IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002332
UI-2024-002334
First-tier Tribunal:
HU/62714/2023
HU/62175/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 August 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

Mr GANESH GURUNG (1)
Mr SANTOSH GURUNG (2)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant at FH 22.7.24 Hearing: JAM GAZZAIN of counsel
For the Respondent: Mr Wain, a Home Office presenting officer

Heard at Field House on 22 July 2024

DECISION AND REASONS

Introduction

1. The two appellants before the Upper Tribunal (UT) are the adult children of Kamar Balladur Gurung and Kurmari Gurung, the sponsor, who were born on 1st January 1948 and 25th of July 1955, respectively.

2. Santosh and Ganesh's appeals were heard in Manchester on 2.4.24 and the decision was reached on 3 April 2024. FTT Judge Turner (the judge) in his/ her decision promulgated on 3 April 2024 decided to dismiss their appeals on human rights grounds. They appeal to the UT with permission of FTT Judge Davison against that decision.

3. Judge Davison considered it to be at least arguable that the appellants had lived "with their father (the sponsor) prior to her departure from Nepal a relevant factor in the assessment". There appeared to Judge Davison to be inadequate consideration of this aspect of the claim in the determination. In addition, it was at least arguable that the Judge misapplied the test of "real or committed or effective" support and arguably misapplied the test referred to the leading cases of **Kugathas [2003] EWCA Civ 31** at [17] and **Rai [2017] EWCA Civ 320** at [17]. That phrase had been determined to be conjunctive, as indicated by his use of the word "and" between the three adjectives whereas they should have been read disjunctively (see e g at paragraph 17 and at page 17). To construe the test in that way risked applying too high a test when assessing the engagement of family life for the purposes of article 8 of the ECHR.

4. In granting permission to appeal Judge Davison pointed out that the appellants may have lived with with the sponsor prior to their departure from Nepal.

5. Standard directions were given and a consolidated electronic bundle was filed which included the material documents was prepared for use before the UT.

Background

6. The Gurung firmly are Nepalese. Mr Kaman Bahadur GURUNG -the father and a former British Army Brigade of Gurkhas solder- died in 2007. Their mother k, the sponsor, continued to live in Nepal until 2022 when she was given ILR in the UK.

7. SANTOSH GURUNG – was born on 26.2.79 and Ganesh GURUNG – younger son-live in a property owned by the sponsor in Nepal.

8. In her application sponsor asserted that her sons had "not formed any independent life and are still financially/emotionally dependent on me and is financially wholly dependent on funds sent from me and their

emotional ties with me are very strong" (paragraph 4 of capital of the sponsor's application at PPD at page 152 of the consolidated bundle).

9. A certain amount of evidence of remittances of money to Nepal for the support of the sponsor's two adult sons was supplied (see for example page 156).

The hearing

10. At the hearing I heard submissions from Mr Gazzain who said that:

    (i) The judge got the maintenance test wrong;

    (ii) The judge to deal adequately with the evidence in this case and reached erroneous conclusions.

(i) Ground 1 – the test for maintenance

11. He said that it was accepted by the respondent that there was an error in the judge's decision but not that the error was material. He referred me to various pages in the 187-page bundle. He submitted that the correct test was: whether there was "real, effective or committed support" for the appellants

12. He referred me to page 11 of the bundle where, at paragraph 16 ii) of the decision the judge made the first of a number of mistaken references to the correct test. I was also referred to paragraph 32 and 33 where similar incorrect references appear. I also noted that the same words I used (i.e. including the word "and" rather than the word "or") in paragraph 17. It was accepted that if the judge had used the word "and" the error would have needed to be corrected but he did not do so.

13. On the question of materiality, he said the issue before the tribunal was whether the respondent's decision was justified under article 8. To this end he wished to refer me to an unreported case of **Sherpa UI-2023-004562** Before DEPUTY UPPER TRIBUNAL JUDGE JARVIS. Although that case was unreported, Mr Gazzain relied on it as, he said, that case involved the test to be applied to the question of maintenance. The respondent pointed out that an error in a reference to the standard required, had been called for. In that case it was regarded as sufficiently material by the respondent to concede to the setting- aside by consent of the decision of the First-tier Tribunal.

14. I indicated to the representatives that I would decide whether to consider this case when I came to make my decision. Neither party's

representative objected to that course and it was inevitable that I would at least read the decision before making up my mind as it was reported on the Upper Tribunal's website. I have now read that case in full. However, Mr Wain indicated that this tribunal was not bound by concessions in a different case and what was material or immaterial differ from case to case.

15. Mr West, who was due to appear in a later case in my list, explained that paragraph 11.2 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the Practice Statement) contained the relevant guidance on when it was appropriate to refer to an unreported case. It depends on whether the case contained a proposition of law which could not be found in any higher reported case. I was not provided with a copy of the practice statement in question so carried out my own research. This revealed the Guidance below:

> 11.2. An application for permission to cite an unreported decision or judgment must: (a) include a full transcript of the decision or judgment; (b) identify the proposition for which the decision or judgment is to be cited; and (c) certify that the proposition is not to be found in any reported decision or judgment.

16. I have concluded that none of the above are met. Hence it will not be appropriate to make further reference to the unreported case relied on.

(ii) Ground 2 – whether there was in this case real or effective or committed support

17. I was referred to paragraph 15 under the heading ground 2 where the appellant refers, inter alia, to **Mobeen v Secretary of State for the Home Department [2021] EWCA Civ 886**. He said that that case supported the view that cohabitation was a strong indicator of family life.

18. Secondly, he said that remittances were sent to Nepal (from the UK) and this was not essentially in issue. He suggested that that there was, here, effective maintenance. Indeed, the judge appeared to have accepted this (at paragraph 33).

19. Thirdly, I was referred to the paragraph 38 of the decision of the Court of Appeal's decision in **Rai** where Lord Justice Lindblom referred to the Upper Tribunal having concentrated excessively on the appellant's parents' decision to leave Nepal and settle in the UK, without focusing

on the practical and financial realities entailed in such a decision. This was allegedly another error committed in this case, Mr Gazzain said.

20. I was also referred to paragraph 39 in **Rai** where the court commented on the Upper Tribunal's error in focusing on the voluntary nature of the departure of the sponsoring person rather than on the extent of family life established at the point of departure. In particular, Lindblom LJ said the question 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.

21. Fourthly, I was referred again to the case of **Mobeen** at paragraph 46, which is summarised at paragraph 21 of the judge's decision. The judge appears to have accepted there that the necessary dependency had been established within the framework set by that and other cases.

22. Mr Gazzain then dealt with paragraph 16 of his grounds – PDF page 6 of the bundle -which criticises paragraph 31 of the decision. There, the judge suggests the absence of more than normal emotional bonds between the sponsor children, although money remittances do take place. This was, in the judge's view, not in any way compelling. The sponsor had not claimed that her daughter was dependent on her but is possible that the remittances were a gift. Paragraph 21 was incorrect in suggesting that remittances were simply a gift. Mr Gazzain said they were more "to do with dependency". Paragraph 33 was one of paragraphs criticised earlier in his submissions

23. It was therefore submitted that ground 2 ("failing to take into account relevant considerations and/or taking into account irrelevant considerations in assessing article 8 (1) family life between the sponsor and the appellants"). Was also made out and the matter should be remitted to the First-tier Tribunal, given the judge's application of the wrong test in the case.

24. Mr Wain said that any typing errors or other slips in the decision one way or another, did not go to the heart of the matter. It would not, therefore, warrant setting aside the decision as these were not material errors. The judge had recognised in paragraph 12 of his/her decision the true nature of the test by reference to **Kugathas**, indicating there was

no artificial cut-off in terms of the age of the applicant. The test was highly fact sensitive and this judge had applied the test to these facts.

25. According to paragraph 13 of **Rai**, was no requirement to exceptionality in applying the test. There had to be more than "normal ties of affection" between parent and child or other relative. I was referred to paragraph 13 of **Rai** and paragraph 30 **Mobeen** . It was necessary to ask whether the support given by the sponsor in the UK was effective, real or committed support. The errors in this case were immaterial and the decision should be allowed to stand, therefore.

26. With regards to the other errors alleged, Mr Wain said by reference to paragraph 25 et seq of the decision, where the issue of cohabitation had been referred to, and cited paragraph 42 of Gurung. The issues of when and whether the appellant could have settled with the parents when they came to the UK was properly one for the judge hearing the evidence. It was not for the appeal judge to re-consider this in the absence of clear errors.

27. Cohabitation was an important factor which the judge had considered.

28. At paragraphs 26-27 the judge had dealt with the education and employment of the appellant and concluded that they were both educated individuals who have been able to secure employment in Nepal over a lengthy period of time. He also referred to paragraphs 31-33 whether the judge had concluded that the money remittances were not indicative of anything more than normal emotional bonds between the sponsor and her adult children.

29. He then drew attention to the nature of the **Rai** decision, which the judge had considered at paragraph 13 of his decision.

30. Mr Guzzain responded to say that he relied on the skeleton drafted by A Childs in the FTT and pointed out that the judge clearly considered this in paragraph 21 but ultimately decided to reject the argument that financial remittances to the appellants were sufficient here to support the continued existence of family life between the sponsor and her two adult children.

31. He referred to Judge Davison's grant of permission to appeal and the reference to the cases of **AA v UK (Application No. 8000/08)** and **Ghising**. He said that, although there was a different approach to adult children in some cases, overall each case depended on its own facts.

32. The judge had failed to give adequate reasons and mistook dependency for the test he/she was dealing with, which was either there was family life between adult sons and their ageing mother.

33. There was a further response from the respondent to the effect that **Ghising** , **AA Gurung** had been referred to at paragraph 10 of the judge's decision, where he /she indicated the fact or not of whether the adult appellant lived with his supporting parent or parents. This was only one factor to take into account. The important issue of proportionality had been dealt with in paragraphs 25-27 of appellant's submissions were also referred to. Finally, I was referred to paragraphs 37, 38, 39 40 , 41 and 42 of the submissions on behalf of the appellants in the FTT, which were clearly considered by the judge. However, Mr Wain acknowledged that referring to the law and applying it were difference.

34. At the end of the hearing, I reserved my decision as to whether there was an error of law and, if so, whether it was appropriate to interfere with the decision of the FTT.

Discussion

35. The application of the test to be applied when assessing the engagement of family life in the context of Ghurka cases was addressed in paragraph 30, where the judge refers to **Mobeen**, having been referred to that case by the appellant's representative, Mr Gazzain. In the passage cited (from paragraph 46 of that case) the judge's attention is drawn to the requirement of "effective, real or committed support" as an indicator of family life. That passage went on to say: "The extent and nature of any support from other family members will be relevant, as will the existence of any relevant cultural or social traditions. Indeed, in a case where the focus is on the parent, the issue is the extent of dependency of the older relative on the younger ones in the UK and whether or not dependency creates something more than normal emotional ties".

36. It is clear from this case and from **Rai** that the test was "effective, real or committed support" as was set out in extract from the **Mobeen** case quoted in paragraph 30 of the judge's decision. It is of concern therefore that in paragraph 32 to the judge described a "3 stage test" and made repeated references to the test being whether there was family life "and real and effective support".

37. The reference to a "3 stage test" and the repeated reference to "and" at numerous points in the decision, suggest that the judge did indeed become confused as to the correct test. Effectively, the judge seems to have sought effective, real and committed support when in fact one of those alternatives would help to support the claim to family life. This has to be seen in the context of the decision which does not make any explicit reference to the correct test, other than by reference to authorities such as the **Mobeen** case in the passage above, but repeatedly referred to the wrong test. This is unsurprising given that the test itself appears to have been reformulated over the years so that at the time of the **Kugathas** case it was indeed "effective, real and committed" support that was looked for.

38. There is no doubt that the words "effective", "real" and "committed" ought to be read disjunctively as alternatives – hence the use of the word "or".

39. The lack of explicit reference to the correct test in the context of his/her deliberations on the evidence are a cause for concern. Given his/her comprehensive rejection of the credibility of the appellants' case, there would have been little difficulty in upholding the judge's decision were he/she to have done so. But an appellate tribunal finds itself in a difficult position where, as here, the judge appeared to apply the wrong test and not simply misquoted it, despite the cogency of his/her fact findings.

40. There is also potential confusion in the decision as to the concept of material financial support and the concept of dependency. Thus, for example, the judge refers to the remittances to the sponsor's daughter is not being indicative of a dependent relationship whereas in fact the contended relationship between the adult appellants and the sponsor was not one of dependency but one of "family life". This was in the context of adults in the country of origin and the sponsoring person being in the UK.

41. The conclusion that any payments made from the sponsor to the appellant's was not indicative of any more than normal emotional bonds which exist between mother and son may well be the correct conclusion but it was reached without giving proper consideration to the correct test.

42. In the circumstances, the UT has little alternative but to conclude that there was an error of law and furthermore that it was material to the outcome of the appeal.

Conclusion

43. In circumstances where there is a material error of law, I can see little alternative but setting aside the original decision of the FTT. I considered retaining the matter in the UT but since fresh fact findings will be required on updated evidence applying the proper test, it seems this matter must be remitted to the FTT for a fresh hearing before a judge other than Judge Davison.

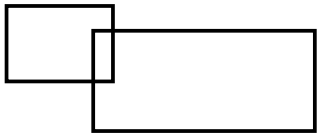
Notice of Decision

The appeal is allowed.

The decision of the FTT is set aside.

The appeal is remitted to the FTT for it to make directions leading to a re-hearing of the appeal before a judge other than Judge Davison.

No anonymity direction is made.

Signed  Date 7th August 2024

Deputy Upper Tribunal Judge Hanbury