



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05050/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9 May 2018

Decision & Reasons Promulgated
On 18 May 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

NIRMALA LIMBU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant:

Mr S Kotas, Home Office Presenting Officer

For the Respondent:

Mr P Donnison of Counsel instructed by N C Brothers & Co
Solicitors

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer but I will refer to the original appellant, a citizen of Nepal born on 1 September 1987 as the appellant herein. She appeals the decision of the Entry Clearance Officer on 18 January 2016 to refuse her application for an entry clearance as the adult child of the sponsor, her father, Mr Birdhoj Gurung. The appellant's appeal against the decision came before a First-tier Tribunal Judge on 9 August 2017. The judge allowed her appeal and the appeal before me is the appeal of the Entry Clearance Officer against that decision.

2. The First-tier Judge records that the appellant was born in Nepal and has lived there all her life. Her father served in the Gurkhas from 1970 until 1986. Following his discharge from the army he returned to Nepal and it was his evidence that he would have come to the United Kingdom after he had left the army had the option been open to him at that time. The appellant is the only child of the sponsor's first marriage. His first wife died in 1992. He has two children by his second marriage. The sponsor lived together with his second wife and three children in Nepal until June 2013 when the family, apart from the appellant, came to the United Kingdom. The sponsor had not been able to apply for the appellant to join him at that point under the Rules then in force. It was following a new concession in 2015 that the appellant had made her application.
3. The judge helpfully described the key points raised by the Entry Clearance Officer as follows:
 - “(i) It was said that the appellant did not fall within the ambit of the policy for the adult children of former Gurkhas, as set out in annexe K because she had not established that she is emotionally or financially dependent on him.
 - (ii) It was not considered that the decision placed the United Kingdom in breach of the duties arising under section article 8 of the European Convention on Human Rights. Regard was had to the guidance set out in **Gurung & others, R (on the application of) v SSHD [2013] EWCA Civ 8** and **Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC).**”
4. The judge records that the sponsor gave evidence at the hearing. He had visited the appellant from November 2015 until February 2016 and he was accompanied by his wife on that one visit. He told the judge that he would have liked to visit more and had intended to do so, but was unable to do so because of his ill-health. They had stayed with the appellant on that visit. He kept in touch with his daughter by phone and Viber and spoke twice a week for ten to twenty minutes, sometimes more. He sent £62.00 to her each month. The Presenting Officer noted there was no evidence of money transfers between 2015 and 2017 and the sponsor said that the reason for the lack of evidence prior to that was that he used the “Hundi system”. He changed the method of payment because he was advised to do so when his daughter made her application. It is recorded in paragraph 10 that the Presenting Officer (referred to as “Ms Knight”) had no cross-examination.
5. There is an issue in this case as to what extent the Presenting Officer conceded any matters. Paragraph 11 reads as follows:

“In her submissions, Ms Knight sought to rely upon the entry clearance officer's refusal, and the manager's review. She agreed that the matter stands or falls on the issue of whether there is family life. She submitted that there is a lack of evidence of telephone calls, and there has been only one visit. She did not accept that family life has been established.”

6. The judge carefully directed himself on the law and referred to numerous authorities, including **Agyarko v Secretary of State [2017] UKSC 11** and **Jitendra Rai v ECO (New Delhi) [2017] EWCA Civ 230** with specific reference to paragraphs 39 and 42. The judge found as follows in paragraph 20 of his decision:

“Having considered the principles set out in case law, I turn, as I must, to the fact-sensitive exercise of deciding whether there is family life of sufficient intensity to engage article 8(1) in the circumstances of this case. The appellant lived together with her sponsor and other family members until mid-2013. There has been one substantial visit since then. That was a very lengthy visit, and it is indicative of a strong relationship. I accept Ms Knight’s point that there have not been further visits. I attach little weight to that. That is because I accept the evidence that the sponsor wanted to make further visits, but his health precluded that. From the medical evidence, that seems to me a good explanation. The sponsor has rheumatoid arthritis for which he has been prescribed significant medication, including disease modifying drugs and steroids, together with pain relief. Although it is not specifically stated, I infer from the fact that he has a GTN spray that he also has angina. There is no other reason why he would have been prescribed a GTN spray. There has been substantial telephone contact, including lengthy conversations by Viber. I accept that I have no supporting evidence for that, but I found the sponsor to give clear, credible and consistent evidence. Ms Knight did not challenge his account on cross-examination. I accept it. Likewise, I accept his account of providing regular financial support. The sums involved are relatively small, but that is in the context of a retired man in poor health with, it is reasonable to infer, limited financial resources. I have no evidence to support his account of payments pre-2015. Again, Ms Knight did not challenge it, and I accept it.”

7. The judge found that Article 8 was engaged and he went on to consider the issue of proportionality in the light of the decision in **Hesham Ali v Secretary of State [2016] UKSC 60**. He also noted the historic wrong done to former Gurkhas referring to **Gurung** and **Ghising** (cited in paragraph 3 above). The judge’s decision concludes as follows:

“25. I am satisfied that there is sufficient casual nexus between the historic wrong done to former Gurkhas and the circumstances giving rise to this appeal. The significant point in relation to the issue is the clear evidence that, following his discharge from the Army, the appellant’s father returned to Nepal, having been told that he would not be allowed to settle in the United Kingdom. The sponsor says that, had he been able to come to the United Kingdom at that time, he would have done so. That aspect of the history is not contested by the respondent. I accept that the appellant’s father’s decision to return to Nepal was shaped by the fact that he had been told that he would not be allowed to settle in the United Kingdom in consequence of which he had no option other than to do as he did. Had that not been the case, he may well have elected to come here on leaving the army, and the appellant would have been born in this country.

26. I am further mindful of the position established by case law that, in cases such as this, the historic wrong will ordinarily determine the proportionality assessment where the respondent only relies on their immigration policy as the legitimate aim. As is stated in **Ghising**,

‘If the Respondent can point to matters over and above the ‘public interest in maintaining of a firm immigration policy’, which argue in favour of removal or the refusal of leave to enter, these 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. 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. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant’s favour.’

27. Following on from the principles established in case law, I give due weight to the impact of the historic injustice done to former Gurkhas. I have considered whether there are any countervailing factors to outweigh that, beyond the usual weight to be given to immigration control as section 117B(1) makes clear. Nothing of substance has been advanced. Having considered all the circumstances in the round, I am satisfied that the impact of the historic injustice outweighs the legitimate aim of maintaining immigration control, and that this is a case where the weight to be given to that injustice requires a decision in the appellant’s favour.”

8. Accordingly, the judge allowed the appeal.
9. There was an application for permission to appeal in which it was argued that insufficient regard had been paid to the submissions of the Presenting Officer. The Tribunal had not got her correct name which was Mrs James and not Ms Knight. Reliance was placed on the Presenting Officer’s note of the hearing and the note clearly demonstrated the challenges made by the Presenting Officer on the issues of contact and financial support. These were disregarded without relevant findings by the Tribunal. In ground 2 it was argued that the judge had made findings without evidence. Reference was made to what he had said in paragraph 20 (which I have set out above). Further, in ground 3 it was submitted he had erred in finding that Article 8 was engaged and proportionality should not have been considered. In ground 4 it was said that the public interest had not been considered.
10. The First-tier Tribunal granted permission to appeal specifically with reference to ground 1 on the point that the judge had arguably failed to have due regard to the whole of the evidence before him. The grant of permission was not limited to ground 1.
11. At the hearing Mr Kotas relied on the grounds and submitted that it had not been open to the judge to conclude that the appellant was financially dependent on the sponsor and there was a lack of family life. Although there may have been no express cross-examination, how could it (he argued rhetorically) be established that there was a real, committed or effective support as required in **MM (Article 8 - family life - dependency) Zambia [2007] UKAIT 0004**? In relation to ground 4 I was referred to paragraph 56 of the decision of the decision in Rai where the Court of Appeal appeared

to have accepted the submissions on both sides, including the point that in view of the “historic injustice” considerations under Section 117A and B would not have made a difference to the outcome adverse to the appellant. In the circumstances Mr Kotas did not press ground 4.

12. Counsel submitted that the judge had carried out his function of considering all the evidence and the post-hearing minute did not indicate that the Presenting Officer had cross-examined the appellant. Counsel submitted that it was a thoughtful decision and it was noted there was only one visit. In paragraph 20 the judge expressly accepted the Presenting Officer’s point about the lack of further visits. It was open to him to attach little weight to that for the reasons he gave. He had considered all the evidence before him. It was also open to him to accept the evidence of financial support in the absence of documentary evidence for the reasons he gave. He had found that the sponsor’s evidence to be “clear, credible and consistent”. There was not a requirement to furnish supporting evidence in the circumstances. The sponsor’s evidence had not been challenged in cross-examination. It was apparent that the judge had both considered the Presenting Officer’s submissions and had rejected them. In relation to ground 3 it was clear that Article 8 was engaged and the fourth ground had not been pursued. There was no reply from Mr Kotas to these submissions and I reserved my decision.
13. I have carefully considered the arguments that had been advanced on both sides. I remind myself that in order to interfere with the decision of the First-tier Judge it is necessary to identify an error of law. It is plain that the sponsor was not cross-examined. Reliance is not placed on a Record of Proceedings but on a post-hearing minute. The note starts by recording preliminary issues and records that the judge announced that he would allow the appeal at the conclusion of the hearing. It then turns to the submissions that had been made and makes reference to Agyarko. It was said there was nothing exceptional or compassionate about the case. Reference was made to Section 117B and the need for effective immigration control and it was open to the sponsor to join the appellant in Nepal. It was simply an issue of choice made by the family.
14. It appears to be accepted on both sides that the sponsor was not cross-examined. He gave his evidence and the judge accepted that evidence. The judge does record the submissions made by the Presenting Officer. I am not satisfied that anything turns on the mistake about her name. I find that the First-tier Judge fully and carefully directed himself by reference to the relevant authorities as to the task he had to undertake. He did not overlook the submissions advanced on behalf of the Entry Clearance Officer, and indeed as Counsel submits, properly had regard to them. It was open to the judge to find that family life had been established for the reasons that he gives between paragraphs 16 and 19 of the decision, and specifically given his consideration of the case of Rai in paragraph 19. I see no evidence of any misdirection in the approach of the First-tier Judge to the issue. Although the judge accepted the Presenting Officer’s submission that there was only one visit it was open to the judge to conclude as he did for the reasons set out in paragraph 20. I see no evidence of an error of law in the

judge's approach on either the visit issue or the financial issue. These were findings of fact made by him which were open to him. Again, it is not without relevance that the sponsor was not cross-examined. He was entitled to conclude there was continuing family life as he says in paragraph 21. The point in relation to Section 117 of the 2002 Act is not pursued – rightly in my view. It was plainly open to the judge to resolve the issue of proportionality in favour of the appellant given the historic wrong done to former Gurkhas as he says. I agree with the Counsel that the decision is a thoughtful one. I have carefully considered the points made on behalf of the Entry Clearance Officer but I find they raise no material error of law and I direct that the decision of the First-tier Judge shall stand.

Notice of Decision

15. Appeal dismissed.
16. The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge did not make a fee award in this case and I make none.

Signed

Date 14 May 2018

G Warr, Judge of the Upper Tribunal