



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18592/2019(V)**

THE IMMIGRATION ACTS

Heard at Field House

On 29th June 2021

**Decision & Reasons
Promulgated**

On 1st September 2021

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**MIN BAHADUR GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jaja of Counsel, instructed by Howe & Co Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no audio or visual difficulties during the course of the hearing. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained the papers in hard copy.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Hembrough promulgated on 27 January 2021, in which the Appellant's appeal against the decision to refuse his application for entry clearance as the dependent of a Gurkha widow dated 27 September 2019 was dismissed.
3. The Appellant is a national of Nepal, born on 5 April 1993, who applied on 2 July 2019 for entry clearance to the United Kingdom as a dependent of his mother, a Gurkha widow. The Appellant's mother had also previously applied for entry clearance which was granted on 27 July 2012 and she arrived in the United Kingdom on 12 August 2012. The Appellant's brother made a similar application which was successful following an appeal and he arrived in the United Kingdom in 2018.
4. The Respondent refused the application on the basis that the Appellant did not meet the eligibility requirements for a grant of entry clearance either under the Immigration Rules or the relevant policy in relation to Gurkha dependents. It was not accepted that Article 8 of the European Convention on Human Rights was engaged as there was only limited evidence available which did not establish that the Appellant was either financially or emotionally dependent on his mother. An Entry Clearance Manager reviewed and maintained the decision on 28 January 2020, noting that no further evidence had been provided and that the Appellant was now aged 30 and had lived apart from his mother for over six years such that family life had not been established.
5. Judge Hembrough dismissed the appeal in a decision promulgated on 27 January 2021 on human rights grounds. In summary, the relationship between the Appellant and his mother did not engage Article 8 of the European Convention on Human Rights as the relationship did not go beyond normal emotional ties and there was a lack of evidence of financial or emotional dependency. The First-tier Tribunal found that there was a lack of candour from the Appellant about his history of working abroad in Saudi Arabia and there had only been limited financial support to the Appellant since 2018.

The appeal

6. The Appellant appeals on two grounds as follows. First, that the First-tier Tribunal materially erred in law in applying the wrong test as to whether Article 8 of the European Convention on Human Rights was engaged; considering only whether the Appellant is dependent on his mother and not whether there was evidence of real, committed or effective support between them. Secondly, that the First-tier Tribunal materially erred in by failing to assess whether there was real, committed or effective support to the Appellant from his mother.
7. At the oral hearing, Ms Jaja accepted that both grounds of appeal raised essentially the same issue, which was whether the First-tier Tribunal properly applied the test for engagement of Article 8 of the European

Convention on Human Rights as set out in Rai v Entry Clearance Officer [2017] EWCA Civ 320. The Respondent acknowledged the correct test to be applied in the reasons for refusal letter and although the First-tier Tribunal purported to direct itself to the correct test, it was not properly applied to the facts of this case.

8. In particular, the First-tier Tribunal had failed to assess all relevant periods from when the Appellant's mother moved to the United Kingdom in 2012 as he was not working abroad for the entire period. There was evidence from the Appellant's passport as to his dates of travel, showing he was working abroad in 2011 with a visa for 90 days and returning to Nepal in 2012 prior to his mother's departure and during which time they lived together in the family home; followed by a second period of working abroad for two years from 2015. It was submitted that whether or not there was a lack of candour, the information was clear from the documentary evidence as to these periods. Further, it was submitted that even if family life could not be established for a particular period, it does not mean that it had been extinguished and family life can be re-established even following a period where a person is independent.
9. The evidence before the First-tier Tribunal was that the Appellant remained in Nepal between 2012 and 2015 living with his brother, who came to the United Kingdom in 2018. Shortly after, there was evidence of financial remittances to the Appellant from his mother in the United Kingdom, showing that she was the one providing for him financially and in his sole name from 2018. Counsel suggested that prior to 2018, the Appellant's mother provided financial support to both the Appellant and his brother; albeit there was no evidence of this before the First-tier Tribunal. In any event, the Appellant and his mother both asserted that the Appellant was financially dependent on her.
10. Overall, on behalf of the Appellant it was submitted that the error was material as the Appellant was entitled to a correct decision on the law and evidence; but he had not received a properly reasoned refusal of his appeal as the First-tier Tribunal had only considered the period when the Appellant was working abroad.
11. On behalf of the Respondent, Mr Melvin relied on his skeleton argument. He submitted that the onus was on the Appellant to establish his case on the evidence before the First-tier Tribunal and in this case, he had not. Counsel for the Appellant repeatedly sought to rely on evidence which was not before the First-tier Tribunal and on the evidence that was available, a different outcome to the appeal could not lawfully have been reached.

Findings and reasons

12. The First-tier Tribunal sets out the key issue in this appeal in paragraphs 24 and 25 which is as to whether there is family life between the Appellant and his mother capable of engaging Article 8; given that if there is, the weight to be attributed to the 'historic injustice' in Gurkha cases is likely to

exceed the public interest in immigration control. In paragraphs 26 to 31 there follows express reference to a number of Gurkha cases in the Upper Tribunal and Court of Appeal, including Patel & ors v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17; Ghising (family life – adults – Gurkha – policy) [2012] UKUT 00160 (IAC) as approved in R (Gurung) v Secretary of State for the Home Department [2013] EWCA Civ 8; PT (Sri Lanka) v Entry Clearance Officer (Chennai) [2016] EWCA Civ 612; Singh v Secretary of State for the Home Department [2015] EWCA Civ 630; and Pun v Secretary of State for the Home Department [2017] EWCA Civ 2106. From these cases, the First-tier Tribunal notes the fact sensitive nature of the assessment of family life and that for family life to be found to continue, a child must not have established an independent life or family of their own. Later, there is express reference to the case of Raj in paragraph 36 of the decision and reference to a family life which existed at the time of the family member's departure and had endured beyond it.

13. In paragraph 37 of the decision, the First-tier Tribunal refers to the evidence of the Appellant working in Saudi Arabia, with a passport stamp showing a two year employment permit from 2015 and evidence from the Appellant's mother that he worked there for four or six years. On either basis, the Appellant was found to have worked in a foreign country for a considerable period of time during which he fended for himself; there being no evidence of the Appellant's mother providing him with 'real, committed or effective support' during this period. There was a lack of evidence of financial support either from the Appellant when he was working after 2012 or to the Appellant prior to 2018. The First-tier Tribunal also rejected the Appellant's mother's evidence that she provided continued emotional support to the Appellant given her inability to give any evidence as to the Appellant's attempts to gain employment in Nepal or abroad as he had done in the past.
14. In paragraph 43 of the decision, the First-tier Tribunal concludes that the Appellant has not continued to be emotionally or financially dependent on his mother and that he had formed an independent life whilst living and working in Saudi Arabia. In the following paragraph, the First-tier Tribunal rejected the Appellant's claim to have become dependent on his mother on return to Nepal in 2016.
15. The First-tier Tribunal then returns in paragraph 48 to quote from Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; that there is no presumption of family life between parents and adult children and what is required is dependency going beyond normal emotional ties, adding "*What is required is support which is "real" or "committed" or "effective".*"
16. Whilst there are repeated references to the requirement of dependency in the decision to establish family life; there are also clear and express references to the qualification of the same set out in the later authorities, specifically in the context of Gurkha cases to show support which is real, committed or effective. Further, whilst there are findings that the

Appellant had not established either financial or emotional dependency on his mother; there are also express findings that he had formed an independent life and had not established that during the period the Appellant was working abroad in particular, there was real, committed or effective support to the Appellant from his mother.

17. The First-tier Tribunal may have been clearer in the decision by focusing solely on the case of Rai and the guidance contained therein as to the applicable test for establishing family life for the purposes of engaging Article 8 of the European Convention on Human Rights in an appeal such as this; but the broader references do not detract from the clear findings in accordance with the test in Rai that the Appellant had simply failed to establish family life on the evidence before the First-tier Tribunal. The dual references to dependency and real, committed or effective support are not necessarily helpful, but do not amount to a material error of law in circumstances where dependency was an alternative way of demonstrating family life for the purposes of Article 8; where there were clear findings applying the correct test and where in any event, the evidence before the First-tier Tribunal was not capable of leading to any other conclusion.
18. Counsel for the Appellant was asked repeatedly during oral submissions what evidence there was before the First-tier Tribunal which could have led to a different outcome on the appeal, namely, what evidence there was of real, committed or effective support for the period 2012 to 2019 when the application for entry clearance was made. Ms Jaja was unable to identify any such evidence beyond the financial remittances which started only in March 2018 and explanations or assertions of other evidence which were not contained in either the written or oral evidence, or any documentary evidence that was before the First-tier Tribunal.
19. In these circumstances, even if the First-tier Tribunal had consistently only referred to whether there was real, committed or effective support between the Appellant and his mother; the evidence fell very far short of demonstrating that for any part of an extended period of time between 2012 and 2019; let alone all of it, that for the purposes of Article 8 family life existed in 2012 when the Appellant's mother left Nepal (after the Appellant had already spent a period of time working in Saudi Arabia) and continued to exist up to the date of application or decision. This is not a case in which it was even arguable that family life had resumed after the Appellant returned to Nepal having lived independently in Saudi Arabia due to the lack of evidence. There was no error in the First-tier Tribunal not making express findings on every part of the period from 2012 to 2019; particularly when there was no clear or consistent evidence before it as to the precise periods when the Appellant was working in Saudi Arabia.
20. In this appeal, whilst the First-tier Tribunal decision unhelpfully refers to requirements of dependency and of whether there is real, committed or effective support for the purposes of whether Article 8 was engaged; there are sufficiently clear findings applying the correct test such that there is

no material error of law in the decision read as a whole. On the very limited evidence before the First-tier Tribunal, the Appellant fell very far short of establishing that Article 8(1) of the European Convention on Human Rights was engaged.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed G Jackson

Date

28th August 2021

Upper Tribunal Judge Jackson