settlement and their family.

13. The judge arguably failed to ask himself whether the appellant provided emotional support to the parents or whether their needs and his absence constituted more than the normal emotional ties. The evidence was that the sponsor suffers from hearing loss and sight impairment and very severe chronic obstructive pulmonary disease and atrial fibrillation. The sponsor's wife was in receipt of carer's allowance and the sponsor, and his wife could miss medical appointments because they cannot speak English and the sponsor spoke to the appellant four to five times a week.

Analysis

14. It is clear from the decision that the judge acknowledged that the one issue in the appeal was whether Article 8 was engaged, [18]. The judge proceeded to find that the appellant lived in his parents' home in Nepal, albeit with his two sisters, and was supported by his parents. Specifically, the judge said at [19]:

> *"He is receiving money from his parents. I find on balance and having regard to the evidence as a whole that the money is being*

used towards household expenses and on the basis of the oral evidence is shared between the siblings. I agree with Mr Wilford [representative for the appellant] *that both the financial remittances and the evidence that the appellant is living rent-free in his parents' home does go towards and support a case for dependency.".*

15. The judge's found in the following paragraph at [20] that the appellant enjoyed a family life in real terms with his daughter (a child according to the evidence derived from the death of the daughter's mother and with whom the appellant had never had a formal relationship) and siblings than he did with his parents. That, however, does not exclude a family life with the parents and the presence of siblings, as the judge acknowledged, did not preclude the existence of family life.

16. The judge also acknowledged at [22] that the sponsors continued to send funds for the appellant and his two sisters and at [23] the judge stated: "I am willing to accept that it could be sufficient to amount to a financial dependency".

17. In **Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320** Lindblom LJ said this:

> *"18. In Ghising (family life – adults – Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in Kugathas had been 'interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts', and (in paragraph 60) that 'some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence'. It went on to say (in paragraph 61):*
>
> > *'61. Recently, the [European Court of Human Rights] has reviewed the case law, in [AA v United Kingdom [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …'.*
>
> *The Upper Tribunal set out the relevant passage in the court's judgment in AA v United Kingdom (in paragraphs 46 to 49), which ended with this (in paragraph 49):*
>
> > *'49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'.'*

19. *Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in Gurung (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'. The court expressly endorsed (at paragraph 46), as 'useful' and as indicating 'the correct approach to be adopted', the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy), including its observation (at paragraph 62) that '[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive'.*

20. *To similar effect were these observations of Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgment):*

> *'24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.'"*

18. There was in this particular appeal considerable evidence as to the close family connection and communication between the adult appellant and the sponsor in the UK. The judge found that there was financial dependence and there was close communication and as stated in **Jitendra Rai** at [36], had the judge paid attention to the concept of "support" which needed to be ""real" or "committed" or "effective" there was ample evidence on which the judge could have found that it was so in the appellant's case such that Article 8(1) was engaged. As stated, there is no

requirement for the financial or emotional dependency which constitutes family life to reach an extraordinary or exceptional level.

19. The question of whether an individual enjoys family life is one of fact and depends on the careful consideration of all the relevant circumstances.

20. Having made the findings that there was close communication between the appellant and sponsor, that the appellant lived in the family home and continued to receive remittances, I find that the judge erred in the approach to the assessment of family life, not least by the application of a cumulative test in terms of real, effective and committed support and in effect requiring an elevated test to that set out in **Kugathas**. The judge erred in effectively applying a test of exceptionality when considering article 8 and this is also reflected by the cumulative test.

21. I set aside the First-tier Tribunal decision in relation to the *conclusion* on family life and the following conclusions because of the material error of law and remake the decision, finding that the appellant had established family life with his sponsor in the United Kingdom on the basis of the findings of the First-tier Tribunal alone.

22. Having found there was family life between the appellant, in note **R (on the application of Gurung & Ors) v Secretary of State for the Home Department [2013] EWCA Civ 8** held

> *"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 dependent 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]"*

There would appear to be no public interest considerations to counter the application (none have been raised) and on consideration of all the relevant facts, I allow the appeal on the basis that the appellant had family life with his sponsor when he moved to the United Kingdom and continues to have a family life with the sponsor to the date of application and decision.

23. I note that Mr Clarke helpfully and fairly acknowledged that there was a material error of law in the decision of the First-tier Tribunal and invited me to allow the appeal, which I do.

Notice of Decision

The appeal of Mr Gurung is allowed.

No anonymity direction is made.

Signed Helen Rimington Date 31st October 2022

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because of the complexity of the appeal.

Signed Helen Rimington Date 31st October 2022

Upper Tribunal Judge Rimington