



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/26132/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 8th December 2017**

**Decision & Reasons
Promulgated
On 6th February 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**HENA [R]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, instructed by Everest Law Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 23 November 1969. He appeals against the decision of First-tier Tribunal Judge Sweet dated 1 December 2016 dismissing his appeal against the refusal of leave to remain on Article 8 grounds.

Immigration History

2. The Appellant entered into an arranged marriage with his wife in Nepal on 25 November 2003 and their son, [RR], was born on [] 2007. The

Appellant's father, [MR], [the Sponsor] was issued with a settlement visa on 3 November 2006 and arrived in the UK on 21 January 2007. His mother entered the UK for settlement on 17 September 2009.

3. The Appellant arrived in the UK in June 2010 with a Tier 4 Student visa valid until January 2012, which was later extended on two occasions up to September 2015. On 24 November 2015 his leave was curtailed so as to expire on 27 January 2015 as his college's licence had been revoked. On 26 January 2015, he applied for indefinite leave to remain outside the Immigration Rules relying on his rights under Article 8 ECHR, based upon his being the adult child of a former Gurkha soldier, who served in the British Army from 1954 to 1990. The Appellant appealed against the refusal of 6 July 2015.
4. It is the Appellant's case that he would already be settled in the UK had the Respondent not wronged his father. The starting point is that the Appellant should be put in the position that he would have been if that wrong had not occurred. Article 8 is effective because the Sponsor's application was delayed by the Respondent's previous policy which denied all Gurkhas discharged before 1997 an opportunity to apply for settlement on discharge. That denial was recognised as an historic injustice in R (Limbu) v Secretary of State for the Home Department [2008] EWHC 2261 (Admin).
5. The Appellant's father was discharged from the army in 1990. At that time, the Appellant was 21 years old and was living with his siblings and grandmother in Nepal. His father and mother were living in Hong Kong. He would have settled with his father in the UK if his father had been able to apply for settlement at that time. The Appellant remained dependant on his father and now his father was dependant on him. The Appellant lives with his parents, his brother and his brother's family in the UK. When the Appellant was studying, he worked part-time as a hospital cleaner. He was now his parent's carer. His father, who receives a pension based on his service with the Gurkhas, provides financial support to his wife and child in Nepal and also supports the family in the UK. His brother also provides financial assistance.

Decision of the First-tier Tribunal

6. The Appellant cannot meet the criteria of the Respondent's policy [Annex K], under which adult children of former Gurkhas may settle in the UK, issued on 5 January 2015. He has applied within the UK, rather than from outside the UK and he was aged 45 on the date of the application and not between the ages of 18 and 30. He was not under the age of 18 when his father was discharged in 1990 and he entered the UK in June 2010, three years after his father.

7. In addition to the above undisputed facts, the judge concluded that there were strong arguments for the Appellant not being able to meet the requirements of Annex K. As the Appellant is married and has a child, he is not emotionally dependent upon his Gurkha father and any financial dependence is as a result of his current immigration status in the UK; he has lived apart from his father for more than two years and he has formed an independent family unit.
8. The judge concluded at paragraphs 26 and 27: "I do not accept that the Appellant's case has a special and compelling character. He is looking after his parents as their carer, but I am not satisfied that their medical condition is such that such care is strictly necessary and cannot be provided by the Appellant's brother, who also lives with the parents, (or his brother's wife) or by other means. The Appellant's parents' medical conditions are being controlled by medication and in any event are the result of old age. His father is suffering from gout, hearing loss, a dislocated right elbow and has recently had an eye operation. He is aged 77.
Applying the five-fold test set out in Razgar [2004] the main factor for my consideration is whether such interference with the Appellant's right to respect for his private or family life is proportionate to the legitimate public end sought to be achieved. I am satisfied that it does. I accept that this is a balancing exercise, but taking into account the many ways in which the Appellant cannot meet the criteria set out in Annex K, I do not uphold his claim under Article 8 ECHR. It is accepted that he cannot meet the Immigration Rules."
9. Permission to appeal was granted by Upper Tribunal Judge Blum on 5 October 2017 for the following reasons : "The Appellant was over the age of 18 when his Gurkha father was discharged from the army and was 46 years old at the date of the First-tier Tribunal decision. He could not meet the requirements of the Respondent's policy on settlement of adult children of former Gurkhas issued in January 2015, Annex K. Although paragraph 26 of the determination suggests that the FtJ did not find the Appellant's relationship with his parents sufficient to trigger the protection of article 8, either when considered from the perspective of family life or private life, he then states, at paragraph 27, that the main factor for his consideration is the issue of proportionality. This may suggest that the FtJ was satisfied that there was a sufficient relationship between the Appellant and his parents such as to trigger the operation of article 8. Although it is not apparent how the Appellant would have obtained notional entry clearance as an adult on his father's discharge in 1990 but for the historic injustice, it is nevertheless arguable that the FtJ may have failed to consider whether the historic injustice was a relevant factor in the balancing exercise and this may have undermined his proportionality assessment."

Appellant's submissions

10. Mr Jesurum submitted that there was no clear finding on family life and family life was clearly argued before the judge at paragraphs 17 and 18 of the skeleton argument. Why should the Appellant's father have to give up family life with his son or move to Nepal in order to be able to enjoy it. Although the judge did not have the benefit of the case of Jitindra Rai v Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320, he was clearly aware of the case of Kugathas and the definition of dependence: support which was real, committed or effective. It was clear from paragraph 36 of Rai that the judge should pay much more attention to support which was a threshold rather than a consideration.
11. Mr Jesurum submitted that whether Article 8(1) was engaged was a question of fact and bonds of choice were only material to the proportionality assessment under Article 8(2). The issue in this case was whether it was right and proper to expect a man who served his country for 32 years, twice in combat, to give up the company of his son. The judge had erred in law because there was no adequate self direction of the law on family life. The judge had in fact elevated the test and there was no analysis of how the injustice had affected proportionality. Had the judge directed his mind to the key question the outcome might have been different.
12. Mr Jesurum submitted that this was an historic injustice case even though the Appellant was over 18 at the date of discharge and he had subsequently married. The Appellant's father was a victim of the injustice. There was a reciprocal bond and it would not be reasonable to expect his father to give up the ties he had with his adult dependent son. The fact that the Appellant was over the age of 18 was not an obstacle to the case succeeding. The policy, which was summarised at paragraph 3 of the decision, failed to include the last two paragraphs which stated that if the policy was not met then Article 8 should be considered. The policy was phrased in terms of the Appellant's dependence and dependence by the Sponsor on the Appellant was not covered. It was clear however from Ghising that it was appropriate to look at reciprocal bonds and the judge failed to consider this.
13. Further, the Appellant's age was not an obstacle because the policy looked at dependence. The Appellant had lived in the family home throughout his life and was 21 years old when his father was discharged. He was, at that stage, an integral part of the family unit and would have satisfied Article 8 at the time of discharge even though he could not bring himself within the policy. The reason the Appellant was over the age of 18 at the date of discharge was because of the nature of the service rendered by his father. His father had an outstanding career with the Gurkhas and had been promoted thirteen times from rifleman to major. It would be wrong that, because of the outstanding service of his father, the Appellant would not be able to benefit and be compensated for the historic injustice.

14. The Appellant's father could not apply for settlement until 2004, notwithstanding he was discharged in 1990 and the court had concluded that the policy was irrationally restricted from 2004 until 2009. The Sponsor was denied settlement when he first applied. The policy was rejected in 2004 in Limbu because there was no account of meritorious service, or of the ties that were unlikely to be acquired and the Respondent failed to honour the military covenant. Settlement was normally granted after four years in service. Great weight must be attached to the historic injustice following Ghising. The mere fact of the injustice was sufficient to tip the balance in the Appellant's favour. Following Rai there was greater weight for those serving for a longer time and for those who had taken part in conflict and had been promoted to the rank of officer. The facts of this case showed the strongest record of service that could possibly be attained short of gallantry awards. The Sponsor was discharged in 1990 and had to wait until 2006, sixteen years, for the historic wrong to be corrected, and he had to go through an appeal process in order to achieve settlement. The Appellant had been thoroughly mistreated by the policy. The fact that he attained majority was a relevant consideration, but it did not assist the Respondent and it was no bar to the judge finding in the Appellant's favour.
15. Mr Jesurum submitted that, following Gurung, the fact that the policy is expressed in terms of exceptionality did not show where the balance of proportionality lies. The weight to be attached to the policy was a matter for the court. It was not a rule and had not been laid before Parliament. In any event the policy specifically states that consideration must be given to Article 8. In weighing the policy in his assessment of Article 8 the judge had erred in law. Multi generational households were the norm in most jurisdictions. The Appellant's wife had joined the family and his family life warranted the protection of Article 8 despite his marriage. Family life was not broken by marriage just because lack of independence is supportive of family life continuing. The judge should have paid more attention to 'support'. On the facts of this case family life had never ceased to exist and age was no bar to the continuation of family life. The Appellant is the Sponsor's carer. There was uncontested evidence of the Sponsor's medical needs and of the role the Appellant carried out in caring for his father.
16. Normally in assessing Article 8 cases there was a requirement for a compelling case, although that was not determinative. This however was not an ordinary case. The principles in Ghising applied to the Sponsor and his bond with his son. The judge failed to take those into account. Although there was nothing compelling about the Appellant's circumstances, because this is an historic injustice case, the Respondent had to show something over and above immigration control. Whether there were 'compelling circumstances' was not a relevant consideration. Section 117B did not apply in an historic injustice case for the reasons given at paragraphs 55 to 57 of Rai.

17. Mr Jesurum submitted that Section 117B(2) and (3) carried no weight in this case because of the historic injustice. If this was a private life case only, whilst ordinarily little weight should be attached to private life, because of the historic injustice then this was a compelling case. The Appellant was relying on the Sponsor's rights and the judge failed to consider this at all. Had he done so he could have found in the Appellant's favour. Even if the Appellant was not a direct victim of injustice, the Sponsor was and his father's need of support was sufficient for the case to succeed on Article 8.
18. Mr Jesurum referred me to the witness statements of the Appellant and Sponsor and the medical evidence. The Appellant had a close bond with his father and was his carer. The fact that the Appellant's parents could be looked after by the Appellant's brother was not an answer in this case. The issue was whether the father should have to give up his relationship with the Appellant.

Respondent's submissions

19. Mr Clarke submitted the case of The Queen (on the application of) Sharmilla Gurung, Rijen Pun, Motiraj Gurung and Tika Chandra Rai v Secretary of State for the Home Department [2013] EWCA Civ 8. He relied on paragraph 42 of the judgment which states:

“... If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now.”
20. Mr Clarke submitted that the Sponsor could not propose to settle in the UK until his service had finished. On the Appellant's own evidence, in 1990 when his father was discharged from the army, the Appellant was living with his siblings and grandmother in Nepal and he was 21 years of age. It cannot be right that someone who was not British would have greater rights than British citizens. The dependent relative route was a strict test and the idea that the Sponsor's service put the Appellant in a better situation than a British citizen had no basis in any of the jurisprudence. There was no historic injustice in this case.
21. Mr Clarke accepted that the policy was not determinative of the claim and the judge made findings consistent with that approach at paragraphs 25 and 26. The Appellant was 45 years old, married with a child and was not emotionally dependent on his father. He was only financially dependent and had lived apart from his father for more than two years. In the case of Rai, relied upon by the Appellant, there was emotional dependence. Without this emotional dependence the Appellant could not satisfy the threshold for the engagement of Article 8. There was no family life

established in this case. The judge was purely looking at private life at paragraph 26 and this was a standard private life claim.

22. Mr Clarke submitted that there was no historic injustice here to be considered. The judge conducted the proportionality assessment on the basis of private life and he took into account all relevant factors. Even if the judge had concluded that the Sponsor had some emotional dependence on the Appellant that would not materially affect the decision because it was not strictly necessary for the Appellant to provide care of his parents. Such care could be provided by his brother and the Sponsor could rely on his rights as a settled person in the UK. However, the judge found that there was no emotional dependence in this case and this finding was not challenged in the grounds of appeal. The judge did not consider the case from the perspective of the Appellant's father, but this was not material in this case. This case relied on financial dependence which was insufficient to succeed under Article 8 and family life.

Appellant's response

23. Mr Jesurum submitted that any submissions on materiality were irrelevant to the remaking of the decision. Paragraph 42 of Gurung, Pun and Rai did not address what would happen to someone born after discharge and the policy was not determinative of where the balance of proportionality would lie. There may be cases where it was proper to give weight to the family life of a man who would serve the Crown rather than someone who did not. The judge should have looked at the support provided by the Appellant to the Sponsor and he did not.
24. In finding that the Appellant was not emotionally dependent on his father the judge failed to consider the Article 8 jurisprudence which was not the same as under the policy. Dependence meant support and no more. Financial dependence was not decisive. If financial dependence was provided because of bonds which were more than emotional ties, then family life was engaged. The relevant consideration was Patel at page 104 of the authorities' bundle which shows that family life can exist without dependence and the judge failed to consider reciprocal dependence. There was family life in the household in the UK.
25. Mr Jesurum submitted that the care provided by the Appellant did not have to be strictly necessary because he was the victim of historic injustice. Although the Appellant was 21 at the time the Sponsor was discharged from the army, he would have benefited under Article 8 and the quality and duration of the Sponsor's service was a relevant consideration. The situation should be looked at on the basis of what would have happened if the historic injustice had not taken place. The historic injustice still applied because the Sponsor could have resigned his commission to settle in the UK, if that was available. The authority for historic injustice is at paragraphs 1, 11 and 14 of Patel and the Court of Appeal in Gurung

accepted it was bound by Patel. This gives rise to an error of law in this case. Whether the Appellant would succeed on the rehearing was another matter. The current situation was many miles from the ordinary Article 8 and the judge fell well short of assessing this case to the appropriate standard.

Discussion and Conclusions

26. The judge concluded that the Appellant was not emotionally dependant on his father, he was married with a child, he had lived apart from his father for more than two years and he had formed an independent family unit. These findings were open to the judge on the evidence before him.
27. The judge's failure to make a specific finding on whether there was family life did not amount to an error of law because on the particular facts of the case the Appellant had failed to establish more than normal emotional ties which would give rise to family life. Financial dependence in these circumstances was insufficient. The judge's failure to make a finding was therefore not material because on the facts of this case family life was not established.
28. Mr Jesurum submits that family life does exist because the Sponsor is dependent on the Appellant who provides care for himself and his wife. Had the judge considered the position from the perspective of the Sponsor he would have concluded that there was family life and therefore the failure to deal with it amounted to an error of law. I am not persuaded by Mr Jesurum's submission for the following reasons.
29. The judge concluded that there was no emotional dependence in this case and the dependence was purely a financial one. The care provided by the Appellant for his father and mother was not strictly necessary and could be provided by other family members. The medical conditions of the Appellant's parents are a result of old age and are being controlled by medication. Therefore, the level of support required to amount to effective, committed or real support was not present in this case and family life was not engaged. In any event, the judge took into account the care the Appellant provided for his parents at paragraph 26 and then went on to consider proportionality.
30. The issue of whether there is an historic injustice is relevant to the assessment of proportionality. The judge makes no mention at all of whether there was historic injustice in this case, although he finds that the Appellant could not benefit from the Gurkha policy. On the facts of this case, at the time the Sponsor was discharged from the army, the Appellant would not have qualified for settlement under the policy. Therefore, it cannot be said that, but for the historic injustice, the Appellant would have already obtained settlement in the UK.

31. Mr Jesurum seeks to persuade me that at the age of 21 the Appellant was still part of the Sponsor's family when he was discharged from the army and therefore his appeal would have succeeded under Article 8. However, that is not evident from the facts in this case. At that stage the Appellant was living with his grandmother and siblings in Nepal and was not living with the Sponsor. Their family life had been disrupted for some time at that point. Accordingly, I am not satisfied that there is an historic injustice in this case such that the judge erred in law in failing to properly assess proportionality. The Appellant would not have qualified for settlement when his father was discharged from the army and it could not be said that, but for the government's failure to offer settlement to Gurkha servicemen, the Appellant would be settled in the UK.
32. Accordingly, this was not a case where the proportionality balance lay in the Appellant's favour. There was no error in the judge's failure to consider whether there was in fact historic injustice since the judge's findings supported his conclusion that the Appellant could not qualify under the policy and would not have been eligible for settlement in 1990. It was accepted that the Appellant could not satisfy Annex K.
33. The judge proceeded on the basis that the Appellant should show compelling circumstances. There were none in this case. His parents' medical conditions did not amount to exceptional circumstances. I appreciate that the Sponsor may wish to be cared for by his son and does not wish his son to return to Nepal and that some recognition should be given to his service in the Gurkhas. However, on the particular facts of this case, it could not be said that, but for the historic injustice, the Appellant would be settled in the UK. The judge's conclusion that the refusal of leave was proportionate was open to him on the evidence before him. There was no error of law in the judge's assessment of proportionality.
34. I find that there is no error of law in the judge's decision dated 16 November 2016 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

J Frances

Signed

Date: 2 February 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 2 February 2018

Upper Tribunal Judge Frances