



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01617/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2018

Decision & Reasons Promulgated
On 29 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

ENTRY CLEARANCE OFFICER, NEW DELHI

Appellant

and

MR KESH BAHADUR PARIYAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, HOPO
For the Respondent: Mr S Shepherd, Counsel

DECISION ON ERROR OF LAW

1. The Entry Clearance Officer has been granted permission to appeal the decision of First-tier Tribunal Judge Loughridge in which he allowed the appeal of the respondent under Article 8 of the ECHR.
2. The respondent will be referred to as “the applicant” for ease of reference.
3. The applicant is a citizen of Nepal born on 19 July 1993. He applied for entry clearance to settle in the UK as the child dependant of his mother, Jimaya Damai (“the sponsor”), widow of his father Hem Bahadur Damai who passed away on 21 June 2010. The sponsor was issued a settlement visa on 30 October 2015. The application was refused on 12 January 2017.
4. At the hearing before the judge there was no representation on behalf of the ECO. Mr Shepherd appeared on behalf of the applicant below.

5. The judge said at paragraph 8 that in submissions, Mr Shepherd referred him back to the explanation he had given at the start of the hearing, which is recorded at paragraph 2, regarding the provisions relating to the settlement of ex-Gurkha soldiers and their families in the UK, and to the determinative issue being whether there is family life between the applicant and the sponsor. Mr Shepherd said the evidence strongly points towards this being the case and that, if it is accepted, the proportionality argument should be resolved in the applicant's favour just as it would be if his father was still alive and settled in the UK. The judge said Mr Shepherd agreed to submit a skeleton argument summarising these points, which he had now received.
6. The ECO contended in the grounds that the judge allowed Counsel for the applicant to submit a skeleton argument after the hearing, which he received. However, the ECO was deprived of the opportunity to comment on the post-hearing submissions. It was further contended that the judge erred in considering this case as a Gurkha ADR application. Nor did the judge make reasoned findings on any emotional dependence.
7. Judge Mailer granted permission. He said it is arguable that there has been procedural unfairness in the circumstances. It is also arguable that there may have been a misdirection of law in ground 2, although the contention that there were no reasoned findings as to emotional dependence was less persuasive.
8. I note that at the hearing below there was no representation on behalf of the ECO. Notwithstanding that the ECO was not represented at the hearing, I find that the judge ought to have referred Mr. Shepherd's skeleton argument to the ECO for his comment as at the heart of the decision in this case is whether Article 8(1) is engaged. By failing to do this the judge committed a procedural unfairness. I find further that the judge may have erred in considering this case as a Gurkha ADR.
9. I further find that the judge erred in law in his assessment of family life. At paragraph 16 the judge based his assessment on evidence which he said showed a continuing practical, financial and emotional dependence by the applicant on his mother. I find that the judge was wrong to include emotional dependency because that is not the test. The test as stated in Kugathas and other case law is that family life has to go beyond the normal emotional ties of dependency.
10. For these reasons I find that the judge's decision cannot stand. It is set aside and needs to be remade.
11. The applicant's appeal is remitted to the Newport Hearing Centre for rehearing by a judge other than First-tier Tribunal Judge Loughridge.
12. The sponsor will require a Nepali interpreter.
13. No anonymity direction is made.

Signed

Date: 27 June 2018

Deputy Upper Tribunal Judge Eshun