



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06029/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 6 October 2017

Decision & Reasons Promulgated  
On 18 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

and

MR KHUMRAJ THAPA  
(ANONYMITY DIRECTION NOT MADE)

Claimant/Respondent

Representation:

For the Appellant/Secretary of State: Mr E Tufan, Senior Home Office Presenting Officer  
For the Respondent/Claimant: Mr L Youssefian, Richmond Chambers LLP

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Amin promulgated on 23 January 2017 in which she allowed the Claimant's appeal on human rights grounds pursuant to Article 8 of the ECHR. For the purposes of clarity, I will refer to Mr Thapa as the 'claimant', given that he was the Appellant before the First Tier Tribunal, but the Secretary of State has appealed to the Upper Tribunal.
2. The claimant in this case is a national of Nepal who was born on 18 September 1983. In her decision Judge Amin noted how the Claimant was a child of an ex-Gurkha and

correctly considered the position regarding the Gurkha policy and the historic wrong in respect of the children of former Gurkhas and in her findings Judge Amin found that there was emotional and financial dependence by the Claimant upon his parents that went beyond the normal emotional ties of a family and that therefore Article 8.1 of the ECHR was engaged. She further found at paragraph 27 of her judgment that the Claimant's father had confirmed that he would have settled in the UK had he been permitted to do so and they did not intend to live apart and the mother has confirmed that the sons are very close.

3. The judge went on to find at paragraph 32 that she was satisfied that the Claimant is an adult dependent child of a Gurkha veteran and found on balance that he was emotionally and financially dependent on the sponsor as supported by the oral and documentary evidence. She accepted the sponsor's evidence that he would have settled in the UK if he had been allowed to after his discharge from the British Army, therefore the Claimant would have been with him but for the historic injustice, which, she said, the respondent did not dispute.

4. At paragraph 33 Judge Amin went on to state:

*"The respondent has not given any reasons why admitting the appellant would be against the public interest or how it would undermine order in the United Kingdom given that the Claimant's siblings, who were over the age of 18 years, were granted entry in 2013. There is nothing to suggest that the appellant has a bad immigration history or has a criminal record in Nepal that weighs in favour of the public interest",*

and at paragraph 35: *"I find having considered the evidence in the round and on balance that the historic injustice in this case carries significant weight on the side of the appellant and outweighs matters relied upon by the respondent."* She therefore found that it was disproportionate to the legitimate public ends sought to be achieved.

5. The Secretary of State has now sought to appeal against that decision. Within the grounds of appeal it is argued that the finding of the Tribunal that the Claimant was emotionally and financially dependent upon his parents was not supported by the evidence before the Tribunal. It is argued that the Claimant is 33 years old and is in good health and educated to a high standard and has lived by himself in both China and Finland. It is argued that the Tribunal Judge went on to have limited regard to those features and accepted the claimed assertion of dependence. Mr Tufan today on behalf of the Secretary of State effectively argues that the judge's findings in that regard amount to irrationality.
6. It is further argued within the grounds of appeal that in effect the judge had failed to apply the **Kugathas** test of emotional dependency, which, it is said in the grounds of appeal, requires elements of dependency beyond the normal emotional ties, and it is argued that the Claimant has not shown such ties.
7. In the fourth paragraph of the grounds of appeal it is further argued in the alternative that the judge's Article 8 assessment was flawed on the basis that he had made no findings pursuant to Section 117B of the Nationality, Immigration and Asylum Act 2002. It is argued that the judge had not made any findings on whether

the Claimant has the ability or means to integrate within the UK and it is argued that the Article 8 assessment is incomplete.

8. Permission to appeal has been granted in this case by First-tier Tribunal Judge Farrelly on 27 July 2017, when he found that it was arguable that the judge did not give adequate reasons for concluding the Claimant was dependent upon his parents and so erred in law and also found that it was arguable that inadequate consideration had been given to the factors in Section 117B.
9. I am most grateful to both legal representatives for their submissions today. Full record of those submissions are contained within the Record of Proceedings and I will therefore not repeat them in their entirety here but in summary Mr Tufan on behalf of the Secretary of State challenges the findings of emotional and financial dependency and relies upon the grounds of appeal. He seeks to argue that the Claimant has been living independently away from his parents in both China and Finland and he seeks to argue that there are no elements of dependency meeting the **Kugathas** test in this case.
10. He also argues that the judge erred in considering whether or not there was financial dependency and in that regard he refers me to the Court of Appeal case of **AAO v Entry Clearance Officer [2011] EWCA Civ 840** and paragraph 35 of that judgment, being the judgment of Lord Justice Rix, who at the end of paragraph 35 stated: "*That is not to say that reliance on the further element of financial dependency will bring a breach of Article 8: no case in which it has in the present context has been discovered.*"
11. Mr Tufan went on effectively to argue that although the Tribunal can take financial dependency into consideration, he argued that in effect it was a neutral factor and it was not actually wrong to mention financial dependency, but said that that in and of itself in the absence of emotional dependency would be insufficient. In respect of the Section 117B point he argues that that had not been adequately dealt with by the First-tier Tribunal Judge but he conceded that in fact that was not material to the outcome if there is family life here for the purpose of Article 8 (1) given the historic injustice arguments and the weight to be attached to that historic injustice.
12. Mr Youssefian in reply relies upon his Rule 24 notice, which I have now taken account of, and argues that in fact there is no merit in the appeal brought by the Secretary of State and there was no case really to answer. He says that financial dependency is a factor that can be taken into account in determining whether or not there are the ties going beyond the normal emotional ties between parents and adult child such as to meet the **Kugathas** test and argues that in any event in this case the judge found that there was the emotional dependency sufficient to meet the **Kugathas** test. He argues that the judge made findings which were open to the judge and that the judge found the witnesses to be highly credible.
13. He has referred me to various paragraphs within the recent Court of Appeal decision in the case of **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320** and seeks on the basis of that decision to argue that the Court of Appeal in that case did not consider that financial dependency was an irrelevant consideration and did not seek to say that the Upper Tribunal when considering financial dependency erred.

14. He further seeks to rely upon the fact that within the **Rai** case consideration was given to the existing jurisprudence regarding the requirements that had to be met in order to meet the **Kugathas** test. In that regard he referred me in particular to paragraphs 17 and 18 of the judgment of the Court of Appeal relating to the original **Kugathas** test where Lord Justice Sedley at paragraph 17 of the judgment indicated that there would have to be support which was real, committed or effective. Counsel then went on to refer me specifically to paragraph 18 of the Upper Tribunal case of **Ghising (family life - adults - Gurkha policy)** where the Upper Tribunal accepted that **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 and went on at paragraph 61 to state:

*“Recently, the European Court of Human Rights has reviewed the case law, in **AA v United Kingdom [2012] Imm AR 1**, finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them.”*

15. First-tier Tribunal Judge Amin when making her findings within her decision at paragraph 20 specifically found that the Claimant had

*“spent his entire life with the family until the family came to the UK and the family is his backbone. The Claimant continues to be wholly financially and emotionally dependent on his family. I have seen the Viber messages and the money remittances including the bank account which has been put at his disposal in Nepal.”*

16. Judge Amin went on at paragraph 21:

*“The oral evidence I heard from the Claimant’s parents and his brothers confirms the strong family life that is in existence along with the dependency. The Claimant has visited his family in the UK on one occasion and was granted a visitor visa and his family have visited him in Nepal. They keep in constant and regular communication via Viber.”*

17. The judge noted that four years had passed since Immigration Judge White’s decision to refuse the Claimant entry clearance and there had been a deterioration in the wellbeing of the Claimant and this was a serious inhibition of his ability to live a full and fulfilling life and went on then to consider that the previous decision had not actually considered the historic injustice principles.

18. Judge Amin reminded herself at paragraph 28 of the need to show more than the usual emotional ties between adult children and their parents, referring to the case of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**, and at paragraph 29 went on to find that she was satisfied on balance that:

*“Whilst the Claimant is an adult he is emotionally and wholly financially dependent on his parents, as supported by the oral and documentary evidence of the visits by the sponsor and his wife and the money that the Claimant has access to in Nepal from his father’s pension.”*

She accepted the evidence that the contact was by phone and that the unchallenged evidence was that the Claimant lived with his parents and siblings before they came to the UK and she found that the Claimant was still reliant on funds from his parents to survive on a day-to-day basis and he had not formed an independent family unit and he had not severed the family unit and that the evidence was that the Claimant enjoyed a relationship with his parents which goes beyond normal emotional ties of a family, and therefore Article 8(1) of the ECHR is engaged.

19. Although the Secretary of State argues that the Claimant had lived by himself in China and Finland the evidence, which was accepted by the judge, having heard the witnesses, was to the effect that this Claimant was still in very regular contact with his family in the UK including his parents and that they kept in constant and regular communication via Viber. She also noted the visit to the UK and the fact that his family visit him in Nepal. The fact that the Claimant might have actually lived in other countries in terms of having lived in China and Finland does not in itself necessarily mean that there was a break in terms of there being a family unit or necessarily mean there was a reduction in the level of any dependency.
20. The judge, in my judgment, has actually properly considered the evidence in the round and has taken account of and accepted the evidence of the witnesses regarding the level of contact between the Claimant and his parents and his brothers and accepted that that did go beyond the normal emotional ties of a family, given the fact that the Claimant had not, on her findings, actually formed an independent family unit. I consider that was a finding open to her on the evidence.
21. The judge also properly did consider whether or not he was financially dependent upon his parents. In that regard the question of whether or not someone is financially dependent upon their parents may be relevant to the extent of considering whether or not they have actually formed an independent life away from their parents and whether there are still the level of ties which go beyond the usual emotional ties between adult children and their parents.
22. The case of AAO referred to by Mr Tufan at paragraph 35 does not appear to me to be indicating that financial dependency is necessarily a completely irrelevant factor. It is just that financial dependency in and of itself may not be sufficient to engage Article 8. Quite clearly if there is not the elements of emotional dependency going beyond normal emotional ties that may well be the case but it does not mean that financial considerations are necessarily irrelevant and I find that the judge quite properly took account of all the evidence in this case made findings which were quite open to her on the evidence. I do not accept the submission by the Secretary of State that those findings are irrational.
23. I further do bear in mind, as has been correctly stated by Mr Youssefian on behalf of the claimant, that the Court of Appeal in the case of Rai v Entry Clearance Officer did not indicate that the Upper Tribunal erred in considering the financial dependency element in taking that as one of the factors and, as he correctly states, at paragraphs 36 and 37 the Court of Appeal noted the arguments by Mr Jesurum in the Court of Appeal suggesting that the previous Tribunal had been looking not only for

a sufficient degree of financial and emotional dependence to constitute family life but also for some extraordinary or exceptional feature in the Claimant's dependence upon his parents as a necessary determinant of the existence of his family life with them. The Court of Appeal in paragraph 37 accepted that those submissions had force when Mr Jesurum argued that in that regard too high a test and too exacting a test had been undertaken in the UT in that case.

24. In that regard therefore I do find that the judge made findings which were open to her on the evidence and that the judge has quite properly considered whether or not Article 8 was engaged and whether or not there was family life between this adult Claimant even though he was 33 and had lived in other countries and his parents.
25. In respect of the alternative submission within the grounds of appeal that the judge has not made adequate findings on Section 117B of the Nationality, Immigration and Asylum Act 2002 quite clearly the requirement is for judges to take into account the statutory considerations set out within Sections 117A to D of the Nationality, Immigration and Asylum Act 2002, which are said within the actual Sections themselves to be a statutory consideration that the judges have to take into account in every case where Article 8 is being considered. In that regard Judge Amin at paragraph 17 of the decision has stated: "I have had regard to Section 117A and B of the Nationality, Immigration and Asylum Act 2002 (as amended)."
26. It appears as if she has not actually gone on to individually set out everything which is said there within those paragraphs or to consider questions as to whether or not the Claimant would be financially independent or the like but quite clearly from the judge's findings she has gone on to actually find that the Claimant was wholly financially dependent upon his parents and therefore was aware of the fact that there was financial dependency and that the Claimant was not financially independent. Clearly has stated that she has taken account of Section 117A and B and the fact that it is in the public interest that someone who is seeking leave to enter the UK is financially independent.
27. She has quite clearly said that she has taken account of those factors but in any event I therefore do find that the judge has taken account of the issues that she says she has, but even if I am wrong and the judge should have actually gone on to specifically consider each and every one of the factors set out in Section 117A and B, as Mr Tufan quite properly concedes, even if that is an error in that regard, and I am not satisfied that it in fact that would be material to the outcome, given the historic injustice in this case.
28. In that view I am also bolstered by paragraphs 55 and 57 of the Court of Appeal decision in the case of Rai wherein the Court of Appeal, again dealing with Section 117A and B, noted in that case that Section 117B including the maintenance of effective immigration control being in the public interest and it being in the public interest that those who seek entry into the UK speak English and are financially independent had not been properly dealt with but in view of the historic injustice could not have seen that the decision would have been any different in any event and therefore was immaterial.

29. I therefore find that the decision of First-tier Tribunal Judge Amin does not contain any material errors of law and the decision is maintained.

**Notice of Decision**

The decision of first-tier Tribunal Judge Amin does not contain any material errors of law and is maintained. The Secretary of State's appeal from that decision is dismissed.

I do not make any order in respect of anonymity, no such order having been sought before me and no such order having been made by First-tier Tribunal Judge Amin when the case was in the First-tier Tribunal.

Signed

Dated 6<sup>th</sup> October 2017

Handwritten signature in black ink, appearing to read 'RFM McGinty'.

Deputy Upper Tribunal Judge McGinty