



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/07825/2019 (P)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reason Promulgate

On 11 May 2021

On 27 May 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

LG

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

For the appellant: Mr M Moriarty, instructed by Everest Law Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I indicated that the appeal would be allowed, giving brief reasons but reserving my full reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Nepalese national born on 21.5.83, and is now 37 years of age, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 7.2.20, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 8.3.20, to refuse her application for entry clearance to the UK as the adult dependent child of her mother, Lok Maya Gurung, widow of her father, a former Gurkha soldier.
2. The application made on 24.12.18 was principally refused because the appellant did not fall within the respondent's historic injustice discretionary policy. Her father, who served as a Gurkha soldier for some 9 years until discharged in 1967, was never able to apply for settlement in the UK prior to his death in 1991, as the policy was not in place until 2009. Whilst the policy applied to the widows of former Gurkha soldiers, so that the appellant's mother was able to come to the UK in 2012, it does not apply to the adult children of such widows. For an adult child of a former Gurkha soldier to qualify for settlement under the policy, at the time of the application the former Gurkha parent must either have been, or was in the process of being, granted settlement under the 2009 discretionary arrangements, or was granted leave under the 2004 arrangement under which the requirement to have been discharged on or after 1.7.97 was waived. It follows that children and other dependent relatives of former Gurkhas falling outside the policy are required to meet the relevant Immigration Rules or other discretionary criteria.
3. The First-tier Tribunal noted that the sponsoring mother chose to come to the UK at a time when there was no right for her to bring her children to the UK. At [23] of the decision, the judge also remarked on "the almost complete lack of documentary evidence in respect of the financial position". After reviewing the evidence, at [29] the judge concluded that it was insufficient to demonstrate that the appellant enjoyed family life with her mother "in the Kugathas sense". The judge went on from [30] of the decision to consider the alternative basis that the finding on family life was wrong, and purported to examine whether the historic injustice was responsible for the current interference. After considering the chronology, at [32], the judge did not accept that the 'debt' could be said to be owed to a Gurkha widow in the same way, concluding that the historic injustice did not apply. At [34] the judge considered that the present case was of an adult child with no particular disability or dependency seeking to join a parent in the UK. She was healthy and had been able to work in Nepal; she could not meet the requirements of either the Rules or the discretionary policy. In the premises, the judge concluded that the decision to refuse entry clearance was proportionate in the article 8 balancing exercise.

4. The grounds argued that the First-tier Tribunal:
 - a. Erred in the approach to the available evidence and failed to disclose concerns as to evidence of contact between the appellant and her mother in the UK;
 - b. Erred on the application of the historical injustice principle;
5. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Gumsley on 3.5.20, who considered that whilst the judge's concerns about the evidence, or lack of evidence, may have been justified, it was arguable that given the significance the evidence relating to telephone and Viber communication seemed to have played in the assessment of the question as to whether there was family life, the judge should have alerted the appellant to these concerns and afforded her the opportunity to respond.
6. In essence, the grounds of appeal advanced an argument that the policy is deficient in not applying to the appellant. It was argued that had the long-standing injustice against Gurkhas and their families not happened, the appellant's father would not have been denied a right to settle in the UK so that the appellant would either have been born in the UK following her father's discharge from the army, or been able to come to the UK as a child with both parents. It was also argued that the appellant is living in extreme poverty and her physical separation from her mother, on whom she is entirely dependent for accommodation and financial support, perpetuates the historic injustice against her father, her mother, and the appellant herself.
7. The grounds accepted that the conditions of the policy as drafted could not be met by the appellant. However, it was argued that the historical injustice principle should be applied to the appellant so that if she enjoys real, effective or committed support from her mother so that family life continues, and if there is no greater public interest than the ordinary interest in immigration control, the appellant should succeed. In essence, the argument is that had those rights been available whilst the appellant's Gurkha father was alive, then the whole family would have come to the UK together and the appellant would probably have been born in the UK.
8. My error of law decision promulgated on 4.9.20, accepted the historic injustice argument, finding a material error of law in the decision of the First-tier Tribunal, and setting it aside to be remade in the Upper Tribunal. The matter came back then before me for remaking the decision in the appeal in a remote hearing on 11.5.21. I had directed in my earlier decision that the resumed hearing should be held face-to-face. However, by email the appellant's representatives asked for the matter to be listed remotely with an interpreter. Fortunately, all parties were able to participate effectively in the remote hearing.

9. In preparation for the resumed hearing, the Upper Tribunal has received copies of the appellant's First-tier Tribunal bundle (in two parts), and the appellant's Upper Tribunal bundle comprising 41 pages. Mr Moriarty also relied on his skeleton argument prepared for the First-tier Tribunal appeal hearing and dated 16.1.20.
10. At the hearing, I heard oral evidence from the sponsor, based on her witness statement of 24.12.19 (ABp6), and further oral evidence from a family friend and former neighbour in Nepal, Mr LG, himself a former Gurkha soldier, who has maintained contact with the sponsor and her family in Nepal. In addition, the new bundle prepared for the Upper Tribunal hearing contains further evidence of voice and social media contact between the appellant and her mother, and further money transfers by the sponsor to her daughter in Nepal.

Consideration & Findings

11. The authority for the approach advocated on behalf of the appellant is derived from the decision in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320, where at [42] the Court of Appeal held:

“Those circumstances of the appellant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under Article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the appellant’s parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then and was still subsisting at the time of the Upper Tribunal’s decision. This was the critical question under Article 8(1). Even on the most benevolent reading of his determination I do not think one can say that the Upper Tribunal judge properly addressed it.”

12. In other words, the historic injustice principles should be applied in consideration of the application of a member of a former Gurkha's family for entry clearance. Although the respondent's policy does not apply to children of widows of former Gurkhas, the historic injustice principles should be considered in the article 8 ECHR considerations, namely whether family between the appellant and her mother was sufficient to engage Article 8 ECHR and, if so, the proportionality balancing exercise between the rights of the appellant and her mother on the one hand and the public interest on the other. In passing, I note that it appears from the respondent's refusal decision that the historic injustice principles were considered and applied to the appellant's circumstances.
13. Reading the impugned decision, it is clear that First-tier Tribunal Judge's approach was to first assess the family life claim applying the Kugathas principles, looking for something more than the normal relationships to be expected between adult relatives. Then, in the event that he was wrong to find

that family life had not been proven to exist, the judge went on from [30] of the decision to consider in the alternative whether the historic injustice principles ought to apply. However, it is clear from [34] of the decision that the judge specifically excluded the historic injustice aspect from both parts of the decision, that is to say whether family life engaging article 8 existed between mother and appellant, and whether the decision was proportionate to any such family life. In the premises, I was satisfied, as Mr McVeety fairly conceded, that was an error of law.

14. At the error of law hearing, Mr McVeety's argument was that the error was not material, because of the specific findings of the First-tier Tribunal as to the inadequacies of the sponsor's evidence. He pointed out that in oral evidence she was unable to recall the ages of her children or who was in education and who was not. The judge had also criticised inadequate documentary evidence of financial support and of communication between the appellant and her mother. I accepted, in general terms, Mr McVeety's point that there were difficulties for the appellant and the sponsor in demonstrating an ongoing a family relationship sufficient to engage Article 8 ECHR but I was satisfied that in making that assessment the judge should have taken account of the historic injustice principles. In particular, it is potentially relevant the mother came to the UK in 2012 to take up her rights previously denied to her husband to settle in the UK and that this separation may have diminished the level of family life contact between the appellant and her mother, which arguably was attributable to the historic injustice.
15. At the continuation hearing for the remaking of the decision in the appeal, the evidence of the sponsor and her supporting witness was largely unchallenged. In cross-examination, Mr McVeety queried the financial circumstances of the appellant and her siblings in the family home. The evidence was that whilst they used to farm their own land, most of that land had been washed away in torrential rain and flooding. The family also lost their cattle in the devastating floods. As a result, to others to try and earn a living, her children must work on the remaining land belonging. They earned roughly 500 rupees a day (about £3), which was not enough to maintain them. The sponsor said that if she did not send money to them, they would have to borrow money to be able to survive. She also said that she speaks to the appellant about 4-5 times a week and had been called by her earlier in the day as it was Mother's Day in Nepal. She added that since the Covid-19 pandemic, they have been speaking more frequently. She is now 74 years old and I have taken this into consideration with regard to her ability to recall details.
16. In his oral evidence, Mr NG relied on his witness statement of 5.5.21 which confirmed the family's circumstances in Nepal. He last visited the family in November 2020, returning in December 2020. He confirmed that most of the land in the village had been washed away in the floods. According to his witness statement, it was he who encouraged the sponsor to apply to come to the UK in 2011. In relation to the difficulties in recalling details of her family during the

First-tier Tribunal appeal hearing, Mr NG pointed out in his statement that she is completely illiterate and has difficulty even remembering her own telephone number. He supported her when she came to the UK and helped her maintain contact with her remaining family in Nepal, including the appellant, then using calling cards and now using mobile phone calls and applications. He also helped her transfer money to her family in Nepal. He continues to help her in this way, taking her to the bank and Western Union and confirmed that he did not keep the receipts as he didn't know they would be important. He confirmed that the sponsor has been sending money regularly stating, "Sometimes, they have their own income and there is a gap of a month for sending the money however, there has never been a gap of two month between the support." He also confirmed that the sponsor visited her family in Nepal in his company before the Covid pandemic. The final part of his witness statement speaks as to his observation of the sponsor's emotions when speaking with her children on the telephone, stating that it was obvious that she missed them very much.

17. In submissions, Mr McVeety stated that if I accepted the evidence, which he did not challenge, the level of contact and continuing financial support would be above that to be expected between adult relatives in normal circumstances. I did accept that evidence as genuine and reliable. It follows that he could not challenge that there was continuing family life between the sponsor and the appellant sufficient to engage article 8 ECHR. He accepted that it then followed that the public interest in enforcing immigration control was outweighed by the historic injustice principle. For his part, Mr Moriarty pointed out that some of the gaps in evidence identified by the First-tier Tribunal had now been filled by the further documentary evidence and the evidence of Mr NG.
18. On the clear evidence, I am satisfied that the appellant enjoys real, effective and committed support from her mother so that family life sufficient to engage article 8 ECHR continues. The mother's financial support is essential to her maintenance and survival. I also accept that but for the historic injustice, the level of that family life would have been greater as they would have been in closer proximity to each other with easier means of communication and contact. On the facts of this case, I am satisfied that there is no greater public interest than the ordinary but important interest of maintaining immigration control. In the premises, that public interest is properly outweighed by the historic injustice, so that the appellant should succeed in her appeal.
19. Whilst this case is a little more remote than the more usual case, given that the mother took advantage of the policy to come to the UK only after her husband died, I am satisfied that it is correct to apply the historic injustice principle to the article 8 claim. When that is done, it is clear that had the right to settle in the UK been available whilst the appellant's Gurkha father was alive, then the whole family would have come to the UK together and the appellant would probably have been born in the UK, or at the very least the appellant would have been able to enter and settled in the UK at the same time as her mother.

Decision

The appeal of the appellant is allowed on article 8 ECHR human rights grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 11 May 2021

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 11 May 2021