



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-005219

First-tier Tribunal No: HU/54114/2021
IA/10587/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 12 March 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

INDRA HANG RAI
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms K McCarthy, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 21 February 2023

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge O'Garro promulgated on 17th August 2022, dismissing his appeal against the decision of the Entry Clearance Officer (ECO) dated 9th April 2021 refusing his application for entry clearance to the UK as the adult dependent child of his mother, the widow of a former Ghurkha soldier.
2. The hearing took place in person in Field House. I heard submissions from Ms McCarthy and Mr Tufan and I reserved my decision.

Background

3. In summary, the background to the appeal is that the Appellant's father served in the Brigade of Gurkhas of the British Army from 1st December 1959 to 2nd August 1970. He died on 28th April 2009. His widow, Ganga Devi, was granted entry clearance and entered the UK to settle here in December 2017. The Appellant has three older siblings who live in Nepal and his youngest sibling, who was born on 2nd April 1990, obtained a settlement visa to join her mother in the UK. The Appellant's date of birth is 1st November 1986, he is 36 years old. He is educated to degree level in Nepal and worked as a teacher for four years during which time he lived away from the family home. In October 2015 he went to Japan to study. His mother took out a loan to facilitate his studies there. He returned to Nepal in December 2020 and since then has lived in the family home which is occupied by the Appellant's uncle and his family. He is single and is not employed in Nepal and claims that he is financially dependent on the support he receives from his mother. On 13th January 2021 he made an application to settle with his mother in the UK.
4. The Entry Clearance Officer refused the application, finding that the Appellant could not meet the requirements of the Immigration Rules. The ECO considered the Appellant's application under the Secretary of State's discretionary policy for adult children of ex-Gurkhas but refused the application as the Appellant did not meet the requirements of the policy as he was over 30 years old at the date of application. The ECO also considered the application in terms of Article 8 outside of the Rules but found that the Appellant did not have a family life with the Sponsor.

First-tier Tribunal Decision

5. The judge noted at the outset that it was not in dispute that the Appellant's application was bound to fail under the Immigration Rules and went on to consider the appeal on Article 8 grounds outside of the Rules. The judge firstly considered whether the Respondent's refusal interferes with the Appellant's right to respect to his right to enjoyment of his family life [paragraph 27]. The judge set out the relevant case law. The judge noted that at the date of the application the Appellant was over 30 years old and at the date of hearing he was 35 years old. The judge noted the Appellant was highly educated with a university degree and that he lived away from home during his studies and when he was employed as a teacher thereafter for a period of four years. The judge found that during this period the Appellant lived an independent life, making important decisions for himself [paragraph 34]. The judge noted at paragraph 35 that the money the Appellant earned from his job as a teacher just about covered his food and accommodation but that he managed.
6. The judge acknowledged at paragraph 36 that the Appellant needed money to further his plans to study in Japan and said that parents are the fall back referring to "the bank of Mom and Dad". The judge accepted that the Appellant turned to his mother for her support in getting a loan to further his studies, she stood as guarantor for the loan and she was faced with repaying the loan. The judge did not find that the fact that the Appellant's mother was responsible for repaying the loan as demonstrating that the Appellant was no longer living an independent life and that the repayment of the loan created a dependency [36]. The judge considered that, in light of the Appellant's educational achievements, there was a high probability that she expected the Appellant to repay that debt to her once he had achieved his educational goals and found employment. The judge found

that the Appellant's mother supported her adult child in times of need in the way many parents over the world had done.

7. The judge said at paragraph 38 that she found that the Appellant continued down the path of independence he started several years ago and he could not return to relying on his mother to make all the decisions in his life. He made the decision to go to Japan and moved from course to course at his own will and not at the direction of his mother because in the judge's finding in was living an independent life. He was working and studying and able to maintain himself and his mother was not financially maintaining him in Japan.
8. The judge pointed out that there was no evidence as to the efforts the Appellant has made to find employment in Nepal after his return there and any difficulties he may have encountered in finding employment. The judge found at paragraph 40 that she accepted that the appellant's mother has stepped in to support him financially since he returned to Nepal but did not accept that this creates a dependency. The judge accepted that the loan in relation to the Appellant's studies in Japan was repaid by the Appellant's mother and also by his sister when she started working in the UK. The judge accepted that the Appellant and the Sponsor speak to each other on the telephone regularly [paragraph 41]. The judge found that the Appellant has lived an independent life for many years and that this has not changed.

The Challenge to the First-tier Tribunal Judge's Decision

9. There are two Grounds of Appeal. It is contended in Ground 1 that the judge applied the incorrect threshold for engagement of Article 8(1) family life. The grounds highlight that the judge accepted that the Appellant's mother stood as guarantor for the loan for the Appellant's studies in Japan, and that she was responsible for repaying the debt and that the judge accepts that the loan was repaid by the Appellant's mother and sister. The grounds further highlight that the judge accepted that since his return from Japan the Appellant's mother has stepped in to support him financially. The grounds contend that despite these findings, the support was found to be an example of "the bank of Mom and Dad" and that the Appellant's mother did what many parents over the world have done, which is support their adult children in times of need. It is contended that the judge applied an incorrect test setting too high a threshold for engagement of Article 8(1) family life. It is contended that the judge accepted that the Appellant's mother provided him with real, effective or committed support by obtaining the loan to go to Japan and financing him on return to Japan yet rejected the submission that this support engages Article 8(1) reasoning that many other parents give money to their adult children. It is contended that the judge does not apply the case law and that the judge erred in not considering that the examples of "the bank of Mom and Dad" may very well also be situations that meet the threshold for engagement of Article 8(1). It is argued that, by discounting all parental support to adult children as normal and therefore incapable of engaging Article 8(1), the judge is applying a new test that has no foundation in the case law and Article 8(1).
10. In Ground 2 it is contended that the judge, in focusing mainly on "the bank of Mom and Dad", failed to consider wider evidence supporting the engagement of family life between the Appellant and his UK settled widowed mother. Reliance is placed on paragraph 25 of the decision of **Kugathas v SSHD [2003] EWCA Civ 31** which points to ties which might exist if the Appellant were dependent on his family or vice versa. It is contended that the judge failed to consider the

Appellant's mother's evidence about her exceptional closeness to the Appellant, in part due to the father's difficulties with alcohol while the Appellant was growing up and of the mother's need for the Appellant to be in the UK to make meaningful use of the settlement she was belatedly granted. It is pointed out that the Appellant is the Sponsor's only surviving son as six of his siblings died in infancy or childhood including one who died aged 9 in an accident. He has four surviving sisters, three of whom live in Nepal and one lives with the Appellant's mother. It is contended that the judge failed to consider the evidence that even when the Appellant was teaching in Nepal he was not earning enough to support himself or build an independent life and needed financial support from his mother, and it is further contended that the judge should have considered the Appellant's mother's evidence as to why she was unable to apply for the Appellant to come to the UK at the same time as she did.

11. First-tier Tribunal Judge O'Brien granted the appellant for permission to appeal on 31st October 2022. Judge O'Brien noted that the judge cited many of the authorities relevant to the existence of family life. However, having apparently accepted that the appellant's financial dependence on his Sponsor was sufficient to establish extant family life, the judge arguably applied too high a threshold for establishing dependency in particular given her finding that the Sponsor presently supported the Appellant financially in Nepal.

Discussion

12. At the hearing Mr Tufan accepted that if Article 8(1) is engaged, that is if it is established that the Appellant has a family life with his mother, that is determinative of the appeal in that he accepted that the historic injustice would mean that it is not proportionate to maintain the refusal on public interest grounds.
13. I find that the judge made an error in applying too high a threshold for the engagement of family life in her assessment as to whether there is family life between the Appellant and his mother.
14. The judge made a finding that the Appellant lived away during his studies and thereafter when he was working as a teacher. The judge accepted that the Appellant's mother obtained a loan to further the Appellant's studies in Japan and that she, along with the Appellant's sister, repaid that loan. The judge accepted that since the Appellant returned to Nepal from Japan in December 2020 his mother has supported him financially. Therefore, on the judge's findings the Sponsor has financially supported the Appellant for a number of years and certainly, on the judge's findings, since 2015 when he went to study in Japan. Financial support on its own may not be enough to establish family life within Article 8. As established in the case law, what is required is real, effective and committed support (Kugathas) and the assessment is a holistic one depending on the facts in the case (Gurung v SSHD [2013] EWCA Civ 8).
15. I note that the judge focused on the Appellant's decision making, for example at paragraph 35 and 38. The judge found at paragraph 38 that the Appellant continued down the path of independence he started several years ago and "he could not return to relying on his mother to make all the decisions for his life." She went on to find that the Appellant went to Japan and made the decision to move from course to course at his own will and not at the direction of his mother making the decisions which were best for him. The judge focused therefore on

the Appellant's decision making without adequately considering the financial aspect in accordance with her earlier findings.

16. The judge focused on "the bank of Mom and Dad" at paragraph 36 and elsewhere in the decision. The judge's use of this phrase without an analysis of what the concept means seems to be a shortcut for a proper analysis of the financial support provided by the Sponsor in the context of the rest of the evidence. This phrase, as well as the other phrases used by the judge, such as "concerned parent", minimises the support provided by the Sponsor and in my view distracted the judge from the actual test to be applied.
17. Further, I accept that Ground 2 has been made out. The judge failed to take adequate account of the evidence before her about the family background as set out in the Appellant's witness statement where he talked about his father's problems with alcohol. The judge failed to take account of the Appellant's evidence as to his stresses and worries about having put his mother in debt because of his idea of becoming independent in Japan (paragraph 7 of his witness statement). The judge failed to take account of the Appellant's evidence that he struggled to find work because of Covid restrictions and the pandemic in Nepal (paragraph 8 of the witness statement). The judge failed to take account of the evidence in the Sponsor's witness statement as to the difference between the Appellant's salary whilst he was working as a teacher in Nepal compared to her family pension. She also talked about his frequent visits and her continuing ongoing support during this period.
18. Taking account of all of this evidence I find that the judge applied too high a threshold for engagement of Article 8(1) (**AG (Eritrea) v SSHD [2007] EWCA Civ 801** at paragraph 28).
19. Accordingly I find that the judge made a material error of law. For that reason I set aside the decision of the judge. I preserve all of the findings of fact as these were not in dispute.

Re-making the Decision

20. At the hearing Mr Tufan agreed that if I found an error of law it was appropriate to re-make the decision on the basis of the evidence before me. Although Ms McCarthy had some concerns about the extent of the evidence which could be called on a re-make, I am satisfied that I have adequate evidence to enable me to re-make the decision on the basis of the evidence before me. There was no application for admission of further evidence in advance of the error of law hearing and Ms McCarthy gave no indication of what further evidence would be submitted.
21. I have considered all of the evidence in the round. I take account of the case law set out above. The First-tier Tribunal Judge accepted all of the evidence. There is nothing in the judge's findings to indicate that any of the evidence before her was rejected.
22. I take account of the history of this case. I take account of the difficult relationship with the Appellant's father which led the Sponsor to send the Appellant and his sister, Sunita, away to be educated (paragraph 6 of the Sponsor's witness statement). I take into account the evidence that, even while the Appellant was working, his mother continued to support him because the family pension was more than his salary as a teacher in a remote area. I note

that the Appellant continued to visit his mother once a month and spent his entire holidays and spare time with her.

23. I consider it very significant that the Sponsor raised a loan to fund the Appellant's studies in Japan and that she and her daughter repaid that loan. It is therefore clear that during this time the Appellant continued to be financially dependent on the Sponsor.
24. I note that at paragraph 10 of the witness statement the Sponsor said that the Appellant has been unable to get work in Nepal, he is looking for jobs as a teacher but has been unable to because of the effects of the pandemic. Even if he were to get a job in Nepal, she says that it would be only for 15,000 to 18,000 Nrs a month whereas she sends him more money than that from the UK per month. I note the unchallenged finding of the First-tier Tribunal Judge that the Appellant's mother has been supporting him financially since he returned to Nepal.
25. On the basis of his ongoing financial dependence, the historic emotional interdependence and all of the evidence before me, I find that the Appellant has established that he has a relationship with the Sponsor that is over and above the normal emotional ties between an adult and a parent.
26. I find that the Appellant has established that he and his mother have a family life within Article 8(1).
27. As confirmed at the hearing by Mr Tufan, it is accepted by the Respondent that, if it is established that there is family life within Article 8(1), the historic injustice outweighs the public interest in the proportionality exercise. Therefore, this is determinative of the appeal.

Notice of Decision

For the foregoing reasons my decision is as follows:

- **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and I set it aside preserving all of the findings of fact.**
- **I re-make the decision by allowing the appeal on human rights grounds.**

Anne Grimes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6th March 2023