Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00875/2020
HU/00876/2020

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On 23rd November 2021	**On 10th December 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS BHOJ KUMARI GURUNG
MSTR BIKKI GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J Khalid, instructed by Goulds Green Chambers
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, the daughter of a former Gurkha soldier born on 14th January 1982 and her son, born on 1st January 2014 (the grandson of the former Gurkha soldier) appeal against the decision of First-tier Tribunal Judge Raymond when he dismissed their appeal against the decision of the Entry Clearance Officer dated 8th November 2019 refusing entry clearance to join the sponsor, father/grandfather and his spouse, who in May 2012 had settled in the UK under the concession of 2009 regarding Gurkha soldiers discharged from the British Army prior to 1997.

Grounds for permission to appeal.

2. The grounds of application for permission to appeal to the Upper Tribunal submitted that "things would have been entirely different for the appellants if their father had been permitted to settle in the UK at the time of his discharge from the army" and it was submitted that the first appellant had married in April 2012, but her marriage had broken down such that their final divorce was granted in August 2019. The grounds submitted that "both mother and son had then reversed (sic) to the main family home and began to live with the parents/grandparents with all types of support being received from them". It was submitted that the judge had erred in many instances. The Tribunal had been presented with the appellant's divorce order issued by the Kaski District Court and it was submitted that Lamjung is where the sponsor (sic) and his whole family had lived and continued to be their main family home "as of now". The appellants and the first appellant's brother Mohan, who had also applied for entry clearance, had been living there. The judge, the grounds stated, found that Beshisahar was found to be a different place, but it was within Lamjung district and where the family home was located.

3. It was submitted that it was an error to find at paragraph 15 that "even if the historic injustice had been engaged under Article 8, it could not be seen that this had stopped the first appellant developing her own 'normal' life". The historic injustice had restricted the sponsor to settle in the UK at the time of his discharge from the army in 1985 and he would have applied for settlement then, which he confirmed at paragraph 3 of his witness statement. The sponsor's support to the appellants is real, committed and effective and the judge had found unconvincing the evidence of the money remittances and the number of visits he had made to provide support. The family life between the appellants and the sponsor had existed and continued to exist and the practice of married children in Nepal reverting to the main family home to live together with the parents once the marriage broke down was not uncommon.

4. The judge made an error of law which materially influenced the adverse outcome of the appeal.

5. Permission was granted by First-tier Tribunal Judge Holmes, who proceeded on the basis that "arguably the first appellant enjoyed family life with her parents as an infant" and the sponsor would have migrated to the UK had he been permitted to do so and there was no suggestion that this family life had ceased prior to the appellant's marriage in 2012. Thereafter the sponsor migrated with his wife to the UK. There was no evidence to contradict the evidence that if the Immigration Rules had then permitted it the first appellant would have accompanied the sponsor and his wife to the UK and the judge erred arguably in focussing solely on the position as it was in May 2012. Her marriage failed and there was a difference between the date of the failure of the marriage and the date of its legal termination by divorce and he should have concentrated on the failure of the marriage from the date of separation in 2015. He stated the only question was the extent of the financial support.

6. At the hearing before me Mr Khalid submitted that the judge had conflated the questions of real, committed and effective support and thus issues in relation to the existence of family life with proportionality. There were remittances as set out and also the appellant's sponsor left money when he visited her. There was also a suggestion that the appellant had access to his pension and there was regular communication between them. The judge did not focus on the evidence of emotional and financial support. In 2012 the sponsor settled in the UK, and it was the cultural norm for adult children to live with their parents and in similar situations of divorce, go back to the family home and the judge failed to take this into account. The appellant married one month before the sponsor went to the UK and there was family life until that point. It was accepted in **Jitendra Rai v Entry Clearance Officer [2017] EWCA Civ 320** that it was not necessary for the appellant and sponsor to be in the same country. Here, the financial support could be described as committed. There indeed was evidence that she had stated that she had not worked and thus the judge was wrong on that basis.

7. Mr Clarke submitted there was no material error of law and although the Rule 24 response indicated that there may be an error of law in relation to historic injustice it was a question of whether family life was in issue and that question needed to be established first. If there was no family life, as the judge found, the approach to historic injustice was not material.

8. The grounds themselves identified three points, with reference first to the existence of the divorce certificate, secondly to the family home and thirdly to historic injustice. Essentially, the judge was not satisfied that the appellant did live in the family home. The divorce document placed the appellant in a different geographical location.

9. Mr Clarke noted that there was no challenge to the credibility findings made by the judge and the question as to where the revenue streams came from and how the sponsor could have afforded the remittances that he did. The reasoning was logical and at paragraph 23 identified that there was a paucity of evidence as to what the money was spent on. Albeit that at paragraph 8 the judge identified that the first appellant had stated that she had never worked the sponsor himself was not aware of what work the appellant was looking for and that fed into his lack of knowledge of the circumstances of the first appellant which lacked credibility. There was a reference at paragraph 23 to the effect that Mohan, the brother, worked and it was unclear if the first appellant was relying on Mohan.

10. At paragraph 24 the divorce document, which was dated 2019, states the first appellant reverted to the 'maternal home' in 2015 but remittances were sent to Pokhara or to Kathmandu, nowhere near Beshisahar or Lamjung. The divorce certificate confirmed the appellant was living with her ex-husband in Pokhara and the remittances were sent to a place where she was living with her husband three to four years after their claimed separation. It was concluded at paragraph 27 that there was a huge outlay to the other siblings and there was a lack of detail with regards to finance.

11. As regards the divorce document it was unusual for a court not to be updated regarding the living circumstances of the appellants and it was open to the judge to make the findings he did. It was also clear from the document that the appellant was present at the hearing. In essence, the judge was not satisfied with the quality of the evidence and the revenue stream was not addressed. It was not sustainable to argue that there was a failure to take remittances into account because they were clearly taken into account and the conclusions at paragraphs 32 to 38 were not irrational. The judge made a very clear finding there was no family life and there was no misunderstanding. Further, paragraph 44 was important. The divorce document suggested that the father had made a contributory role, but the sponsor stated he did not know where the father was. That appeared to be contradictory

12. Mr Khalid submitted that on the one hand the divorce document was rejected as lacking in probative value but on the other hand it was accepted when the evidence went against the appellant. The remittances could be collected from any office and that question was not addressed by the judge. There was a lack of reference to contact between the appellant and her family. Further, the judge needed to reach clear findings on family life, which he did not.

Analysis

13. The grounds themselves were rather discursive and lacked focus but essentially the point appeared to be that the judge did not appreciate that the appellant continued to live with the sponsor and her whole family and continued to live in their main family home in Lamjung; further that the historic injustice restricted the sponsor in settling at the time of his discharge from the army in 1985. It was also argued that the sponsor's support to the appellants was real, committed and effective and the judge was unjust in his treatment of the evidence of the money remittances.

14. In essence, the ground is that the judge failed to direct himself properly on the law relating to family life. The relevant law is set out clearly in **Jitendra Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**. That authority in turn referred to **Ghising (family life - adults - Gurkha policy) [2012] UKUT 160** which (although revisited in the Court of Appeal in relation to historic wrong) set out the approved approach to be taken with regard to family life, citing **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] INLR 31** , which **Ghising** found had been interpreted too restrictively in the past, recognising that family life may continue between parent and child even after the attainment of majority.

15. In particular, at paragraph 61 **Ghising** had this to say:

> *"61. Recently, the ECtHR has reviewed the case law, in AA v United Kingdom (Application no 8000/08), finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. The Court said, at [46] – [49]:*

'46. The Court recalls that in Bouchelkia v France, 29 January 1997, § 41 Reports of Judgments and Decisions 1997, when considering whether there was an interference with Article 8 rights in a deportation case, it found that 'family life' existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In Boujlifa v France, 21 October 1997, § 36, Reports 1997-VI, the Court considered that there was 'family life' where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France, In Maslov, cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted 'family life'.

47. However, in two recent cases against the United Kingdom the Court has declined to find 'family life' between an adult child and his parents. Thus in Onur v United Kingdom, no. 27319/07, § 43-45, 17 February 2009,the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional amount of dependence normally required to establish 'family life' between adult parents and adult children. In A.W. Khan v United Kingdom, no. 47486/06, § 32, 12 January 2010. the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34 year old applicant in that case did not have "family life" with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.

48. Most recently, in Bousarra, cited above, § 38-39, the Court found 'family life' to be established in a case concerning a 24 year old applicant, noting that the applicant was single and had no children and recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute 'family life'.

49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own can be regarded as having 'family life'.'"

16. It was stated the different outcomes in the various cases demonstrated that the issue under Article 8(1) is highly fact-sensitive and each case should be analysed on its

own facts to determine whether or not family life exists. That is the process the judge adopted.

17. The relevant facts in this case, and as set out by the judge, are that the first appellant married in the month prior to the departure of her parents and set up home with her husband and had a child of her own born in 2014. Those details were identified by the judge at paragraph 2. Although criticism was made of the judge for being equivocal about the divorce certificate, he states that there was no copy of the original and he was not clear this was the final order in the divorce but "nonetheless it purports to show what would seem to have been a compromise reached over marital assets". There appeared to be shared responsibility of the child with the father whilst the first appellant had custody. That finding was not challenged. The judge noted that despite having stated that the appellant lived in the maternal home in Lamjung the certificate identified her "permanent address" as being in Pokhara.

18. The judge stated:

> *"On the face of it therefore this is such a sloppily and inaccurately drafted claimed court document, with the only copy available being one translated into English, that it is hard to know what to make of it, as corroboration that the first appellant and her husband have been separated as claimed from 2015."* (Paragraph 3).

19. The grounds for permission did not challenge the approach to the divorce certificate but separately and independently from that document, it is quite clear that the judge found the evidence inconsistent and lacking credibility and those findings were not challenged. The judge noted that incongruously, the first appellant had submitted that she had moved to the "main family home to live with my parents" although they had lived in the UK since May 2012 (paragraph 7). In particular the judge concluded that despite asserting close contact and family life the sponsor 'did not know much about the lives of the appellants'. Albeit the first appellant stated that she was unemployed, and that she was looking for work, her father did not know the nature of that work. I return to this point below.

20. The Entry Clearance Officer refusal letter had raised squarely that even if the first appellant had received some financial assistance from her father there was no evidence that this was necessary for her to be able to reside in Nepal. The judge clearly addressed the financial remittances, listing them at paragraph 12 finding, however, they showed "a spread of monies sent by the sponsor to the first appellant principally, not for her at Limjanu [Lamjung] where it is claimed she lives, but in Pokhara and Kathmandu also to her brother Mohan in Beshisahar". Indeed, the judge lists the remittances. It is not arguable that he failed to take them into account. Although the sponsor was stated to have left money after he travelled to Nepal there was contradiction between the appellant and sponsor about the number of visits and moreover, the objective evidence demonstrated that remittances were not sent to the appellants at the said family home in Lamjung but all to Pokhara or Kathmandu. That Beshisahar is in Lamjung does not undermine those findings because the

remittances sent there related to the brother, who apparently lived there, not the appellants.

21. Part of the confusion in the decision is that the findings are to be found throughout the decision but when read carefully as a whole the judge has addressed the issue of the remittances and clearly had in mind contact. The judge clearly referred to the social chat with the mother and the father confirmed almost daily contact sine 2019 at paragraph 11 but noted that the actual content of the conversations was not highlighted.

22. As set out in **Jitendra Rai**, when considering the decisions of specialist Appellate Tribunals dealing with a complex area of law decisions should be respected unless it is quite clear judges have misdirected themselves and that where a relevant point is not expressly mentioned by the Tribunal the court should be slow to infer that it has not been taken into account.

23. Crucial is that the judge did not find the sponsor a credible witness. None of the credibility findings were challenged in the grounds for permission to appeal. For example, the sponsor stated that the first appellant and her son lived alone in the family house in Lamjung and then contradicted himself by saying that her brother also lived there (paragraph 22). The judge also found at paragraph 23 that it was unclear whether the appellants could also be relying on the support of Mohan, who was supposed to live with them and who had had an extended period of remunerative employment in Dubai. I repeat, the judge noted that the remittances were to her not in Lamjung but to Pokhara and Kathmandu since 2017, albeit her marriage was supposed to have broken up in 2015.

24. The judge identified that the sponsor claimed to be supporting the appellants in their essential needs (paragraph 26) and also the siblings Mohan and the other daughter as well as the applications for the three siblings to enter the UK and thus, the judge concluded it was not credible that the sponsor would have anything left (paragraph 27). That deduction was open to him. There appeared to be no detailed schedule of expenses. Additionally, there was the contradiction of the whereabouts of the first appellant's ex-husband. Albeit the judge found the divorce document confusing, it is clear from the remittance evidence itself that they were sent to the location other than the appellants' claimed family home.

25. I am not persuaded as submitted by Mr Khalid that the appellant was deprived of the opportunity to respond to the point that the remittances were sent to different offices. That was evident from the evidence supplied by the appellants themselves. Nor was that raised in the grounds of appeal.

26. The judge specifically observed at paragraph 30 there was no evidence that the first appellant and her son had lived in the family home in Lamjung since 2015 and the judge states:

> *"This is at the heart of the difficulty posed not just by the complete lack of evidence for the appellants living at the family home in Lamjung but indeed for their life at all in*

Nepal, as well as for that of the two siblings of the first appellant in Nepal, who like her are supposed to have been receiving monies from the sponsor."

27. Overall it was open to the judge to find there was an obscurity surrounding the lives of the first appellant and the child and that of the remaining two siblings in Nepal.

28. As the judge noted, there was no causal connection between the end of the 2012 marriage of the first appellant and historic injustice because the other son settled in the UK with his parents in 2015, albeit he had been previously deprived of that opportunity. The judge made a very clear finding that the appellant embarked upon her own independent and separate married life away from her parents and their family home in Lamjung in 2012 and indeed *before* they settled in the UK in May 2012.

29. At paragraph 36 the judge stated that he recognised that historic injustice was not necessarily determinative though it should be given substantial weight and "if it is found that Article 8 is engaged, and, but for the historic wrong, the appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an appellant's favour".

30. The judge concluded however that the 'reality is that around the time when the sponsor and father of the first appellant and her mother and brother Kebindra were settling in the UK in May 2012 under the policy, she had already set out on her own independent family life through marriage in April 2012'. The judge supported that conclusion on finding no family life stating with the findings at paragraphs 39, 40, 41 and 42 as follows:

> *"39. With remittances, moreover, in 2019 indicating her continued presence in Pokhara, and indeed in Kathmandu as well.*
>
> *40. Which hardly supports the claimed continued dependency upon her father, as purportedly focused upon the family home in Lamjung, since 2015.*
>
> *41. Therefore, taking into account the lack of credibility of the evidence of the first appellant and sponsor for the reasons detailed in the preceding, I find that the historic injustice is not a factor which played a role in the actual circumstances of the life of the first appellant, whatever may have been the proper rights and advantages that it brought to her parents in May 2012, and added to which is the considerable obscurity that surrounds the circumstances of her life and that of her two siblings in Nepal since.*
>
> *42. I further conclude therefore that the first appellant, and her witness the sponsor, have not established a dependency on her part upon her father the sponsor, as was identified in* ***Jitendra Rai v ECO (New Delhi) [2017] EWCA Civ 320****, by Lindblom LJ at §36-37, with whom Henderson and Beatson LJJ agreed, as amounting to a threshold of 'support' that is 'real' or 'committed' or 'effective', and in that way compatible with the approach established in* ***Kugathas*** *for family life between adults as being that 'something more exists than normal emotional*

ties', and without the need for any extraordinary or exceptional feature to be present."

31. Contrary to submissions, the judge made a very clear finding at 43 conclusively that Article 8 was not engaged. The judge found the evidence to be lacking in credibility, not only because of the largely owing to the contradictory evidence given by the sponsor and the contradictory evidence of the remittances. Family life was broken one month before the sponsor came to the UK and the judge further found it had not continued or resumed.

32. Paragraph 7 of **Jitendra Rai** identified that in 2009 a policy was introduced which indicated that dependent children aged over 18 would not normally have the discretion exercised in their favour and would be expected to qualify for leave to enter or remain in the UK under the relevant provisions of HC 395 or under Article 8 of the Convention unless there were exceptional circumstances in the particular case. However, in March 2010, the 2009 policy was superseded by the 2010 policy which although issued in similar terms, no longer contained the five 'factors' listed in the previous iteration. The 2010 policy was upheld as lawful in **Gurung**, which concluded at paragraph 26, *'The policy recognises that such children may be granted leave to enter under rule 317(i)(f) and if article 8 requires it'*... The critical point is that the appellant's daughter could have accompanied the sponsor to the United Kingdom in 2012 but did not.

33. The judge referenced that position. Unlike the scenario described at paragraph 42 of **Jitendra Rai** the reason that the family did not come to the UK together was because the first appellant had just married. By the time of the settlement of the sponsor, the appellant had forged her own family life and then subsequently had her own child. By the time the appellant's parents left Nepal they did not have a family life together in Article 8 terms and in this instance the judge concluded, for cogent reasons, that he was not satisfied that that family life continued to date. It was open to the judge to find as he did that family life was ruptured in 2012 and had not effectively been resumed since.

34. The judge found the best interests of the child, the second appellant were to remain living in Nepal where the child continued to have had contact with his father. Thus the effective finding was that the child would continue to have family life with his father there and that was not challenged. The second appellant was not even born when the sponsor departed from the UK and it is difficult to see how family life with the sponsor, in these circumstances, could be substantiated.

35. The findings on family life were clear and open to the judge and thus the question of historic injustice was not engaged. I find the findings in relation to family life were separate from those in relation to proportionality. The judge properly directed himself with regards the existence of family life and it is not evident that he elevated the threshold of "support" that is "real" or "committed" or "effective" to too high a bar.

36. I find no material error of law in the decision for the reasoning given above.

Notice of Decision

37. As such, I find no material error of law and the decision of the First-tier Tribunal shall stand and the appeals remain dismissed.

No anonymity direction is made.

Signed *Helen Rimington* Date 2nd December 2021

Upper Tribunal Judge Rimington