Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03387/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 October 2017	**On 7 November 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR BIKASH GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr D Balroop, instructed by Everest Law
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appears with permission against the decision of First-tier Tribunal Judge Mitchell promulgated on 18 January 2017, dismissing his appeal against refusal of entry clearance as the adult dependent relative of his father who is an ex-Ghurka soldier. The decision in question was made on 29 July 2015.

2. The sponsor had been granted indefinite leave to remain in the United Kingdom on the basis of his army service on 18th September 2006 having served fifteen years in the British Armed Forces. At the same time, the sponsor's wife (the appellant's mother) and siblings were granted indefinite leave to remain. It would appear that this occurred under the policy introduced by the Secretary of State in October 2004 contained in the Diplomatic Service Procedures at chapter 29 paragraph 14 (see **Gurung v SSHD** [2013] EWCA Civ 8 at [4] and [5]).

3. Although the appellant had applied on that occasion his application for entry clearance was refused. Second it is unclear whether there was any appeal against that decision or whether it was possible or not.

4. The respondent concluded that the appellant did not fall within Annex K of the Immigration Rules the appellant having lived apart from the sponsor for more than two years at the date of application as a direct result of them migrating to the United Kingdom. He was not satisfied that the appellant aged 29 years and 11 months at the date of application was unable to care for himself, concluding that he was in good health and having spent the majority of his life in Nepal there were no factors preventing him from working there and no evidence that his living conditions were anything but adequate and no obvious reason why his father could not continue to support him financially if he remained in Nepal. He concluded that the appellant was not wholly financially or emotionally dependent on the UK sponsor.

5. The respondent concluded also, having had regard to Article 8 of the Human Rights Convention and **Gurung** as well as **Ghising [2013] UKUT 00567** that in this case the reasons for the refusal outweigh the consideration of historical injustice as family life continues as it may have done without interference and he was not satisfied the appellant has established family life with his parents over and above that between an adult child and parents and he did not consider that the historical justice had been such as to prevent him from leading a normal life. Thus it did not outweigh the proportionality assessment in Article 8.

6. In his review, the Entry Clearance Manager noted the appellant had been refused a UK visa application for settlement and submission "or submission of false documents" and a copy of that refusal is provided but it was accepted that Article 8(1) was engaged. The Entry Clearance Manager concluded that refusal was proportionate and appropriate.

7. He concluded that the evidence of the appellant and the UK family being emotionally tied was extremely limited [21] and directed himself whether, in line with **Kugathas v SSHD [2003] EWCA Civil 31**, whether there were factors suggesting the existence of family life and dependency [23].

8. The judge then recited the history noting that family life could exist without dependence [28]; that the evidence was clear that the appellant

would have applied for settlement whereas the appellant was under the age of 18 if he had been able to do so legally [29] and at [31] held

> "This is not one of the relatively rare cases where because of peculiar circumstances in the family that there is a continuing family life beyond that of the normal emotional ties between the appellant and sponsor."

9. The judge noted at [32] that he did not know the reason why the application in 2006 had failed and whilst the argument that there was no historic injustice as a result of the past failure, it was cogent, the appellant clearly could not meet the requirement of the Immigration Rules.

10. The judge then considered Sections 117A and B of the 2002 Act as well as Article 8, applying the test set out in **Razgar [2004] 2 AC 368** concluding at [35] that there was not an interference with the family life as the appellant's family life will continue as before save that the decision was clearly in accordance with the law and

> "The decision to refuse the appellant's entry clearance is clearly in accordance with the law and does not engage Article 8 ECHR and is proportionate to the legitimate aim to be achieved that is the maintenance of effective immigration control. I therefore dismiss the appellant's appeal under Article 8 ECHR."

11. The appellant sought permission to appeal on the grounds that the judge had erred in that:-

    (i) on the basis of **Gurung** he should have been granted settlement with the rest of his family [5], the judge failing to take into account that when the father was finally granted settlement his son was refused because he was 21 years old [7] it not being established until 2013 that this was unlawful and he had not been separated from his family through his own fault;

    (ii) on the judge's own finding financial dependency in this case was one of necessity [10] and that the judge failed to make a proper finding or assess the evidence of emotional dependence it being the evidence that the appellant speaks to his family every day and phone records had been submitted to corroborate this [11] and thus the finding that the appellant did not satisfy the policy is unlawful;

    (iii) that the appellant is financially and emotionally dependent on the sponsor and thus Article 8(1) is engaged [15], the assessment of dependency being flawed and, in light of the case law and failure for the respondent to highlight any effect as over and above the public interest decision was not proportionate.

12. On 16 August 2017 First-tier Tribunal Judge P J M Hollingworth granted permission.

13. Mr Balroop relied on the grounds submitting that the decision in **Gurung** was still relevant, in light despite the introduction of Section 117A and 117B of the 2002 Act, relying on their decision in **Rai v Entry Clearance Officer [2017] EWCA Civil 320**. He submitted that the judge had failed properly to engage with the issue of historic injustice.

14. Mr Bramble submitted that the judge had adequately dealt with the issue of historic injustice and that there were in this case other factors to be taken into account to be assessed against that given the prior use of false documents.

15. There is no proper indication that the judge had engaged with the clear concession by the Entry Clearance Manager that Article 8(1) of the Human Rights Convention was on the facts of this case engaged. I consider that there is sufficient merit in this submission that the judge failed as set out in the grounds that the judge has not properly addressed having found either why the financial dependency was not of necessity or properly dealt with the evidence of continued emotional dependency; as is averred there is no reference to the communication between the appellant and his family. Merely stating that the evidence is "extremely limited" is not a sufficient basis for assessing evidence. That said, it is clear that he took account of the communication at [31].

16. Whilst the judge appears at [31] to conclude that there is no continuing family life in this case in the sense meant in **Kugathas**, and there is a finding that there is no interference [35], it is unclear why if a judge concluded that there is no interference, that he went on to consider the following five questions in **Razgar** without stating whether he was doing so in the alternative. Further, whilst it may be said that having reached that conclusion, if it were sustainable, would mean that the rest of the decision is immaterial, that is predicated on the assumption that that conclusion is sustainable. I do not consider the decision that there is no interference is sustainable given the concession by the Entry Clearance Manager and also a failure properly to reason whether or not there was a family life which was protected.

17. Further, the assessment of proportionality which the judge does go on to consider, thereby and in not stating that this was in the alternative, apparently accepting that there was interference of sufficient gravity failed properly to address the issue of historic injustice. There is no clear finding at whether there was an historic injustice in this case or not. The judge appears to accept that there was not at [32] but states only that the argument "has some cogency" but did consider that it was not to be taken in account as the appellant could not meet the requirements of the Immigration Rules which is simply wrong.

18. For these reasons, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law in that the judge has failed to make proper findings on material facts specifically whether there is protected family life, whether there is an interference with that, whether

there was in this case a historic injustice and whether having taken those factors into account the decision was proportionate.

19. Given the scale of the fact-finding exercise that will need to be undertaken I consider that the appropriate course of action in this case is for it to be remitted to the First-tier Tribunal for fresh findings of fact on all issues.

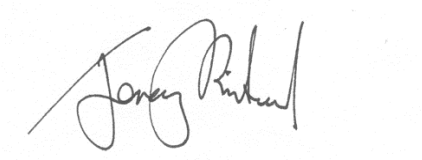
Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The appeal is remitted to the First-tier Tribunal for a fresh decision on all issues.

3. No anonymity order is made

Signed Date: 6 November 2017



Upper Tribunal Judge Rintoul