



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06726/2019 &
HU/06732/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House
And via Teams
on 26th May 2021

Decision & Reasons Promulgated
On 18th June 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR ARJUN KUMAR RANA MAGAR
and
MISS REKHA RANA MAGAR
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: *Ms K McCarthy*, instructed by Everest Law Solicitors
For the Respondent: *Ms S Cunha*, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 26th May 2021.

2. Both representatives and I attended the hearing via Teams, while the hearing was also open to attend at Field House. The parties did not object to attending via Teams and I was satisfied that the representatives were able to participate in the hearing.
3. This is the remaking of the decision in the appellants' appeal against the respondent's refusal of their applications for entry clearance to settle as adult dependent relatives of their mother, the widow of a former Gurkha soldier, Ms Padam Kumari Rana Magar (the 'sponsor'). The background to the appeals and the First-tier Tribunal's decision, which I set aside subject to preserved findings, is set out in my error of law decision promulgated on 29th March 2021, a copy of which is in the annex to this decision, and I do not repeat the background. I had preserved the First-tier Tribunal's findings at §30 of Judge Hussain's decision that:

"Before coming to this country in 2002, the appellants were members of their sponsor's household. Since coming here, she has regularly returned to Nepal to reunite with her family, including the appellants. I am also satisfied that the sponsor has financially supported the appellants from the benefits she receives in this country, and the pension she gets in Nepal. She has also remained in close contact with them. There is, in the appellant's bundle, sufficient evidence from which to infer these facts."

The contested legal issues in this appeal

4. The parties agreed that there was a single legal issue in this appeal: whether the appellants have family life with the sponsor. As per the authority of R (Gurung & Ors) v SSHD [2013] EWCA Civ 8, the historic injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the article 8 ECHR consideration and while it may not be determinative,
"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." (§42)
5. The representatives accepted that there were no public interest considerations to counter the applications (none having been raised), and were I to find that family life has been established, on these particular facts, refusal of entry clearance would be disproportionate.
6. The representatives also agreed that when considering whether family life existed, there was no requirement of exceptionality or necessity of need for adult dependent children. Instead, the test was whether there was real, effective or committed support (see Rai v The Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320).

Documents

7. The respondent provided a bundle containing the appellants' applications and previous decisions refusing entry clearance. The appellants produced their own paginated and indexed bundles, which included a supplemental witness statement of the sponsor.

The sponsor's evidence

8. Having agreed the issues with the representatives, the sponsor adopted her three witness statements. The first statement which I was asked to consider was dated 27th January 2021, which I now summarise. The sponsor had entered the UK in 2012, by which time Arjun was already 30, whilst Rekha was 27. Prior to that, the sponsor had been living with them and her youngest daughter in Nepal, who has since been granted entry clearance for settlement in the UK. The sponsor had returned to Nepal to live with them as much as she was allowed. None of the children were able to make a living on their own and she had to send them money from the UK for their expenses. She spoke to them every day using electronic communication and because of her limited education, found it difficult to use new messaging software. She continued to send money to her children both separately and collectively, around £200 in some months. The only reason that the sponsor had come to the UK was to provide better financial support for her children in Nepal.
9. The sponsor's second, more recent statement was contained in a supplemental bundle, at pages [8] to [9]. In summary, she addressed the issue I had previously identified in my error of law decision, namely a reference in an earlier determination of Judge Moore, promulgated on 24th May 2017, whereby he recorded that the sponsor had given evidence that three older siblings of her youngest daughter (later granted entry clearance) were married and lived with their own families. The sponsor confirmed in this statement that she had six children, the oldest three of whom were married whilst the three youngest siblings (including the two appellants) remained unmarried and this was the evidence she had given to Judge Moore in the third statement, which she also adopted.
10. Ms Cunha cross-examined the sponsor on her witness evidence. I make the general observation that I regarded the sponsor as credible. She was candid to confirm points which might not necessarily be in her favour such as contributions to the older married children but was also consistent about how she treated the married and unmarried siblings differently. She gave her evidence in a straightforward manner and her credibility has not, in my view, been substantially challenged in the hearing before me. She confirmed that the youngest of the daughters, Kabita, was now living and working in the UK and contributing to the UK home finances but the sponsor continued to provide financial support to her children in Nepal. She was asked why she continued to do so in circumstances when Kabita was making contributions to the UK

household. She said that this was for the UK household expenses as Kabita now had a job in the UK, whereas the appellants continued to struggle to pay for food, so the appellant continued to send remittances. The sponsor candidly accepted that she did, on occasions, pay to the three eldest married children remittances but she added that they were separate remittances, and I was referred to page [22] of the appellants' bundle before the First-tier Tribunal, which was consistent with the different, lesser and less frequent amounts paid to the married children and also, in the supplemental bundle, evidence of remittances between December 2020 and May 2021 by reference to specific children. The sponsor gave evidence, which I find was consistent with the documented remittances, that the occasional remittances to the eldest married children were when they were occasionally out of work. The sponsor also gave evidence, unchallenged, that she spoke to the appellants on a daily basis, whereas she spoke to the older married siblings far less frequently. She had arranged all the marriages of the eldest children but had been unable to arrange marriages for the youngest three because of the family lacked money. The unmarried children in Nepal lived separately from their married siblings.

The respondent's closing submissions

11. Ms Cunha indicated that the respondent continued to dispute real, effective or committed support because, in essence, the level of support to the two appellants was no different qualitatively from the level of support to the three married children. The suggestion that she was unable to arrange marriages for the two younger children was undermined by the fact that she was able to financially support them and there was a lack of evidence that the appellants were unmarried. Also, because the sponsor was getting financial support from Kabita, in reality, Kabita was paying the financial support to the two appellants. Whilst there undoubtedly existed family life in a general, non-legal sense, there was not such distinguishing support for the purposes of article 8 ECHR.

The appellant's closing submissions

12. Ms McCarthy relied on her skeleton argument and added that it was simply not correct that there was no differential treatment. In particular, the sponsor indicated that she had sent money more frequently and the need to send remittances for the other children was only on particular occasions such as their lack of work. In addition, there was a greater level of contact and the two appellants continued to live unmarried in the family home in Nepal, where they had lived with the sponsor before she came to the UK. In that context, their family life clearly engaged article 8. The suggestion they were not married, and there was an absence of evidence for this, for example some sort of letter from the local municipal authority which sometimes can be adduced in such cases, was an unfair criticism where the respondent had not disputed that the two appellants remained unmarried. In the circumstances, no adverse inference could be drawn from the lack of production of a document and instead the appellants have produced the remainder of the documents one

might normally expect, such as the family roll and the sponsor's witness evidence. Finally, the suggestion that Kabita was in fact providing support to the appellants and not the sponsor was unsustainable. The sponsor had never suggested that she was financially dependent on her daughter in the UK and indeed she had the benefit of a UK pension. All she had said was that Kabita, who was now working, made contributions to the UK household finances, which was an entirely different matter from somehow indirectly sponsoring and paying for the two appellants.

Findings of fact and conclusions

13. I find, without hesitation, that the appellants enjoy family life with the sponsor so as to engage article 8 ECHR. I do so for a number of reasons. The first is the clear and straightforward oral evidence given by the sponsor, who was cross-examined by Ms Cunha, which was consistent with the documentary evidence, of the difference in treatment between the two appellants and their older married siblings, in terms of financial remittances and regularity of contact. Second, the sponsor's evidence has to be set in the context of the preserved findings which were of cohabitation prior to the sponsor coming to the UK; regular remittances by the sponsor to the appellants; regular and frequent contact; and also visits by the sponsor to the appellants when she is able to do so. Third, the continuing payments, on occasion, to the married siblings, was explicable where it was because of a particular need, such as a loss of a job. In contrast, the sponsor's evidence about the reasons for her remittances to the appellants were because they relied on her entirely for their accommodation and basic living needs. I also accept the force of Ms McCarthy's submission that the fact that the younger sibling, Kabita may be making a contribution to the UK household is not the same thing as the sponsor accepting that she was somehow dependent on Kabita, which would then in turn mean that the appellants were indirectly dependent on Kabita. Indeed, it is common sense that upon Kabita entering the UK and working and living in the UK home of the sponsor, she makes a contribution to the household finances. However, the remittances sent by the sponsor to the appellants are of a long-term nature and the recent additional contributions made by Kabita to her mother do not begin to support a contention that somehow it is Kabita on whom the appellants are financially dependent. Finally, the sponsor was never challenged on her evidence that the appellants remain unmarried.
14. The representatives had agreed that in these particular circumstances, were I to find that family life did exist, there was no countervailing public interest reason which would mean that the refusal of entry clearance remained proportionate and that the respondent's decisions to refuse entry clearance would be disproportionate. As a consequence, the respondent's decisions to refuse entry clearance breach the appellants' article 8 rights and are not upheld. The appellants' appeals succeed.

Decision

15. The respondent's decisions to refuse the appellants' applications for entry clearance are not upheld. The appellants' appeals succeed.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: 7th June 2021

***TO THE RESPONDENT
FEE AWARD***

The appeals have succeeded. I regarded it as appropriate to make a fee award of £140.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: 7th June 2021

ANNEX: ERROR OF LAW DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/06726/2019
& HU/06732/2019 ('V')

THE IMMIGRATION ACTS

**Heard at Field House
And via Skype for Business
On 25th March 2021**

Decision & Reasons Promulgated

On

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**MR ARJUN KUMAR RANA MAGAR
and
MISS REKHA RANA MAGAR
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellant:

Ms K McCarthy, Counsel, instructed by Everest Law Solicitors

For the respondent:

Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 25th March 2021.
2. Both representatives and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.
3. This is an appeal by the appellants against the decision of First-tier Tribunal Judge M B Hussain (the 'FtT'), promulgated on 14th April 2020, by which he dismissed the appellants' appeals against the respondent's decisions dated 20th February 2019 to refuse the appellants' applications for entry clearance to settle as adult dependent relatives of their mother, the widow of a former Gurkha soldier. The appellants are siblings, born on 27th April 1981 and 13th December 1984 respectively. The respondent refused the applications on the basis that both were over 30 years' old at the date of the application so did not meet the requirements of the Immigration Rules or the relevant discretionary policy; and the respondent did not accept that there was family life between the appellants and the sponsor for the purposes of article 8 ECHR, noting the authorities of Kugathas v SSHD [2003] EWCA Civ 31 and Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC). The refusals were maintained on Entry Clearance Manager review on 8th September 2019.

The FtT's decision

4. The FtT identified at §28 that were he to find that family life did exist between the appellants and the sponsor, this would be determinative of the article 8 claims, given the historic injustice reflected in the applicable case law. Whilst noting at §30 that the appellants had been members of the sponsor's household prior to her coming to the UK in 2002, and that she had regularly returned to Nepal to visit them, had maintained close contact, as well as providing them with financial support, at §31, the FtT took into account that any dependency on the sponsor was by choice and there was no reason why the appellants could not seek independent lives, as their older siblings had done. At §32, the FtT concluded that there must "*surely come a point*" when adult children would have independent lives themselves and there was no reason why the appellants should not seek such independent lives. The FtT rejected as relevant, the fact that the appellants' younger sibling had been granted entry clearance, because she met the age requirements of Annex K of the Immigration Rules. That was not true of the appellants because of their ages (the younger sibling was under the age of 30).
5. Having considered the evidence as a whole, the FtT dismissed the appellants' appeals.

The grounds of appeal and grant of permission

6. The appellants lodged grounds of appeal which are essentially:

- 6.1. ground (1) - the FtT had impermissibly applied test of necessity in relation to dependency as opposed to a requirement of real, effective or committed support (see Rai v The Entry clearance Officer (New Delhi) [2017] EWCA Civ 320). The FtT had apparently accepted at §31 that there was dependency, but then sought an additional requirement of necessity;
 - 6.2. ground (2) - the FtT had impermissibly applied a higher standard for adults aged over 30 when comparing the appellants with their younger sibling;
 - 6.3. ground (3) - the FtT's conclusion that there was no family life was irrational, with unchallenged evidence of cohabitation until the sponsor's move to the UK, and after that, regular visits by the sponsor to the appellants; the appellants' financial dependency on the sponsor, and their lack of work; their reliance upon her for accommodation in her family home in Nepal; and the accepted emotional ties between all three.
7. First-tier Tribunal Judge Fisher granted permission on 17th June 2020. The grant of permission was not limited in its scope.

The hearing before me

8. I identified and agreed with the representatives the issues and at the very beginning, Mr Whitwell conceded (in my view realistically) that there were material errors in relation to grounds (1) and (3). He did not make a concession in respect of ground (2), as Annex K made a permission distinction on grounds of age but accepted that the other two errors made the FtT's finding that there was no family life between the appellants and the sponsor unsafe, and the FtT's decision should be set aside.
9. In setting aside the FtT's decision, the representatives agreed that I should preserve the FtT's findings at §30, which are as follows:

"Before coming to this country in 2002, the appellants were members of their sponsor's household. Since coming here, she has regularly returned to Nepal to reunite with her family, including the appellants. I am also satisfied that the sponsor has financially supported the appellants from the benefits she receives in this country, and the pension she gets in Nepal. She has also remained in close contact with them. There is, in the appellant's bundle, sufficient evidence from which to infer these facts."

Disposal and remaking

10. By reference to the paragraph 7.2 of the Senior President's Practice Statement, given the narrowness of the issues, both representatives agreed that it was appropriate that I retain the remaking of the appeal in the Upper Tribunal. Both were initially content that I did so this afternoon based on submissions. However, an issue arose in consequence of a document in the appellant's bundle which was provided to the First-tier Tribunal but also provided to me for the purposes of this appeal. That document was a decision of First-tier Tribunal Judge Moore, promulgated on 24th May 2017 in respect of the appellants' younger sibling Ms Kabita Rana Magar. At §12 of the decision, at page [137] of the appellants' bundle, Judge Moore recorded:

"The mother gave evidence that the appellant was her youngest daughter and the child that she was closest to. Whilst there were three older children than the appellant, they were all married and lived with their own families. The appellant was totally dependent on the mother ..."

11. In the circumstances, Ms McCarthy indicated to me that she was not in a position to address the issue of whether the appellants might be married with their own families, not least because she did not have before her kindred records which would indicate the marital status of the two appellants, nor did we have before us the witness statements that were before Judge Moore. In the circumstances, she invited me to adjourn the remaking hearing and there was no objection by Mr Whitwell. Accordingly and not going beyond the preserved findings, I regarded it as appropriate to adjourn the remaking hearing. I therefore gave the following directions for remaking:

Directions for Resumed Hearing

12. The remaking hearing will be listed for a hearing to be held via Skype for Business at Field House, lasting two hours, with a Nepalese interpreter, on the first available date, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeals.
13. The appellants shall no later than **4pm, fourteen days prior to the resumed hearing**, file with the Upper Tribunal and serve on the respondent's representative a consolidated, indexed and paginated bundle containing all the documentary evidence on which they intend to rely. Witness statements in the bundle must be signed, dated and contain a declaration of truth which will stand as the evidence-in-chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.
14. The respondent shall have leave, if so advised, to file any further documentation she intends to rely on and in response to the appellant's evidence, provided the same is filed no later than **4pm seven days before the resumed hearing**.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to the preserved findings at §30 of the First-tier Tribunal's decision. The remaking of the appeal will be retained in the Upper Tribunal.

No anonymity direction is made.

Signed *J Keith*
Upper Tribunal Judge Keith

Date: 26th March 2021