IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000718
UI-2024-000719
First-Tier Tribunal Nos: HU/55934/2023
LH/05476/2023
HU/55938/2023
LH/05474/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29th April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

BHUPAL RAI
MUNA RAI
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mrs T Srindran of Counsel instructed by SAM Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 10 April 2024

DECISION AND REASONS

Introduction

1. The appellants are siblings and citizens of Nepal born on 26 August 1985 and 2 February 1987 respectively. The appellants applied for entry clearance as the adult dependent relatives of their father and sponsor, Mr Jai Prasad Rai, a Gurkha soldier. The applications, both made on 6 February 2023, were refused by the respondent on 21 July 2023. The appellants' appeals against those decisions were dismissed on 19 January 2024 by First-tier Tribunal Judge Suffield-Thompson ("the judge") following a hearing on 18 January 2024.

2. Permission to appeal was granted by Judge of the First-tier Tribunal T Lawrence on 26 February 2024 on grounds 1 and 2 only, and Ms Srindran confirmed before

me that there was no challenge to the refusal of ground 3. Permission was granted on the basis that it was arguable that the First-tier Judge, in assessing whether family life existed between the appellants and their sponsoring parent, had erred in their assessment of emotional and financial support as a separate factor or in the alternative that the judge had erred in their assessment of emotional support.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law and if so, whether any such error was material and thus whether the decision should be set aside.

4. In the grounds of appeal and in oral submissions by Ms Srindran it was argued in short summary for the appellants as follows:

5. The judge referred in the decision to the judgment of the Court of Appeal in **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**. Lord Justice Sedley agreed that there was no absolute requirement of dependency, in the economic sense, and that if dependency was read down as meaning "support" in the personal sense and if one adds, echoing the Strasbourg jurisprudence, real or committed or effective to the word support then it represented in Lord Justice Sedley's view, the irreducible minimum of what family life implies.

6. It was argued that the judge erred in apparently requiring that the appellants demonstrated emotional dependency in addition to financial reliance, rather than deciding whether the irreducible minimum of real, committed or effective support was established in the round on the facts accepted by the judge.

7. It was argued that the judge failed to consider dependency as a whole, when she accepted financial dependency existed, having assessed this from [46] to [50] and found that the appellants were financially reliant on the sponsor.

8. It was argued in ground 2, that the judge materially erred in their approach to the question of whether family life existed between the appellants and their sponsoring parent, in requiring emotional support that was exceptional by comparison with other families, rather than considering whether such emotional support reached the threshold of the irreducible minimum described by Lord Justice Sedley in **Kugathas**.

9. The judge considered emotional support at [53] and maintained the previous judge's findings, with the appellants having been previously refused by the respondent on 6 May 2022 and their appeals against that refusal being dismissed by Judge Norris on 23 July 2021. The judge considered the previous judge's findings that there was no evidence of travel, but it was submitted that the judge failed to give any consideration to the sponsor's statement explaining the reason for that lack of travel.

10. It was further submitted that the judge improperly rejected the telephone call evidence as proof of emotional support stating that there did not appear to be greater commitment between the sponsor and the appellants than their older children. It was argued that this failed to differentiate the different circumstances between the appellants and the older children who were married. It was submitted the judge was wrong to reject the evidence that showed short

duration calls and many missed calls, and it was argued that the judge failed to consider the cultural background.

11. Ms Srindran argued that the judge had therefore elevated the threshold in **Rai [2017] EWCA Civ 320** when assessing emotional dependency, with references to paragraphs 36 and 37 of **Rai** which established it was not necessary to find exceptionality and that real, effective or committed support did not have to equate to something exceptional and extraordinary.

12. In oral submissions Ms Srindran reiterated that the judge had accepted financial support at [44] to [50] of the decision which had departed from the previous judge's decision and moving on from those findings, had then erred in her approach to emotional support in assessing travel and communication evidence.

13. It was submitted that there were reasons why the sponsor had not travelled, including Covid and the sponsor's diagnosis with cancer which was set out in the sponsor's statement and the judge was wrong in their approach to this in considering the evidence of visits to be inadequate.

14. Although Ms Srindran conceded that the weight to be attached to the evidence was a matter for the judge, she maintained that there was a reasonable explanation why there was no travel and there was a reasonable explanation for the evidence of communication that was before the judge. Ms Srindran submitted that the appellants met the minimum requirements for real, effective or committed support and the judge failed to apply the jurisprudence correctly.

15. Although there was no Rule 24 response on behalf of the respondent, in oral submissions Ms Nolan argued in short summary as follows:

16. Read as a whole the determination by the judge applied the jurisprudence including in **Rai** at paragraph 19 which underlined that Article 8(1) and the question of whether an individual enjoys family life, is one of face and depends on a careful consideration of all the relevant factors of the particular case is fact-sensitive. At paragraph 20 of **Rai**, relying on Sir Stanley Burnton's observations in **Singh v Secretary of State for the Home Department [2015] EWCA Civ 630**, the facts based approach was approved with it noted that 'the love and affection between an adult and his parents or siblings will not of itself justify a finding of family life'.

17. Ms Nolan submitted that the judge had applied the correct approach. The judge had found financial dependency, but it was open to the judge to consider emotional dependency, with the judge making findings at [53] in relation to the lack of evidence including that there was no evidence to show further visits and that if it had existed this would have been included in the bundle.

18. In relation to contact the judge assessed this including at [56] and based on the evidence of communication found that there was no evidence of any additional connection between the appellants and the sponsors over and above the normal contact between the whole family including other siblings.

19. The judge found at [57] that there was no doubt that the family missed each other, which is normal when families live apart, but took into consideration that

the appellants had lived part from their parents 'for many years'. The judge also found that the appellants had formed their own family unit of two.

20. Drawing all this together at [58], the judge reached the conclusion that this was insufficient even with the accepted financial support to amount to real, effective or committed support. Ms Nolan submitted that the judge had applied the correct case law having set this out at [34]. Ms Nolan further submitted that the judge had not improperly separated financial from emotional support, and it was open to her to address the financial support issue first, because of **Devaseelan** and that this was not a separation, but rather the judge dealing with the issues before her in order, and the judge had then tied all of her findings together at [58]. Ms Nolan emphasised that **Rai** confirmed that the consideration of whether there is family life is highly fact-sensitive and it was open to the judge to reach the findings she did.

21. In reply Ms Srindran submitted that the judge should not have found the sponsor's inability to travel to be adverse to her findings on emotional support, and in terms of contact there was evidence before the judge at the respondent's bundle of missed calls. The sponsors were illiterate which meant that this was the level of their contact and the judge ought to have taken this into account. In terms of other siblings in the family, Ms Srindran again submitted that the key difference was that these were not married and the support that would have been given to the appellants would have been very different which goes to the real, effective or committed support. It was Ms Srindran's submission that the judge just stating the case law was not enough.

Conclusions – Error of Law

22. The respondent did not accept that the appellants had established family life with the sponsor. The burden was on the appellants to establish that family life exists. I am satisfied that the judge correctly directed themselves on the tests to be applied, including having set out at [33] that this was a historical injustice case, setting out Article 8 at [34] and setting out at [35] the questions to be addressed in **Razgar [2004] UKHL 27 2004.** At [36] the judge then considered the case law including of **Rai v Entry Clearance Officer [2017] EWCA Civ 320** and **Ghising** regarding the engagement of the right to family life.

23. The judge also considered **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**, at [37] and considered the impact of Strasbourg jurisprudence including at [38]. It was not a case therefore, as submitted by Ms Srindran, of the judge simply citing the relevant case law.

24. The judge went on at [40] to set out case law in relation to the historic injustice and considered **Patel & Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17** at [41]. The judge at [58] identified the relevant test.

25. Although I note that the judge incorrectly stated the word "and" in the test, which is 'real, committed, or effective support' there was no ground raised in relation to this error. In any event, having considered this myself, I am not satisfied that any error is material. It is clear from a fair reading of the judge's decision that she properly directed herself and was aware that the appellants had to show real or effective or committed support between them and the sponsor

over and above normal emotional ties between a parent and adult child (as highlighted by the judge at [45]).

26. The hearing before the First-tier Tribunal was conducted by CVP with the sponsor not attending but his wife giving evidence due to the sponsor's illness. There was no application to adjourn.

27. The judge gave adequate reasons for finding in this case, that although the appellants had established financial support, on the particular facts, considering all the evidence holistically this was insufficient to amount to real, effective, or committed support.

28. The judge was aware of the contents of the witness statements, including having quoted from the sponsor's witness statement including at [53] and [51] and would have been aware therefore of the stated reasons for the lack of visits. It was open to the First-tier Tribunal to attach the limited weight it did to the evidence of contact for the reasons given, including taking into consideration the evidence that the sponsors are in contact with all their adult children, including those that are married.

29. The judge was required to assess whether the dependency went above normal emotional ties, and it was open to the judge to assess this on the available evidence before the Tribunal, including applying **Devaseelan**. The judge took into account at [43] that there was a previous decision in the appellants' cases in 2021 and that there was very little new evidence since that decision. The fact that the judge used the word "compelling" is not fatal to the judge's overall findings which disclose that the judge was not applying an elevated test.

30. The judge set out at [45] that in considering whether the ties went beyond normal emotional ties, the judge considered all the oral and documentary evidence including taking into account the age of the appellants (who were 38 and 36 years old) which was a relevant factor, with the judge also considering with whom they were living, and the presence or otherwise of other close relatives, telephone records, financial and employment documentation. The judge's findings, at were consistent with the guidance in **Rai** including in finding that these appellants' factual circumstances undermined the existence of family life between the appellants and the sponsor.

31. The judge gave adequate reasons including at [57] why, notwithstanding the accepted evidence of financial support, this was insufficient in this particular case to amount to real, committed, or effective support including taking into account that there was no evidence that either appellant had any personal or serious health issues needing greater support than any other adult of their age living away from their parents, and in finding that the appellants had formed a family unit of two in living together for many years away from their parents.

32. The grounds of appeal are not made out.

Decision

33. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

M M Hutchinson

Deputy Upper Tribunal Judge Hutchinson
Immigration and Asylum Chamber

19 April 2024