



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

Appeal Number: HU/14374/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 9 July 2019**

**Decision & Reasons Promulgated
On 1 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MR TIKAMAN TAMANG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Wilford, instructed by Courtney Smith Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By my decision promulgated on 10 May 2019 I set aside the decision of the First-tier Tribunal. I now remake that decision.
2. The appellant is a citizen of Nepal, born on 15 April 1991, who is seeking to join his mother (“the sponsor”), a widow of a former Gurkha soldier, in the UK. The appellant and the sponsor applied at the same time for leave to settle in the UK. The sponsor’s application was allowed whilst his was refused. The sponsor moved to the UK without the appellant 2017.

3. The appellant claims that refusing him entry to the UK in order to join his mother would be a breach of article 8 of the ECHR.
4. The respondent's position is that the relationship between the appellant and the sponsor is not such that there is family life between them for the purposes of article 8(1) and therefore refusal of entry is not contrary to article 8.
5. Both parties were in agreement (and confirmed at the outset of the hearing) that the appellant does not satisfy the requirements of the Immigration Rules or those set out in Annex K of Paragraph 9(1) of the IDI Chapter 15 Section 2A 13.2. It was also common ground that if family life for the purposes of article 8(1) exists then refusing entry clearance would not be proportionate because of the historical injustice faced by former Gurkha soldiers.
6. The sole issue before me, therefore, is whether Article 8(1) is engaged.

Evidence

7. I heard oral evidence from the sponsor and I have also considered her written witness statement dated 27 September 2018. I have also considered the statement of the appellant as well as the various documents that were submitted to the First-tier Tribunal.
8. The factual matrix is to a large extent not in dispute. The appellant's father is a former Gurkha soldier who died in 2010 leaving ten children, five of whom are children of the sponsor who was his second wife. All of the children live outside of the family home apart from the appellant, who resided in the home with the sponsor until her departure to the UK and has since then resided there alone.
9. The sponsor regularly sends funds to the appellant and has enabled him to withdraw money from her account.
10. The appellant does not work and has never done so. Several years ago (before the sponsor moved to the UK) the appellant attempted to obtain work in Malaysia but was unable to do so because of a physical health problem. The sponsor had difficulty describing or remembering the nature of the health problem or the circumstances of the attempted application for work in Malaysia but I am satisfied she was being truthful in her recollections and the failure to remember details (which she attributed to her age) does not, in my view, damage her credibility. I accept the sponsor's evidence that the appellant does not work and has not done so; and was unsuccessful in his attempt to secure employment in Malaysia.
11. I also accept the sponsor's evidence that the appellant is not married, that they are in regular contact, and are emotionally very close.

Submissions

12. Ms Everett argued that the relationship between the appellant and sponsor does not go beyond normal family ties that exist in Nepalese culture where it is not unusual for an unmarried son to live in his parents' home. She argued that the fact that the appellant had sought work in Malaysia is indicative of independence and she stressed that living in the family home is not a sufficient basis to establish that family life exists. She also argued that regard should be had to the appellant's age, maintaining that the older a son or daughter is the less ready one should be to accept that there is the real and effective or committed support necessary to establish family life under Article 8(1).
13. Mr Wilford's argument, in essence, was that the appellant has lived his whole life in the family home and lived with his mother until she moved to the UK. They had applied together to move to the UK, indicating an intention at all times to not be separated. Mr Wilford drew attention to the documentary evidence showing that regular withdrawals have been made from the sponsor's bank account by the appellant and he highlighted withdrawals by him on four occasions between June and August 2018. He argued that the evidence of the sponsor demonstrates that she provides the appellant (who is without employment and has not started his own separate family life) with real, effective and committed support.

Analysis

14. The issue in contention in this appeal is whether family life for the purposes of article 8 exists between the appellant and the sponsor. As was made clear by the Court of Appeal in *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320, there is no legal or factual presumption as to the existence or absence of family life between a parent and an adult child; and the assessment under article 8(1) is highly fact sensitive, requiring consideration of whether there exists real, committed, or effective support that goes beyond normal emotional ties.
15. At paragraphs 41 - 42 of *Rai*, the Court of Appeal elaborated on the approach to be taken when considering an adult child of a Gurkha soldier. The Court stated:
 41. The burden of the evidence of the appellant's father and mother in their witness statements, and the appellant's in his, was this: that, in consequence of the "historic injustice", it was only in 2010 that his father had been able to apply for leave to enter the United Kingdom; that his parents would have applied upon the father's discharge from the army had that been possible; that they could not afford to apply at the same time as each other or with their dependent children - the appellant and their daughter Chandra; that the stark choice they had had to make was either to remain with the appellant and Chandra in Nepal or to take up

their long withheld entitlement to settle in the United Kingdom; that they would all have applied together if they could have afforded to do so; that the appellant had never left the family home in Nepal, begun an independent family life of his own, or found work outside the village; and that he had remained, as his father put it, "an integral part of the family unit" even after his parents had settled in the United Kingdom.

42. 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.
16. I am satisfied that at the time the sponsor left Nepal she and the appellant enjoyed a family life within the meaning of article 8(1). The appellant was not married, did not have children, and lived with the sponsor, who provided him with free accommodation and sufficient funds to sustain himself. Ms Everett argued that this amounted to no more than normal emotional ties in the context of the culture in Nepal. I do not agree. None of the other children of the sponsor lived in the family home or were provided with support in a comparable way. The relationship between the appellant and the sponsor, whilst the sponsor and appellant resided together in Nepal, was markedly different to that between the sponsor and the other children and went beyond the normal ties that are to be expected between a parent and an adult child.
17. I am also satisfied that the relationship subsists. The sponsor and appellant did not intend, or wish, to separate. On the contrary, they applied at the same time to move to the UK, with the intention of continuing to live together. Since the sponsor moved to the UK she has provided for the appellant financially – for example, by giving him access to her bank account and allowing him to live rent free in her property. The evidence also establishes that a close emotional tie has been maintained. I therefore find that family life continues to exist between the appellant and sponsor within the meaning of article 8(1).
18. The issue of proportionality under article 8(2) was not in dispute. As explained in *Ghissing* [2013] UKUT 00567, in Gurkha settlement cases the weight to be given to the historic injustice will normally require a decision in the appellant's favour and Ms Everett did not argue that this was a case

where the historic injustice would not tip the scales in the appellant's favour.

19. Accordingly, I allow the appeal on the basis that family life under article 8(1) exists between the appellant and sponsor and refusing the appellant entry to the UK would represent a disproportionate interference with that family life under article 8(2).

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 24 July 2019

