



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08259/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2018

Decision & Reasons Promulgated
On 5 June 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MR KUMAR THAPA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe
For the Respondent: Ms Daykin, Counsel

DECISION AND REASONS

1. For ease of reference I refer to the parties as they appeared before the First-tier Tribunal, namely, the appellant is Mr Thapa and the respondent is the Entry Clearance Officer.
2. The appellant is a citizen of Nepal born in 1985. He appeals against a decision of the respondent made on 25 February 2016 to refuse his application for entry clearance to settle in the UK as the dependent son of Tul Bahadun Thapa, a former Gurkha soldier.
3. The decision was refused with reference to Annex K IDI Chapter 15 as amended on 5 January 2015 not least because the appellant and sponsor, his ex-Gurkha father had

lived apart in excess of two years and the appellant was not wholly financially or emotionally dependent on the sponsor.

4. He appealed.

First tier hearing

5. Following a hearing at Taylor House on 26 June 2017, Judge of the First-tier Davey allowed the appeal on human rights grounds.
6. The appellant's position was that he was wholly financially and emotionally dependant on the sponsor. The respondent's decision was an unlawful interference with family/private life rights contrary to article 8 ECHR.
7. The judge noted the unchallenged evidence, namely, that having served as a Gurkha soldier his father was discharged with an exemplary conduct assessment in 1986. The appellant was born in Brunei during British Army service. Following discharge the sponsor found work in Brunei.
8. In 2006 he got ILR enabling him to settle in the UK. His wife followed him to the UK soon after. But for the then policy he would have applied for his children to join him.
9. The sponsor and his wife returned several times to Nepal for lengthy stays but had to return to the UK when necessary to ensure they did not lose settlement status. They made shorter visits in 2014, 2015, 2016 and 2017. The only reason they went was to look after their son.
10. The evidence was that the appellant has not formed an independent life, has always been fully financially and emotionally dependant on his parents, they have never truly been separated and that such physical separation as has occurred has not effectively changed family life.
11. Further evidence was that the appellant has only a limited education, speaks poor English but has the ability to learn it, is unmarried and unemployed and unable to find work. A further difficulty in that regard is that following an accident in 2012 when he suffered a serious leg break he has mobility problems for which he required care.
12. In moving on to consider his assessment of the evidence the judge took the view that a number of points were relevant. These included the historic injustice and consequences of the then policy; that in the context of family life whilst there is a positive obligation to foster the development of family life, something more needs to exist beyond the normal emotional ties that might arise between adults in particular parents and their child; that elements of dependency may be found and that such means 'support' that is 'real', 'effective' or 'committed' (per *Kugathas* [2003] EWCA Civ 3 at [17]). Also, that attaining the age of majority does not end family life nor does voluntary separation; that in assessing the existence of family life obviously relevant is whether the child has established a life of their own.

13. The judge's conclusions are at paragraph 13ff. He found on the undisputed facts that there is family life. He noted again that there has to be something more than normal love and affection. The appellant has a close relationship with his parents and they speak on a very regular basis over and above that which might be expected. There is clear financial dependency borne out of necessity and the limitations of his health. He is still living in the family home, not truly living an independent life and needs the support and external care provided.
14. In considering proportionality the judge found that but for the historic injustice family life would never have been interfered with.
15. In considering section 117A and B of the Nationality, Immigration and Asylum Act 2002 the judge found that '*the appellant can improve his English and with assistance be able to find albeit part-time work and therefore there is no reason why he needs to be a burden on the taxpayer in coming to the United Kingdom and making a life here with his family.*' [16]

Error of law hearing

16. The respondent sought permission to appeal which was granted on 25 January 2018.
17. At the error of law hearing before me Ms Willocks-Briscoe relied on the grounds. In summary, the judge had not been entitled on the evidence before him to find that article 8 was engaged. The evidence did not show elements of dependency beyond the normal emotional ties between adults. The judge recognised there had to be '*something more*' [9,14]. He appeared to take that to be the appellant's health. However, he did so on limited evidence and not on the basis of anything up to date. As such he should not have given weight to that limited evidence and in doing so he misdirected himself.
18. Ms Willocks-Briscoe added that the judge appeared to have found that were it not for the historic injustice of Gurkha settlement policy the sponsor would have come to the UK on his retirement. Such, however, was speculation and should not have been given weight in the proportionality assessment.
19. Further, although the judge noted the need to have regard to section 117 and noted that the appellant cannot speak English, he erred in finding that there was no reason why, despite that and despite his health problems, he would not be able to work or successfully integrate into British society.
20. In reply, Ms Daykin submitted that Ms Willocks-Briscoe was wrong in stating that there was no up to date medical evidence and that the sponsor had not indicated that he would have come to the UK on retirement if he had been able to. He said such in his witness statement. She emphasised that there had been no challenge to the evidence. It was clear that this was a close relationship over and above what might be expected. Not only is he wholly reliant on them financially, his emotional reliance also goes well beyond a regular relationship. Their separation had not been voluntary.

They have kept going back to see him. The judge's conclusion that there is family life was sustainable. Any error in his consideration of section 117 was immaterial as the case law indicated that if it is found that article 8 is engaged and had it not been for the historic wrong the appellant would have settled in the UK long ago, such will ordinarily determine the proportionality assessment in his favour.

Consideration

21. In considering this matter the first criticism of the respondent is that the judge should not have found there was article 8 family life.
22. In *PT (Sri Lanka) v ECO, Chennai* [2016] EWCA 612 it was held that some Tribunals appeared to have read *Kugathas* as establishing a rebuttable presumption against any relationship between an adult child and his parents being sufficient to engage Article 8. That was not correct. *Kugathas* required a fact sensitive approach, and should be understood in the light of the subsequent case law summarised in *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 160 and *Singh* [2015] EWCA Civ 630. There was no legal or factual presumption as to the existence or absence of family life. It all depends on the facts. The line of case law was again considered in *Rai v ECO, New Delhi* [2017] EWCA Civ 320 (in the context of the adult son of a former Gurkha soldier). There is no test of exceptionality in determining whether family life exists between the appellant and his parents.
23. In this case the facts, which the judge emphasised were unchallenged, included that the sponsor having been enabled to settle in the UK in 2006 and his wife later that year, they quickly returned to Nepal but had to return to the UK in two years otherwise they would have risked losing their settlement rights. This I take to be a reference to article 13(4)(a) of the Immigration (Leave to Enter or Remain) Order 2000: '*where the holder has stayed outside the UK for a continuous period of more than two years, [his leave to enter UK] shall thereupon lapse.*' Having returned to the UK they went back again to Nepal the next year, the sponsor once again returning to the UK after two months. However, his wife remained living in family with the appellant until late 2011. Once again the sponsor returned to Nepal and ultimately he and his wife came back to the UK to preserve their status. Subsequently they went back to him yet again in 2014, 2015, 2016 and 2017
24. On that evidence the judge was entitled to find that the appellant who is unmarried and is '*still living in the family home, not truly living an independent life, needing the support and external care provided, he has not established an independent life but continues to be a dependent...*' [15]. Further, that '*the sponsor's support is a key to the appellant having a roof over his head*' and that he '*has a close relationship with his parents and they speak on a very regular basis over and above that which might be expected*' [13]. Also that he has '*always been fully financially and emotionally dependent on his parents and they have never truly been separated and such physical separation as has occurred has not effectively changed family life*' [4]. In that regard '*the separation between the appellant and his parents has not in its true sense been voluntary but driven by the limitations on leave to enter the UK which lies on the sponsor and his wife.*' [15]

25. It is clear that the judge found the elements of dependency to be beyond the normal emotional ties. He recognised that there had to be '*something more*' (per *Singh v SSHD [2015] EWCA Civ 630* at [24]). I consider that such was open to him on the evidence. This was more than, as the grounds claim, keeping in touch and the occasional visit.
26. As a further factor the judge placed reliance on the appellant's medical condition namely, a serious leg condition which hampers his mobility. I do not find merit in Ms Willocks-Briscoe's submission that the judge erred in his assessment of the evidence of the sponsor as to his son's disability in the absence of independent medical evidence confirming his condition. First, as indicated the evidence was not challenged before the First-tier. Second, there is independent medical evidence, namely a letter and medical notes from B & B Hospital, Lalitpur, Nepal. The letter, dated 8 March 2016, by a consultant orthopaedic surgeon states that the appellant was diagnosed with left sided sub-trochanteric fracture which was treated surgically but problems required further surgery. At follow-up in 2016 it was found that there was '*leg length discrepancy along with malunion of the fracture. The patient uses canes for walk.*' It was indicated that the appellant should have corrective surgery.
27. I conclude that the judge was entitled to give the weight he did to the appellant's disability. Further, for the reasons given above, that he was entitled to find that article 8 family life was engaged. The appellant had a family life which existed at the time of the parents' departure to settle in the UK and had endured beyond it notwithstanding their having left Nepal when they did.
28. Having found that family life exists the judge went on to the assessment of proportionality. I do not find merit in Ms Willocks-Briscoe's submission that it was speculation that the sponsor would have come to the UK on retirement from the Army had not been prevented from doing so by the historic injustice. He said as much in his witness statement [para 3]. As indicated, again, there was no challenge to any of the evidence before the First-tier Judge.
29. The judge noted that the appellant does not speak English and is not financially independent but that he has the ability to learn and to get a job. I do not consider that future possibilities accord with the stated public interest requirements of the section and that as such his lack of English and lack of financial independence weighs against the appellant. However, I do not consider that to be a material error because historic injustice had to be weighed.
30. In *Ghising and other (Gurkhas/BOC's: historic wrong; weight)* [2013] UKUT 567 the Tribunal stated:

'[In Gurung and others [2013] EWCA Civ 8] The Court held that, as in the case of British Overseas Citizens, the historic wrong suffered by Gurkha ex servicemen should be given substantial weight.'
(headnote (3))

'Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the appellant would have settled in the UK long ago, this will ordinarily

determine the outcome of the Article 8 proportionality assessment in an appellant's favour where the matters relied on by the SSHD/ECO consist solely of the public interest in maintaining a firm immigration policy.'
(headnote (4))

31. On the facts as they were before the judge he was entitled to find that the appellant would have settled in the UK with his parents long ago were it not for the historic injustice which is recognised by both the respondent and the courts. In the circumstances he was entitled to find that the respondent's decision was a disproportionate breach of the right to family life.

Notice of Decision

The decision of the First-tier Tribunal shows no material error of law. That decision allowing the appeal stands.

No anonymity order made.

Signed

Date

Upper Tribunal Judge Conway