



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004516;
UI-2022-
004517

First-tier Tribunal No:
HU/02553/2021; HU/02551/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

3rd October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

BIMALA & RABINDRA GARBUJA PUN
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford counsel instructed by Everest Law solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 4 September 2023

DECISION AND REASONS

1. The Appellants are nationals of Nepal, born on 27 November 1978 (Rabindra) and 25 March 1986 (Bimala) and are sisters. Their father, Siri Prasad Garbujja Pun was formerly a Gurkha in the British armed forces from 23 January 1957 to 4 November 1968. On 23 January 2012 he and the Appellant's mother came to the UK for settlement

but the Appellants remained in the family home in Nepal. The Appellants sought entry clearance on 29 September 2020 and these applications were refused in decisions dated 24 November 2020.

2. The appeals came before the First tier Tribunal Burnett for hearing on 10 January 2022. In a decision and reasons dated 25 February 2022 the appeals were dismissed.
3. The Appellants sought permission to appeal to the Upper Tribunal, in time on 20 March 2022. Permission to appeal to the Upper Tribunal was refused in a decision dated 11 May 2022 and renewed grounds of appeal were lodged on 1 July 2022, which asserted that the Judge:
 - (i) made erroneous findings as to the available evidence eg with regard to seasonal work and unchallenged evidence of Sponsors at [18] that the A's were reliant on money from their parents to meet their needs;
 - (ii) took irrelevant matters into consideration and set the bar too high by requiring a level of evidence that is not actually necessary to meet the modest threshold for engagement with article 8 of ECHR;
 - (iii) incorrectly applied the family life test and threshold.
4. Permission to appeal was granted on 14 November 2022 by UTJ Lindsley in *inter alia* the following terms:

"2. The grounds of appeal contend, in summary, that the First-tier Tribunal firstly erred in law in making erroneous findings of fact amounting to errors of law on the evidence before it – it was clear from the evidence that the appellants do some seasonal work when they can, do not have bank accounts for this work and rely mainly on the sponsors for financial support – which was sent by transfer, with friends travelling and with the sponsors when they travelled; secondly that irrelevant matters were taken into account and too high a bar was set for finding that Article 8(1) ECHR was met when it was a modest threshold – the test that should have been applied was whether there was real, effective or committed support provided by the sponsors to the appellants and it was not relevant to set out a complete summary of the finances to satisfy this test or for the appellants to have explained how they paid for their mobile phones; thirdly that an incorrect test for the existence of family life was applied, instead of looking for more than normal emotional ties a test of emotional dependency was required which was not correct when dependency is not needed at all to show family life..."

4. The First-tier Tribunal clearly directs itself correctly on the case law surrounding Article 8 ECHR at paragraphs 38 to 50 of the decision, including with regards to the fact that there is no requirement of dependency to show family life, and that the test is whether there is real, committed or effective support. However, at paragraph 52 the First-tier Tribunal seems to focus on whether there is financial dependency, it having been noted that the appellants receive regular support from the sponsors in the UK. It is arguable that if it is found that there is regular support (presumably the financial remittances, provision of accommodation in the family home and through regular telephone calls) the appeal ought to have succeeded. It is arguable that the existence or otherwise of bank statements is not relevant to whether there is a family life relationship, as it seems to be contended at paragraph 54, and that the requirement for detailed financial information/ confirmation as to how mobile phones are paid for is seeking confirmation of dependency which is not required. All grounds may be argued.

Hearing

5. At the hearing before the Upper Tribunal Mr Wilford sought to rely upon the grounds of appeal. He submitted that the sole issue was whether article 8(1) was engaged and this was considered at [49]-[62] of the decision and reasons. The grounds of appeal assert that Judge Burnett's determination is defective in 3 respects:
 - (i) that he failed to consider uncontested evidence;
 - (ii) he took into account irrelevant considerations; and
 - (iii) he applied the incorrect test with regard to article 8(1) of ECHR.
6. Mr Wilford addressed ground 3 first. He acknowledged that Judge Burnett cites the appropriate test in terms of support cf. *Rai* [2017] EWCA Civ 320 ie. whether there is real, committed and effective support. However, at [61] the Judge incorrectly cites the *Kugathas* test, which he submitted is a subtle but material elevation of that test in that the Judge considered that it had not been demonstrated that there is a real emotional dependence over and above the usual ties one would expect between parents and their children.
7. With regard to ground 1 and the assertion that the Judge failed to consider uncontested evidence, the Judge noted at [13] that the examination of the witness centred around the family of the appellants and their dependency upon the sponsors. There was no assertion by the Respondent in this case that the witnesses were not telling the truth. The evidence of the sponsor is that he provides financial support to his children and that for a significant period of the year he also provides accommodation. The evidence was that they require the additional subsidy from their father because any work undertaken is seasonal work and the wage is very low. For the

younger of the two appellants there has been service work. The Sponsor's evidence is also that he has been providing support to the Appellants for a long period and there is access to the account where his army pension is paid and he provides explanatory evidence as to why he does not have receipts for the earlier period.

8. Mr Wilford submitted that Judge Burnett appeared to allow the issue of the non-existence of bank statements to obscure his consideration of the question of whether financial support of the Appellants is regular eg at [54] where the Judge held that: *"the lack of bank statements is telling and impacts negatively upon the suggestion that there is family life in this case."* However, at [52] the Judge noted that it was accepted by the ECO that the Appellants are provided with regular support from their parents in the UK albeit *"limited evidence had been provided to demonstrate that the appellants are truly dependent upon the financial provision they receive."*
9. Mr Wilford submitted that nowhere was it put to the Sponsor that he was not telling the truth and that credibility certainly did not appear to be the basis of the Respondent's case. He submitted that the Judge compounds that error with the evidence he does consider: at [57] and [59] which shows piecemeal approach:

"57. I acknowledge and appreciate that the fact that the appellants remained living with their parents and in the family home can be indicative of a continuation of family life even though they were beyond the age of 18. I have taken this into account but this is not determinative.

59. I accept there is regular communication between the appellants and their family members. However, most families communicate with each other regularly as adult members of the same family. This does not mean that there is family life in the Convention sense. I accept that there is a loving relationship but as the case law makes clear, this of itself is not sufficient."
10. Mr Wilford submitted that, properly directed, the Judge ought to have considered whether the uncontested evidence in its totality was indicative of article 8 family life.
11. In his submissions, Mr Tufan noted that the evidential burden is always on the Appellants. At [29] the Judge notes the shortcomings in this evidence and notes that there is nothing in the bundle which demonstrates the Appellants' own financial circumstances in Nepal and their expenditure and that this shortage of evidence also transfers into the precise details of the work [33] and the absence of evidence that they were working and earning and receiving funds for their work.

12. In terms of the relevant test, Mr Tufan submitted that the Judge did not come across as being confused and that he did get the “real, effective and committed support” test right. He submitted that there was no assertion that the Sponsor was not telling the truth but that there was lack of evidence. The test is a balance of probabilities and the Judge found family life was not proven, due to a lack of detail at [53] and at [54] the judge was entitled to rely on the absence of bank statements.
13. Mr Tufan submitted that there was evidence of financial support but this does not necessarily mean that article 8(1) is engaged. He sought to rely upon the judgment in AAO [2011] EWCA Civ 840 which is not a Gurkha case but at [35] found that reliance on the further element of financial dependency will involve a breach of article 8.
14. I found a material error of law in the decision and reasons of the First tier Tribunal Judge for the reasons set out in the grounds of appeal and that I would provide my detailed reasons for that decision in writing and then re-make the decision.

Decision and reasons

15. At [55] of the decision and reasons the Judge held that “*there was little to show that the relationship is one beyond the normal emotional ties between parents and adult children.*” As has been made clear in the jurisprudence specific to the Gurkha historic injustice cases such as *Rai* (op cit) that test, which is taken from *Kugathas* is not the test *per se*, but rather whether there is real, committed and effective support. At [55] and [61] the Judge repeats the *Kugathas* test. In so doing the Judge was, in my view applying too high a standard of proof to the question of whether article 8(1) was engaged and so fell into material error.
16. In this case, despite making a number of positive findings in favour of the Appellants, which are set out below, due to his misdirection as to the threshold for establishing engagement with article 8(1) I find the judge erred in concluding at [60] that the evidence does not demonstrate that the support received is real, committed and effective. In so doing the Judge failed to take proper account of material evidence and considerations and focused on those that were not material eg that they did not live in the family home all the time [53] or were not “*truly*” financially dependent upon the Sponsor [52].
17. The findings of fact made by the Judge were:
 - (i) there appear to have been some visits back to Nepal [55];

- (ii) the appellants remain living with their parents and in the family home can be indicative of a continuation of family life [57];
- (iii) there is evidence of the financial support given to the appellants [58];
- (iv) there is regular communication between the appellants and their family members and a loving relationship [59].

18. I adopt these findings of fact by the First tier Tribunal.

19. In re-making the decision I take account of the evidence before the First tier Tribunal which includes the following:

- (i) in her statement Bimala describes the “work” she undertakes as a domestic helper for a villager in the neighbouring village, where she is given food, old clothes and a place to live if she wants to and occasional cash, but it is not considered as employment. She states that their life in Nepal is *“hugely supported by the money arranged by my parents”* ... *“our reliance on our parents is essential for our livelihood in Nepal.”*
- (ii) in his statement, Rabindra, Bimala’s brother states that he goes to work in the fields; his father’s pension is the only livelihood for most of the year and provides for the major portion of their needs and that they depend on this support and that he missed their parents very much;
- (iii) in his statement the Sponsor describes that there was no work for him following his retirement from army service; he has a very little land holding, a small house made from mud and stone with a thatched roof and some livestock. He was forced to borrow money from neighbouring landlords and his children still work to pay these loans off. There was no option of settlement otherwise he would have come to the UK at that stage and his remaining children would have been born British. He confirmed that his army pension has been the source of their income in Nepal and he left authority with his middle daughter, now married, to distribute his pension amongst the children. He also states that he send a portion of his UK state pension and benefits to Nepal for his children from time to time and that he has done this by sending cash via others visiting Nepal. The Sponsor also describes the difficulties involved in visiting their village, both in terms of the journey and the length of time they are able to spend there from an immigration perspective. He states: *“Even with the Army pension in Nepal, my children and us were living on the borderline poverty.”* He describes being sad and lonely in the UK without his children and that he needs them more and

more with increasing health issues. His wife's statement is in similar terms;

- (iv) in terms of evidence, there are copies of the Sponsor's UK and Nepalese bank accounts, the latter showing monthly payments in of 61,442.81 Nepalese rupees [£380] ; money receipts dated 1 October 2021 of £400; 14 June 2021 of £307.77; 7 January 2021 of £400; 30 November 2020 of £200; 30 November 2020 of £100; 28 September 2020 of £600.59; 20 June 2019 of £361.54; 3 September 2018 of £450; 9 March 2018 of £399. There are also some documents in the Respondent's bundle which were submitted as part of the applications for entry clearance, but these appear to overlap with those in the Appellant's bundle.
20. I further take account of evidence submitted pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which comprises a short addendum bundle containing remittance receipts dated 27 April 2023 and 5 December 2022 of £150 and 9 June 2022 of £500 and screenshots from "messenger" from 24 May 2022 through to 27 August 2023.
21. In summary, there is documentary evidence dating from 2018 of financial support of the Appellants by their father and Sponsor. The Sponsor's evidence, which I accept, because the credibility of his account and that of the Appellants was not challenged at the hearing before the First tier Tribunal and there is nothing inherently implausible in the statements submitted by the family members, is that he provided financial support essentially since he left Nepal in 2012, both via remittances taken by friends and family and in the form of access to his pension in Nepal. The Appellants continue to access their father's pension and receive remittances from him from the UK. I do not find the fact that the Appellants may occasionally earn small amounts of money from work for landlords in nearby villages detracts from their financial dependency upon the Sponsor.
22. I have also taken into consideration the evidence of communication between the Appellants and their parents, which is in the form of screenshots of messenger and video calls. The evidence of this communication is less extensive than the evidence of financial support but it was expressly accepted by the First tier Tribunal Judge at [59] that there is regular communication between the appellants and their family members and a loving relationship. I also accept that there have been visits to Nepal but these are becoming increasingly difficult as the Sponsor and his wife age.
23. In *Rai* [2017] EWCA Civ 320 the Court of Appeal at [7] set out the history of the statement of changes to the Rules and policies in relation to the dependents of former Gurkhas and reviewed the authorities, including *Kugathas* [2003] EWCA Civ 31; *R ota Gurung*

[2013] 1 WLR 2546; *Ghising* [2013] UKUT 567 (IAC) and *Singh* [2015] EWCA Civ 630. Lindholm LJ held at [36]:

"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."

And at [39]:

"the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did."

24. In light of all the evidence, both oral and documentary, I find that there is family life between the Sponsor and his wife and their children, who have always lived in the family home. I consider that it has been demonstrated on the balance of probabilities that there is real, effective and committed support of the Appellants by their father and Sponsor; that family life existed at the time that the Sponsor and his wife left Nepal and has endured beyond that time.
25. It follows that, having found Article 8 was engaged, applying *Ghising* (*op cit*) the proportionality assessment should be resolved in the Appellants' favour, given the matters relied on by the Secretary of State consist solely of the public interest in maintaining a firm immigration policy and it is necessary to factor in the historic injustice aspect to the proportionality assessment. For the purposes of the statutory public interest considerations, the Judge found at [63] that the public interest considerations were neutral in this case.
26. For the reasons set out above, the appeals are allowed.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

27 September 2023