



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09580/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 May 2018

Decision & Reasons Promulgated
On 15 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MISS MAYA GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr E Wilford, Counsel instructed by Howe & Co Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Nepal born on 31 December 1987. She appealed to the First-tier Tribunal against the refusal, by the respondent, of her application for entry clearance for settlement in the United Kingdom as a dependant of her father, Kul Bahadur Gurung, a former Gurkha. The refusal by the respondent is dated 15 March 2016. In a Decision and Reasons promulgated on 7 August 2017, Judge of the First-tier Tribunal M R Oliver, dismissed the appellant's appeal on human rights grounds.

2. The appellant appeals with permission on the following grounds:

Ground 1 - Misdirection on law in relying solely on **Kugathas [2003] EWCA Civ 31** and in elevating the test and looking for “strong financial or emotional dependency” in order to establish family life. The judge also fell into error in finding that the appellant enjoyed “some family life”;

Ground 2 - It was argued that the judge erred, at paragraph [17] in finding that the historic injustice did not make the refusal disproportionate, whereas in the absence of a bad immigration history or criminal behaviour a decision is required in the appellant’s favour (see **Ghising [2013] UKUT 00567 (IAC)**);

Ground 3 - Failure to make findings and provide reasoning, it being argued that the majority of the decision was a cut and paste in relation to the historical background and apart from one sentence in [15] the only findings were in [17], amounting to three sentences. It was argued there was no proper reasoning.

Ground 4 - Failure to apply the applicable authorities which were mentioned by the First-tier Tribunal Judge but not considered or applied.

Discussion

3. Mr Wilford emphasised the judge’s finding at [17] that:

“... the appellant clearly enjoyed some family life with her father at the time when he left”.

However, the judge went on to find that the evidence did not demonstrate “strong financial or emotional dependency”. Mr Wilford submitted that what the judge should have been looking for was the existence of real, effective or committed support and the judge had elevated the test for family life. This is a case where the appellant was a 28 year old unmarried woman with no children, dependent on her parents for support. The finding that Article 8 was not engaged was not borne out by the evidence and Mr Wilford relied on the witness statement and supplementary witness statement of the sponsor before the First tier Tribunal, that he sends the appellant money whenever she needs it, including through family and friends and that the evidence of receipts was not the sole evidence before the First-tier Tribunal.

4. In the sponsor’s initial statement, at page 28 of the First-tier Tribunal bundle, the sponsor reiterated that the appellant is fully reliant on the sponsor “for financial support, accommodation and all other matters throughout her life”. In addition there was evidence including at pages 35, 36 and 37 of the bundle of the passport stamps showing visits by the sponsor to see the appellant, following settlement in the UK by the sponsor. In addition to money receipts the sponsor provided Viber receipts and telephone calling cards. Mr Wilford relied on paragraph 36 in **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320** that the threshold of support is “real” or “committed” or “effective”. Mr Wilford also relied on the grounds, in relation to the inadequacy of the reasons, including that the judge appeared to negate the relationship between the appellant and her parents by reference to her relationship with her brother

which was an error. The inference drawn is that the family life with the parents had diminished because she had arguably a stronger family life with her brother as both had been living alone together. Mr Wilford submitted that was not a sustainable finding and that the judge failed to address the evidence of effective, committed and real support from the appellant's parents.

5. Mr Wilford further submitted that the appellant was single and that she had not established an alternative family unit. Although the appellant had been separated from her father for five years, Mr Wilford submitted that the Court of Appeal in **Rai** at [37] to [40] criticised the Upper Tribunal's approach in concentrating on the appellant's parents' decision, in that case, to leave Nepal for the United Kingdom without focusing on the practical and financial realities, an approach found to be mistaken. The question still remains as to whether, as a matter of fact, the appellant herself enjoyed family life with her parents. Mr Wilford further submitted that the judge did not take the correct approach. Although at [14] reference was made to the heart of the issue, the question of whether family life was subsisting, the findings at [17] were insufficient to address that question. Mr Wilford submitted that there was no suggestion that the sponsor was anything other than a truthful witness. There were no adverse findings made against him and it was the sponsor's consistent evidence that the appellant was wholly financially dependent on him (and I note that that evidence went beyond financial support but speaks of the appellant being totally "reliant" and "dependent", including that the sponsor calls the appellant whenever he can as well as sending money).
6. Mr Tufan submitted that the judge correctly identified, at [14], that the preliminary issue was whether there was family life at the point of departure by the sponsor. Mr Tufan noted that the judge found in the appellant's favour in relation to the issue before the First-tier Tribunal as to the appellant's age (at [15]) and this was not disputed. The remaining findings were at [16] and [17]. Mr Tufan accepted the findings were somewhat thin, but initially submitted that they were sufficient. He submitted that the judge did not actually find family life at the time of departure, instead finding that:

"Although the appellant clearly enjoyed some family life with her father at the time when he left I am not satisfied that that this extended beyond that normally found between adults (**Kugathas v SSHD [2003] EWCA Civ 31**)."

7. Mr Tufan conceded however, that the terminology subsequently used by the First-tier Tribunal, that since separation the contact and support had not demonstrated a "strong financial or emotional dependency and what has been supplied is mostly very recent" was incorrect and that the judge ought to have applied the approach set out in **Rai** of addressing whether there was real, committed and effective support. Mr Tufan had to accept that the judge did not do that. In light of this, Mr Tufan conceded that he was in some difficulties and made no further submissions.

Error of Law Conclusion

8. I am satisfied that the First-tier Tribunal took the wrong approach in assessing whether family life existed. Although the judge set out the correct legal framework, including

that he had to assess whether there was family life when the appellant's parents left the United Kingdom and whether it had continued to subsist, the Tribunal's findings at [17] are flawed. Although on the one hand the judge found that the appellant clearly enjoyed some family life with her father at the time when he left, the judge went on to find that he was not satisfied that this extended beyond the normal ties between adults and relied on Kugathas. However, the Tribunal provided no adequate reasoning for that finding other than stating that the "bond with her stepmother was not biological and had been of comparatively short duration". The Tribunal went on to address the issue of subsequent contact and then applied an elevated test of strong financial or emotional dependency.

9. It was a material error to fail to adequately address the evidence before the First-tier Tribunal, which had always been that the appellant has continually resided in Nepal and is totally financially and emotionally dependent on the sponsor and his wife. The sponsor set out that he provides all of his daughter's accommodation and other expenses and supported her fully as his dependant and that she has no-one else to support and assist her. There were no findings as to whether or not the judge rejected this and if so for what reason. The sponsor stated that he had two further children, the appellant's older brother who was single and studying in Australia, and the appellant's older sister who was in Nepal and married with her own daughter. The sponsor confirmed that he continued to support his daughter through money and contact through Viber and telephone and sent her money if she needed it, including as set out in the money receipts.
10. However, although the decision refers to the evidence being 'very recent' there were no findings as to whether he rejected the sponsor's evidence that the receipts were not a true picture of how much he supported his daughter as, in addition, he sent money through family and friends. The sponsor also indicated that the appellant was living in a "family home" that was in his son's name and that his son was in Australia. The judge addressed this simply by referring to the appellant having a stronger family life with her brother as they had been living together alone which would continue "especially as he now owns the house they live in". Again, there is no adequate reasoning for such a finding which did not address the sponsor's evidence or give any adequate reasons why the Tribunal rejected the sponsor's evidence, that this was a 'family home' in his son's name (rather than exclusively his son's property) and that he and his wife provide for all the appellant's accommodation, financial and emotional needs.
11. It is significant that the decision, although it cited the Rai in the Court of Appeal, did not cite the test to be applied in relation to establishing whether or not family life existed at the time of departure and continued to subsist, which was of real effective and committed support, and the reasoning that the test in Kugathas had been too high. The Tribunal also concentrated on the appellant's brother, including that although it was accepted that he was currently away from Nepal, "there is no evidence he has any plans not to return at the conclusion of his studies to the family home which they shared before he left". Such is speculative. I agree with Mr Wilford that in essence the judge conflated the issue of whether the appellant enjoys family life with her brother,

with the issue of whether she enjoyed and continues to enjoy family life with her parents.

12. Although the First-tier Tribunal criticised the lack of a witness statement from the appellant and that her father had not suggested that she was in education, the sponsor provided two witness statements and gave oral evidence and there was no suggestion in the judge's findings that the sponsor failed to address any questions as to the appellant's circumstances in Nepal during the intervening five years between her father leaving and the application being made. Again, the Tribunal failed to give any adequate reasons why, if that was the case, it rejected the sponsor's consistent claim that the appellant was continually financially dependent on her parents for support, accommodation and "all other matters throughout her life," including that it was his duty as part of Gurkha culture to support a dependent child until such time as they were independent.
13. I am satisfied there are material errors in the First-tier Tribunal decision, such that it cannot stand. I preserve the First-tier Tribunal's findings up to and including [15], whereby the judge accepted that the date of birth had been corrected and that she did not fail the suitability test.

Remaking the Decision

14. As I am satisfied that there are material errors of law in the First-tier Tribunal's decision I have proceeded to remake that decision in light of the evidence before me and submissions. Mr Wilford confirmed that no further documentary or oral evidence was relied on. Mr Tufan had no submissions to make other than that if the Tribunal found that Article 8(1) was engaged then the appellant had to succeed because of the historic injustice. Mr Wilford relied on the materials before me and made no further submissions.

Background

15. It is undisputed in this case that the appellant's father, and the sponsor, was a Gurkha who served in the Brigade of Gurkhas from 22 October 1955 until 28 December 1980 and was discharged with an exemplary record of service. The sponsor was discharged prior to the birth of the appellant in this case. Following his discharge he returned to Nepal where his family continued to reside. As already noted the appellant has two older siblings with a married sister with a young child in Nepal and a single brother studying in Australia. It has always been maintained by the sponsor and I accept that this is the case, that he received a long service and good conduct medal in his British Army career, achieving the rank of Corporal. It was also his case that at the time of his army discharge there was no settlement policy in place for British Gurkhas and their dependent families and that right was only given recently and that he did not have the opportunity of applying for settlement together with his dependent family immediately after his discharge. He confirmed, and I accept that this is the case, that he would have applied for settlement together with his dependent children upon discharge, had he had the opportunity to do so. Had that been the case, I note that the appellant would have been born in the UK.

16. The appellant appeals the refusal of the respondent of entry clearance dated 15 March 2016. It is not in dispute that the appeal can only be considered under Article 8 and the relevant policy.
17. It is common case that prior to 1997 veterans of the Brigade of Gurkhas were denied the opportunity for settlement. This was found to be an historic injustice. It was not until a further policy was introduced in 2009 that the first opportunity was provided for all adult children to apply for entry clearance, with this policy being amended in 2015, to remove the requirement for exceptionality, in light of the Court of Appeal decision in **Gurung [2013] 1 WLR 2546**.
18. I have considered the five stage test in (**R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368**). It is settled law that the Article 8 rights of the full family must be considered (**Beoku-Betts [2009] 1 AC 115**).
19. In considering whether family life exists between the appellant and her family members I have considered all the evidence. The appellant was born on 31 December 1987 after her father's discharge from the Gurkhas. The appellant's mother, the sponsor's first wife, died on 31 March 2007. The appellant's second marriage ended in divorce and he married his third wife on 15 April 2009. The sponsor's third wife was granted entry clearance a year after the sponsor and they both entered the United Kingdom on 6 December 2010. I accept, and such is not disputed, that the appellant resided with the family until her father and stepmother's departure to the United Kingdom and that there was no opportunity for the sponsor to apply for settlement before he did, in 2009.
20. I accept that it is a relevant consideration that the sponsor faced a choice between availing of such settlement in the UK or continuing family life as it then was in Nepal. I take into consideration that at the time the sponsor and his wife left Nepal the appellant was three weeks away from her 23rd birthday. However, it is uncontroversial that family life, for the purposes of Article 8, can persist amongst adult children and their parents. I take into consideration that at that time the appellant had remained in the family home and it was the consistent evidence before me from the sponsor that she remained dependent on her father for all of her needs, financial and otherwise.
21. The respondent Entry Clearance Officer stated in the refusal that although the appellant has stated she was unemployed the Entry Clearance Officer found it to be "highly unlikely that you will not have worked in the past". However, there was no reasoning behind such a statement and Mr Tufan did not pursue or rely on this argument. Again, it has been the sponsor's consistent evidence that the appellant "remains wholly dependent on us and she will continue to be so for the foreseeable time". Although I accept there is no indication of medical conditions or disability, that in itself does not indicate that a young female family member will have gained employment or be otherwise independent and I place weight on the fact that it is not disputed that she has remained throughout in the family home.

22. Although I accept there was no documentary evidence of financial support during the time that the family were all living together in Nepal, I consider it is more unlikely for there to be so, considering the passage of time. The appellant had produced additional evidence, including from the Kathmandu Metropolitan City Office confirming the appellant's statement that she was unmarried and unemployed. In such circumstances I am satisfied that it is plausible that the appellant might have remained in the family home, given that she was unmarried and unemployed and remained dependent on her father. I take into account that her father has maintained that it is part of Gurkha culture that the sponsor should continue to maintain a dependent child until they become independent. I have also taken into consideration that there was no challenge to the sponsor's evidence and in addition to the money receipts, I accept his account that this was not a true picture of the support as he also sent money through friends and family. Again Mr Tufan made no submissions that might query any of that evidence.
23. I find, therefore, that the appellant was dependent and has remained dependent on her father throughout. I am satisfied that family life existed at the date of departure. I place weight on the witness statements and additional evidence from the sponsor of that continued dependence, including through phone calls and other electronic contact, visits to Nepal (such again not being disputed) and evidence including through money receipts and the sponsor's evidence that it was transferred using individual's travelling to Nepal.
24. I accept the consistent evidence that regardless of the appellant's age, she has remained emotionally close to her father, as evidenced by the continuing contact and financial and emotional support and I accept that I can place weight on the evidence provided including Viber receipts, transfer money receipts, family photographs and telephone calling cards, all of which I have considered in the round including that phone card evidence can be corroborative of a contention to communicate by telephone (see **Goudey (subsisting marriage - evidence) Sudan [2012] UKUT 00041 (IAC)**).
25. In deciding whether family life exists the test remains as to whether "something more exists than normal emotional ties" (**Kugathas v SSHD [2003] EWCA Civ 31**) and relevant factors include who the relatives are, the nature of the links, age, where and with whom the appellant has resided in the past and the nature of contact. I accept that in order to establish family life it is not necessary to find that support is indispensable, which it is unlikely to be in an appellant of this age. However, as already detailed, I must consider the nature of these ties in light of the Court of Appeal guidance in **Rai** and its endorsement at [36] of Sedley LJ's opinion in **Kugathas** that dependence means support which is real or committed or effective. It is particular in this context that the Upper Tribunal in **Ghising [2012] UKUT 160** confirmed that **Kugathas** had been interpreted too restrictively in the past and the Court of Appeal in **Patel & Ors v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17** confirmed that family life can exist without indispensable support.
26. The jurisprudence confirms that the attainment of the age of majority in itself does not mean that family life has ended and in this case I have given weight to the fact that

family life was continued in the family home, together with what I find to be evidence of continued financial and emotional support, the latter of which is reciprocal; the sponsor noted that the time apart had been difficult for him and was playing on his health. I am satisfied that there is real, committed and effective support by the appellant's father (and stepmother) of the appellant and in such circumstance I am satisfied that family life both existed at the time of departure and has continued to do so.

27. I then go on to consider whether the respondent's refusal would interfere with that family life and I am satisfied that this question must be answered in the affirmative and that given the low threshold, such interference is sufficiently serious to potentially engage Article 8. Such interference is in accordance with the law and for the legitimate purposes of maintaining effective immigration control. I therefore address the final question in **Razgar** as to whether the interference is proportionate. In so doing I have had regard to Section 117 of the Nationality, Immigration and Asylum Act 2002, the public interest consideration. I take into consideration that Section 117B represents the ordinary interests of immigration control (**Dube (ss.117A-117D) [2015] UKUT 90**).
28. I take into consideration that there is no evidence of the appellant's proficiency in English language or financial independence and that therefore the public interest is engaged in this respect. However, I must consider this in the context of the respondent's policy in respect of the historic injustice to Gurkhas and I note Mr Tufan's concession on this point.
29. I must therefore give appropriate weight to the historic injustice, although I have reminded myself that that is not the only issue to be considered. **Patel & Ors** (above) confirms that whilst the interest in immigration control would in most cases outweigh Article 8 rights, in historic injustice cases the reverse is true and the approach in **Patel** is a compensatory one in terms of "righting the wrong". The starting point is that those denied entry earlier should be put in the position that they would have been but for that wrong. The Court of Appeal in **Rai** (above) confirmed that whilst the Tribunal must have regard to Section 117B, it was correct that given the historic injustice such considerations in themselves would not make an adverse difference to the outcome.
30. I have considered, as set out in **Ghising and others [2012] UKUT 160**, that a bad immigration history or criminal behaviour may tip the balance in the respondent's favour, but if all that is relied on is the public interest, "the weight to be given to the historic injustice will normally require a decision in the appellant's favour". It is not disputed, and indeed I have adopted the findings of the First-tier Tribunal Judge, that this is not a case where there is a bad immigration history or criminal behaviour and therefore there are no countervailing factors. I have considered further in the appellant's favour that the sponsor sacrificed many years of his family life to serve in the British Army, serving well in excess of the four years necessary to qualify for settlement and although the appellant was not yet born at that stage the sponsor's access to his family during that time was more limited than that endured by other soldiers of the British Army (see **R (Purja) v MOD [2004] 1 WLR 289**).

31. For all the reasons set out above I am satisfied that the respondent's decision represents a disproportionate interference with family life.

Notice of Decision

32. The decision of the First-tier Tribunal contains an error of law and is set aside. I remake the decision allowing the appellant's appeal.

No anonymity direction was sought or is appropriate in this case. None is made.

Signed

Date: 10 May 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I make a full fee award.

Signed

Date: 10 May 2018

Deputy Upper Tribunal Judge Hutchinson