



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01268/2019 (P)

THE IMMIGRATION ACTS

Decided at Field House under rule 34  
On 18 June 2020

Decision & Reasons Promulgated  
On 30 June 2020

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

INDIRA RAI  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant, a citizen of Nepal born in March 1977, appeals with permission granted by the First-tier Tribunal against the decision of that Tribunal which, following a hearing in Birmingham on 12 August 2019, dismissed the appellant's appeal against the refusal by the respondent of her human rights claim. The appeal in the Upper Tribunal was due to be heard on 23 March 2020 but that hearing was cancelled as a result of the Covid-19 pandemic. Following the cancellation, I issued directions, pursuant to the Pilot Practice Direction of the Senior President of Tribunals and the Presidential Guidance Note No. 1/2020, in which I indicated that I had reached the provisional view that it would be appropriate to determine, without a hearing, whether the First-tier Tribunal's decision, dismissing the appeal, involved the making of an error of law and, if so, whether that decision should be set aside. I stated that, in reaching that provisional view, I had taken account of the detailed grounds of application, drafted by Ms Revill of counsel.

2. I will address those grounds in due course. First, it is necessary to say something about the appellant's appeal to the First-tier Tribunal and the First-tier Tribunal Judge's decision on it.
3. The appellant is a citizen of Nepal, the adult daughter of an ex-Ghurkha serviceman. The respondent refused the appellant's application for entry clearance because the respondent considered that the appellant did not satisfy the requirements of Annex K, IDI chapter 15 section 2A. Nor did the appellant satisfy the relevant provisions of Appendix FM of the Immigration Rules. The respondent considered Article 8 of the ECHR, outside the Rules. She did so by reference to Gurung & others v Secretary of State for the Home Department [2013] EWCA Civ 8, where it was found that if a Gurkha can show that but for the historic injustice that was perpetrated against Gurkha service personnel, the ex-Gurkha serviceman would have settled in the UK at a time when his now adult child would have been able to accompany him as a dependent child under the age of 18, then that was a strong reason for holding that it was proportionate to permit the adult child to join the family in the United Kingdom now.
4. The respondent also took account of Ghising & others v Secretary of State for the Home Department [2013] UKUT 00567, where the Asylum and Immigration Tribunal found that, where Article 8 is engaged in such a case and but for the historic injustice, an appellant would have settled in the United Kingdom long ago, this would ordinarily be determinative of the outcome of an Article 8 proportionality assessment, where the matters relied upon by the respondent consisted solely of the public interest in maintaining a firm immigration policy.
5. The respondent considered that the reasons for refusal outweighed the considerations of historic injustice, in the case of the appellant. She had grown up in Nepal. Her parents chose to apply for settlement visas when she was already an adult, in the full knowledge that their adult children did not automatically qualify for settlement. There was no bar to the appellant's parents returning to Nepal, either permanently or temporarily. The appellant had been living in Nepal without her parents for over two years and had been able to continue to live independently. Family life could continue as it had done, without interference.
6. Overall, the thrust of the respondent's decision was that there was no protected family life between the appellant and her parents in the United Kingdom and that any interference with the appellant's private life was justified, notwithstanding the issue of historic injustice.
7. At the hearing before the First-tier Tribunal Judge, there was no appearance on behalf of the respondent. The First-tier Tribunal Judge proceeded with the hearing, at which the appellant was represented by Ms Revill.
8. The judge heard evidence from the sponsor parents of the appellant. They spoke in support of the appellant's case, that it would be a disproportionate interference with the appellant's Article 8 family life rights for her to be denied entry clearance. The appellant's case was that she had been married in 2006 to a man from a neighbouring village. The marriage produced two children. The appellant separated from her

husband in 2015 and came to live with the sponsors in their family home in Nepal. This was shortly after the appellant's sister had died. The appellant's father stated that the appellant at this time needed his and his wife's emotional support.

9. In 2016, the sponsor father decided that he should go to the United Kingdom, along with his wife and minor daughter. When planning this, the sponsor father was (according to his witness statement) "thinking about my poor daughter Indira all the time. She had been through bad relationship ... since our arrival in the UK, both my wife and myself were anxious and distressed about Indira and [another of his children in Nepal]". The sponsor father feared that the appellant "may also lose her mind because of the stress and distress she has faced in her life. She needs us emotionally to be around which we are trying to manage over the phone".
10. So far as material dependence was concerned, the sponsor father's statement said that because the family in the United Kingdom had "free living and other benefits", they were in turn able to help their daughters in Nepal. The daughters "continue to work in the field and look after cattle but now we do not have to ask for charity and alms".
11. The First-tier Tribunal Judge, having heard evidence from the parents, found them to be "evasive in their evidence". Although they "claimed to be very close to the appellant, when the father was asked why the appellant's marriage broke down, he said he did not know. He also did not know why the appellant had agreed to leave her daughters in the care of her husband, when she separated from him". The judge found that the appellant's mother "gave vague replies when asked the same question".
12. The judge noted that both of the parents claimed the appellant separated from her husband in 2015 and came to live with them in their family home at that time. "But when I asked them why, if that was the case, they had not applied for the appellant to come to the UK with them, they became evasive. The appellant's mother referred to financial difficulties".
13. The judge found that the parents gave inconsistent evidence on when the separation took place. The appellant had said that she separated permanently from her husband in 2015; but the appellant's father told the judge that the appellant had left her two daughters with her husband almost a year ago, which would have been around August 2018. There was documentation before the judge to show that the appellant had become divorced in July 2018.
14. The First-tier Tribunal Judge was not impressed by the evidence from the sponsors regarding the sister who is said to live with the appellant in Nepal. At some point, S had gone a trip for six months.
15. The judge noted that the money transfer receipts adduced by the father were all dated 2019. The judge was not satisfied that the parents were regularly sending the appellant money just to cover her basic needs or, indeed, any of her needs. She found that the money transfer receipts were produced to "create a false picture of

dependency". The judge nevertheless bore in mind that it was not necessary for the appellant to prove financial dependency on the parents.

16. The judge held that although the appellant may have gone to live with her parents in July 2018 when her marriage broke down, she did not accept this meant she had re-joined the family unit. This was partly because the judge was not satisfied that the appellant had at any material time been genuinely financially dependent on the parents and that there was no emotional, psychological or social dependence that went beyond the normal dependency that existed between adult children and their parents.
17. The judge found that the appellant did not move to live in with the parents until after her divorce in July 2018. But if the appellant's account of the separation taking place in 2015 was true, and that she had left her daughters in her husband's care at that point, "then her dependency on her parents would have been great and in all probability they would have taken her to the UK with them".
18. The judge concluded that the reality of the matter was that because the parents in the United Kingdom were ageing and becoming frailer, they decided in 2018 that the appellant should come and care for them. The appellant's younger sister had been doing this for two years but she was now working and had her own life. The judge could see no reason why the appellant would give up on the relationship with her own daughters or that that would be in their best interests. The appellant had lied about her relationship with her daughters to try to create a false picture of being a lone female without dependants following her divorce. The appellant was not dependent in any way on her parents.
19. The first of Ms Revill's grounds of appeal submits that the First-tier Tribunal Judge had not given adequate reasons for rejecting the explanation of the appellant's mother that there were "financial difficulties" in attempting, in 2018, to bring the appellant to the United Kingdom. The judge did not explain why this explanation was found by her to be evasive and, by application, untruthful. Furthermore, Ms Revill submits, the judge wrongly assumed that the appellant would have been able to obtain entry clearance in 2016, notwithstanding that she was at that time over 30. Given that the appellant could not, accordingly, meet the provisions of Annex K, it would, according to Ms Revill, have been far from apparent to a layperson that an entry clearance application was worthwhile in those circumstances. Significantly, the Court of Appeal judgment in Rai v ECO New Delhi [2017] EWCA Civ 320, which considerably strengthened the claims of persons in the position of the appellant, had not been decided. In that case, the Court of Appeal disapproved of the approach taken by the Upper Tribunal, which had concentrated unduly on the decision of the Ms Rai's parents to leave Nepal, unduly emphasising its voluntary nature, without focusing on the practical and financial realities entailed in that decision.
20. Ground 2 contends that the First-tier Tribunal Judge was wrong in failing to appreciate that the appellant, by continuing to live rent-free in the family home in Nepal, thereby enjoyed a significant material benefit, which was provided by her parents. The judge's conclusion that the amount of money sent in 2019 to the

appellant by her parents was “very limited” was, accordingly, flawed, in ignoring “what for most people would be their biggest expense – namely, accommodation costs”.

21. Ground 3 argues that, in consequence of the errors identified in grounds 1 and 2, the First-tier Tribunal Judge failed to conduct a proper proportionality assessment under Article 8(2). Her flawed findings led her to conclude that Article 8(1) family life was not engaged. If it had been, then, having regard to Ghising (family life – adults – Gurkha policy) [2013] UKUT 567, the historic injustice issue would carry significant weight, on the appellant’s side of the proportionality balance, and would be likely to outweigh the matters relied on by the respondent, where these consists solely of the public interest in maintaining firm immigration control.
22. In her submissions in response to my directions, Ms Revill submits that the “error of law” issue cannot fairly be resolved, without an oral hearing, unless that issue is conceded by the respondent. I do not accept that contention. To do so would be to re-write rule 34 of the Upper Tribunal Rules. There may be circumstances in which, regardless of the stance of the other party, a judge can be satisfied that it is compatible with the overriding objective in rule 2 for a matter to be determined without a hearing. Each case must be looked at on its own merits. General observations, such as those cited by Ms Revill in R v Parole Board ex parte Smith [2005] UKHL 1 are no more than that: general observations.
23. In the present case, the respondent has not, so far as I can ascertain, responded to the directions. It is, therefore, the case that she has not conceded there is an error of law in the First-tier Tribunal’s decision. I am, nevertheless, entirely satisfied that I am able to decide the relevant issues without a hearing. I have taken account of Ms Revill’s submissions. The respondent has had an opportunity to make her submissions, but has declined to do so. The requirements of rule 34(2) are, therefore, satisfied.
24. I consider that ground 1 has been made out. On its face, it is difficult to understand how the fact that the appellant’s mother referred to financial difficulties can be said to be evidence of her being “evasive”.
25. It is possible that the First-tier Tribunal Judge did not press the matter, in her questioning of the witnesses, as she did not wish to be seen to be “descending into the arena”, effectively taking over the job of the absent Presenting Officer for the respondent. If that were so, it is not a matter that can be held against the appellant.
26. I also find force in Ms Revill’s submission that the father’s decision not to attempt to bring the appellant with him in 2016 had to be looked at against the background of what was then the legal position, whereby adult dependants could not succeed under the respondent’s written policies. As Ms Revill submits, the guidance of the Court of Appeal in Rai, which emphasises the need for a wide-ranging consideration of Gurkha cases, focussing on the practical and financial realities, had not been handed down. In those circumstances, the First-tier Tribunal Judge adopted too narrow an approach in her analysis of the decisions taken in 2016.

27. On this issue, the judge's finding that the evidence of the appellant's mother was "evasive" was crucial. As the judge herself remarked, if the account of the separation of the appellant and her husband taking place in 2015 were true, and she had left her daughters in her husband's care at that point, "then her dependency on her parents would have been great". It was only because of the alleged evasiveness in the evidence relating to "financial difficulties" that the judge concluded that the father's failure to take the appellant with him in 2016 meant that the appellant had not, in fact, separated from her husband and gone to live with her parents a year earlier.
28. The narrowness of the judge's focus is underscored by the problematic nature of her finding that the appellant moved into the family home, only upon the pronouncement of her divorce in July 2018. It is a commonplace of marital breakdowns that difficulties arise, and resulting separations occur, some time before the parties become divorced. Accordingly, the account given by the appellant and the parents was, in this regard, a plausible one, albeit that it was of course noteworthy the appellant left her children behind with her husband.
29. Ground 2 is also made out. The judge failed to have any regard at all to the fact that the appellant would derive a significant material benefit from being able to live without charge in the family home in Nepal. The judge's observation that the appellant "must have had another source of support or otherwise she could not have survived" is said by Ms Revill to be flawed because it failed to recognise that, even if the funds sent in 2019 were modest, the biggest expense; namely, the cost of accommodation, was in practice being met by the sponsors. But the judge also failed to note the passage in the father's witness statement, at paragraph 17, that the appellant and her sister "continue to work in the field and look after cattle but now we do not have to ask for charity and alms". If one aggregates the rent-free accommodation, the modest financial remittances and the work done by the appellant, the overall picture is very different from that presented by the judge in her decision.
30. As a result of these errors, I find that ground 3 is made out. If the judge had not committed these errors, there was evidence before her that could have led her to conclude that Article 8(1) family life existed at all material times between the appellant and her parents. At that point, the weight to be ascribed to the historic injustice would ordinarily have demanded a finding that the respondent's refusal of entry clearance represented a disproportionate interference with that family life.
31. For these reasons, I find that the decision of the First-tier Tribunal Judge contains errors on points of law. Those errors are material to the outcome. I therefore set the decision aside.
32. Given that an entirely fresh fact-finding exercise is necessary, I find that, compatibly with the overriding objective and the Practice Statement, the case should be remitted to the First-tier Tribunal for a fresh hearing on all issues.

No anonymity direction is made.



Signed *Mr Justice Lane*

Date 18 June 2020

The Hon. Mr Justice Lane  
President of the Upper Tribunal  
Immigration and Asylum Chamber

