



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04718/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26th January 2018

Decision & Reasons Promulgated
On 1st March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR SIMON LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel

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

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 10th August 1986. He made application for entry clearance to settle in the United Kingdom as the adult dependent relative of his father, Mr Bhim Bahadur Limbu – an ex-Ghurkha soldier. The Appellant's application was considered in relation to the Home Secretary's policy as outlined in Annex K, IDI chapter 15, Section 2A 13.2 as amended on 5th January 2015. By Notice of Refusal dated 5th August 2015 the Appellant's application was refused.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Turquet sitting at Taylor House on 9th August 2016. In a decision and reasons promulgated on 1st September 2016 the Appellant's appeal was dismissed.
3. On 15th September 2016 Grounds of Appeal were lodged to the Upper Tribunal. On 21st December 2016 First-tier Tribunal Judge Grant-Hutchison refused permission to appeal.
4. On 14th January 2017 renewed Grounds of Appeal were lodged to the Upper Tribunal. Those grounds stated that the Appellant's father and Sponsor had served in the Brigade of Ghurkhas for almost ten years and that he had been discharged in 1979 but denied any opportunity to settle in the United Kingdom. The Secretary of State had accepted that the Sponsor would have applied on discharge and that had the injustice not happened the Appellant would have been born British. The grounds contended:-
 - (1) That there had been a failure to consider the relevant facts and that the First-tier Tribunal Judge had concluded that the Appellant was not, contrary to the evidence of the Sponsor, dependent upon him and had rejected the evidence of a close bond engaging Article 8.
 - (2) That there had been insufficient direction of law in that the First-tier Tribunal Judge had found that the Appellant's bonds with his parents amount to "no more than the usual emotional ties."
 - (3) The First-tier Tribunal Judge goes on to resolve the question of proportionality against the Appellant and has failed to accept that unless a Respondent relies on something more than the ordinary interests of immigration control, the weight to be given to the historic injustices will normally require a decision in the Appellant's favour. (*Ghising and Others (Ghurkhas/BOCs - historic wrong - weight)* [2013] UKUT 567 (IAC).
5. On 1st March 2017 Upper Tribunal Judge Rimington refused permission to appeal stating that the judge had given clear reasoned findings as to why she did not find family life and this was prior to the findings on proportionality which would import the consideration of historic injustice and the ordinary interests of immigration control.
6. On 16th March 2017 grounds were lodged by the Appellant for judicial review for refusal of the Upper Tribunal to grant permission to appeal. On 26th May 2017 the Honourable Mr Justice Morris granted permission. In doing so Morris J said

"It is arguable that the UT's refusal of permission to appeal and the underlying FtT determination promulgated on 1st September 2016 were each wrong in law in that:-

 - (1) there was a failure properly to assess the credibility and weight to be attached to the Sponsor's evidence at paragraph 49 of his witness statement; and

- (2) the First-tier Tribunal Judge applied too high a threshold for testing the existence of

“Family life, in view of the existing state of the authorities, having found there was some financial support and some emotional attachment but that the claimant was not ‘wholly financially dependent’ nor ‘emotionally dependent’”.

7. Mr Justice Morris concluded that the issue of the correct legal test in relation to “family life” involving adult children raised an important point of principle and that there was some other compelling reason to hear the claim in that if there was an error in relation to Article 8(1) the case then raises questions relating to the “historic injustice”.
8. On 20th October 2017 Master Gidden quashed the decision of the Upper Tribunal to refuse permission to appeal. On 15th November 2017 permission to appeal was granted by the Vice President of the Upper Tribunal. On 8th January 2018 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response contends that the judge was entitled to find that there was no more than the usual emotional ties and that the judge had given adequate reasons in the determination as set out at paragraph 31. Further it was contended that the judge also properly considered the proportionality exercise at paragraph 32 and onwards.
9. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel, Mr Jesurum. Mr Jesurum is extremely familiar with this case. He attended before the First-tier Tribunal. He is the author of all Grounds of Appeal and the application for judicial review. The Respondent appears by her Home Office Presenting Officer, Mr Bramble.

Submissions/Discussion

10. Mr Jesurum relies on his Grounds of Appeal. He notes that the First-tier Tribunal Judge had found that the Appellant’s bond with his parents amounted to “no more than the usual emotional ties” and accepts that while that test is a correct reference to the *Kugathas* test it is arguably not sufficient and that it is necessary to show not dependence but real and committed support”. Dependence he submits in the sense that it is an indispensable support is not a requirement. He submits it is necessary to look at the character of the Sponsor and that everything in the Sponsor’s favour should be considered and that there have to be clear assertions as to what he has done. He refers me to the most recent authority of *Jitendra Rai [2017] EWCA Civ 320* being a decision of the Court of Appeal and indeed one in which he appeared for the Appellant. He takes me to paragraph 36 and 38 setting out that it is insufficient to say dependence is more than an individual tie, and it is wrong in law of the judge to concentrate on the Appellant’s parents’ decision to leave Nepal and settle in the United Kingdom without focusing on practical and financial realities entailed in that decision. He submits that it is necessary to look at the whole decision to see if the

findings were open to the judge. He submits that had the judge applied the correct test he would have come to a different conclusion.

11. Further he submits the judge's analysis pursuant to Section 117B is wrong and that unless the Respondent relies on something more than the ordinary interests of immigration control the weight to be given to the historic injustice will normally require a decision in the Appellant's favour. He considers that following *Ghising [2013]* the judge has taken the wrong approach. He refers me to paragraphs 55 and 57 of *Rai* and in particular at paragraph 57 the findings of the Court of Appeal. In similar circumstances to this case the Court of Appeal failed to see how the provisions in Section 117A and B of the 2002 Act can affect the outcome of the appeal. In such circumstances he asks me to set aside the appeal and to remake it allowing the appeal.
12. Mr Bramble's approach is most helpful. He starts by taking me to the judge's findings at paragraph 31 and 34 and whether the relationship between an adult sibling and a parent in these cases engages Article 8 and acknowledges that the decision predates *Rai* but concedes that the judge has potentially erred with regard to his findings on family life.

The Law

13. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
14. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

15. I am satisfied both from the submissions made and Mr Jesurum and by the concession made by Mr Bramble that the judge has materially erred in law in his

assessment, approach and findings on family life and the correct approach is to now set aside that decision and to go on and remake the decision.

Remaking of the Decision

16. *Rai* is authority for saying that to apply a test of “exceptionality” in order to determine whether family life exists between an Appellant and his parents is wrong and is contrary to the approach taken in *Ghising* and *Gurung*. The correct approach is that there is no requirement of exceptionality, that all depends on the facts, and that there must be something more than the love and affection between an adult and his parents or siblings which will not in itself justify a finding of family life. Against that background I turn to the supplemental bundle that is provided by the Appellant’s instructed solicitor and Counsel and I have considered the further documentary evidence that has been produced. The correct approach is to apply the test of support and Mr Jesurum asks me to find that the Appellant is in daily contact with his family and that there is evidence of some family life in Nepal of support. Applying the test set out in *Rai* the Appellant is consequently clearly a dependant.
17. The Sponsor is effectively taking up what should have been granted back in 1979. I am satisfied that there has been sufficient evidence produced to show that the financial support to the Appellant continues and that it is correct to make a positive finding of good character of the Sponsor.
18. I have been considerably assisted in this matter by the approach adopted by Mr Bramble on behalf of the Secretary of State who does not seek to challenge this approach or these findings. I am consequently satisfied the evidence shows real and committed support by the Sponsor for the Appellant and bearing that in mind and taking into account the guidance given in *Rai* I remake the decision allowing the appeal.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. On hearing further evidence/submissions from the Appellant’s legal representatives the decision is remade allowing the Appellant’s appeal.

No anonymity direction is made.

Signed

Date 23rd February 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 23 February 2018`

Deputy Upper Tribunal Judge D N Harris