



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02627/2016

THE IMMIGRATION ACTS

Heard at Field House

On 27 November 2017

Prepared 27 November 2017

**Decision & Reasons
Promulgated**

On 13 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

**JANA BAHADUR LIMBU
(ANONYMITY DIRECTION NOT MADE)**

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

Respondent

Representation:

For the Appellant: Mr G Lee, instructed by Kent Immigration and Visa Advice

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Caskie who in a determination promulgated on 19 July 2017 dismissed his appeal against a decision of the Entry Clearance Officer, New Delhi to refuse to grant entry clearance to enable him to join his father, a Gurkha veteran, in Britain.
2. The appellant is a citizen of Nepal, born on 14 June 1986. His father applied, successfully, for leave to enter as a Gurkha veteran in 2014. The

following year the appellant applied to join him and was refused by the ECO who not accept that he was single or reliant upon the sponsor either financially or emotionally. Weight was placed on the fact that the appellant had travelled to the United Emirates in 2008 to work and that he was 29 years of age. It was also considered that the appellant was married as that had been stated on his father's application form. It was suggested that it would have been reasonable for the appellant to have sought employment and had he been unable to obtain employment there would surely have been written rejections which he could produce. It was pointed out that the appellant had originally claimed that he have not left Nepal during the previous 10 years when there was evidence that he had gone to the UAE to work in 2008.

3. The grounds of appeal asserted that the appellant was not married – his father had expected him to marry when he had made his own application but the appellant had not done so. It was argued that it was irrational to place weight on the fact that the appellant travelled to the UAE “for any number of reasons and even if he did go there to work temporarily in 2008 it did not mean that he was not now dependent on his father”. It was argued that the Entry Clearance Officer was wrong to refuse the application as the appellant had “not evidenced that he was unemployed”. It was asserted that the appellant was maintained by his father and that the discretionary provisions relating to the entry of the children of former Gurkhas were such that the appellant should be entitled to entry. It was also submitted that his rights under Article 8 of the ECHR were breached by the decision.
4. The judge, having set out the reasons for the refusal, listed at some length the evidence given to him by the appellant's father and by his sister. He concluded that the fact that the appellant had gone to the UAE to work in 2008 and had worked there for approximately sixteen months indicated that the appellant had formed a separate life for himself. Despite the fact that the appellant's father's evidence was that he had only put on his application form that his son was married because he expected him to marry, the judge found that the appellant had married: he did not accept the appellant's father's evidence.
5. The judge took into account the fact that the appellant was living with his brothers on a small holding in Nepal, working there for “self-consumption” and that he worked for other neighbours as a labourer, earning some money. The judge accepted that the sponsor sent money to Nepal but stated that he considered that that money was not essential to the appellant. In paragraph 31 he wrote:-

“Whilst I consider the financial support provided is of assistance to the appellant I consider that the life the appellant lives would essentially be the same with or without the sponsor's support.”
6. He stated that he considered the appellant had become an independent adult supporting himself collectively with his brothers.

7. When considering the issue of whether or not the appellant was living an independent life he accepted that the appellant had worked in the UAE for a period in excess of one year and that the appellant had been a young man when he had done so. He stated that:-

"I do not consider that the relationship between the appellant and the sponsor is such that family life continues between them. The appellant as a young man had travelled abroad to work for a period in excess of one year. There is also in my view the evidence that he married. I consider that even the evidence of the appellant leaving home to travel to another country to work for a period in excess of one year such as to fundamentally undermine the claim that the appellant has a relationship of the nature necessary to be granted leave to remain in the United Kingdom."

8. In reaching his conclusion the judge stated that he had taken into account relevant case law. He referred to the decision of the Upper Tribunal in **Ghising [2012] UKUT 160**. He noted that the Tribunal had said:

"Where Article 8 is held to be engaged if the fact that but for the historic wrong the appellant would have been settled in the United Kingdom long ago is established, this will ordinarily determine the outcome of the proportionality assessment, and determine it in the appellant's favour."

It is noted that a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the appellant's side. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a 'trump card' in the sense that not every application by such a person will inevitably succeed. However, if the respondent is only relying on the public interest described by the Court of Appeal at paragraph 41 then the weight to be given to the historic injustice will normally require a decision in the appellant's favour."

9. He referred it to the statement of Lord Justice Sedley in Kugathas in which Lord Justice Sedley had said:

"... if dependency is read down as meaning support in the personal sense, 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."

10. The judge concluded, in paragraphs 29 and 31:

"29. I do not consider there is a relationship between the appellant and the sponsor such that family life continues between them. The appellant as a young man had travelled abroad to work for a period in excess of one year. There is also in my view the evidence that he married. I consider that even the evidence of the appellant leaving home to travel to another country to work for a period in excess of one year is such as to fundamentally undermine the claim that the appellant has a relationship of the nature necessary to be granted leave to remain in the United Kingdom, standing the law stated above. I consider the appellant has become an independent man, and upon his return to Nepal from United Arab Emirates is much more likely than not that he would have been altered, affected, and become independent as a result of becoming self-supporting for a period in excess of one year outside his homeland."

...

31. I also note the family circumstances and Nepal as described to me. I am satisfied that the appellant and his brothers live as subsistence farmers in Nepal, supported financially by their father from the UK. I consider the financial support provided is of assistance to the appellant. I consider that the life the appellant lives would essentially be the same with or without the sponsors support. I consider the appellant has become an independent adult supporting himself collectively with his brothers."

11. The judge therefore dismissed the appeal. The grounds of appeal asserted that the judge had erred when considering the issue of the existence of family life. They stated that he had not adopted a structured approach to assessing whether the appellant and his father enjoyed a family life and whether the respondent's decision disproportionately interfered with their rights to enjoy that family life as set out in the judgment of Lord Bingham in the Court of Appeal in **Razgar** and had not, in fact, made a finding on whether he considered the appellant and his father shared family life and had erred when he had concluded that the relationship between the appellant and the sponsor was such that he did not consider that family life continued between them. It was stated that in so doing the judge had misdirected himself in law as, having found that the appellant lived with his brothers on the family farm and was financially supported by his father, the judge had erred in his consideration of the financial support provided and the assistance that he gave to the appellant.
12. Reference was made to the judgment of Sedley LJ in **Patel & Others v ECO (Mumbai) [2010] EWCA Civ 17** where he had said that "what may constitute an extant family life falls well short of dependency". Moreover the European Court of Justice in the case of **Khan v UK [2010] 50 EHRR 47** had said that "dependence" meant "real support", "effective support" or "committed support" and that it was argued therefore that the judge should have found that family life existed in the presence of "real", "effective" or "committed" support. The grounds asserted that the judge had failed in his duty to identify why the existence of elements of dependence and committed support did not show that the appellant and his father shared family life. Moreover, they argued that the judge should not have found that the fact that the appellant had worked in the UAE had disrupted the family life between the appellant and the sponsor.
13. It is also argued that the judge had failed to apply historic injustice when considering the proportionality of the respondent's decision. It was stated that he should have identified the fact that the historic injustice was causative of the delay in the application for entry and therefore the balance of proportionality was reversed. It was also argued that the judge had failed to identify relevant principles which postdated the decision in **Ghising**. They referred to the dictum of Lord Dyson MR in **R (Gurung) v SSHD [2013] 1WLR 2546** at paragraph 41 where he had said:

"The crucial point is that there was an historic injustice in both cases, the consequence of which was that members of both groups were prevented from settling in the UK. That is why the historic injustice is such an

important factor to be taken into account in the balancing exercise and why the applicant dependant child of a Gurkha who is settled in the UK has such a strong claim to have his Article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in the maintaining of a firm immigration policy.”

14. In his submissions Mr Lee stated that the judge had erred, particularly in his findings regarding the support sent by the appellant’s father to him where he had said that “while he has considered the financial support provided was of assistance to the appellant he considered the life the appellant lives would essentially be the same with or without the sponsor’s support”. He stated that that did not square with the issue of finding whether or not the funding that was received by the appellant was “not real”. The judge having found that the appellant was a subsistence farmer and had made an error of law when, having accepted that the appellant was receiving money, he had found that the appellant was not supported by his father. He also emphasised the importance of the judge taking into account the historic injustice in the fact that the appellant had not been able to join his father in Britain.
15. In reply, Mr Bramble having noted that Mr Lee relied on the observations of Lindblom LJ in **Rai [2017] EWCA Civ 320** where it was indicated that Gurkha cases went beyond the provisions as set out in the Court of Appeal judgment in **Kugathas**. He referred to paragraph 36 of the judgment in **Rai** which emphasised that the judgment of Sedley LJ in **Kugathas** meant that support had to be real, committed or effective. He also referred to paragraph 39 of that judgment where it was made clear that the real issue under Article 8 was whether as a matter of fact the appellant 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 endured beyond it notwithstanding they having left when they did. He stated that it was relevant that each case was fact sensitive and the judge had been able to bring the various factors together. He had heard evidence and had assessed that evidence and had been entitled to reach the conclusion that the appellant was living an independent life and that therefore family life provisions in Article 8 were not engaged. He argued the judge had considered all the relevant evidence.
16. In reply Mr Lee referred to the fact that the appellant was living on the family farm and asserted that that was where the appellant’s father had lived before coming to Britain.

Discussion

17. I consider there is no material error of law in the determination of the judge. It was incumbent upon him to take into account all relevant factors when determining the appeal. He was entitled to take into account not only the appellant’s age at the date of application but also, and more importantly, the fact that the appellant had had an independent life while working in the UAE and that he was married – the judge’s findings on

those points were fully open to him. Moreover, the judge did consider the support sent by the appellant's father to the appellant and his brothers in Nepal. He reached the conclusion, having considered all the evidence before him, that although that money was useful it did not mean that the appellant was dependent on his father. The money being sent was not, he concluded, "real" in the sense that it did not indicate dependency. I consider that he was therefore entitled that there was no interference in the family life between the appellant and his father and that that finding was clear: it is incorrect to suggest that he did not make a finding on that issue.

18. I would add that even if the judge was wrong to find that there was no family life between the appellant and his father he would have been right to conclude that the decision was not disproportionate, taking into account the fact that he was justified in finding that the appellant was married and had worked abroad and that he was farming in Nepal for his own needs and those of his family and was also earning money from working on the other farms. Moreover, he would be entitled to place weight on the age of the appellant when the application was made and, of course, the appellant did not apply when his father applied, as his father's dependent.
19. I do not consider that the judge incorrectly considered relevant case law or that he misapplied the relevant principles when considering the issue of historic injustice which he clearly did take into account. For these reasons I find there is no material error of law in the determination of the judge in the First-tier and I find that his decision should stand.

Notice of Decision

The appeal is dismissed.



Signed
2017

Date: 12 December

Deputy Upper Tribunal Judge McGeachy