



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/06484/2015  
HU/06480/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 December 2017**

**Decision & Reasons Promulgated  
On 12 January 2018**

**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**ENTRY CLEARANCE OFFICER - NEW DELHI**

Appellant

**and**

**HASTA BAHADUR GURUNG (FIRST RESPONDENT)  
SAMMAR GURUNG (SECOND RESPONDENT)  
(ANONYMITY ORDER NOT MADE)**

Respondents

**Representation:**

For the Appellant: Ms A Fijiwala, Presenting Officer

For the Respondents: Mr R Jesurum of Counsel instructed by Everest Law Solicitors  
(19-20 Chambers)

**DECISION AND REASONS**

1. Although this is the Secretary of State's appeal I will continue to refer to the original appellants as the appellants herein. Their father, the sponsor, is Mr Damber Hasta Bahadur born in 1951. Mrs Gurung is their mother. She was born in 1962. They have a third son (Prithibi), born in 1993, who is present and settled in the UK with his parents. The sponsor and Mrs Gurung are citizens of Nepal and have been present

and settled in the UK since April 2011. The appellants were born on 4 January 1988 and 19 May 1991 respectively. They are also citizens of Nepal.

2. On 7 August 2015 the appellants applied for entry clearance to settle in the UK as the dependent sons of the sponsor. These applications were refused on 27 August 2015. The appellants appealed against the decision on Article 8 grounds and their appeal was heard before the First-tier Tribunal on 11 January 2017.
3. The facts as asserted by the appellants were summarised by the First-tier Judge as follows:
  - “3. The sponsor served in the Brigade of Gurkhas from 24 November 1969 until his discharge on 24 October 1984. During his 15 years’ service he served in many countries including Malaysia; Hong Kong; Brunei; Australia; and the UK. When discharged, the sponsor was 33 years of age; held the rank of Corporal; and was discharged with a certificate of exemplary conduct and character.
  4. The sponsor and Mrs Gurung were married on 3 July 1984, shortly before the sponsor’s discharge from the British Army. Had they been permitted to do so, upon the sponsor’s discharge, they would have chosen to settle in the UK. Their 3 sons (the appellants and Prithibi) were all born in Nepal after the sponsor’s discharge.
  5. Following his discharge from army service, the sponsor went to live in Nepal with his wife. His household income was his army pension which he supplemented by farming a small piece of land which he owned. Thereafter, the sponsor provided for his family by working abroad in Saudi Arabia and Iraq. Whilst working away from home, the sponsor was only able to visit his family in Nepal once a year; but Mrs Gurung remained in Nepal caring for the children.
  6. It is a matter of public record that it was not until 2004 that Gurkha veterans and their families were permitted to settle in the UK upon discharge from service. In 2004 this applied only to former Gurkhas who had been discharged in or after July 1997. In 2009 the right to settle was extended to all Gurkha veterans with 4 or more years’ service. The right to settle extended to family members including spouses and children under the age of 18. The right does not extend to children over the age of 18. Other than in exceptional circumstances, to be permitted to settle with their parents, such children would be expected to qualify for leave to enter and remain under the relevant provisions of the Immigration Rules or under Article 8 ECHR.
  7. As promptly as he reasonably could, following the 2009 changes, the sponsor applied for entry clearance and settlement to the UK for himself; Mrs Gurung and Prithibi. He could not, at that stage, include either of the appellants in his application; they were at that time aged 23 and 19. On 3 March 2011, the sponsor’s application for entry clearance and settlement was granted; he had to take up settlement within 2 years or the right would be lost. He and his wife, together with Prithibi, arrived in the UK on 4 April 2011; and have resided here ever since.

8. Whilst resident in the UK, the sponsor; Mrs Gurung; and Prithibi have returned to the Nepal at least once each year, for several weeks at a time, to maintain contact; and family life with the appellants. They have also communicated regularly from the UK using electronic means. The appellants continued to live in the family home in Nepal and, on their account, remain financially dependent on their parents who transfer money to them on a regular basis and also withdraw cash to leave with them when in Nepal.
  9. The 1<sup>st</sup> appellant secured employment as a researcher with the Oasis Institute in Nepal from February 2012 to December 2014. However, during this period, he remained financially dependent upon his parents as his income (£155.45 per month) was insufficient to meet his needs. Since December 2014, he has been unemployed; and fully dependent on his parents. When the sponsor came to the UK, the 2<sup>nd</sup> appellant was still in full-time education; he has since completed his education; but has never been able to secure employment in Nepal. He has remained completely financially dependent on his parents since they settled in the UK.
  10. The appellants each speak some English but they are far from fluent”.
4. The judge summarised the respondent’s case noting that it was conceded by Counsel (Mr Jesurum who also appears before me) that neither of the appellants qualified for entry or settlement in the UK under the Rules or policies. The respondent argued there was no interference with the family life of the appellants and they had been living separate lives for four years as at the date of application. The family had been separated by the decision of the sponsor to settle in the UK in 2011. In any event the decision was proportionate. It was not accepted the appellants were financially or emotionally dependent but were leading independent lives and able to support themselves. The judge noted that in 2014 that while employed by the Oasis Institute the first appellant had applied for a business visit visa to enter the UK as part of a research team and commented:
- “It is ironic that, in refusing the 1<sup>st</sup> appellant’s current application, the respondent relies, in part, on the 1<sup>st</sup> appellant’s employment with the Oasis Institute as evidence of non-dependence on the sponsor; however, the 2014 application was refused by the respondent on the basis that she did not accept that the 1<sup>st</sup> appellant was employed by the Oasis Institute and receiving an income as claimed”.
5. The judge heard oral evidence from the sponsor, Mrs Gurung and Prithibi and found their evidence to be wholly consistent with the facts as summarised in the extract from the determination which I have reproduced above. The evidence of the sponsor had been subject, as the judge puts it, “to a degree of mild challenge” by the Presenting Officer “only to the extent that she queried whether the appellants were truly financially and emotionally dependent upon their parents”. The evidence of the other witnesses was not challenged. The judge commented that the sponsor was a man of positive good character with fifteen years’ service in HM Forces and a discharge with exemplary conduct. He was satisfied that he was a man of the highest integrity and that he was a wholly credible, truthful and reliable witness. The judge then turned to consider the law and authorities in relation to Article 8. He

set out Section 117B in full at the start of paragraph 18 of his determination. He then reviewed the relevant authorities and stated:

“From these decisions I distil the following legal principles which I have applied in this case: -

- (a) The denial to Gurkha veterans, discharged before 1997, of any opportunity, prior to 2004, to make application for settlement in the UK was a ‘historic injustice’.
- (b) When considering questions of family life, the decision maker should consider the interests of the entire family; and not simply the applicant or appellant.
- (c) It is relevant to consider whether there are obstacles to the continuation/resumption of family life outside the UK.
- (d) Family life can exist without indispensable support – what may constitute an extant family life falls well short of ‘dependency’.
- (e) Voluntary separation does not end family life.
- (f) The attainment of the age of majority does not end family life.
- (g) Critical features in assessing the existence of family life are continued presence in the family home; and whether the dependent has established a family of their own.
- (h) Where a historic injustice is causative of the delay in an application for status that an appellant would already have but for that injustice the balance of proportionality is arguably reversed. In other words, while the interests of immigration control would in most cases outweigh Article 8 rights, in historic injustice cases the reverse is true”.

The judge then reiterated that he had accepted the facts as found. He concluded that the position of Gurkha veterans and their families and the potential effects of the “historic injustice” did amount to compelling circumstances and it was appropriate to consider family and private life outside the Rules – he referred to **SS Congo [2015] EWCA Civ 387**.

6. The judge concluded his decision as follows:

*“Family Life*

25. I must first consider whether, at the time of these applications in 2015 and now, there is an extant family life which might potentially suffer interference. There are two significant factors which ordinarily may suggest that family life no longer existed in this case. Those two factors are the length of separation since the sponsor and his wife and youngest son came to the UK in 2011; and the age of the applicants who by the date of application were 27 years and 24 years respectively – ages at which in many cases children would have achieved independence.

26. There are however special factors applicable to this case: I find that these two appellants remained living in the family home in Nepal after their parents departed for the UK; and, but for the existence of the family home, they would effectively have been homeless. I further find that save for the first appellant's short period of employment (2012 – 2014), they have remained wholly financially dependent upon their parents. And I accept the evidence of the three witnesses who gave oral evidence before me, which was consistent with the written statements of the appellants themselves, that there were ongoing strong emotional ties between these appellants and their parents and sibling.
27. In the circumstances, I am satisfied to the requisite standard of proof that at the time of the applications for entry and settlement and today there is an extant, indeed strong, family life within the meaning of Article 8.

#### *Interference*

28. It is arguable that the respondent's decision to refuse entry clearance in this case does not of itself interfere with family life. The interference arises by the decision of the sponsor; Mrs Gurung; and Prithibi; to settle in the UK in 2011 well knowing that there was no guarantee of entry clearance for the appellants. Similarly, it is open to the sponsor and the other members of the family to return to Nepal and continue family life there.
29. In my judgement, such arguments cannot be sustained: to uphold them would be undermine the right which has been conferred on the sponsor to settle in the UK in recognition of his military service. Accordingly, in my judgement, the focus must shift to the respondent's decision; which has the effect of separating the family upon the exercise by the sponsor of his right. Viewed in this way, the respondent's refusal to allow entry and settlement to the appellants is a clear interference with their family life; and that of the other members of their family.
30. It cannot be argued that the respondent's decision is unlawful (other than by reference to Article 8 ECHR); because it is conceded that her decision is in accordance with the Immigration Rules and statements of policy. Further it is conceded, and is clearly the case, that the respondent had a legitimate aim in her decision, namely that of proper immigration control; which is clearly in the public interest.

#### *Proportionality*

31. It is in assessing the proportionality of the respondent's decision in the proper pursuit of her legitimate aim that the question of the 'historic injustice' comes into focus. But for that injustice, the sponsor and Mrs Gurung would have settled in the UK upon the sponsor's discharge from the Army; the appellants would have been born here; by now they would be British citizens. In my judgement, it cannot be a proportionate response in seeking to properly control immigration to deprive the appellants from what would undoubtedly have been theirs but for the injustice visited upon their father.

32. In any event, my judgement is that the separation of this family effected by the respondent's decision is disproportionate whatever the circumstances of the sponsor having acquired the right to settle here. This is clearly a close family; each member heavily dependent on the others emotionally; and all of them dependent on the sponsor financially. Considering the right to family life of the entire family, in my judgement, it is disproportionate to enforce their separation".
7. The judge accordingly allowed the appeal on human rights grounds.
8. The Entry Clearance Officer applied for permission to appeal. The first ground argued that the Tribunal had not considered in any detail the evidence before it and the three witness statements were it was said identical and it was asserted that there was no evidence in the bundle to show that Hasta Gurung was no longer employed. The evidence had been accepted without question and the conclusions were unsafe.
9. In relation to Article 8 it was submitted that the judge had erred in finding that the claimed "strong emotional ties" reached the threshold in **Kugathas [2003] EWCA Civ 31**. Both appellants were adults and it was for them to show that the emotional ties exceeded "normal" levels and the point had not been addressed. No regard had been paid to the public interest as expressed in Section 117B of the 2002 Act. There was no assessment of financial independence or access to adequate financial provision or ability to integrate by being able to communicate in English.
10. Permission to appeal was granted by the First-tier Tribunal on 22 September 2017.
11. A response was filed drafted by Counsel on 9 December 2017. It was submitted there was no error in the factual challenge and no point had been taken on the similarity of the witness statements before the First-tier Judge. It was untrue that there was no evidence to show that Hasta was no longer employed and Counsel referred to evidence in the bundle and the sponsor's witness statement to that effect.
12. In relation to the second ground the case on emotional ties had been largely unchallenged before the First-tier Judge, the evidence of travel to Nepal had been unchallenged and the judge had properly directed himself on the law. There had been no challenge to the judge's summary of the legal principles which I have set out above.
13. The ground that the **Kugathas** threshold was not met had not been supported by any reasons. Reference was made to **Rai v Entry Clearance Officer Delhi [2017] EWCA Civ 320** at paragraph 36 – the question the judge needed to pay attention to was the issue of "support". The judge had noted at paragraph 26 of his decision that but for the sponsor's support they would be homeless.
14. Section 117B had been addressed in a skeleton argument before the First-tier Judge and no submissions had been made by the Presenting Officer on the matter. The judge moreover referred to Section 117B at paragraph 18 of his decision and had

concluded on the issue of proportionality in paragraphs 31 and 32 of the decision. Reference was made to the case of **Rai v Entry Clearance Officer** at paragraphs 55 to 57. The decision of the Court of Appeal had been given on 28 April 2017, after the decision of the First-tier Judge the month before.

15. Ms Fijiwala submitted that 117B had not been addressed by the judge in paragraphs 31 and 32 of his determination. She referred to **Rai v Entry Clearance Officer** at paragraph 15 and the need to reach a fair balance between the Article 8 right and the public interest in maintaining a firm immigration policy. She acknowledged that the other ground was not the strongest following **Rai v Entry Clearance Officer**.
16. Counsel referred to **Ghising [2013] UKUT 567 (IAC)** at paragraph 60. Where reliance was placed upon the public interest the weight to be given to the historic injustice would normally require a decision in the appellant's favour. This case had been decided before Section 117B had come into effect. Counsel submitted that Section 117B simply codified the position and would not affect the outcome. There was also the question of the chain of causation which had been argued in the skeleton argument before the judge. The sponsor would have applied when he had been discharged if he could have done. He was a victim of injustice which was causative of the present circumstances and the appellants should be put in the position they would have been but for the injustice.
17. In reply Ms Fijiwala maintained her point that the issue of the public interest should have been considered within the proportionality exercise which it had not been.
18. At the conclusion of the submissions I reserved my decision. I remind myself that the decision of the First-tier Judge must stand unless I find a material error of law in it.
19. The first ground relied upon by the Entry Clearance Officer – essentially a factual and reasons challenge – was not developed by Ms Fijiwala. The judge plainly gave the material before him appropriate scrutiny and he heard oral evidence which he quite clearly accepted. He records the aspects of the evidence that were, as he puts it, mildly challenged. As Counsel points out there was evidence to support the judge's findings in respect of Hasta being no longer in employment. I am not satisfied that these points go further than expressing disagreement with the findings of fact. They raise no error of law.
20. In relation to the ground based on **Kugathas** again this point was not developed by Ms Fijiwala and as Counsel says, the case on emotional ties was largely unchallenged before the First-tier Judge. The judge had properly directed himself on the law and Counsel refers, as I have said, to **Rai v Entry Clearance Officer** and the issue of support. The judge found the family to be a close one with each member heavily dependent on the others both emotionally and financially.

21. The main issue was the question of Section 117B. I am not satisfied that the judge left Section 117B out of account, not least because he directed his attention to it in paragraph 18 of the decision as I have said, setting out the relevant parts of the Section in full. The judge had also referred to the interests of immigration control in his distillation of legal principles which I have set out above at sub-paragraph (h). The judge refers to the appellants speaking English but being far from fluent in paragraph 10 and the interests of immigration control in paragraph 30 of the decision. It is clear that the judge assessed the issue of proportionality in the light of the historic injustice. I am not satisfied that the judge failed to take account of Section 117B when he reached his decision.
22. As submitted in counsel's response to the grounds, the judge would have had in mind the submissions on Section 117B made on the appellants' behalf as set out in the skeleton argument. There had been no submissions in reply from the Home Office Presenting Officer. Viewed as a whole I find that it is apparent the judge did take Section 117B into account but in the alternative it is clear that the Secretary of State's arguments are met by the points made by counsel and the decision of the Court of Appeal in Rai.
23. I am not satisfied that the judge erred in failing to make express reference to Section 117B in the concluding paragraphs of his decision. He plainly had the Section in mind. I do not find that the failure to make an express reference raises a material error of law in this case. Accordingly, the appeal of the Entry Clearance Officer fails and the decision of the First-tier Judge shall stand.

### Anonymity Order

24. The First-tier Judge made no anonymity order and I make none.

### TO THE RESPONDENT FEE AWARD

The First-tier Judge made a fee award of any fee which had been paid or payable which I maintain.

Signed

Date 11 January 2018

G Warr, Judge of the Upper Tribunal