



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18250/2013

THE IMMIGRATION ACTS

Heard at Field House
On 24 May 2016

Decision & Reasons Promulgated
On 05 July 2016

Before

THE HONOURABLE MR JUSTICE DOVE
DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

PREM THAPA MAGAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Ball, instructed by Howe & Co Solicitors
For the Respondent: Mr T Sadiq, Government Legal Department

DECISION AND REASONS

1. The appellant, a citizen of Nepal, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 7 May 2013 to refuse his application for indefinite leave to remain in the UK as the dependant relative of a person present and settled in the UK. First-tier Tribunal Judge Chana dismissed the appeal in a

decision promulgated on 27 May 2014. Permission to appeal was refused twice and the second decision was challenged by way of judicial review proceedings which led to a fresh decision to grant permission to appeal. The appeal was considered by a panel comprising the President, Mr Justice McCloskey, and Upper Tribunal Judge Grubb who, at a hearing on 10 February 2016, set aside the decision of the First-tier Tribunal aside for the reasons set out in the panel's written decision which is appended hereto.

The proceedings

2. The appeal came before the instant panel so that the decision could be remade. We heard oral evidence from the appellant and his father through an interpreter having ensured that the witnesses and the interpreter understood each other. We heard submissions from Mr Sadiq and Mr Ball and we reserved our decision.

The Law

3. Mr Ball accepted that the appellant does not meet the requirements of the Immigration Rules therefore the appeal proceeded on the basis of Article 8 of the European Convention on Human Rights (ECHR).
4. Article 8 states:
 - “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
5. It is for the respondent to demonstrate that any interference with the right to private and family life under Article 8 is in accordance with the law, corresponds to a pressing social need and is proportionate to the legitimate aim pursued.

The background

6. The background to this appeal is set out in the appellant's SET (F) application form, witness statements and in his oral evidence. In summary the basis of his claim is that the appellant's father (hereinafter the sponsor) joined the British Army Gurkha Brigade on 2 November 1972 and was discharged on 25 March 1988 at which stage he had reached the rank of Corporal. The sponsor's father and father-in-law also served as Gurkhas as does his son-in-law. The appellant was born on 2 December 1976 in Nepal. He is the eldest child and has a younger sister and two younger brothers. Whilst he served with the Gurkhas the sponsor was away from home leaving his wife to look after the family.

7. The sponsor and his wife came to the UK as a visitor on 22 September 2006 to visit their daughter who lives in the UK. They applied for and were granted indefinite leave to remain on 9 October 2006. The sponsor's youngest son who was a minor at that time joined the sponsor in the UK. Their other son was working in the US and remains there. The sponsor and his wife and youngest son were naturalised as British citizens on 17 December 2013.
8. The appellant remained in Nepal. He says that he remained at the family home which is in a very remote area. His parents supported him financially through money transfers and through the Hundi transfer system. He said in oral evidence that they spoke on the telephone every other day. He married on 28 August 2008. He came to the UK with his wife on 31 August 2010 when he was 33 years old, his wife had a student visa and he came as her dependant. However their marriage broke down and they were divorced on 31 January 2012. He says that he has remained living with his parents since then and they continue to support him emotionally and financially.
9. The sponsor said at paragraphs 6-7 of his witness statement dated 7 March 2014 that at the time of his discharge there was no settlement policy in place for Gurkhas and their dependant families and that he did not therefore have the opportunity to apply for settlement in the UK with his family at the time of his discharge. He said that he would have applied for settlement along with his family if there had been a policy allowing Gurkha veterans and their families to settle in the UK after service in the UK.
10. The respondent refused the appellant's application on the basis that she was not satisfied that he met the requirements of paragraph 319 with reference to 317 of the Immigration Rules nor did he meet the requirements of paragraph 276ADE which sets out the requirements for leave to remain on the basis of private life or Appendix FM dealing with family life. The respondent decided that there were not exceptional circumstances to justify the grant of leave to remain outside the Immigration Rules.

Discussion and conclusions

11. It was accepted by Mr Ball that the appellant cannot meet the requirements of the Immigration Rules relating to family and private life. In the circumstances of this case we are satisfied that there are arguably good grounds for considering the appeal under Article 8 as there may be compelling circumstances not sufficiently recognised under the Rules.
12. We therefore follow the guidance given by Lord Bingham in **R v SSHD ex parte Razgar [2004] UKHL 27 (17)**;
“... In a case where removal is resisted in reliance on Article 8, these questions are likely to be:
 - (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

13. The first question is therefore whether the appellant has established that he has a private or family life in the UK. We asked Mr Sadiq whether, in the light of his residence in the UK since 2010, the Secretary of State accepted that the appellant had established a private life in the UK. He took instructions and advised the panel that she did not.
14. In assessing family life between the adult appellant and his parents we have considered the relevant case law. In **Kugathas v SSHD [2003] EWCA Civ 31**, which concerned an adult's relationship with his mother and adult siblings, at paragraph 14 of the decision Sedley LJ referred to the following passage from **S v United Kingdom [1984] 40 DR 196**:

"Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

15. Sedley LJ accepted the submission that 'dependency' was not limited to economic dependency, at [17]. He said:

"But if dependency is 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 represents in my view the irreducible minimum of what family life implies."

16. In **Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC) (Ghising No1)** the Tribunal's findings were summarised in the head note as follows:

- "1. A review of the jurisprudence discloses that there is no general proposition that Article 8 of the European Convention on Human Rights can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

2. The historic injustice and its consequences suffered by former members of the Brigade of Gurkhas are to be taken into account when assessing proportionality under Article 8(2) but the 'historical wrong' was not as severe as that perpetrated upon British Overseas Citizens and carries substantially less weight. Because of the exceptional position of Gurkha veterans, and their families, the Secretary of State has made special provision for their entry to the UK outside the Immigration Rules as an acknowledgment that it is in the public interest to remedy the injustice.
3. Given that the Gurkhas are Nepali nationals, it is not inherently unfair or in breach of their human rights to distinguish between Gurkha veterans, their wives and minor children on the one hand, who will generally be given leave to remain, and adult children on the other, who will only be given leave to remain in exceptional circumstances. The scheme that the Secretary of State has developed is capable of addressing the historical wrong and contains within it a flexibility that, in most cases, will avoid conspicuous unfairness."

17. In **Gurung & Ors, R (on the application of) v SSHD [2013] EWCA Civ 8** the Court of Appeal said that the correct approach to the assessment of family life is as follows:

"45. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. Ms McGahey submits, therefore, that the case law, both domestic and European, can be of only limited assistance. She (rightly) accepts that, as a matter of law, in some instances an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents. It all depends on the facts.

46. We think that the cases are of some assistance to decision-makers and tribunals who have to decide these issues. Paras 50 to 62 of the determination of the UT in *Ghising* contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at para 62 that "the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive". The correctness of the UT's review has not been doubted before us. We endorse it. We doubt whether any useful purpose is served by further general elaboration."

18. We therefore consider the particular facts in this case in assessing whether the relationship between the appellant and his parents amounts to family life under Article 8. We must consider whether there are further elements of dependency involving more than the normal emotional ties and whether there is committed real or effective support between the appellant and his parents.
19. Mr Sadiq relied in the apparent conflict in the appellant's evidence in relation to his contact with his parents between 2006 and 2010 in that he did not mention prior to his oral evidence that he had been in contact with them by telephone every other day.
20. Mr Sadiq submitted that there is no emotional dependence in this case and he highlighted the following factors in support of his submission:

- When his parents entered the UK in 2006 they left the appellant in Nepal;
 - There is very little in this relationship over and above the normal emotional ties in particular during the period between 2006 and 2010 given the lack of evidence in relation to financial support and ongoing contact and the conflict between the appellant's evidence and the contents of the divorce petition which states that the appellant's family did not support the appellant's wife;
 - The fact that the appellant married a Nepalese national and his parents did not attend the wedding and there is a suggestion that he did not inform his parents that he was getting married which indicates that he was living independently;
 - The appellant entered the UK four years after his parents as the dependant of his spouse who had leave to enter as a Tier 4 student and at that time he was 33 years old;
 - The appellant is a healthy adult male;
 - The witness statements made no reference to the appellant living with his parents since he entered the UK;
 - The appellant worked as a cleaner in the UK for around 2 years and supported his wife during that time;
 - There is little evidence of any family life over and above the normal emotional ties since the divorce and little evidence of financial dependency over and above what would be expected in Nepalese culture;
 - It is Nepalese culture that the youngest son is expected to look after elderly parents and the sponsor's youngest son lives with his parents in the UK.
21. Mr Sadiq made no submissions in relation to private life but accepted that he had an uphill struggle arguing that the appellant had not established a private life in the UK.
22. Mr Ball submitted that Article 8(1) is engaged. He relied on **AG (Eritrea) v SSHD [2007] EWCA Civ 801** and submitted that the threshold for engagement of Article 8 is not high. He referred to paragraph 56 of the judgement in **Ghising** (No1) where the Tribunal accepted that the judgment in **Kugathas** had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts. He relied on the words of Sedley LJ at paragraph 17 of the judgement in **Kugathas** where he said that the 'irreducible minimum' of family life is dependency amounting to real, committed or effective support. He submitted that family life is dynamic and is not set in stone. He submitted that it may exist at one point in time and not at another and it may reengage. He submitted that the issue is whether there is family life today. In this context he submitted that the main point put forward by the respondent was alleged differences between what was said earlier and what was said in oral evidence but the evidence at the hearing was simply amplification of the same material. He submitted

that the appellant's wife said in the divorce petition that she was not supported by the appellant's parents and that this is consistent with the appellant's evidence that he was working from 2010 until 2012 and is not inconsistent with the existence of a current family life.

23. Mr Ball submitted that Article 8 (1) is engaged for the following reasons:
- The appellant has lived all of his life with his mother apart from the period from 2006-2010 during which period he was in regular contact and was financially dependant on his parents;
 - Cultural factors which mean that there is an particularly close family life in Nepali families;
 - The family are from a remote area and growing up in isolated conditions led to them being a very close unit;
 - The effects of the sponsor's peripatetic lifestyle were that the appellant's mother was left as a single parent under considerable strain raising children leading to a particularly close bond between the appellant and his mother;
 - There was emotional dependency as a result of the appellant's marriage breakdown as described in the witness statements;
 - There was ongoing financial dependency.
24. Mr Ball submitted that the appellant has established a private life in the UK. He accepted that if it is found that the appellant has established only a private life a more nuanced approach to the assessment of the historic injustice in the proportionality exercise would be required.
25. We accept that there is a lack of evidence between 2006 and 2010. The appellant has not established that there was ongoing contact and dependency during this period. However we accept Mr Ball's submission that family life is dynamic. Family life evolves and, whilst the fact that dependence did not exist at a particular time in the past may be relevant to as assessment of family life, it is not determinative of the existence of family life at present. In the particular circumstances of this case we accept that before 2006 and since 2012 the appellant has been financially and emotionally dependant on his parents. We accept on the basis of the witness statements that the appellant's parents have offered him emotional and financial support during the stressful period during and since his divorce. We take account of the factors set out by Mr Ball, in particular the strong bonds between the appellant and his mother developed as a result of the isolation of their home and his father's absence. We accept that cultural factors and the appellant's divorce mean that there are currently very strong bonds between the appellant and his parents. We accept that the appellant has established on the particular facts of this case that the bond between him and his parents constitutes real, effective or committed support. We find that the appellant has established that he has family life within Article 8 (1) with

his parents. Given his length of residence in the UK we also find that the appellant has established a private life in the UK.

26. We accept that the removal of the appellant would interfere with his private and family life and that such interference would have consequences of such gravity as potentially to engage the operation of Article 8. As the decision is in accordance with the Immigration Rules it is in accordance with the law. This brings us to the fourth and fifth questions posed by Lord Bingham in Razgar and an assessment of proportionality.
27. Mr Sadiq submitted that the proposed interference is proportionate to the respondent's legitimate aim of the maintenance of a fair and firm immigration control. He submitted that it was established in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) (Ghising No2) that the burden of proof is not reversed in these cases. Despite what had been submitted in the skeleton argument (which had not been drafted by him), Mr Ball accepted on the basis of Ghising No 2 that the burden of proof is not reversed in these cases.
28. Mr Sadiq submitted that the historic injustice is a factor which should be weighed in the proportionality balance but that it is not determinative and he relied on paragraph 38 of Gurung. He submitted that causation must be established, that is whether, but for the Gurkha's inability to settle in the UK, they would have come a long time ago. In other words whether there is a causal nexus between the historic injustice and the current situation. He submitted that if the sponsor would not have come earlier then there is no prejudice caused by the historic injustice. He submitted that the sponsor's evidence in cross-examination was that he only decided to settle in the UK when he entered in 2006, at that stage the appellant would have been 29. He submitted that section 117B of the Nationality, Immigration and Asylum Act 2002 must be considered. He referred to section 117B (3) and submitted that the appellant is not financially independent. He referred to section 117B (5) and submitted that any private life established by the appellant whilst his status was precarious should be given little weight. Mr Sadiq further submitted that there is no reason why the appellant cannot return to Nepal and get a job there and could relocate within Nepal if necessary.
29. Mr Ball submitted that there is a causal connection in this case. He submitted that Mr Sadiq had asked the sponsor in cross-examination whether he would have come to the UK in 2006, however the relevant time for the purposes of assessment of the historic injustice is 1988, when the sponsor was discharged from the Army. He submitted that the sponsor had answered that question at paragraph 6 of his witness statement. He submitted that the causal connection is therefore made good and that there are no matters over and above the public interest to weigh against the appellant in this case.
30. The head note in Ghising No2 summarises the Tribunals' guidance in assessing the historic injustice where the question of proportionality is reached as follows:

“(1) In finding that the weight to be accorded to the historic wrong in Gurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.

(2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).

(3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.

(4) Accordingly, where 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, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.

(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance.”

31. In considering the proportionality of the decision to remove the appellant we note that Mr Sadiq accepted that the historical injustice is a relevant factor to be considered in assessing the proportionality of the Secretary of State's decision.
32. We take account of the sponsor's unchallenged evidence at paragraphs 6 and 7 of his witness statement and we accept that he would have applied for settlement in the UK with his family after his discharge from the British Army. At that time the appellant would have been a minor. We therefore accept that there is a causal connection here between the historic injustice and the current situation. But for the historic injustice it is likely that the appellant would have come to the UK to settle when he was a minor. The respondent has not relied on any additional factors in this case to be weighed against the appellant. We note that the appellant's sister and younger brother live in the UK. The appellant lives with his parents and brother. The

sponsor and his wife work and support the appellant. The appellant's brother is also working.

33. On the other side of the scales we accept that the appellant does not meet the requirements of the Immigration Rules. We have considered the provisions of section 117A and 117B in the assessment of proportionality. We note that the maintenance of effective immigration control is in the public interest. We note that the appellant gave evidence to us through an interpreter and it is not clear whether he can speak English. Whilst there is no evidence that he is in receipt of benefits we note that the appellant is not financially independent as he is supported by his parents. However he has previously worked and there is no reason why he cannot do so again. We attach little weight to any private life established whilst the appellant's immigration status was precarious.
34. Considering all of these factors and attaching particular weight to the historic injustice we conclude that the respondent has not established that the decision to remove the appellant is proportionate to his right to enjoy private and family life in the UK.

Decision

The appeal is remade by allowing it on human rights grounds.

No direction for anonymity is made.

Signed

Date: 4 July 2016

A Grimes
Deputy Judge of the Upper Tier Tribunal

Fee Award

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 4 July 2016

A Grimes
Deputy Judge of the Upper Tier Tribunal

ANNEX



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18250/2013

THE IMMIGRATION ACTS

Heard at Field House, London
on 10 February 2016

Decision given orally on 10 February
2016 and promulgated on

.....

Before

The Hon. Mr Justice McCloskey, President and
Upper Tribunal Judge Grubb

Between

PREM THAPA MAGAR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Mr Jesurum of counsel, instructed by Howe and Company Solicitors
Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION

Introduction

1. The origins of this appeal lie in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 07 May 2013, whereby the application of the Appellant, a national of Nepal, aged 39 years, for indefinite leave

to remain as the dependent relative of a person present and settled in the United Kingdom was refused.

2. The procedural history thereafter is as follows:
 - (a) By its decision promulgated on 27 May 2014, the First-tier Tribunal (the “FtT”) dismissed the ensuing appeal under the Immigration Rules and Article 8 ECHR.
 - (b) Permission to appeal to the Upper Tribunal was twice refused.
 - (c) The second of these refusals was challenged by an application for judicial review in the Administrative Court.
 - (d) By order dated 06 January 2015 permission to apply for judicial review was granted.
 - (e) The judicial review proceedings were not contested and, by order dated 30 January 2015 the decision of the Upper Tribunal refusing permission to appeal was quashed.
 - (f) By further order of the Upper Tribunal dated 21 May 2015, the Vice-President granted permission to appeal. He stated:

“Permission is granted in the light of the decision of the High Court in this case. The parties are reminded that the Upper Tribunal’s task is that set out in Section 12 of the 2007 Act.”

The Secretary of State’s Decision

3. The Appellant was considered to be a person “*applying as the dependent relative aged over 18 of your father, a person present and settled in the United Kingdom*”. It was acknowledged that the Appellant’s parents had entered the United Kingdom on 22 September 2006, securing the grant of indefinite leave to remain one month later. The Appellant entered the United Kingdom four years later, then aged 33. The decision maker reasoned:

“It is considered that you are a healthy educated man aged 36 You have worked while in the UK and [have] therefore demonstrated your capacity to support yourself. You were married until January 2012 and this further indicates your capacity to live independently from your sponsor ...

It is therefore believed that you will be capable of working and supporting yourself on return to Nepal

Therefore, the Secretary of State is not satisfied that you will be living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom."

On this basis the Appellant's application was refused under Immigration Rules 317 and 319.

4. The decision maker then gave consideration to the second basis of the Appellant's claim, namely the Secretary of State's Immigration Directorate Instruction ("IDI") entitled "Persons Seeking Settlement on Discharge from HM Forces", specifically section 2A of chapter 15 thereof, which was published in December 2012. The decision continues:

"The purpose has never been that [the IDI] should allow a means by which over aged dependants with no previous attachment to the UK may circumvent the Immigration Rules and achieve settlement solely on the basis of being the children of former serving Foreign or Commonwealth members of HM Armed Forces"

The assessment, therefore, was that this did not provide the Appellant with a basis upon which to advance his claim. Finally, the Appellant's claim was considered both within and outwith the framework of the Rules and rejected on both bases. In this specific context the decision maker stated:

"Your legal representatives claim that there are exceptional circumstances because your father is a former Ghurkha and you are a central part of the family unit. They claim that in Nepalese culture an elder child is expected to live in his parents' household. They also claim that you remain financially dependent on your father. You also claim that it is traditional for sons to look after their parents when they become elderly."

Noting that the Appellant's parents were aged 59 and 53 respectively and, further, that his sister and brother had been granted permission to enter the United Kingdom with settlement for the purpose of joining the parents, in 2006, it was considered that these siblings ".... will be able to provide support if this eventually becomes necessary".

Decision of the FtT

5. The core of the appeal was formulated by the Judge in the following terms:

"The Appellant's central contention is that where it not for the injustice done to his father (a Ghurkha veteran) in preventing him from making an earlier application for settlement upon his army discharge, the Appellant would be settled in the United Kingdom."

The Judge paid particular attention to the Secretary of State's policy, as expressed in the IDI (*supra*). The following specific finding was made:

“I find that the Respondent correctly applied the policy to the Appellant [sic] circumstances and came to a sustainable conclusion that the Appellant does not satisfy the criteria set out in the policy to be granted settlement rights on a discretionary basis.”

Next, the decision adverts to an agreement between the parties’ representatives that the Appellant’s appeal was proceeding under Article 8 ECHR only.

6. Continuing, in considering the question of whether family life existed vis-à-vis the Appellant and his parents and adverting to the decision in Kugathas - v - Secretary of State for the Home Department [2003] INLR 170, the Judge made the following further specific finding:

“I find that the Appellants and his parents’ insistence at the hearing that the Appellant has never worked and is unable to work because he has no qualifications is a fantasy so that they can maintain the myth that he is dependent on his father in order to be captured by the Respondent’s policy as an adult child dependent on his parents.”

Having noted that the Appellant lived independently in Nepal, was married, travelled to the United Kingdom and worked here as a cleaner, the Judge made the further finding:

“I find that the Appellant can support himself in Nepal like his father did by farming.”

Next, the Judge pronounced the inter-related findings that the Appellant has no financial dependency on his parents and that there is no mutual emotional dependency outwith the norm. The Judge then concluded, in the alternative, that any interference with the right to respect for family life would be underpinned by the legitimate aim of immigration control and would be proportionate, essentially on the basis of the findings already noted and taking into account the factor of historic injustice.

Error of Law?

7. In a thoughtful submission, Mr Jesurum, on behalf of the Appellant, argued that the FtT had erred in law in two basic respects. First, in its consideration of the evidence and in certain findings made. Second, in its conduct of the proportionality exercise. We identify a series or error of law in the decision of the first instance tribunal which we enumerate thus:
 - (i) The judge conflated two quite separate questions, namely whether the Appellant could satisfy the terms of the Secretary of State’s policy and whether the appeal could succeed under Article 8 ECHR, in circumstances where the appeal was presented under Article 8 exclusively.

- (ii) The judge's blunt finding that the Appellant and his father's assertion in evidence that the Appellant "*has never worked and is unable to work*" is unreasoned and, further, confounded by the evidence, recorded in the determination, that the Appellant had worked since arriving in the United Kingdom until the expiry of his visa. This is an irrational finding in the Edwards v Bairstow sense.
 - (iii) Linked to (ii), the judge made a related error of substance in summarising the Appellant's claim that "*... he is financially dependent on [his] father as he has never worked in his life*". In short, [35] and [36] of the determination are riddled with confusion.
 - (iv) The further finding that the Appellant has at no time been a dependant of his father since arriving in the United Kingdom is also irrational, given the clear evidence that the Appellant worked during a limited period only and the absence of any evidence that he had other means of supporting himself.
 - (v) In the proportionality exercise, the judge failed to identify the highly important factor, which by authority attracts substantial weight, of historic injustice. The proportionality exercise; is manifestly flawed in consequence.
 - (vi) The judge gave no consideration whatsoever to the private life dimension of Article 8.
8. For this combination of reasons, the decision of the FtT cannot survive. Ultimately, Mr Jarvis, on behalf of the Secretary of State did not seek to maintain any defence of it.

Decision & Directions

9. For the reasons and on the grounds elaborated above we set aside the decision of the FtT.
10. We make the following directions;
- (i) The decision of the FtT will be remade in this forum.
 - (ii) The Appellant's skeleton argument will be served on the Secretary of State by 16.00hrs on 09 March 2016.
 - (iii) The Secretary of State's replying skeleton argument will be served by 16.00hrs on 06 April 2016.
 - (iv) The Appellant's index and paginated bundle for hearing will be served and filed by 16.00hrs on 20 April 2016.

- (v) The re-hearing will take place on the first available date thereafter.
11. If it is possible to assemble the same panel of judges this will be done.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 29 February 2016