



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

Appeal Number: HU/01489/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 26 April 2019**

**Decision & Reasons
Promulgated
On 15 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**SURENDRA KUMAR RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel instructed by Howe Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Ian Howard sitting at Hatton Cross on 5 December 2018) dismissing his appeal against the decision of an Entry Clearance Officer to refuse him entry clearance as the adult dependant relative of a Gurkha veteran. The First-tier Tribunal did not make an anonymity direction, and I do not consider

that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Nepal, whose date of birth is 15 March 1983. On 11 August 2017 he applied for entry clearance as the adult dependant relative of his father, a Gurkha veteran.
3. On 15 November 2017 an Entry Clearance Officer gave his reasons for refusing the application. It had been considered in relation to the Home Secretary's policy as outlined in Annex K, IDI Chapter 15, section 2A, paragraph 13.2, as amended on 5 January 2015. It had also been considered under paragraph EC-DR.1.1 of Appendix FM of the Rules. His parents were present and settled in the UK as the result of being issued with settlement entry clearance in New Delhi on 10 May 2016, and arriving in the UK on 5 June 2016. An applicant must be 18 years of age or over, or 13 years of age or under on the date of application. He was 34 years 4 months and 27 days old at the date of application.
4. His mother and father had migrated to the United Kingdom over one year before the date of his application. Accordingly, the family unit had been based in the UK since 5 June 2016. From the passport copies presented, it appeared that his parents had visited Nepal once for a period of 3 weeks since migrating to the UK. Accordingly, he had been living apart from his sponsor as a direct result of his parents' migrating to the UK rather than as a result of him being away from the family unit as a consequence of educational or other requirements. His parents had migrated to the UK by choice. There was no evidence that any care arrangements had been put in place by his sponsor before they migrated to the UK. In the circumstances, his parents had decided that, as an adult, he was able to care for himself. He was in good health, educated to 9th grade level, and there were no obvious factors preventing him from working in Nepal. He had not mentioned any personal incapacity, and had not declared any medical conditions or disability. There was also nothing to prevent his parents from returning and living with their family in Nepal.
5. Accordingly, the ECO was not satisfied that the appellant was wholly financially and/or emotionally dependent upon his sponsor, as required under paragraph 9(5) of Annex K.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Howard. The Judge received oral evidence from the sponsor and from the appellant's younger brother, Bimal Rai, who had accompanied his parents to the UK in June 2016.
7. In his subsequent decision, the Judge set out his findings at paragraph [14] onwards. He found that the appellant continued to live in the family home

where he had lived all his life. As a consequence, he had lots of friends in the neighbourhood. Even though both the sponsor and Bimal Rai had given evidence that the appellant had been unable to find employment, the Judge did not accept this. At paragraph [21] the Judge held: *“As the appellant and Mr Rai have been candid enough to acknowledge, it was always the family’s intention that the appellant would seek leave. However, I do not accept his and his father’s evidence that he is, in effect, unemployable in Nepal and therefore entirely dependent upon money sent from the UK for his maintenance and accommodation. I am satisfied that the true picture is either that he is in employment, but seeking to hide this fact, or deliberately not seeking employment in order to enhance his appeal.”*

8. The Judge concluded that the appellant did not meet the requirements of Annex K, because (among other things) the appellant was not dependent upon his father or others settled in the UK.
9. The Judge turned to consider an Article 8 claim outside the Rules. At paragraph [24], he directed himself, in accordance with **Ghising (Family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC)**, that the critical question was whether the adult child had formed their own independent life, or whether they remained part of their parents’ family unit, together with the practical, emotional and financial dependence that usually brings. The Judge continued:

“Here the appellant was 34 at the date of the respondent’s decision. He was living in Nepal in the family home. He received some money each month from his family in the UK. He claims that this is his only income.

Can he be said to have formed his own independent life?

The short answer is ‘yes’. Common sense and experience tells me that those in the circumstances of the appellant, whether they have employment or not, have progressed sufficiently from the family environment for it to be said that they have formed their own independent life. Apart from the claimed need for financial support, something I am far from satisfied about, I cannot envisage anything about which this thirty-four year old man would seek the support and guidance of his mother in order to go about his day-to-day life.

Mr Rai talks about the dangers of living in Nepal. Objectively there is no evidence of such dangers and subjectively the family made the decision to settle in the UK leaving the appellant to live alone in the family home. This action does not support the contention [that] there are real dangers inherent in living alone in Nepal.”

10. The Judge said that, in reaching this decision, he had considered the Court of Appeal guidance on the amount of weight to be given to circumstances such as these and what has become known as the historical injustice affected upon Gurkhas and other British overseas citizens. He reminded himself that in **R (Guring and Others) -v- SSHD [2013] 1 WLR 2546** Lord Dyson MR said, at page 2566, that if a Gurkha should

show that, but for the historical injustice, he would have settled in the UK at a time when his dependent (now adult child) would have been able to accompany him as a dependent child under the age of 18, that was a strong reason for holding that it is proportionate to permit the adult to join the family now. The Judge continued:

“However, given my earlier findings, this appellant has not established that, but for the historic injustice, his father would have settled in the UK at a time when his dependent (now) adult child, the appellant, would have been able to accompany him as a dependent child under the age of 18. I make this finding in the knowledge that this appellant chose not to settle in the UK at that time, but instead to remain in Nepal. That being so, he cannot now argue the contrary.”

11. At paragraph [25], the Judge said that for, each of the foregoing reasons, he was not satisfied that the appellant’s circumstances in Nepal, or those of his father, mother and brother in the UK, engaged Article 8.

The Reasons for the Grant of Permission to Appeal

12. On 28 February 2019 Judge PJM Hollingworth granted the appellant permission to appeal for the following reasons: *“It is arguable that the Judge has set out an insufficient analysis of the concept of real support in the context of considering the existence or otherwise of family life and the extent of that family life taking into account the factors identified in the permission application and the factors referred to in the decision appertaining to this. It is arguable that the question of employment or otherwise is relevant to the existence of the nature and degree of support in contradistinction to potential employability. It is arguable that in considering real support all the relevant elements fall to be identified and the appropriate weight attached. It is arguable that the proportionality exercise has been affected.”*

The Hearing in the Upper Tribunal

13. At the hearing before me to determine whether an error of law was made out, Mr Harding, who had not appeared below, developed the case advanced in the permission application. On behalf of the respondent, Mr Lindsay acknowledged that the Judge’s finding on historic injustice at the end of paragraph [24] was inconsistent with his earlier finding at paragraph [17]. However, he submitted that the Judge’s error was not material, as there was no justification for interfering with the Judge’s finding that Article 8 was not engaged due to the absence of existing family life between the appellant and his family in the UK. In reply, Mr Harding submitted that the historic injustice principle governed all matters, including the determination of whether there was subsisting family life between the settled Gurkha veteran and the adult child left behind.

Discussion

14. In the RFRL, the ECO did not dispute the proposition that, but for the historic injustice, the appellant's father would have settled in the UK at a time when the appellant would have been able to accompany him as a dependent child under the age of 18. The point taken by the ECO was that his parents had chosen to apply for settlement visas the appellant was already an adult, in the full knowledge that their adult children did not automatically qualify for settlement.
15. Following the introduction of the 2009 discretionary arrangement (the 2009 Policy), the appellant's father and mother were eligible to apply for settlement, but neither the appellant nor his younger brother were eligible to apply for entry clearance alongside their parents as they were both over the age of 18. From January 2015, the appellant's younger brother was eligible to apply for entry clearance alongside his parents, as he was still under the age of 30. Although the appellant fell outside the scope of Annex K by virtue of his age, he was still eligible to apply for entry clearance with the rest of his family relying on an Article 8 claim outside the Rules.
16. The Judge accepted at paragraph [17] that the intention of the sponsor when making applications for himself, his wife and younger son in 2015, was that his elder son (the appellant) would make an application for entry clearance in due course to join them in the UK.
17. At the end of paragraph [24], the Judge makes two separate findings which are not logically connected. The first finding is that the appellant has not established that, but for the historic injustice, his father would have settled in the UK at the time when the appellant would have been able to accompany him as a dependent child under the age of 18. The Judge has not given adequate reasons for reaching this adverse finding of fact, and, as noted above, the finding runs counter to the position taken in the RFRL. Accordingly, this finding is not sustainable.
18. The second finding is that the appellant chose not to settle in the UK "*at that time*", but instead to remain in Nepal. If by "*that time*", the Judge was referring to 2015, when the rest of the family sought to settle in the UK, his finding is sustainable, in that the appellant could have sought to settle in the UK with the rest of his family, albeit that his entitlement to settle was weaker than the rest of them, in the view of the fact that his age was over 30.
19. If the Judge had reached the fifth question posed in **Razgar**, then I accept that his proportionality assessment would have been vitiated by the error discussed above. However, the Judge never progressed beyond the first and second questions posed in **Razgar**, which was whether Article 8 ECHR was engaged.
20. Although the Judge characterised the guidance given by the Court of Appeal in **Guring** at paragraphs [41] and [42] as being relevant to the decision as to whether Article 8 was engaged, the guidance which he cited

was completely irrelevant to this issue. The guidance was only relevant to the issue of proportionality.

21. The authorities do not support Mr Harding's proposition that in Gurkha cases there is a relaxation of the **Kugathas** criteria.
22. In **Patel & Others -v- ECO (Mumbai) [2010] EWCA Civ 17**, Sedley LJ said at paragraph [14]: *"You can set out to compensate for historical wrong, but you cannot reverse the passage of time. Many of these children are now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and Art 8. will have no purchase."* In the same passage, Sedley LJ went on to say that the potential relevance of the historic wrong to Article 8 claims is not as a mechanism for turning the clock back, but as being relevant to the application of Article 8(2). Lord Dyson MR made the same point in the passage from **Gurung** cited by the Judge.
23. The Court of Appeal in **Gurung** went on to discuss the appeals of NL and SL at paragraphs [47]-[51]. NL and **SL** were now 24 and 26 years of age. Their father was granted leave to settle in the UK in 2009, and their mother followed him in August 2010. The claimants remained in Nepal. They were both students whose course fees are funded by their father. The First-tier Tribunal Judge accepted that the father supported them financially, but this was expected in Nepalese culture. It did not therefore suggest a bond over and above that usually to be expected in the relationship between adult parents and their adult children. The Judge found that there was no real evidence about how the claimants related to their parents and the effect on them of being separated from their parents or what emotional sustenance they received from their parents, and on that basis held that the appellants did not enjoy family life with their parents. The Court of Appeal held, at paragraph [50], as follows: *"We accept the submissions of Ms McGahey that the First-tier Tribunal did not make any error of law in reaching its conclusions. The critical issue is whether there was sufficient dependence, and in particular sufficient emotional dependence by the claimants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the Tribunal to determine. In our view, the First-tier Tribunal is entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent."*
24. In **R (on the application of) Rai -v- SSHD [2017] EWCA Civ 230**, which was cited to the First-tier Tribunal Judge, Lindblom LJ at paragraph [24] expressly endorsed the application of the **Kugathas** criteria in the context of a Gurkha case.
25. The facts of **Rai** were that the appellant was born in Nepal on 1 January 1986, and his father entered the UK with ILR on 26 June 2010. His mother followed his father to the UK with ILR on 17 February 2012. On 2 October

2012 the appellant, then 26 years old, applied for entry clearance to settle in the UK as his father's dependant.

26. Giving the leading judgment of the Court, Lindblom LJ held at [39] that the real issue under Article 8(1) was, "*whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the UK and had endured beyond it, notwithstanding their having left Nepal when they did.*"_At paragraph [42], Lindblom LJ reiterated that the critical question was whether family life between the appellant and his parents had subsisted at the time when they left Nepal to settle in the UK, "*and was still subsisting at the time of the Upper Tribunal's decision.*"
27. The Judge did not in terms ask himself whether the appellant had enjoyed family life with his parents before they left Nepal in June 2016 to settle in the UK. However, family life in the literal sense clearly ended with the parents' departure, and it was open to the Judge to find that the appellant had not discharged the burden of proving that he was emotionally dependent upon his parents at the date of the hearing.
28. The grounds of appeal do not in any event challenge the Judge's finding of an absence of emotional dependency. It is merely asserted that he failed to consider the evidence of an emotional connection between him and his elderly parents and his brother with whom he lived prior to their departure. An emotional connection is not sufficient. There must be emotional dependency. Even if the Judge did not give adequate reasons for his finding of a lack of financial dependency, the Judge made a sustainable finding that there was a lack of emotional dependency, which is an essential requirement for Article 8 ECHR being engaged.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 10 May 2019

Deputy Upper Tribunal Judge Monson

