



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00916/2019

THE IMMIGRATION ACTS

Heard at Field House
Oral decision given following hearing
On 5 December 2019

Decision & Reasons Promulgated
On 22 January 2020

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

NARENDRA YAKHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nepal who was born in February 1983, so he is currently 36 years old. He is the son of an ex-Ghurkha soldier who served in the Ghurkha regiment from the ages of 21 to 28. When he left the service of the regiment at that time he was not entitled to settle in the UK; that has now been recognised as an “historic wrong” and it is common ground that had the law at that time been as it is now, he would have been entitled to settle in the UK. It has not been disputed either by the respondent that had he done so his children would have been born in

the UK and accordingly this appellant would have been a British citizen or at the very least entitled to permanent residence in this country.

2. The appellant's mother died when he was 10 years old and his father remarried. As is clear from the statement of his stepmother which is within the file, he is regarded by her as a child of the family, and her statement is exceedingly supportive of him.
3. In 2004 the appellant's father (who is the sponsor) had a stroke and it is the appellant's case, as set out in particular in his stepmother's statement (which does not appear to have been disputed at any time by or on behalf of the respondent) that the appellant himself effectively put his life on hold in order to look after his father. He would carry him when it was necessary for him to be taken for medical treatment and he also looked after his physical intimate needs. This care continued for very many years to beyond when in 2008 the sponsor had a second stroke. He has clearly been very ill for many years, such that in the stepmother's opinion (as set out at paragraph 9 of her statement) "had it not been for [the appellant] it would have been impossible for us to keep him alive". It appears that somewhat understandably this ill-health put a huge strain on the family's finances, such that in 2015 the sponsor and his wife decided to come to the UK. By so doing they were enabled to get the benefit of treatment on the National Health Service to which the sponsor was entitled by reason of his past service with the Ghurkha regiment but a consequence of their coming to the UK was that the appellant, being by that time over 30, was not under the policy then in force entitled to come to the UK with his father and stepmother under that policy. Only the two children of the sponsor and his second wife were able to come with their parents.
4. When they came to the UK the sponsor and his wife left behind between £1,500 and £2,000 for the use of the appellant and his siblings in order to enable them to maintain themselves for a year or two. The sponsor also sends money from time to time whenever he can to assist his son and his other children.
5. The appellant has subsequently applied for leave to enter the UK to join the sponsor, as the adult dependent relative of an ex-Ghurkha settled in the United Kingdom. The basis of the application, consistent with current case law is that first but for what is now regarded by the courts as the "historic injustice" (whereby Ghurkha members of the UK forces were not permitted to settle at the conclusion of their service) he would have, in his case, been born in the UK and therefore entitled to remain here and secondly there was still family life for Article 8 purposes between himself and his father, the ex-Ghurkha soldier.
6. The application was refused essentially because the respondent did not accept there was still family life between the appellant and his father and the appellant appealed as against this decision.
7. This appeal was heard before First-tier Tribunal Judge Watson, sitting at Birmingham on 31 July 2019 but in a decision and reasons promulgated some five days later on 5 August 2019 Judge Watson dismissed the appeal. The appellant now appeals against

this decision, leave having been granted by Upper Tribunal Judge Pickup on 29 October 2019.

8. When setting out his reasons for granting permission to appeal, Judge Pickup stated as follows:
 - “1. It is arguable that the First-tier Tribunal Judge erred in addressing family life between the appellant and the sponsoring parents in the UK in this Ghurkha case and may have applied too strict a test, one primarily focused on financial dependency. The decision is arguably inadequately reasoned with respect to the historical injustice considerations. It is also arguable that the judge had conflated the existence of family life with the issue of proportionality.
 2. Whilst on the facts of this case the appellant may ultimately struggle to succeed, there is sufficient basis of arguable error to justify a closer examination of the issues. ...”
9. Mr Jesurum in his submissions took the Tribunal through all the relevant case law in some considerable detail but it will suffice for the present purposes if I simply state that it is clear from these decisions (the law being summarised in particular in the 2013 Upper Tribunal decision in *Ghising and others (Ghurkas/BOCs: historic wrong; weight)* [2013] UKUT 561) that provided it can properly be said that but for the “historic injustice” a claimant would have been entitled to remain in the UK and also there was still family life between that claimant and the ex-Ghurkha soldier, then absent some special factor (such as for example a criminal record such as to make that claimant’s entry to the UK unsuitable) a claim to be allowed to join his or her parent ought to succeed.
10. In this case, it is said first that the judge failed to appreciate that the “but for” test in this case was not disputed and secondly that the judge did not adequately consider the issue of whether or not there was still family life between this appellant and his father before determining that there was not.
11. So far as the first issue is concerned, it is clear that, in this particular case, that is not an issue which the respondent has in reality challenged. Accordingly, the crucial issue in this case is whether or not there was, at the time of the application, for Article 8 purposes, a family life between the appellant and his father which goes beyond the normal relationship to be found between an adult child and his parent (as discussed in the leading authority of *Kugathas*).
12. The judge, at paragraph 23 of her decision, sets out the question which she considers needs properly to be asked as “Has the appellant shown family life, emotional **and** [my emphasis] financial dependence upon the sponsor?”.
13. On behalf of the appellant, Mr Jesurum submits that that is the wrong test, because it is not necessary for Article 8 purposes to show both emotional and financial dependence upon the sponsor; the issue is the closeness of the ties and “financial dependence” is not a necessary element before that can be established.

14. At paragraph 27 the judge found as follows:

“I find that the appellant has not shown that he is financially dependent upon the sponsor for **all** [again my emphasis] of his living costs. Some money has been left in Nepal and I accept that the sponsor does what he can and that it will have assisted in financial support but I do not find that the appellant has been significantly supported by his father in the recent past (ten years) nor is he now”.

15. Again, Mr Jesurum submits that this is the wrong test. It is not necessary for a claimant to establish, in order to show that there is still family life in existence with his or her ex-Ghurkha parent, that that parent provides all of the financial support necessary for his or her living.

16. In my judgment, Mr Jesurum’s submission is correct in this regard, and if and to the extent that this was the test that the judge was applying, it was, in the words of DJ Pickup, when setting out his reasons for granting permission “too strict a test”.

17. The judge also finds at paragraph 31 that even if he is “wrong in my assessment of the engagement of Article 8, I would find that despite the historic wrong ... the decision is proportionate”. Again, this aspect of the decision appears to be at odds with decided authority, which is that if Article 8 is engaged in a case where but for the historic wrong a claimant would have been able either to come with his or her parent to the UK or to have been born here, then absent some other feature which is not present in this case, that person would expect to be allowed now to join his or her parent.

18. Mr Jesurum also challenges what is said towards the end of the decision by the judge that she “cannot look back and make assumptions that the appellant would have been born in the UK, ...” Because, as he notes, this aspect of the application had not been challenged by the respondent and nor on the facts could it be.

19. Mr Jesurum also submits that the final paragraph of the decision that “if Article 8 is engaged I find that the decision remains proportionate in all the circumstances of both the sponsor and the appellant for the same reasons noted above” also is at odds with the current case law, and in that I agree he is correct.

20. Notwithstanding what appears to have been errors within the decision as briefly discussed above, Mr Avery on behalf of the respondent, submits that these errors are not material, because the judge did in any event consider whether or not there was family life properly to be found between the appellant and his father for Article 8 purposes and concluded that there was not. Having found that the appellant had not been “significantly supported by his father in the recent past (ten years) nor is he now” the judge then went on to find at paragraph 28 as follows:

“I find that there are no emotional ties over and above those of a normal adult person of 30 who has lived with parents in a large family. The appellant has shown no particular emotional dependence upon the sponsor”.

21. The judge was also concerned that in the application itself the appellant's claim was significantly overstated; for example he claimed to be living alone whereas in fact, as was clear from the evidence, he had always lived with his three siblings.
22. Had the judge considered fully all the evidence properly before concluding that there were not emotional ties over and above those to be expected within a normal relationship between a parent and his or her adult child, it may be that the errors, as discussed above, would not have been material, because if in the event there was no family life within Article 8 then notwithstanding the "historic injustice" the appellant would not have been entitled to join his father in the UK. However, it is not clear from the decision that the judge took proper account of the very unusual features in this case and in particular the huge contribution made by the appellant to support his father for very many years (between 2004 to 2015) and also the considerable distress which (according to the evidence of his stepmother) his father continues to suffer because of his separation from the appellant. Furthermore, the judge throughout her decision does refer to the need to show both "significant financial and emotional dependency" (repeated at paragraph 31) which is not the test. Nor is it the test as the judge also says at paragraph 31 that "public interest in immigration control is such that the decision is proportionate", as discussed above.
23. Accordingly, although this decision is perhaps more finely balanced than some, nonetheless the errors identified above are, in the judgment of this Tribunal, material.
24. It follows that this decision will have to be remade and because for logistical reasons it may not be possible for the rehearing to be before myself such that a transfer order would be necessary, it is appropriate (because there will have to be a full rehearing on the evidence) for the appeal to be remitted back to the First-tier Tribunal for rehearing by any judge other than First-tier Tribunal Judge Watson, and I will so order.

Notice of Decision

The decision of First-tier Tribunal Judge Watson is set aside as containing material errors of law and this appeal will be remitted back to the First-tier Tribunal, sitting at Taylor House, for a complete rehearing, with no findings of fact retained.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Upper Tribunal Judge Craig

Date: 14 January 2020