



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/06883/2017

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On: 28 September 2018**

**Decision Promulgated
On: 15 October 2018**

**Before
DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

Between

**MR BIKASH RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - NEPAL

Respondent

Representation:

For the Appellant: Mr D Surestha of Counsel

For the Respondent: Ms S Vidyaran, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appealed against the decision of the respondent dated 11 May 2017 to refuse to grant him entry clearance to the United Kingdom pursuant to Annex K and the IDI Chapter 15.
2. The appellant's appeal was dismissed by First-tier Tribunal Judge Row following a hearing at Birmingham on 9 April 2018. Permission to appeal was initially refused by First-tier Tribunal

Judge Beach on 13 June 2018 but subsequently granted by Upper Tribunal Judge Perkins on 31 July 2018.

3. Thus, the appeal came before me.
4. The First-tier Tribunal Judge made the following findings in his decision which I summarise. The Judge began his decision by saying that the only point raised by the respondent in refusing the appellant's application was that the appellant had not demonstrated that he is Financially and emotionally dependent on his sponsor in the United Kingdom. At the time that the appellant's parents took up the opportunity to settle in the United Kingdom under the 2009 Gurkha policy, the appellant 18 years old and would have been entitled to join them. The sponsor decided not to bring the appellant because of financial reasons. At the time the sponsor left the appellant he was 22 years old.
5. The appellant's argument is that he has never worked and cannot find employment and is financially supported entirely by his sponsor. The appellant provided a letter from an official in Nepal confirming that the appellant was unemployed. The payments made by the sponsor to the appellant are relatively small and therefore the appellant must have some other means of supporting himself. These remittances might indicate financial dependency or on the other hand they may simply be a demonstration of the natural tendency of parents to make gifts to their children. They may have paid for the management of the sponsor's house that he retains in Nepal. The appellant also indicated that he has access to the sponsor's bank account in Nepal.
6. The appellant says that he is emotionally dependent on his sponsor. The sponsor has not provided evidence of telephone conversations that he has made to the appellant although he says that he used a different telephone to make the calls.
7. So far as emotional dependency is concerned the evidence would seem to suggest that the sponsor and his wife waited until the appellant was 22 years old before deciding to leave him in Nepal and come to the United Kingdom. They made no special arrangements for his care. It would not be expected that special arrangements will have to be made for an adult male in reasonable health. The appellant was not suffering from any mental health problem or physical disability which might make him emotionally dependent. His parents considered that he was able to live on his own. He is not emotionally dependent on his sponsor and his wife now. The appellant therefore does not meet the requirements of Annex K.

8. In respect of article 8 rights of the European Convention on Human Rights, the Judge took into account the case of **Kugathas [2003] EW CA Civ 31** and **Rai [2017] EWCA Civ 320** and in particular the guidance given at paragraph 42 when it was stated that the heart of the matter is the question of whether family life subsisted at the time the appellant's parents chose to settle in the United Kingdom and whether family life still subsists at the date of the hearing.
9. The appellant has not demonstrated on a balance of probabilities that he had family life with his parents on 4 December 2014. He was 22 years old and still living in the family home. The appellant has lived independently in Nepal for three years at the date of hearing. He is now 25 years old. I have found he is not financially dependent on the sponsor and he is not emotionally dependent on them either. There is no family life between the appellant and the sponsor at the date of hearing. Therefore Article 8 is not engaged. It is therefore not necessary to go on to consider the issue of proportionality. The Judge dismissed the appellant's appeal pursuant to Article 8 of the European Convention on Human Rights.
10. The grounds of appeal state the Judge did not take into account all relevant factors in concluding that the appellant was not financially dependent of the sponsor. The Judge stated that it must have been envisaged by the appellant's parents that their separation from the appellant when his parents came to the United Kingdom as permanent. This is against the sponsor's evidence in his witness statement he said that the plan was two sponsor the appellant from the United Kingdom after the first came here.
11. The Judge stated that no special arrangements were made for the appellant when he left him in Nepal and from that concluded that there must have thought that he was able to look after himself. In respect of his finding that the money transfers to the appellant were insufficient and therefore he must have some means of supporting himself is perverse because the evidence was unchallenged by the respondent that the appellant has been sending money the appellant and also left money in his bank account in Nepal including giving him money on his visits. The Judge then goes on to state that money transfers indicates financial dependence but goes on to suggest that these are gifts that parents normally give to children which is speculative.
12. In respect of Article 8, the judge found that there was no family life between the appellant and his sponsor for him to consider

proportionality. However, the Judge found that there was family life with the appellant and the sponsor when they left Nepal.

13. At the hearing I heard submissions from both parties at the hearing.

Discussion

14. The Judge failed to properly consider and interpret all the evidence in this appeal, therefore came to a materially flawed decision and fell into material error. The Judge accepted that family life did in fact exist between the appellant and his parents when they left Nepal yet still found that there is no family life between the appellant and his sponsor at the date of the hearing in accordance with Article 8 (1). The Judge found that the appellant has not demonstrated that his ties with his parents are above normal emotional ties between adult parents and children found that there was no family life at all and stated that he does not have to conduct the proportionality exercise.
15. However, this conclusion was against the evidence before him. The Judge stated that when the appellant's parents left the appellant in Nepal at the age of 22, there was no expectation that they would ever live together again. This was a flawed conclusion based on the sponsor's evidence that at the time that he and his wife came to the United Kingdom they could not bring the appellant with them for financial reasons and left him living in their home Nepal with the intention of sponsoring him to join them in this country.
16. The Judge referred to the case of **Rai [2017] EWCA Civ 320** and in particular the guidance given at paragraph 42 there it was stated that at the heart of the matter is the question of whether family life subsisted at the time the appellant's parents chose to settle in the United Kingdom and whether family life was still subsisting at the time of the hearing.
17. Under Article 8(1) the appellant must demonstrate that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding them having left Nepal when they did. The evidence that was before the Judge indicated that there is a real, committed and effective support and relationship between the appellant and his parents which

has continued after they left Nepal to settle in the United Kingdom.

18. The Judge found that the appellant has been sent money by his father but said it was of limited amounts and speculated that he must have other sources of income. The Judge failed to consider the evidence that the appellant's sponsor would visit Nepal and give him money including access to his bank account in Nepal. The Judge also failed to consider that the appellant continues to live in his father's home, has not established independent family unit of his own and has been financially supported by his sponsor from the United Kingdom. The Judge also failed consider the evidence that the appellant was unemployed.
19. The Judge also failed to consider the evidence that the appellant's sponsor's financial situation at the time he came to the United Kingdom was such that he could not apply for him to the company him the United Kingdom. This is a relevant factor for why the appellant did not accompany his parent to the United Kingdom.
20. The Judge failed to take into account that the intention of the Gurkha policy was not to split families and decisions made by Gurkha families was to avail themselves of the opportunity to settle in the United Kingdom and within the policy is that they can sponsor their children within two years. Although the appellant's application was just over two years, that in itself was not a reason to find that there was no family life.
21. The Judge failed to consider the historic injustice for Gurkha settlers. In **Pun and others (Gurkhas-policy article 8) Nepal [2011] UKUT 377 (IAC)** where he said that the Tribunal was not being asked to exercise discretion under the policy, but rather that in applying Article 8, the policy should be taken into account when considering the weight to be given to the public interest in maintaining firm and fair immigration control when assessing proportionality. The Judge by finding that the appellant and his sponsor did not have family life at all, materially erred given his finding that they did have family life when they left Nepal. His misunderstanding of the evidence that having left him there, there was no intention of them living together.

22. It has been held in **Ghising and others (Gurkhas/BOC's historical wrong: weight) [2013] UKUT 00567 (IAC)**, that the historical wrong suffered by Gurkha ex-serviceman should be given ***substantial weight*** (*emphasis mine*). When the appellant has shown that there is family life and the decision made by the respondent amounts to an interference with it, the burden lies with the respondent to show that a decision to remove is proportionate although I accept that the appellant will, in practice, bear the responsibility of producing evidence that lies within their remit and about which the respondent may be unaware. The Judge failed to give substantial weight to the policy in reaching his decision in dismissing the appellant's appeal under Article 8.
23. The House of Lords in **Bekou-Betts v Secretary of State for the Home Department [2008] UKHL 39** states that the Judge must consider the family life of all those who share their family life with the appellant. In the appellant's case it is the appellant's sponsor and his wife who have been granted settlement status in the United Kingdom. The Judge did not consider the family life of the appellant's sponsor with the appellant. That was also material error of law.
24. I give less weight to the respondent's requirement of an orderly and efficient immigration control given the peculiar features of adult children of Gurkhas. The Judge considered that the historical injustice goes to the assessment of proportionality but is also operates on the logical necessity of interference.
25. I find that there were material errors in the decision of the First-tier Tribunal and I set aside the decision in its entirety. I remake the decision and allow the appellant's appeal.

Decision

The appellant's appeal is allowed under Article 8 of the European Convention on Human Rights.

Signed by
2018

Date 8th day of October

A Deputy Judge of the Upper Tribunal
Ms S Chana