



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/17482/2013
OA/17483/2013

THE IMMIGRATION ACTS

Heard at Field House
On 22 April 2015

Decision & Reasons Promulgated
On 5 May 2015

Before

UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MR BHIM BAHADUR LIMBU
MR SUKBIR LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Collins, Counsel, instructed by Howe & Co Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Nepal and brothers. Mr Sukbir Limbu's date of birth is 20 February 1991 and Mr Bhim Bahadur Limbu's date of birth is 26 December 1991.

They made applications for entry clearance which was refused by the ECO (New Delhi) in a decision of 28 August 2013. The applications were to join their father (the sponsor Padam Lal Limbu), their mother (Bhim Rani Limbu) and their two younger siblings (Man Bahadur Limbu (date of birth 16 February 1993) and Purandhoj Limbu (date of birth 26 October 1996)). The family was granted entry clearance in 2010. The sponsor was in the Gurkha Brigade of the British Army between 29 October 1951 and 14 January 1959 and was granted entry clearance under the policy applicable at the time.

2. The appellants appealed against the decision of the ECO and their appeal was dismissed by the First-tier Tribunal. Deputy Upper Tribunal Judge Mailer found that the First-tier Tribunal had made a material error of law and set aside the decision to dismiss the appeals. The error of law decision reads as follows:

“32 I am satisfied that the First-tier Tribunal Judge has not adequately engaged and applied the current legal considerations and jurisprudence relevant to the issue of whether family life in this case existed between the appellants, the sponsor and his family in the UK.

33. The correct approach has been to move on from the earlier case law requiring that it be demonstrated that more than the usual normal emotional ties existed.

34. Moreover, the finding that no weight whatsoever should be given to the historic injustice in the context of the proportionality assessment appears to be contrary to the dicta in Ghising, supra. Finally in maintaining that on discharge, the sponsor most certainly would not have applied for settlement in the UK with their mother and their children, the Judge did not properly take into account the relevant evidence given by the sponsor himself”.

3. The matter came before me for a rehearing. At the start of the hearing Mr Collins indicated that the sponsor was not in attendance at court because he was unwell. He took further instructions from his solicitor and spoke with the sponsor’s wife who was in attendance. On resuming the hearing Mr Collins explained that the sponsor was very unwell as a result of a road traffic accident which had occurred in 2013. (The fact that he was involved in such an accident is referred to by the First-tier Tribunal and is not a matter of contention.) Mr Collins having spoken to his instructing solicitors and those solicitors instructed by Mr Limbu in relation to the accident itself agreed that the hearing should proceed in his absence.
4. The sponsor has memory loss as a result of the accident and it now appears that he has developed dementia. I took into account a letter handed to me by Mr Collins to from Fentons Solicitors to Dr Cockerell which refers to a report of Dr Cockerell’s in which he states that the sponsor suffered a relatively minor head injury as a result of the incident and that he is now fully dependent on his family for his care needs and

there is a possibility that he has dementia which was probably caused by the incident although this is not definite.

5. It was intended that the sponsor's wife give evidence at the hearing before me. On the file there is the respondent's bundle which contains the Reasons for Refusal Letter. There is an appellants' bundle which contains witness statements and other documents in support of the appeal and an authorities bundle. Mr Collins submitted a skeleton argument and relied on the skeleton argument before the First-tier Tribunal. Parties referred to the cases of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC), Ghising and Others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), (Gurung) and SSHD [2013] 1 WLR 2546, Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160.

The Evidence of Sukbir Limbu

6. This appellant's evidence is contained in a witness statement of 20 February 2013 and a joint witness statement (with Bhim Bahadur Limbu) of 17 July 2014. His evidence can be summarised.
7. Both appellants are living in Dharan in the family home there. They are totally dependent on their parents who they miss. They are single and unemployed. The sponsor visited Nepal in order to assist them to complete their application for entry clearance. Since their family left Nepal to live in the UK their aunt has moved into the family home. The sponsor remits money to her so that she can use it in order to support them. The appellants have regular telephone contact with their family and they miss them desperately.

The Evidence of Bhim Bahadur Limbu

8. This appellant's evidence is contained in the above mentioned joint statement and a witness statement of 17 July 2014. His evidence can be summarised.
9. Mr Limbu is a student at Bajwa International College in Kathmandu where he is studying a degree. He lives in rented accommodation and is wholly financially dependent on his father who pays his rent and course fees. During holidays and at some weekends he returns to the family home in Dharan which is his permanent address. He is in full-time education and does not have an income. His father remits money directly to him. He lived in the family home in Dharan permanently until he completed his schooling. In this appellant's later statement it appears to be the case that he is no longer studying and has returned to the family home.

The Evidence of Padam Lal Limbu (the Sponsor)

10. The sponsor's evidence is contained in his witness statement of 15 July 2014, and of 1 February 2013. His evidence can be summarised.

11. The sponsor sold his land in Nepal in order to fund the applications for entry clearance for himself and his wife and their two younger sons. The sponsor and the two younger sons travelled to the UK on 4 December 2010. The sponsor's wife remained in Nepal in order to look after the two older sons.
12. It was difficult for the sponsor to look after the two younger sons and he asked his wife to join him in the UK. She joined him on 18 May 2011 and left the two older sons alone for the first time.
13. The sponsor had a road traffic accident on 6 July 2013 and was injured and as a result has become very forgetful.
14. The sponsor was married to his first wife Maya Limbu a citizen of Malaysia whom he married after he was discharged from the army. They were married for about 25 years and have two children who are grown up and independent. The sponsor cannot remember the date that she passed away. He married his current wife Bhim Rani Limbu on 20 August 1988.
15. The appellants are dependent on the sponsor and are very much part of the family unit. They rely wholly on the sponsor and his wife for financial support and accommodation. They are single and unemployed. The family is very close and they are sad to be separated. They are both students in full-time education and wish to continue their studies in the UK. It is the sponsor's duty as a Gurkha to continue to support his children.
16. The sponsor's wife sends money to the appellants in Nepal. She sends approximately £200 a month. They are concerned about their children's safety in Nepal. The sponsor contacts them every day by telephone. The sponsor enlisted in the Brigade of Gurkhas on 29 October 1951 and he served for over seven years. The sponsor was not allowed to apply for settlement in the UK when he was discharged and therefore he never made enquiries about settlement here. He learned in 2010 that he would be able to apply for settlement but wishes that this had been possible at an earlier stage. By the time the sponsor was allowed to apply (in 2009) the appellants had already reached 18 years of age. Because the sponsor was not able to settle in the UK on discharge from the army he obtained work as a farmer in Malaysia where he worked for 25 years.

The Evidence of Bhim Rani Limbu

17. Mrs Limbu's evidence is contained in her witness statement of 15 July 2014. She attended the hearing and gave oral evidence, through an interpreter, in Nepalese. Her evidence can be summarised.
18. It was a difficult decision for the family to make to leave their dependent children in Nepal. It was the first time they had been left on their own. Mrs Limbu had to come

and join her husband here because he was finding it difficult to take care of the two younger children.

19. The family communicates daily on the telephone. In Gurkha culture unmarried children are the sole responsibility of their parents until they are married and the appellants are still very much part of the family unit.
20. The family in the UK receives pension credit and Mrs Limbu receives a benefit for taking care of her husband. The sponsor forgets things and has no control over himself. In her first statement her evidence is that she works as a cleaner and earns approximately £300 a month, but this does not appear to be the case any more.
21. If her sons are allowed to join them they can look after the family. They can work here and help them. One of her sons is currently working here in the UK, but Mrs Limbu was unable to give any details of his employment.

Submissions

22. Mr Tufan submitted that the appellants cannot be wholly financially dependent on funds from the UK because the family here is dependent on benefits. The Secretary of State's position is that there is no family life between the appellants and the sponsor and their family in the UK and therefore Article 8 is not engaged. It is also the Secretary of State's case that there is no historic injustice in this case.
23. Mr Tufan relied on the judgment of the Court of Appeal in Gurung and submitted that the appellants' circumstances are analogous to the appellants NL and SL (see paragraph 47-52). I asked Mr Tufan if the Secretary of State is relying on matters over and above the public interest in maintaining a firm immigration policy and he referred me to Section 117B(3) of the 2002 Act.
24. Mr Collins made submissions in the context of his skeleton argument.

Findings and Reasons

25. The First-tier Tribunal accepted there was financial dependency between the appellants and the sponsor and there is no reason to go behind this finding. The sponsor gave evidence at the First-tier Tribunal and his evidence is recorded as follows:-

"11. It was the sponsor's testimony that he applied for discharge from the Gurkhas in 1959 because his father, in Nepal, had become seriously ill and it was his duty as the eldest son to care for the father. Thus, the sponsor further testified, he would not have come to the United Kingdom at that time since he would not have been able to look after his father. The sponsor's father had died six months after the sponsor returned to Nepal. In that context it was submitted, on behalf of the appellants, that had the

sponsor waited until his father's death before applying to come to the United Kingdom it was impossible to believe that that application would have been refused by reason of six months' delay. Following the death of the sponsor's father, according to his testimony, the sponsor had gone to Malaya to secure work and not to join his girlfriend in that country. This was the situation, it was submitted, it was apparent from the sponsor's testimony that he had been to India to find work. No doubt the sponsor equally would have, if given the opportunity, sought work in the United Kingdom. It was submitted that the question as to whether the sponsor would, following his discharge from the Gurkhas, have come to the United Kingdom could only be very hypothetical given the considerable passage of time. In the case of Ghising and Gurung the sponsor's discharge from the Gurkhas had been within the last twenty years thus the time frame had been different. The sponsor should not be penalised because he was an older Gurkha veteran and did not meet his second wife (the mother) and have four children with her until a number of years later. It was a long outstanding injustice which arose in the present case".

26. I had the benefit of hearing the appellants' mother give evidence. I found her to be credible. Her evidence was consistent both internally and with the evidence of the other witnesses and it was relatively detailed.
27. I have had full regard to the judgment of Ghising [2012] in relation to family life. At the date of the decision the eldest appellant was 22 and the youngest was 21. I must consider the position at the date of the decision.
28. There is no inconsistency in the evidence of financial dependency. It does not follow that because the family here is dependent on benefit the appellants in Nepal are not financially dependent on them. I accept that the family in the UK sends money on a regular basis to the appellants and they are wholly financially dependent on this.
29. There has been deterioration in the sponsor's health since the date of the decision. . At the date of the decision which was prior to his accident his evidence was (see his witness statement of 1 February 2013) that the appellants are very much part of the family unit. This is supported by the evidence of the appellants' mother. She remained in Nepal in order to stay with them after her husband and two younger children had come to the UK. I accept her evidence that this was an emotionally difficult decision for her to make because of the dependency of the appellants.
30. I find that prior to the sponsor and his wife coming to the UK the family lived together in the family home in Dharan. It may be that at the date of the decision Bhim Bahaadur Limbu was at University, but he regularly returned to the family home. I accept that the appellants are not independent and that they form part of the family unit. The sponsor's evidence is that the family has daily telephone contact and I accept this evidence.

31. Family life may continue between parent and child even after the child has attained his majority. I am satisfied on the evidence that the appellants have a close knit family relationship with their parents and younger siblings in the UK. The appellants depend on their parents for financial, practical and emotional support and guidance.
32. The determinative issue in this case is whether or not the decision is proportionate (Razgar, R (on the application of) v SSHD [2004] UKHL 27).
33. I find that the sponsor in this case would have made an application for settlement shortly after his discharge should there have been provision for him to do so. I have taken into account his evidence before the First-tier Tribunal in relation to taking care of his elderly father; however, I accept that the sponsor would have made such an application after the death of his father which was six months after his discharge from the army. I have attached particular weight to the sponsor's witness statement which in which he states that he would have applied for settlement had he been able to do so.
34. There is in my view a casual nexus between the historic injustice and the action of the sponsor. I have taken on board the passage of time and the obvious fact that neither appellant was born at the time the sponsor was discharged from the British Army; however in this case there is a nexus and there is family life between the sponsor and the appellant. The family should not be prejudiced on the basis that the sponsor's discharge from the British Army is historic and that in light of the fact he was not able to settle in the UK he got on with his life and had another family.
35. I must consider proportionality through the prism of Section 117B, the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control is in the public interest. Maintenance of immigration control is not a legitimate aim under Article 8(2) of ECHR but it is in this case an aspect of the economic wellbeing of the country.
36. It is the evidence of the appellants' mother that both were able to speak English and this was not challenged by Mr Tufan. I accept that the appellants have some English language ability.
37. Mr Tufan attached significance to 117B(3), namely that it is in the public interest that persons who seek to enter or remain in the United Kingdom are financially independent. However, this limb of Section 117A has to be considered in the context of the circumstances of this application and that it rests on establishing dependency. The appellants were and still are financially dependant on their parents. The family is at the date of the hearing mainly dependent on public funds here in the UK. I have considered the appellants' mother's witness statement which is dated 15 July 2014. In this statement her evidence is that she was working as a cleaner. Her evidence at the hearing before me is that she now cares for the sponsor. She was not cross-examined about her previous employment, but it is a fact that the sponsor's health

has deteriorated and he has become more dependent. Mrs Limbu's statement was made after the date of the decision, but it casts light on the circumstances of this family at the date of the decision, namely that they have an intention to become financially independent. I accept that at least one son in the UK is currently in employment although there is very little detail of this. It was and is the intention of the appellants to study and seek employment should they come to the UK. That the sponsor was involved in a serious accident and has dementia or dementia like symptoms must have had a profound effect upon the family. I must consider the circumstances at the date of the decision which was made weeks after the accident since when his condition has deteriorated and this has affected his and their ability to work.

38. Mr Tufan has not pointed to matters over and above the public interest in maintaining a firm immigration policy. I accept that being an adult child of a UK settled Gurkha ex-serviceman is not a "trump card", but the weight in this case to be given to the historic injustice requires a decision in the appellants' favour. The economic wellbeing of the country through the maintenance of immigration control is the public interest relied upon by the Secretary of State in this case and it does not outweigh the powerful factors bearing on the appellants' side.

Notice of Decision

The appeal is allowed under Article 8 of the 1950 Convention in Human Rights.

No anonymity direction is made.