Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04560/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 October 2017	**On 02 November 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

JITENDRA RAI
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER
NEW DELHI, INDIA

Respondent

Representation:
For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent: Mr R Jesurum, Counsel instructed by Howe & Co Solicitors

DECISION AND REASONS

1. The appellant is the adult son of a Ghurkha veteran. His appeal against refusal of entry clearance was heard originally in the First-tier Tribunal in 2013. The decision of First-tier Tribunal Judge Majid was then set aside and remade in the Upper Tribunal and it is the decision of the Upper Tribunal which is now to be remade, following an appeal to the Court of Appeal.

2. On 7 August 2014, the Upper Tribunal set aside the First-tier Tribunal decision and on 5 September 2014, the Upper Tribunal dismissed the

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appeal, holding that the appellant did not meet the requirements of the Immigration Rules and could not be admitted pursuant to Article 8 ECHR.

3. The appellant appealed to the Court of Appeal and on 4 May 2017, that Court allowed the appeal. The appeal was remitted for rehearing in the Upper Tribunal.

4. That is how the appeal came before me today.

Section 117B

5. Mr Jesurum has raised the question of whether Section 117B affects the appellant's position. I am quite satisfied that it does not. The appellant has not sought to breach the maintenance of effective immigration controls (Section 117B(1)). He remains outside the United Kingdom, and his parents have at all times been lawfully in the United Kingdom as settled persons such that Sections 117B(4) and 117B(5) do not bite.

6. I spend no further time on Section 117B, save to observe that my view chimes with that expressed by Lord Justice Lindblom at [55]-[57] in the Court of Appeal's decision, and in particular at [57]:-

> "57. …Certainly, if the Upper Tribunal Judge's determination is in any event defective as a matter of law, which in my view it is, I cannot see how the provisions in Section 117A and B of the 2002 Act can affect the outcome of this appeal."

Family life

7. Mr Deller reminds me that the date of assessment of family life is the date of application, or at the very latest the date of decision by the Entry Clearance Officer and not the date of the hearing before the Upper Tribunal or any later date.

8. When considering whether family life exists, I am not to apply a test of exceptionality: I am guided by the judgment of Lord Justice Beatson in *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 at [61]:

> "61. … in paragraphs 18 and 26-28 of his determination the judge below appeared to apply a test of 'exceptionality' in order to determine whether family life exists between the appellant and his parents. This is contrary to the approach in the *Ghising* cases approved in this court in *Gurung*'s case and what was expressly stated by this court in *Singh v Secretary of State for the Home Department [2015] EWCA Civ 630.* In *Singh*'s case, Sir Stanley Burnton (with whom Richards and Christopher Clarke LJJ agreed) stated at [24] that there is no requirement of 'exceptionality', that all depends on the facts, and that there must be something more than the love and affection between an adult and his parents or siblings which will not in itself justify a finding of family life."

Factual matrix

9. The undisputed facts were set out by Lord Justice Lindblom in the Court of Appeal at [41]-[43]:

> "41. The burden of the evidence of the appellant's father and mother in their witness statements, and the appellant's in his, was this: that, in consequence of the 'historic injustice', it was only in 2010 that his father had been able to apply for leave to enter the United Kingdom; that his parents would have applied upon the father's discharge from the army had that been possible; that they could not afford to apply at the same time as each other or with their dependent children [they had six children] – the appellant and their daughter Chandra; that the stark choice they had had to make was either to remain with the appellant and Chandra in Nepal or to take up their long withheld entitlement to settle in the United Kingdom; that they would all have applied together if they could have afforded to do so; that the appellant had never left the family home in Nepal, begun an independent family life of his own, or found work outside the village; and that he had remained, as his father put it, 'an integral part of the family unit' even after his parents had settled in the United Kingdom. …
>
> 43. Whether the appellant did enjoy family life at the relevant time was, of course, a question of fact for the Upper Tribunal ...".

The parties today have confirmed that the factual matrix is not in dispute.

10. I return therefore to the core of the question before me, whether having regard to that factual matrix, family life existed when the application was made, such that the provisions of *Ghising* and *Gurung* apply.

11. On the facts of this case, and given the appellant's continued financial dependence and the co-existence of this family in Nepal before the parents travelled to the United Kingdom in 2010, I am satisfied that despite the appellant being an adult there was family life between him and his parents and that accordingly, following the established line of cases in relation to the historic injustice, entry clearance should have been granted.

Conclusions

12. This appeal is therefore allowed.

13. I direct that entry clearance be granted to enable this appellant to rejoin his parents in the United Kingdom.

Signed: Judith A J C Gleeson
Upper Tribunal Judge Gleeson

Dated**:** 1 November 2017