



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02740/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 13 July 2017

**Decision & Reasons
Promulgated
On 24 July 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER

and

ARJUN GURUNG

(ANONYMITY DIRECTION NOT MADE)

Appellant

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr C Mannan, Counsel, instructed by Jusproless Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (Appellant) against the decision of Judge of the First-tier Tribunal Spicer (the judge), promulgated on 22 March 2017, allowing the Respondent's appeal against the Appellant's refusal, dated 7 July 2015, of his human rights claim made on article 8 ECHR grounds, which was upheld by an Entry Clearance Manager (ECM) on 26 October 2015.

Background

2. The Respondent is a national of Nepal, date of birth 27 August 1985. The following facts are not in dispute. The Respondent's father was a member of the Brigade of Gurkhas. He served from 23 October 1962 to 14 October 1968. He passed away on 9 March 2010. On 21 May 2009 the Secretary of State announced discretionary arrangements for the settlement in the UK of members of the Brigade of Gurkhas who were discharged before 1 July 1997. The discretionary arrangements were amended on 5 January 2015. The Respondent's mother qualified for a widow settlement Visa under the discretionary arrangements and entered the UK on 7 August 2012. On 14 June 2015 the Respondent applied for entry clearance to settle in the UK as the adult dependent child of his mother. He was 29 years of age at the date of the application.

The Reasons for Refusal Letter

3. The Appellant noted that, under the discretionary arrangements in existence at the date of decision, the Respondent's father must have settled in the UK or was in the process of being granted settlement. The Respondent could not meet these requirements as his father was deceased and the discretionary arrangements made no provision for adult children of an ex-Gurkha widow. The Appellant noted that the Respondent had lived apart from his mother for more than 2 years. The Appellant noted the absence of any care arrangements that had been put into place by the Respondent's mother before she migrated to the UK. The Appellant concluded that the Respondent was therefore able to care for himself. The Appellant was unclear as to why the Respondent was not working in Nepal given that he was in good health and had been educated at University up until 2005. The Appellant was not satisfied that the Respondent met the requirements for leave to enter as an adult dependent relative under Appendix FM of the immigration rules. The Appellant then considered The Respondent's article 8 ECHR rights. Having regard to the observations identified above the Appellant concluded that there was no family life between the Respondent and his mother. The Appellant finally concluded that the historic injustice to which Gurkhas had been subjected did not outweigh the proportionality assessment under article 8. It is significant to note that the ECM reviewing the decision stated:

From the documents the [Respondent] has submitted, I am indeed satisfied that article 8 (1) is engaged.

The ECM however concluded that the ECO's decision was proportionate and appropriate.

The First-tier Tribunal decision

4. There was no attendance by a representative for the Appellant at the First-tier Tribunal hearing. Although she attended the hearing the

Respondent's mother was not required to give evidence other than to confirm her husband's date of birth. The judge heard submissions from the Respondent's representative. In her decision the judge accurately set out the chronology of events and recorded the core elements of the Respondent's evidence. The judge noted that the Respondent had four married sisters in Nepal, that at the time of his application he had been living with his older brother and his wife, and that before his mother's departure he had lived with her as a family unit. The Respondent was unmarried and unemployed and was said to be emotionally attached to his mother. This evidence was reiterated by the Respondent's mother in her statement. She had visited him in Nepal from April to July 2013 because she was missing him very much. The judge found that the sponsor made regular financial transfers to the Respondent and that the telephone records provided indicated regular contact between the Respondent and his mother. The judge noted the Respondent's educational qualifications and set out the terms of the discretionary arrangements contained in Appendix K to the immigration rules. The judge concluded that the Respondent could not meet the requirements of Appendix K or the requirements of Appendix FM for entry clearance as an adult dependent relative.

5. The judge then considered article 8 outside the immigration rules. The judge directed herself as to the 5 pronged test established in *Razgar* [2004] UKHL 27. The judge noted, at [43],

I find that the decision and not to grant entry clearance to the [Respondent] is an interference with the [Respondent's] right to respect for his family life. This has been acknowledged by the entry clearance manager who has accepted that article 8 (1) is engaged.

6. The judge went on to consider the issue of proportionality. She accepted that the Respondent's family could have come to the UK at any time after 1968 but for the historic injustice. The judge found that the Respondent satisfied most of the requirements in Appendix K but for the fact that his father was not granted settlement. The judge then considered the relationship between the Respondent and his mother by reference to the authority of *Kugathas v SSHD* (2003) INLR 170. At [48] the judge found that the effect of the Appellant's decision would be to enforce continued separation of the Respondent and his mother. The judge repeated the ECM's concession that family life existed between the Respondent and the sponsor. The judge then considered the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. The judge finally considered the effect of the historic injustice identified in *Gurung & Ors, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWCA Civ 8 and *Ghising and others (Ghurkhas/BOCs: historic wrong; weight)* [2013] UKUT 00567 (IAC). The judge concluded, having been satisfied on the evidence before her, that, but for the historic wrong, the Respondent would have settled in the UK as a child. Applying both *Gurung* and *Ghising* the judge found that this ordinarily would be sufficient to

outweigh the public interest in maintaining immigration control. The judge noted that the Appellant had not relied on any countervailing factor, such as poor immigration history or criminality that would be capable of displacing that presumption. Having specifically stated that she had weighed the relevant competing factors and applied the appropriate guidance established in the cited authorities the judge concluded that the Appellant's decision constituted a disproportionate interference with the right to respect for family life and allow the appeal under article 8.

The grounds of appeal and submissions by the parties

7. The grounds repeated many of the points made in the original Reasons For Refusal Letter. It was argued that the family ties did not demonstrate emotional dependency to the *Kugathas* standard and that there was no "... evidence of further elements of dependency, involving more than the normal emotional ties." It was claimed that the evidence before the FTT did not substantiate a finding of emotional or financial dependency 'beyond the norm'. It was submitted that the proportionality assessment could not be assessed in the Respondent's favour as his mother came to the UK by choice 2 years and 10 months prior to his application. The grounds further contend that there was no reason why the current sponsorship arrangements could not continue and that there was no obvious reason why family life could not continue in Nepal. The judge's reasoning in respect of section 117B was said to be insufficiently reasoned and speculative in that the weight attached by the judge to the 'historic injustice' diluted its meaning as historic injustice was just one aspect of the proportionality assessment.
8. Permission was granted by Judge of the first-tier Tribunal Cruthers who found that the grounds were arguable.
9. At the outset of the 'error of law' hearing I raised with Mr Tufan the issue of the concession made by the ECM. Mr Tufan recognised the relevance of this concession and had anticipated it being raised. He accepted that the concession had never been withdrawn. He did not seek at this very late stage to withdraw the concession. Whilst accepting that the concession was very generous Mr Tufan did not submit that the ECM was not rationally entitled to make the concession on the evidence before him or her. Mr Tufan highlighted some aspects of the judge's decision that were not entirely clear, such as her finding that the Respondents family could have come to the UK at any time after 1968 in circumstances where the Respondent was only born in 1985, but accepted that the concession greatly restricted the scope of argument based on the grounds of appeal.

Discussion

10. The grounds take issue with the judge's finding that there was family life between the Respondent and his mother of sufficient strength such as to attract the operation of article 8(1). On the basis of the evidence before the judge she was, it was contended, not rationally entitled to find the existence of emotional and financial bonds over and above those normally expected between adult children and their parents.
11. The judge's conclusions as to the existence of family life were however based on a clear and unambiguous concession made by the ECM. I am satisfied that the ECM was rationally entitled to concede that the requirements of article 8(1) were met. The Respondent's representations to the ECM indicated that he had lived with his mother in a single family unit until she came to the UK, that he was single, unemployed and was financially and emotionally dependent on his mother. I note in the context of immigration control that there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8, and that the love and affection between an adult and his parent will not of itself justify a finding of family life. There has to be 'something more'. I am satisfied there was sufficient evidence before the ECM entitling him or her to conclude that, on the particular facts of this case, there was 'something more' (applying *Singh v Secretary of State for the Home Department* [2015] EWCA Civ. 630, which was considered in *Butt v Secretary of State for the Home Department* [2017] EWCA Civ 184, and *Rai v Entry Clearance officer, New Delhi* [2017] EWCA Civ 320). Although a generous decision, it cannot be said that the ECM's concession was one he or she were not rationally entitled to make on the evidence before them.
12. Nor can it be said that the judge acted in an irrational manner by accepting the unchallenged concession made by the ECM. The judge had before her the same evidence produced by the Respondent for his entry clearance application and for the ECM review, as well as the witness statement from the Respondent's mother and the voluminous evidence of money transfers and telephone calls between the Respondent and his mother, which is evidence of real, committed and effective support. Given the clear terms of the concession made by the ECM, and the evidence going to the nature of the relationship between the Respondent and his mother, the judge was rationally entitled to conclude that the relationship between the Respondent and his mother went beyond normal emotional ties and that the Respondent was financially and emotionally dependent on the sponsor.
13. When assessing the proportionality of the Appellant's decision the judge properly directed herself as to the *Razgar* [2004] UKHL 27 approach and took into account all the relevant public interest factors in section 117B of the 2002 Act and those relied on by the Appellant in her decision. The judge was entitled, on the evidence before her, to

note that the Respondent's mother was capable of financially supporting him and that he intended, in any event, to work in the UK.

14. As the recent Court of Appeal decision in *Rai v Entry Clearance officer* makes clear, the historic injustice visited upon Gurkhas and their families is a significant factor that must be weighed in the proportionality balancing exercise (applying *Gurung* and *Ghising*). The judge's finding of fact that the Respondent's family would have applied for settlement in the UK but for the historic injustice was one rationally open to her (see paragraph 42 of *Rai*). The judge attached appropriate weight to the historic injustice and demonstrably considered whether there were any countervailing public interest factors.
15. In light of the ECM's concession the judge properly directed herself in accordance with the appropriate legal principles and gave appropriate consideration to both sides of the proportionality assessment. I am not persuaded that the judge misdirected herself in respect of the weight she attached to the historic injustice. In the circumstances I am satisfied that the decision does not disclose any error of law sufficient to render it unsafe. I therefore dismiss the Secretary of State's appeal.

Notice of Decision

The First-tier Tribunal did not make a material error. The Secretary of State's appeal is dismissed.

Signed



Upper	Tribunal	Judge	Blum
Date 21 July 2017			