



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06064/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Decision & Reasons Promulgated
On 14 June 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

SAKTI RAJ GURUNG
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr S Jaisri, of Counsel, instructed by Sam Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Introduction

1. The appellant is a citizen of Nepal born on 1st January 1987. In 2015 he applied to settle in the UK as the dependent son of his father, Mr Deo Bahadur Gurung, who is a former Ghurkha soldier, and who lives in the UK with his wife, Ms Dhan Kumari Gurung. The application was refused on 18th January 2016. His appeal against the decision was dismissed on human rights grounds by First-tier Tribunal Judge Greasley in a determination promulgated on the 13th July 2017.
2. Permission to appeal was granted by Judge of the First-tier Tribunal McGinty on 17th January 2018 on the basis that it was arguable that the First-tier judge had

erred in law in findings related to the appellant's father's purported wife Dil Maya, and with permission being granted on all grounds.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law. For the reasons set out below in my decision on error of law at Annex A it was found that the First-tier Tribunal had erred in law, and that the decision and all findings would be set aside.
4. It was agreed that the re-making should be retained in the Upper Tribunal but adjourned to the next available date before me as the sponsors were present but there was no Nepali interpreter, and also because DNA evidence was believed to be soon available (it having been commissioned in September 2017 and the samples taken), and there therefore would shortly be evidence to show conclusively the relationship between the appellant and Mr D B Gurung and the appellant and Mrs Dhan Kumari Gurung. The DNA evidence from Cellmark was filed and served and shows that Mr Deo Bahadur Gurung and Mrs Dhan Kumari Gurung are to a 99.9999% certainty the parents of the appellant. At the end of remaking hearing I reserved my determination.

Evidence & Submissions – Remaking

5. Mr Deo Bahadur Gurung, father of the appellant adopted his statement as his evidence to the Upper Tribunal and confirmed that it was true to the best of his knowledge and belief. In short summary in this statement he sets out the following.
6. He is a citizen of Nepal born in 1944 who served for 16 years in the Brigade of Gurkhas between 1962 and 1978, when he was discharged as a Corporal having an exemplary period of military conduct. He had two daughters from his first marriage born in 1972 and 1975. He has three children, two daughters (born in 1983 and 1985), and a son born in 1987 (who is the appellant) from his second, and current, marriage to Ms Dhan Kumari Gurung. His oldest daughter from his first marriage lives in India and he has no contact with her, his second daughter from this marriage has passed away. His oldest daughter from his second and current marriage lives in Kathmandu and is married with children. His second daughter from this marriage lives in the USA where she works. There was an error on the Kindred Roll which stated that the appellant was the son of him and his previous wife and not Dhan Kumari. This is not the case.
7. Mr Gurung states that he did not apply earlier for the appellant to join him and his wife, who came to the UK in 2010, because it was not possible under the Home Office policy. He states that his son is dependent on himself and his wife financially and emotionally. They cover his expenses and made care arrangements for him when they left Nepal. They left approximately £3735 for him when they left Nepal, and have sent money and given him cheques since that time using the Nabil Bank account. The appellant is not married and so forms part of their family unit still. The family does not feel complete as the appellant is absent, and he would also help his parents in their lives if allowed to come to the UK. Mr Gurung has paid for all of the appellant's education, accommodation,

health and transport costs. There is no work available for the appellant in Nepal and so he cannot lead an independent life. They have visited the appellant in Nepal, and communicate with him through Ncell since they left. He made a month visit to the appellant in Nepal in April 2011, a three month visit in January 2013, a three month visit in December 2013, a three month visit in January 2015 and a one month visit in February 2017. His wife came with him on the two visits in 2013, the visit in January 2015 and the visit in February 2017. If the appellant had been allowed to apply for settlement earlier the appellant would have accompanied him and his wife as a child and they all would have lived together in the UK.

8. In oral evidence Mr Gurung added that the family village is Thalajung, Gorkha, where he and the appellant were born. He went back there after retiring from the Gurkha regiment and lived there until he came to the UK in 2010. During this period between 1978 and 2010 he stayed in his village and did a little bit of farming. In 2010 he, his wife and the appellant were the family members living in the family home. The appellant remained in the village in the only family home until the earthquake in Nepal hit the area in 2015 when they entered a tenancy agreement for him to have two rooms in Kathmandu, this agreement appears at page A45 of the bundle. On the visits he made to Nepal he saw his daughter who is married in Kathmandu and visited the appellant, but the visits were mainly to see the appellant. When he went to visit the appellant prior to his move to Kathmandu he would have to take a bus and jeep and then walk for two hours before he reached the village of Thalajung to see him. This was a trip of some 15 to 18 hours from Kathmandu. He is in touch with the appellant every three or four days by telephone from the UK. The appellant is not provided for by his sister in any way, although as there was no bank in the village when he lived there his sister would take the money from the bank in Kathmandu and give it to him. The payments made by cheques he provides for the appellant have his name, Sakti, beside them on his bank statement. The appellant has never worked, and only had village school education and no college education. Culturally the appellant is the youngest in the family and the one who is seen as the most affectionate and loving to his parents. Culturally he should look after his parents in their old age.
9. Mr Tufan submitted that in accordance with Rai v Entry Clearance Officer New Delhi [2017] EWCA Civ 320 that financial dependency is not enough to show family life between the appellant and his parents, and that there needs to be a real, effective and committed relationship between them. He submitted that there was nothing shown by the appellant beyond normal emotional ties, and so the test set down in Kugathas v SSHD [2003] EWCA Civ 31 was not met.
10. Mr Jaisri submitted that there was real, committed and effective support which was not just financial support between the appellant and his parents. They were all living together in the family home relying upon the father's pension and some farming at the point when the parents left Nepal to come to the UK. The appellant had not lead an independent life but was part of this family unit. It was not until January 2015 that the policy was changed to enable the appellant to apply to join

his parents in the UK. There had been significant visits to the appellant by his parents prior to this despite the fact that it was arduous to reach the family home where the appellant had remained until the Nepali earthquakes in 2015. There was clear commitment shown in these visits and in the telephone calls every three or four days. The appellant's father may have found it hard to define the emotional element of this family life relationship but his actions make it clear that it exists.

Conclusions – Remaking

11. As outlined by the Court of Appeal in the cases of Rai and Kugathas family life requires real, committed and effective support. There is no presumption of this between adult children and their parents and that more than normal emotional ties are required to show Article 8 ECHR family life. Rai, relying upon the Upper Tribunal case of Ghising (family life – adults –Gurkha policy) [2013] UKUT 567, notes that family life had been too restrictively interpreted and that there was no need for evidence of exceptional dependency.
12. There was not questioning of the credibility of the sponsor, Mr Gurung, by Mr Tufan and I find that he is a credible witness who gave considered careful oral evidence which was consistent with his written statement. I am satisfied that the appellant is the son of Mr Gurung and his second wife, who resides in the UK with Mr Gurung, in the light of the DNA evidence, and thus that the appellant and his sponsors have been truthful about his parentage with the entry clearance authorities.
13. This is a case in which, absent the “historic injustice”, the credible evidence before me is that the appellant would have applied to come to the UK with his parents as a child; and failing this would have applied to come with them in 2010 when they were granted entry clearance if that had been permissible under the prevailing policy; and did in fact apply to come to the UK in 2015, a few months after the Home Secretary's policy was amended in January 2015 to enable persons of his age to apply. I find therefore that the move to the UK by the appellant's parents separately from him is in no way indicative of an intention that family life should or did end between them by anyone involved.
14. I find that the appellant had lived his entire life in the family home in the remote village of Thalajung in the Gorkha district of Nepal up until the village was hit by the Nepali earthquakes of 2015, at which point he understandably moved to rented accommodation in Kathmandu arranged by his father. I find that the appellant has always been financially dependent on his father, who provided for him by way of his military pension and whilst in Nepal some subsistence farming. This financial dependence is supporting by documentary evidence including bank statements and financial transfer slips and was not disputed by Mr Tufan. I find that the appellant has never been married or formed a separate family unit, and is not and has never been part of any other family unit other than that of his parents. I find he was undoubtedly part of his parents' family unit with family life based

on interdependent real, effective and committed support between himself and his parents at the time when they left Nepal.

15. I am satisfied on the balance of probabilities that this family life has continued between the appellant and his parents since they left Nepal in 2010. Mr Gurung did not find it easy to particularise this, but it is clearly stated in his written evidence that there is emotional dependency between him and his son, and he continues to view the appellant as part of his family unit and feels his family is not complete without him. I find that he has explained in oral evidence that it is a cultural norm in his community that the youngest child will have the closest loving relationship with his parents and commit to their care in their old age, and indicated that this norm applies between the appellant, himself and his wife. He has made five lengthy visits to Nepal over the past 8 years, primarily to see his son and undergone arduous travel to be able to spend time with him in the village prior to 2015. He continues to speak on the telephone to him every three or four days. I accept that the appellant has not ever had paid employment, and that this is not just a factor which makes him financially dependent on his father but also means he has no work life (unlike his unmarried sister who lives in the USA for instance) and thus makes his family relationships more central to his existence. Mr Gurung's evidence reveals a significant difference in the degree of contact and concern he has with his other children, who are seen as having separated from his family unit. On the totality of the evidence before me I find that there is a real, committed and effective supportive relationship between the appellant and his parents in the UK which goes beyond normal emotional ties and which therefore amounts to family life.
16. As I have found family life between the appellant and his parents it follows, relying upon the decision of the Upper Tribunal in Ghising endorsed by the Court of Appeal in Gurung v SSHD [2013] EWCA Civ 8 that in the context of the historic injustice to former Gurkha soldiers that it will not be proportionate under Article 8 ECHR to refuse to grant the appellant entry clearance to come to the UK to join his parents and sponsors.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal with no findings preserved.
3. I remake the appeal by allowing it on Article 8 ECHR human rights grounds.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 13th June 2018

Annex A

DECISION AND REASONS

Introduction

17. The appellant is a citizen of Nepal born on 1st January 1987. In 2015 he applied to settle in the UK as the dependent son of his father, Mr Deo Bahadur Gurung, who is a former Ghurkha soldier, and who lives in the UK with his wife, Ms Dhan Kumari Gurung. The application was refused on 18th January 2016. His appeal against the decision was dismissed on human rights grounds by First-tier Tribunal Judge Greasley in a determination promulgated on the 13th July 2017.
18. Permission to appeal was granted by Judge of the First-tier Tribunal McGinty on 17th January 2018 on the basis that it was arguable that the First-tier judge had erred in law in findings related to the appellant's father's purported wife Dil Maya, and with permission being granted on all grounds.
19. The matter came before me to determine whether the First-tier Tribunal had erred in law. For the reasons set out below it was agreed that the First-tier Tribunal had erred in law, and that the decision and all findings would be set aside. It was agreed that the re-making should be retained in the Upper Tribunal but adjourned to the next available date before me as the sponsors were present but there was no Nepali interpreter, and also because DNA evidence was believed to be soon available (it having been commissioned in September 2017 and the samples taken), and there therefore would shortly be evidence to show conclusively the relationship between the appellant and Mr D B Gurung and the appellant and Ms Dhan Kumari Gurung.

Submissions – Error of Law

20. It is submitted in the grounds of appeal for the appellant that the First-tier Tribunal erred in law in not finding that the appellant was the son of his father, and thus satisfied the conditions of entry based on this relationship. The First-tier Tribunal also made irrational and unfounded findings that the appellant's father had a wife called Dil Maya which was not supported by any actual evidence whatsoever. The appellant contends he is the son of his father's second wife, Dhan Kumari, although the Kindred Roll contained a mistake and he was recorded as the son of his father's first wife Indra Kumari.

21. Ms Everett accepted that there was an error of law in failing to deal with whether the appellant was the dependent of his father given there was no evidential basis for finding that he was not related to his father even if there was confusion arising out of the totality of the evidence regarding the identity of the appellant's mother.

Conclusions – Error of Law

22. It was therefore agreed by consent that the First-tier Tribunal had erred in law for failing to determine whether the appellant was dependent on his father Mr Deo Bahadur Gurung, and thus to determine the issue of whether refusal to grant entry clearance was a breach of Article 8 ECHR.

Decision:

4. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
5. I set aside the decision of the First-tier Tribunal with no findings preserved.
6. I adjourned the re-making hearing.

Directions

1. The appellant must serve any DNA evidence regarding his relationship with his contended mother and father on the respondent and file it with the Upper Tribunal as soon as it is received by his solicitors.
2. The appellant and respondent must file any other up-dating evidence on which reliance is placed 14 days prior to the re-making hearing date.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 3rd April 2018