



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000914

First-tier Tribunal No: HU/57262/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of November 2024

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

DARSHAN GURUNG
(NO ANONYMITY ORDER MADE)

Appellant

and

The Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr A Jafar, counsel instructed by Gordon and Thompson Solicitors

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 13 November 2024

DECISION AND REASONS

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Wyman who dismissed their appeal following a hearing which took place on 17 January 2024.
2. Permission to appeal was granted by Upper Tribunal Judge Norton-Taylor on 9 September 2024.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

4. The appellant is a national of Nepal now aged fifty-two. On 16 April 2023 he applied for entry clearance as the adult dependent son of his father, a former member of the Brigade of Gurkhas (hereinafter referred to as the sponsor). That application was refused by way of a decision dated 1 June 2023. In short, it was not accepted that the appellant was dependent upon the sponsor.

The decision of the First-tier Tribunal

5. Following the hearing before the First-tier Tribunal, the judge found the sponsor to be a 'broadly credible' witness. The judge accepted that the sponsor was elderly and had various illnesses, accepted that the appellant was unmarried, that he remained living at his parents' former home located in a village, that he had never worked, had received regular financial support from his parents and that there was emotional support from his parents in the context of telephone calls and visits. The judge concluded that Article 8 ECHR was not engaged and dismissed the appeal.

The appeal to the Upper Tribunal

6. The grounds of appeal make the point that in light of the positive findings made by the judge, real or committed or effective support was shown, sufficient to meet the modest test of showing family life, applying *Rai* [2017] EWCA Civ 320.
7. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The judge made a number of positive findings (including financial and emotional support and continued residence at the family home), but ultimately concluded that family life did not exist. It is arguable that the judge was requiring a form of additional dependency, which might not sit well with the authorities. It is also arguable that the judge might have placed weight on the appellant living "independently" in Nepal when the evidence suggested otherwise.

The error of law hearing

8. The matter comes before the Upper Tribunal to determine whether the decision contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. A bundle was submitted by the appellant containing, inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal.
9. The hearing was attended by representatives for both parties as above. Both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary. Mr Lindsay circulated a detailed Rule 24 response dated 2 October 2024 in which the appeal was opposed.
10. Both representatives were of the view that were a material error of law to be found, the Upper Tribunal could proceed to remake the matter on the material which was before the First-tier Tribunal.
11. At the end of the hearing I announced that I was satisfied that inadequate reasons were given for the judge's conclusion that there was no family life

between the appellant and sponsor and I set aside that finding. The remainder of the judge's findings are unchallenged and are therefore preserved.

Decision on error of law

12. In remaking this appeal, I have taken into consideration all the evidence before me, including that contained in the appellant's and respondent's bundles of evidence which were before the First-tier Tribunal as well as the respondent's Rule 24 response and the submissions I heard.
13. It is common ground that the appellant did not meet the requirements of the Immigration Rules at the date of decision and did not fall within applicable Home Office policy on adult dependants of ex-Ghurkha soldiers found in Annex K.
14. The positive findings reached by the judge are that the appellant is unmarried [50]; he lives in the family home where he lived with his parents [52]; he receives regular financial support from his parents [52], [56] and that he does not work other than to grow vegetables on the family land which does not provide him with a sufficient income. The judge also found that there is emotional support between the appellant and parents, there are telephone calls and visits [56] and that the sponsor is elderly and has various illnesses [59].
15. In addition, the sponsor was found to be a 'broadly credible' witness [60] and elsewhere the judge notes that the factual background was not in dispute. Those facts include that the sponsor has been suffering from serious and enduring mental health issues since his retirement from the Gurkha Brigade. Evidence of continuing mental health issues was before the judge which included a detailed account of his mental ill health in the sponsor's witness statement dated 14 December 2023 and a recent prescription for antipsychotic medication.
16. I have considered what was said in *Gurung* [2013] EWCA Civ 8, at [45]:
"Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case."
17. While the judge directed herself appropriately, I find that the judge fell into the trap of interpreting *Kugathas* too strictly at [61] where she made the following comments before concluding at [63] that Article 8 was not engaged.

However, the case of *Kugathas* states that generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent minor children. The appellant is not a minor. Whilst he is not married, he is now over 50 years old as at the date of the hearing.
18. In reaching this finding the judge did not take into consideration what was said in *Ghising* where the Upper Tribunal accepted that the judgment in *Kugathas* had been 'interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts,' [56] and that 'some of the Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence' [60].

19. In view of the judge's positive finding that the appellant was unmarried, continued to live in the family home, received regular financial support and emotional support via telephone calls and visits, an explanation was required as to why this did not amount to real, or committed, or effective support to meet the test of the existence of a family life. Furthermore, the judge was mistaken at [58] to consider that the appellant was living 'independently' in these circumstances.
20. Owing to the lack of adequate reasons for finding that the support available to the appellant did not amount to support which established the existence of family life, the judge's conclusions on this issue are set aside. All other findings are preserved.

Remaking

21. As invited to do by the representatives, I now proceed to remaking the decision in this case.
22. The relevant question was whether there existed a degree of dependency over and above that which would be expected in a normal family. I adopt Judge Wyman's findings that the appellant is and was accommodated and wholly financially supported by the sponsor, that this support is effective to take care of the appellant's financial needs and that there is regular telephone contact in which emotional support is provided. Previously, when the sponsor's health permitted, there were frequent visits. The appellant is the only child of the sponsor. There is, in addition, a factor which the judge did not expressly mention, that of the sponsor's serious mental ill health.
23. Given the extent and longstanding nature of the appellant's dependency on the sponsor, I have no hesitation in finding that there is family life and therefore Article 8 is engaged.
24. In considering the issue of proportionality, I am required to have regard to the matters set out in section 117B of the 2002 Act, as amended. Those matters being that the maintenance of effective immigration control is in the public interest. In this case, the appellant does not speak English however he is currently financially supported and accommodated by the sponsor.
25. I acknowledge the issue of historic injustice and have considered the findings in *Ghising* [2013] UKUT 567 (IAC). In particular, I accept that the fact that an adult child has been prevented from following their parents due to an historic injustice is a relevant factor in the proportionality exercise. I am also bound by what was said in *Pun* [2017] EWCA Civ 2016.

The critical feature for the right to rely on the historic injustice is dependency. ..Both the FTT and the Upper Tribunal...have found that there is no dependency and that, to our mind, prevents the historic injustice from having the same considerable weight it must have for adults dependent on their parents at the time when the application is made."
26. In the appellant's case, the unchallenged evidence is that the appellant is emotionally and financially dependent on the sponsor. Documentary evidence of that dependency has been provided along with a consistent, coherent account provided by the sponsor.

27. The sponsor would have settled in the United Kingdom earlier were it not for the historic injustice and the appellant would have been born here and been a British citizen. Given the foregoing findings, I have attached considerable weight to the historic injustice issue. I conclude that considering all matters, including the appellant's emotional and financial dependency on the sponsor and the sponsor's vulnerabilities, that the appellant's circumstances are sufficiently compelling to outweigh the public interest considerations applicable in this case.

28. In conclusion, the respondent's decision to refuse the appellant entry clearance was disproportionate given the circumstances.

29. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

30. I set aside the decision to be re-made, with all findings of fact preserved.

31. I substitute a decision allowing the appeal on the basis that the Secretary of State's decision was disproportionate.

Notice of Decision

The appeal is allowed on Article 8 ECHR grounds.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 November 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email