Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02501/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2017	**On 24 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR M R
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr E Duncan of Counsel, instructed by N. C. Brothers & Co Solicitors
For the Respondent: Ms J Isherwood, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the

respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a citizen of Nepal who was born on [ ] 1985. He applied for entry clearance to come to the United Kingdom as the dependent child of K B R, a former Gurkha soldier. On 8 July 2015 the application was refused by the Entry Clearance Officer. The appellant appealed against that decision to the First-tier Tribunal.

The Appeal to the First-tier Tribunal

3. In a determination promulgated on 19 October 2016 First-tier Tribunal Judge Nixon dismissed the appellant's appeal. The Tribunal found that Article 8 was not engaged because the appellant did not have any emotional dependence on the sponsor.

4. On 15 October 2016 the appellant applied for permission to appeal against the First-tier Tribunal's decision.

5. In essence the grounds of appeal are that the judge failed to consider the history of Gurkha cases in assessing family life, failed to consider the features of Annex K to the IDIs that the appellant could meet, that there was no consideration of the purpose of righting historic injustice, that the judge failed to consider family life was only severed when the parents and the appellant's sister came to the UK, failed to identify when family life ceased and that the judge was in error in not considering the unfairness of the two year separation test in the particular circumstances of this case. On 8 March 2017 First-tier Tribunal Judge Gibb granted the appellant permission to appeal.

The Appeal before the Upper Tribunal

Submissions

6. The grounds of appeal as amplified by Mr Duncan in oral submissions are interrelated. Mr Duncan submitted that the First-tier Tribunal approached the assessment as to whether or not there was family life incorrectly and failed to take into consideration, when assessing family life, the particular features that arise in Gurkha dependency cases.

7. He submitted that in **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)** the proportionality assessment is normally in favour of an appellant. In Gurkha cases there are particular factors that need to be taken into consideration when assessing family life. He submitted that the wider issues concerning the historic injustice feed into the assessment of Article 8.

8. Mr Duncan submitted that prior to the change in policy in 2015 the test was that a dependent child must satisfy the respondent that there were exceptional circumstances. It was suggested at the hearing that the appellant applied when the rules changed rather than the reason given that he had not been able to afford the fees earlier. Had the appellant's father, i.e. the sponsor, settled in the United

Kingdom a year later in 2013 then the appellant in this case would have satisfied the two year separation Rule. The two year separation Rule was arbitrary and unfair and in this case discriminated against the appellant merely because the sponsor had settled in the United Kingdom in 2012 rather than 2013.

9. He submitted that the separation of the appellant from his family must be seen in the context of the historic right that the appellant had to come to the UK when he was a child. The requisite standard in relation to Article 8 in terms of emotional dependency does not take into account the reason for separation in this case. The probative nature of the policy undermines the Article 8(1) assessment.

10. He submitted that if family life was in existence in 2012 the judge has failed to show or find when that family life ended. The judge failed to attach any weight to the appellant's inability to make an application at a time when he was under the age of 18 when he would have been automatically entitled to settle in the UK. The historic injustice must, as a minimum, carry weight in the assessment of family life in considering the reasons for which the appellant and sponsor have been separated.

11. The judge failed to attach any weight to the factors that the appellant can satisfy of paragraph 9 of Annex K - Adult Children of Former Gurkhas of Chapter 15, Section 2A when assessing whether Article 8(1) is engaged. The judge failed to attach weight to the acceptance that an application would have been made to settle in the United Kingdom upon completion of the Gurkha's service and that the appellant has not formed an independent family unit.

12. The judge failed to consider the intention of the policy found at Annex K, namely that there should be a mechanism to assist the settlement of over-age children of former Gurkha soldiers in an attempt to rectify the historic injustice. The judge failed to consider that the family unit had resided together intact until 2012. It was clear that as of 2012 when the appellant lived with the sponsor in Nepal Article 8(1) was engaged.

13. Ms Isherwood submitted that there is no challenge to the adverse findings regarding the sponsor's evidence. She indicated that the sponsor's daughter came to the UK as a student and not as a dependant of the sponsor under the Gurkha settlement policy. She submitted that the Secretary of State's policy on settlement of adult dependent children was applied to the appellant's case but it was found that he did not meet the requirements. That was conceded by the appellant at the appeal before the First-tier Tribunal.

14. She submitted that the two year Rule is of little importance in this case because the appellant and sponsor's evidence is that the reason they did not apply for the appellant to come to the UK in 2012 was because they could not afford to do so. This was the driving factor with regard to the length of time of separation. The appellant's grounds are a simple disagreement with the Secretary of State's policy.

15. With regard to ground 3 she submitted that the judge was not required to consider the intention behind the policy. The judge did consider all the evidence but did not

accept the evidence of the sponsor. She referred to paragraph 7 of the First-tier Tribunal decision where the judge set out the appellant's evidence with regard to his income.

16. Ms Isherwood submitted that the judge, at subparagraph 11 (7), did not accept the evidence as credible with regard to the sponsor's assertion that he had not visited the appellant in Nepal as he could not afford the travel costs and subparagraph 11(8) where the Tribunal did not find the sponsor to be a credible witness, that he contradicted himself several times in evidence and was evasive in answering seemingly straightforward questions. None of these findings have been challenged.

17. She submitted that the grounds in essence are a disagreement with the finding that Article 8 is not engaged but the only reasons given are consideration of issues that do not directly address the fundamental question which was whether or not the appellant was emotionally dependent on the sponsor. She submitted that almost every paragraph of the grounds related to the weight to be attached to certain matters. The weight to be attached was a matter for the judge. The judge considered the case law of **Gurung & Ors, R (on the application of) v SSHD [2013] EWCA Civ 8**. The judge records that in this appeal there is a lack of evidence to support emotional dependence.

18. In reply Mr Duncan submitted that the Tribunal had adopted too narrow a focus and ought to have taken into consideration the background to the historic injustice and the background to this particular case.

Discussion

19. The First-tier Tribunal notes at the outset that the only issue was whether family life existed between the appellant and the sponsor.

20. The judge's conclusions were set out from paragraph 11:

> "11. I have considered all of the evidence before me and have reached the following conclusions:
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> (1) As was rightly conceded by Mr Duncan, I find that the appellant cannot meet the criteria of Annex K or Appendix FM.

21. It was conceded that the appellant could not meet the requirements of the Rules and did not fall within the terms of the policy set out in Annex K. The appellant's arguments in respect of the judge failing to consider the factors that could be met at annex K are irrelevant. So too is the argument that the judge failed to consider the intention of the policy. The policy exists to assist the settlement of over-age children of former Gurkha soldiers in an attempt to rectify the historic injustice. Mr Duncan did not submit that the policy itself was challenged.

22. The judge considered Article 8 outside the Immigration Rules:

> 11 (2) As to the consideration of Article 8, I bear in mind the decision in **SS (Congo) [2015] EWCA Civ 387** and find that there are compelling circumstances in this case that cause me to go on to consider Article 8 outside the Rules. I have therefore gone on to consider whether their Article 8 rights would be breached by this refusal and as a starting point, I remind myself of the sequential questions laid down by Lord Bingham in **Razgar [2004] UKHL 27**.
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> (3) I have been referred by Mr Duncan to the decision in **Gurung & Ors, R (on the application of) v SSHD [2013] EWCA Civ 8** regarding the issue of proportionality and I accept that it is now well-established that, where Article 8 is engaged and, but for the historic wrong, the appellant would have settled in the UK some time ago, that this will usually determine the issue of proportionality in the appellant's favour, although it is not determinative. This point has in fact been sensibly conceded by Mr Swaby. The only issue for me to determine is whether Article 8 is engaged at all in this case, that is to say, whether family life exists between the appellant and his parents.

23. Mr Duncan's submitted that the historic injustice must, as a minimum, carry weight in the assessment of family life in considering the reasons for which the appellant and sponsor have been separated. The assessment as to whether or not there is family life is a question of fact. In **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)** (as endorsed by the Court of appeal in **Gurung**) the Upper Tribunal held:

> 62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1).

24. The correct approach to consideration of Article 8(1) in cases such as the instant case has recently been considered in **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**:

> 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.

25. I do not consider that the judge in this case has failed to grapple with the issues as identified in **Rai**. In that case the focus of the Upper Tribunal was on the fact that the appellant's parents had chosen to leave the appellant:

> 38. Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and

settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach.

39. The Upper Tribunal judge referred repeatedly to the appellant's parents having chosen to settle in the United Kingdom, leaving the appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: "… not compulsory but … voluntarily undertaken …" (paragraph 20), "… having made the choice to come to the [United Kingdom]" (paragraph 21), "… the willingness of the parents to leave …" (paragraph 23), and "… their voluntary leaving of Nepal and leaving the Appellant …" (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case, **which was whether, as a matter of fact, the appellant had demonstrated 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 their having left Nepal when they did.** [Emphasis added]

26. It is worth setting out in full the judge's conclusions and reasoning in respect of family life:

> 11 (4) I have heard evidence from the sponsor and accept that the appellant is financially dependent upon his father. I note that the appellant is unemployed, but I am conscious that the unemployment rate in Nepal is high. I have heard of no particular circumstances in the appellant's case which lead him to be unemployed and therefore assume that is simply down to the lack of employment in the country. Financial support of the unemployed adult child is expected in Nepalese society and, to some extent, in British society and I therefore do not find this financial support in isolation to be indicative of ties over and above the norm.
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> (5) I accept that the appellant is in regular contact by phone and Viber with his parents but this is something I would expect of family members living apart and this contact does not in my judgment point towards anything over and above the usual emotional ties. I note that the appellant is unmarried but I have heard no evidence of social isolation. He has lived all of his life in Nepal and would have established a network of friends. I have not been told that his living conditions are anything other than adequate and I note that he lives in rented accommodation paid for by his father.
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> (6) The appellant states in his witness statement that he suffers from depression but I have not been provided with any medical evidence to substantiate this assertion nor any evidence to suggest that this contention is caused by separation from his parents. Accordingly I place little weight on this assertion. This is certainly no evidence to suggest that he is not capable of looking after himself. I find therefore that, but for his financial dependence on their father, he is self-sufficient and managing to carry out his day-to-day life as is expected of an adult of his age. I find that there is no evidence to suggest that the appellant is not functioning normally in the absence of his parents, either physically or emotionally.
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> (7) The sponsor stated that he had not visited the appellant in Nepal since coming to the UK in 2012 as he could not afford the travel costs. I do not

accept this evidence as credible. I have heard evidence that the sponsor earns £18,000 net per annum and receives contributions of around £800 per month from his daughter and I find therefore that he would have amply funds to pay for his travel costs to visit son. I find that had there been emotional ties over and above the norm between parent and child, the sponsor would have been to see his son on at least one occasion.

(8) I did not find the sponsor to be a credible witness. I find that he contradicted himself several times in evidence and was evasive in answering seemingly straightforward questions. When asked questions regarding his daughter with whom he lived in the UK, he stated that she was financially dependent upon him. This could not be correct in light of his evidence that she contributed substantially to the monthly household costs. Furthermore I do not accept as plausible that he did not know precisely what employment his daughter was in or whether she worked full or part-time, not only because they live in the same house but also because he paid for her studies and would therefore have shown an interest in her subsequent employment. I find that the sponsor was trying to paint a picture of more straitened finances in order to attempt to justify his lack of visits to his son in Nepal. Mr Duncan urged upon me to treat the sponsor's evidence with some caution as he was giving evidence through an interpreter but I reject this submission. It was quite clear to me that the sponsor and interpreter understood each other perfectly well and I find that the sponsor only became hesitant and evasive when being asked questions regarding his daughter's employment and finances.

(9) I find that had there been any real emotional dependence and concern about the appellant's health, I would have expected the sponsor to have made at least one trip to Nepal. Indeed I have been provided with little evidence as to how the appellant is emotionally dependent on his parents or how he is affected by being separated from his parents, other than the obvious remark that he misses them, which I would expect in any parent/child relationship.

(10) The critical issue before me is whether the appellant has shown that there is sufficient emotional dependence on his parents to justify the conclusion that they enjoyed family life and I find that he has failed to show this. Whilst he is financially dependent upon his father, I find that, although the usual emotional bonds between parents and child are present, the requisite degree of emotional dependence is absent in this case. I find therefore that the appellant has failed to show that there is family life and that Article 8 is engaged. The appeal must fail accordingly."

27. The appellant had been living apart from his father and mother for nearly 3 years at the time the application was made. As found by the judge the sponsor "earns £18,000 net per annum and receives contributions of around £800 per month from his daughter and I find therefore that he would have amply funds to pay for his travel costs to visit his son". These findings were not appealed. There would clearly have therefore been ample costs to have made an application during the 2 years 11 months period. The judge was not required to make a specific finding as to whether or not

the appellant had had a family life with his parents before they left Nepal or identify the point at which it ceased. The question is (assuming that it was in existence at some point) whether that had endured. The judge having taken all the factors into account found that it had not. This was a finding that was open to the judge on the evidence.

28. It was submitted that requiring applications to be made within two years of separation results in unfairness. Had the sponsor delayed exercising his right to settle by over one year the appellant would have been able to satisfy this term of the policy and has therefore been adversely impacted by the sponsor exercising his right in 2012. There is no merit in this ground of appeal. Whether or not the appellant had made his application within 2 years he would still have had to demonstrate that there was family life that engaged article 8. As held in **Patel, Modha & Odedra v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17** paragraphs 14 and 15:

> "You can set out to compensate for a historical wrong, but you cannot reverse the passage of time… By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of art. 8(1) will not have been crossed and the proportionality of excluding them will not be an issue."

29. There were no material error of law in the First-tier Tribunal decision.

The appeal is dismissed. The Entry Clearance Officer's decision stands.

Signed P M Ramshaw Date 21 May 2017

Deputy Upper Tribunal Judge Ramshaw