



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07791/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21st November 2017

Decision & Reasons Promulgated
On 22nd December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

KAMAL KUMAR RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel instructed by Everest Law Solicitors
For the Respondent: Miss N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Farrelly promulgated on 17th July 2017 following a hearing at Taylor House in which he dismissed the Appellant's appeal on human rights grounds.
2. The Appellant applied on 21st January 2016 for entry clearance to settle as a dependant of his father, who is a former Gurkha soldier and was the Sponsor to the application. His father had been issued with entry clearance to the United Kingdom in January 2012 under the 2009 agreement and he had come here with his wife. Judge Farrelly in his decision did not accept that family life had existed between the

adult Appellant and his father for the purposes of Article 8, but went on to find [at 27] that in any event, even if he is wrong in those findings, that he was not satisfied that entry clearance would have occurred earlier, in any event, and that therefore he was not satisfied that the historic injustice in Gurkha cases applied.

3. In the grounds of appeal it is argued that the judge applied too high a threshold for the existence of family life under Article 8(1) following the Court of Appeal decision in the case of **Rai v Entry Clearance Officer - New Delhi** [2017] EWCA Civ 320. Secondly, it was argued that the judge failed to have regard, when considering whether family life existed, to the evidence that the Appellant would have sought entry clearance alongside the Sponsor had the family been able to afford to do so at the time. Further, it is said the judge erred in his approach to financial dependency. Finally, it is argued that the judge failed to have regard to relevant matters when determining proportionality under Article 8(2).
4. I have also considered the Rule 24 response from the Respondent dated 4th October 2017 in which it was argued that it was open to the First-tier Tribunal Judge to find that dependency had not been shown on the evidence presented and that the judge appreciated that money was sent by the Sponsor and contact maintained, but the judge found that that was out of natural love and affection and the Appellant maintained himself by farming the Sponsor's land and it was argued that it was open to the judge to conclude that family life was not established. It is argued that the judge considered the Appellant's case at its highest in any event.
5. I am grateful for the submissions of Mr Balroop of Counsel who appears on behalf of the Appellant and also Miss Willocks-Briscoe who appears on behalf of the Secretary of State.
6. Mr Balroop basically argues that there are in effect two main problems with this judgment. He submits that the Appellant's case before the First-tier Tribunal in respect of the issue of dependency on the evidence was set out in paragraph 7 of the decision and the judge noted he heard evidence from the Sponsor and that the Appellant was said to have studied until the age of 22, but not been able to find employment. He had applied for the army, but had not been accepted. He had some land which he worked, but it was too small to make a living out of. The family also received some rental income from land, but it was not always paid, and the judge had found that the eldest child was disabled. The Sponsor had said that he sent £200 to £300 every two months for their support. The Sponsor said he had daily contact with his children.
7. The judge in his findings whether or not there was family life noted at paragraph 15 the case of **Kugathas** [2003] EWCA Civ 31 and made reference there also to the cases of **Ghising** [2013] UKUT 567 and the case of **Singh v Secretary of State for the Home Department** [2015] EWCA Civ 630. The judge found that the Appellant's parents came in early 2012 when the Appellant was 27 years old at that stage, which he found would be considered to be reaching adulthood and that prior to his parents coming to the UK the Appellant was not leading an independent life and the family had lived as a unit and they survived through farming. The judge noted the

Appellant had not declared any employment, but studied up until the age of 22. The judge found it was clear that the Appellant was now farming the land. Consequently, the judge found that “it may have been that he was self-employed”. The judge went on to find that although the parents since coming to the UK had been sending money to the family, the Appellant was not dependent upon this and money was sent out of natural love and affection with a view to improving the situation of all the remaining children. He found that he could see no reason why they could not maintain their life in Nepal.

8. It was argued by Mr Balroop that the judge’s findings in that regard do not really address the issue as to dependency and as to whether or not there is real effective and committed support as described as being a significant factor necessary in the case of **Rai v ECO - New Delhi**, in establishing that there is something more than normal emotional ties between the adult Appellant and his parents such as to give rise to family life existing between them for the purpose of Article 8. Although in that regard Miss Willocks-Briscoe concedes that the judge could have actually expressed himself better, she does not concede the issue on that regard and it is argued on behalf of the Secretary of State that the judge had adequately dealt with the issue of whether or not there is actual dependency and whether or not there is therefore in light of any emotional and/or financial dependency more than the normal ties of love and affection, such as to give bias to family life for the purposes of Article 8.
9. Mr Balroop argued that the second problem is that although the judge has then gone on to find that he would consider what had happened if wrong in respect of his findings regarding family life, the judge’s reasoning as to why entry clearance would not have occurred earlier had it not been for the historic injustice is unclear and inadequately reasoned. The judge’s findings at paragraph 27 were that he was not satisfied that earlier entry clearance would have occurred on the basis that the army papers records that the sponsor’s elder son had been born in January 1977 with a disability and his daughter was born in 1975 in Hong Kong, granted a status at that stage which the rest of the family were not, but the sponsor, Appellant’s father was then discharged in 1979 and married in May 1971. Mr Balroop argues that it was wholly unclear from that paragraph as to the reasoning why the historic injustice did not apply in this case and why it was that settlement would not have occurred earlier had it not been for the historic injustice. Miss Willocks-Briscoe concedes that the reasoning in paragraph 27 of the judge is not clear, but argues that only becomes relevant if in fact the judge’s consideration of whether family life exists or his explanation in respect of that is actually inadequate or insufficient or legally otherwise in error.

My findings on error of law and materiality

10. In this case the judge clearly considered that prior to his parents coming to the UK in early 2012, the Appellant at that stage was not leading an independent life and that the family lived as a unit and they survived through farming. At that stage the Appellant was said by Judge Farrelly to be 27 years old. Prior to that the judge had found that he studied up until the age of 22 and he accepted that he was now

farming the land. The Appellant was said still to be living within the family home farming the land owned by his father and planting crops upon that land owned by his father. Also, it is the Appellant's case that he was in receipt of some money from land owned by the father which was rented out and that in addition, as had been said by the Sponsor in evidence, the children remaining were being sent £200 to £300 every two months for their support.

11. The argument effectively being raised before the First-tier Tribunal was that in this case there was both financial and emotional support which was real, committed and effective which did mean that there were more than normal emotional ties given the level of dependency that existed. Although Judge Farrelly clearly seems to be of the opinion that the Appellant was self-employed, on the basis that he was farming the land owned by his father, the issue here is whether or not, in circumstances where he was farming land owned by his father, receiving some rental income from land owned by his father which was being rented out, and also being sent money by his father, whether that amounted to financial dependency, and then whether in light of any such financial and any emotional dependency whether or not there was family life engaged.
12. Sadly, the judge has not really addressed the issue here in respect of this land being owned by the Sponsor, his father, and whether farming father's land, amounts to dependency upon the father. In addition, although the judge accepts that money has been sent he concludes in paragraph 20 that the Appellant is not dependent upon this, the money is sent out of natural love and affection with a view to improving the situation of all the remaining children. Again, in my judgement, sadly Judge Farrelly has not adequately explained that finding. The issue before him was as to whether or not there was financial dependency as at the date of the hearing before him, not necessarily in terms of whether or not there may be financial dependency in the future if the Appellant were to obtain a different type of job rather than farming the parents' land. The evidence before him was in terms of the fact that money had been sent, but he does not say as to why it is he formed the view that the Appellant was not dependent upon that as at the date of the hearing before him, why it was simply sent out of natural love and affection with a view to improving the situation of all the remaining children or why they would be able to maintain their life in Nepal without it. He has not explained how, if the appellant is farming his father's land, receiving rental income from his father's other land, and being sent financial aid by his father, that does not amount to financial dependency upon his father.
13. Although Judge Farrelly goes on to consider what the situation would be if he was wrong regarding whether or not Article 8 family life existed between the adult Appellant and his Sponsor, the judge went on to consider at paragraph 27 whether or not entry clearance would have occurred earlier in any event and therefore whether the historic injustice in the Gurkha cases applied in this case. At paragraph 27 Judge Farrelly found that what might have happened is very speculative. He stated that the Appellant's father was discharged in 1979, he married in May 1971. The army papers records that his eldest son, born in January 1977, was born with a disability. His daughter who was born in 1975 in Hong Kong was granted a status at that stage which the rest of the family were not. He was not satisfied earlier entry clearance

would have occurred. As Miss Willocks-Briscoe concedes, the explanation and reasoning given by the learned First-tier Tribunal Judge in that paragraph seems somewhat disjointed and does not fully or adequately explain why it is that simply the Sponsor being married in 1971 with his eldest son being born in January 1977 with a disability and his daughter being born in 1975 in Hong Kong, when the Appellant's father was then discharged in 1979, two years after his eldest son was born, means that the situation was speculative, and does not adequately explain why in such circumstances the Judge not satisfied that entry clearance would have occurred earlier.

14. The evidence before the First-tier Judge in terms of statements from the Sponsor, Mr Bhim Prasad Rai, was to the effect in paragraph 4 he says he was discharged from the army with exemplary conduct. He was merely 33 years old when he was discharged from the army in 1979 after fifteen years long service, and in paragraph 5 he said that he could easily have secured a job in the UK as a security or other officer in a related field, and there was no policy for settlement in the UK at the time, otherwise he would have settled here long ago with his family and would have been able to provide facilities to his children which they did not have in Nepal. His evidence was that had he been given the opportunity to settle in the UK at the time of his retirement from the army service he would have taken it and settled here with his wife and children and his family would not have been separated from him. He goes on to explain in paragraph 6 of his statement how he married his wife in 1971 during the army service. He was on leave of duty for six months after continuous service of three years, but then had to rejoin the service in Hong Kong and his wife remained in Nepal in his ancestral home and he next visited his wife in Nepal after three years. He says that it was in 1974 that he brought his wife with him to Hong Kong where his eldest daughter was born in Hong Kong in 1975 and that she was later recognised as a British national overseas and they lived there for two-and-half years before his battalion then moved to Brunei where he lived with his wife and daughter for a further six months and his son Gobinkumar was born in Brunei in January 1977. The sponsor then explained in paragraph 7 that he was given an option to take leave of six months or continue living with the family and retiring after two years more service and he opted for the latter option.
15. The Sponsor's evidence has not been adequately addressed by the First-tier Tribunal Judge and no adequate reasons have been given for rejecting or disputing that evidence within the decision at paragraph 27. It certainly does not follow and I agree with the concession made by Miss Willocks-Briscoe in that regard that that has not been adequately explained, and simply the fact that one was married in 1971 and had a child born with a disability in 1977 with a daughter born in 1975 in Hong Kong does not explain why it is that when discharged in 1979 he would not have done what he said he would have done, in terms of coming to the UK, had he been able to do so at that time.
16. In such circumstances, in my judgement, regrettably the decision of First-tier Tribunal Judge Farrelly does contain material errors of law. I cannot be satisfied having read the decision that the decision of First-tier Tribunal Judge Farrelly would

necessarily have been the same had those errors not been made, and therefore I do find that the errors of law in that regard are material errors.

17. It has been agreed by both legal representatives before me that further fact-finding will need to be made, both in terms of whether or not family life exists in this case and the balancing exercise taking into account any historic injustice. Both parties agreed that it is appropriate for the case to be remitted back to the First-tier Tribunal to be reheard before any First-tier Judge other than First-tier Tribunal Judge Farrelly. It has not been sought to be argued by the legal representatives that there should be preserved findings of fact. I therefore do set aside the decision of First-tier Tribunal Judge Farrelly, the same containing material errors of law and I remit the case back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Farrelly.

Notice of Decision

18. The decision of First-tier Tribunal Judge Farrelly does contain material errors of law and is set aside. The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Farrelly.
19. No order for anonymity was made before the First-tier Tribunal Judge and no such order has been sought before me today and therefore I do not make any order in respect of anonymity.

Signed

Date 22nd December 2017



Deputy Upper Tribunal Judge McGinty