



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/37073/2014

### **THE IMMIGRATION ACTS**

Heard at Field House, London  
On the 21<sup>st</sup> December 2015

Decision & Reasons Promulgated  
On the 11<sup>th</sup> January 2016

#### **Before:**

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

#### **Between:**

MR BABIN MALLA  
(Anonymity Direction not made)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Appellant**

**Respondent**

#### **Representation:**

For the Appellant:

Mr Chipperford (Counsel)

For the Respondent (the Secretary of State): Mr Kandola (Home Office Presenting Officer)

### **DECISION AND REASONS**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Robinson promulgated on the 26<sup>th</sup> September 2014 in which he dismissed the Appellant's appeal under the Immigration Rules and on Human Rights grounds.

#### **Background**

2. The Appellant is a citizen of Nepal. He was born on the 8<sup>th</sup> March 1983.

On the 20<sup>th</sup> April 2011 he was granted leave to enter the United Kingdom until the 28<sup>th</sup> July 2012 as a Tier 4 General dependent partner. On the 27<sup>th</sup> July 2013, his solicitors applied for a variation of the Appellant's leave to enter or remain on the basis of the care that he provided for his mother and on the basis of his private life. That application was refused by the Respondent in a Refusal Letter dated the 23<sup>rd</sup> August 2013 and the Appellant sought to appeal that decision to the First-tier Tribunal. That appeal was heard by First-tier Tribunal Judge Robinson at Richmond on the 11<sup>th</sup> September 2014, with his decision being promulgated on 26<sup>th</sup> September 2014.

3. Within the decision of First-tier Tribunal Judge Robinson, he accepted and found as a fact that the Appellant was born in Nepal in 1983 and that he was a Nepalese national and had lived with his parents there, but that he now lives with his mother in south-east London. He accepted that the Appellant's father was a former Gurkha soldier and served in the British Army for 15 years between 1963 and 1978 and that his father had made enquiries about moving to the United Kingdom in 2004, but was told that he did not qualify to settle here. His father died in 2005. The Appellant's mother was granted leave to enter and remain in the UK and she came to the UK on the 18th December 2011. The Appellant came to the UK before his mother in May 2011 as a dependent of his wife. First-tier Tribunal Judge Robinson found that the Appellant is in employment and also that he provided day-to-day care for his mother. He noted at [28] of the decision that the Appellant had filed a report from an independent social worker, in which his role in his mother's life was described and that his mother attended at the appeal hearing and her evidence was not challenged. He noted that the Appellant and his mother had been in the UK for 3 years and they had family life together. However, First-tier Tribunal Judge Robinson found that the Appellant's mother would be able to live independently if she so chose, with support from the local authority and health services and that she had some family support in the UK apart from her son in the form of a relative Bishwa Pratap Singh who lived nearby and whom the Judge accepted visited her often, such that she would not be totally isolated if her son were to return to Nepal and she chose to remain in the UK. First-tier Tribunal Judge Robinson found that she does have some family support here apart from her son and also had independent means from her late husband's pension. Alternatively he found that it would not be unreasonable to expect her to return to Nepal if she wished to live with her son. The Judge found that the Appellant did not have a family life in the UK apart from his relationship with his mother and found that it would not be disproportionate in the circumstances to remove him from the UK having undertaken the balancing exercise required in considering proportionality under the fifth stage of the test in Razgar for the purposes of Article 8(2). He concluded that the decision of the Respondent was not disproportionate and dismissed the appeal on Article 8 grounds.
4. The Appellant has sought to appeal that decision to the Upper Tribunal.

Within the renewed Grounds of Appeal, it is argued that the decision of First-tier Tribunal Judge Robinson did contain material errors of law and that in the first ground of appeal it is argued that the Appellant is the son of a former Gurkha who in his statement had stated that he believed that his sisters and himself would have been to settle in the UK with his parents had they been given this opportunity and that by the time the policy for Gurkhas was announced many dependants were already over the age of 18 years old and that the Judge had failed to take account of the historic injustice argument which would ordinarily determine the outcome of an Article 8 proportionality assessment in the Appellant's favour.

5. Within the second ground of appeal it is argued that the Judge had accepted that the Appellant provided day-to-day care for his mother and that his removal would have serious practical implications for both of them and that his mother receives emotional and practical support from her son and relies upon him to meet some of her physical needs including cooking, administering her medication, shopping and operating some electrical gadgets including washing machine and that she struggles to walk. It is said that the Judge found that the son provided significant support and that as his mother does not speak English it may prove difficult for her to continue to live alone, but that despite these findings the Judge found the decision of the Respondent was not disproportionate. It is argued that in this regard the reasons given are inadequate, unclear, inconsistent with the accepted findings and unsupported by the evidence, and that the Judge failed to take account of material matters and various examples are given as to what are said to be inconsistencies which are a matter of record as they are set out in the grounds and are therefore not repeated in full here..
6. It was further argued that the Judge misapplied the test of exceptionality and the Judge had failed to give adequate reasons for his finding that it would not be unreasonable to expect the Appellant's mother to return to Nepal and had failed to direct himself to the burden of proof laying on the Respondent, in respect of whether or not the decision to remove is proportionate.
7. Permission to appeal was granted by Upper Tribunal Judge Eshan on the 23<sup>rd</sup> September 2015, in which she found that the grounds at paragraph 2 (E) arguing that in finding at [35] that no approach had been made to the local authority, the Judge failed to consider the evidence at paragraph 25 of the social worker's report, was arguable and further she found that the other grounds may be argued, but whether or not grounds supporting the permission to appeal were sufficient to overturn the Judge's decision and was said to be another matter.
8. At the start of the appeal Mr Chipperford on behalf of the Appellant sought an adjournment on the basis that no interpreter was present. Mr Chipperford said that the Appellant had spoken to his solicitors who had said that a Nepali interpreter was going to be in attendance at the appeal hearing, but having checked the court file, there was no

evidence of an interpreter having been requested, and indeed, the notes from the Tribunal's clerk in respect of whether or not an interpreter was required, it was specifically noted that no interpreter was required. There is no evidence of the Appellant's solicitors having requested an interpreter, and I further bore in mind that the Tribunal was simply dealing with an error of law hearing first, and that in respect of such an error of law hearing, the Appellant would not be required to give evidence. Mr Chipperford was unable to point me to any correspondence sent from the Appellant's solicitors requesting an interpreter at the error of law hearing. In such circumstances, in applying the overriding objective, I determined that it was appropriate to continue with the appeal hearing in the absence of an interpreter, as Mr Chipperford was there to make representations for the Appellant and was perfectly able to argue the error of law hearing before the Upper Tribunal and that evidence would not be required from the Appellant at that stage. Although the Appellant wished to have an interpreter present, to understand what was being said, without there being a request for such an interpreter, given the need to deal with cases fairly, justly, and proportionately applying the overriding objective. I considered that the case could be dealt with fairly and justly by the Appellant's counsel making all representations, and that given the cost of an adjournment and the delay that would thereby be encountered, dealing with the case justly and fairly did not require the case to be adjourned.

9. Mr Chipperford on behalf of the Appellant in his oral submissions sought to argue that the Judge had failed to take into account the full contents of the social workers' report and the evidence given by the social worker that for cultural purposes the care for the Appellant's mother ought to be provided for by the Appellant and that it would be seriously detrimental to her if he were to be removed. He argued that there was a failure to consider relevant evidence in this regard.
10. In respect of the historic injustice argument, he argued that the historic injustice argument was not taken account when the First-tier Tribunal Judge considered proportionality between [27] and [30], but he did concede that the First-tier Tribunal Judge had found that the Appellant's father had first made enquiries about moving to the UK in 2004, by which stage the Appellant was 21 years old, and that there was no evidence of him being dependent upon his father, for the purpose of Article 8 as at that date.
11. Mr Kandola on behalf of the Respondent relied upon his Rule 24 response, which I have fully taken into account. He again argued that there was no evidence that the Appellant was in fact dependent when his father first sought to apply to come to the UK in 2004 and that therefore the historic injustice argument falls away. He further argued that the findings of the Judge were not inadequate, unclear or inconsistent and that the Judge fully set out the Appellant's mother's abilities and that the Appellant's mother would have been able to cope in the Appellant's absence with the involvement of social services. He

sought to argue that the social workers report regarding who should care for the mother was outside the remit of expertise of the social worker and therefore failure to have regard to it was not a material error.

12. In his reply Mr Chipperford sought to argue that whether or not the Appellant was the best person to give assistance to his mother was within the remit of the social worker's evidence and that evidence had not been considered by the Judge and was therefore a failure to consider relevant evidence. Although the social worker may not be able to comment upon clinical care, the social worker was able, he argued, to give evidence on the mother's well-being, which he argued was what the social worker had sought to do.
13. I reserve my decision on error of law.

#### My Findings on Error of Law and Materiality

14. Although the decision of First-tier Tribunal Judge Robinson at [19] did make reference to the case of Gurung and Others v Secretary of State for the Home Department [2013] EWCA Civ8, when referring to the submissions made by Mr Solomon on behalf of the Appellant which he said explained the extent to which the historic injustice argument may be a relevant factor when considering proportionality in Article 8 cases, the Judge when going on to consider Article 8 in the individual circumstances of the Appellant, then made no reference at all to the historic injustice argument or the relevant cases including: Gurung and Others [2013] EWCA Civ8 and Ghising and Others (Gurkhas/BOC's: Historic Wrong; weight) (Nepal) [2013] UKUT 567 and the principle that "where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this would ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied upon by the Secretary of State/Entry Clearance consists solely of the public interest in maintaining a firm immigration policy".
15. This therefore does amount to an error of law, but given the finding of First-tier Tribunal Judge Robinson that the Appellant's father only made enquiries about moving to the UK in 2004 when he was told that he did not qualify to settle here, by which date the Appellant was aged 21, I find that the Judge's error in this regard was not material, as there was no evidence before First-Tier Tribunal Judge Robinson that the Appellant was dependent upon his parents at that date for the purposes of Article 8, he being an adult at that date, such that if the Appellant's father had enquired about coming to the UK in 2004 as found by First-tier Tribunal Judge Robinson, the historic injustice argument would not in any event have been successful or relevant, given the findings of First-tier Tribunal Judge Robinson regarding when enquiries were made about the Appellant's father moving to the UK in the absence, as was conceded by Mr Chipperford, of any evidence of dependency by the adult Appellant on his parents at that date. Family life for the purposes of Article 8 did

not exist between the adult Appellant and his parents on the evidence, as at that date, on the evidence before the FTTJ).

16. In respect of the second ground of appeal that the Judge has made a decision inconsistent with his accepted findings and has given unclear and inadequate reasons for his decision that the Appellant's removal would not be disproportionate, I find that the reasons given by First-tier Tribunal Judge Robinson between [28] and [43] are clear and consistent. The Judge in carrying out a proportionality exercise under Article 8, clearly has to weigh those factors in favour of the Appellant's removal being disproportionate including the emotional and practical support that Mrs Malla received from her son including help with cooking, administering her medication, shopping and operating electrical gadgets such as the washing machine and that she struggled to walk. However, the Judge weighed against those factors the public interest in maintaining an effective immigration control and his findings that the Appellant's mother would be able to live independently if she so chose with support from the local authority and health services and that she had some family support here apart from her son on an independent means from her late husband's pension, as being factors in favour of the decision being proportionate.
17. In respect of the ground arguing that the Judge misapplied the test of exceptionality, I find that when looking at the judgement as a whole, the Judge has not applied a test of exceptionality. Although he stated that there is no evidence to suggest that the circumstances of the case were exceptional at [38], he has not then gone on to apply the exceptionality test.
18. However, in respect of the evidence of the social worker, Mr Charles Musendo although the Judge has clearly taken account of this report and described at [32] the evidence given by Mr Musendo in his report at paragraph 18 and 19 of the report regarding the Appellant's relationship with his mother in which the First-tier Tribunal Judge found "Mrs Malla receives emotional and practical support from her son. She relies upon him to meet some of her physical needs e.g. cooking, administering her medication, shopping and operating some electrical gadgets including the washing machine. I have noted her medical condition which is briefly described in the GPs letter. Mr Musendo observed that she struggles to walk" and goes on at [33] to find that "the key aspect of the Appellant's case is his relationship with his mother and her dependence on him to perform some daily tasks. It is not suggested that she cannot wash and bath herself. It is not clear whether she can cook for herself".
19. Although First-Tier Tribunal Judge Robinson has considered the social workers report to the extent that he dealt with the physical care provided by the Appellant for his mother, the Judge within his decision has seemingly not taken account of the evidence of the social worker Mr Musendo on the effect of the Appellant's removal on the emotional and mental well-being of Mrs Malla, which the social worker considered at paragraphs 25 to 27 of his report and his evidence regarding his

assessment that Mr Babin Malla, the Appellant and not social services, is the person needed given the overwhelming dependency of Mrs Malla on her son and that in his assessment she does need a full-time carer and that in his assessment she could not live on her own and that the Appellant's removal to Nepal would in his assessment be seriously detrimental to Mrs Malla's well-being and that there was an obvious risk of a potential negative impact on Mrs Malla's health, as well as obvious trauma to her to be forced to be separated from her only family member, if he were to be removed from the UK. There is no evidence of First-Tier Tribunal Judge Robinson having considered this aspect of the social workers evidence when he found in [41] that "I take the view that his mother would be able to live independently if she chose to, with support from the local authority and health services".

20. I find that the failure to consider the social worker's evidence in this regard does amount to an error of law, in that it is a failure to take account of relevant evidence in this regard. I further find that such error of law is material, given that this failure to consider the evidence fully from the social worker, may well have affected the decision which ultimately First-tier Tribunal Judge Robinson made, and that he may have reached a different conclusion, had that evidence been properly considered. I therefore do find that the decision of First-tier Tribunal Judge Robinson contains a material error of law and I set aside that decision.
21. In my judgement the social worker when talking about the effect of the Appellant's removal on Mrs Malla's well-being between paragraphs 25 and 27, is not seeking to give any psychiatric diagnosis as to the effect of the Appellant's removal, but is simply stating what in his opinion the effect of the Appellant's removal to Nepal on Mrs Malla's well-being would be. I consider that he is in a position to give evidence as to the overwhelming dependency of Mrs Malla on her son and who, in his professional opinion as a social worker, is better placed to provide such care that she needs, and the effect on her well-being of her son's removal. I do not consider that he has gone beyond the remit of his expertise in this regard.
22. In respect of the ground arguing that the Judge misapplied the test of exceptionality, I find that when looking at the judgement as a whole, the Judge has not applied a test of exceptionality. Although he stated that there is no evidence to suggest that the circumstances of the case were exceptional at [38], he has not then gone on to apply the exceptionality test.
23. In my judgement, the evidence of the social worker Mr Musendo does need to be properly evaluated, and a full reassessment of the Appellant's claim under Article 8 made, taking account all of the relevant factors. I therefore do consider that it is appropriate for the case to be remitted back to the First-tier Tribunal for a hearing *de novo*.

#### Notice of Decision

The decision of First-Tier Tribunal Judge Robinson does contain a material error of law and is set aside;

I remit the case back to the First-tier Tribunal, for hearing before any judge other than First-tier Tribunal Judge Robinson;

I make no order in respect of anonymity, no order having been sought in respect thereof from the First-tier Tribunal, and no such order having been sought before me.

Signed

Dated 24<sup>th</sup> December 2015

Handwritten signature of R F McGinty in black ink.

Deputy Upper Tribunal Judge McGinty