Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/08219/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2017	**On 4 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR CHANDRA BAHADUR RANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:

For the Appellant: Mr S Jaisri, Counsel, instructed by Sam Solicitors
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Mill (the judge), promulgated on 22 December 2016, in which he dismissed her appeal against the Entry Clearance Officer's decision of 15 April 2015. That refusal arose out of an application for entry clearance made on 9 March 2015. The application was made in order for the Appellant to join his parents in the United Kingdom. His father is an ex-Gurkha soldier, and the Appellant sought leave in line with the Respondent's policy, issued in January 2015, on adult dependant relatives of ex-Gurkha servicemen.

The hearing before the judge

2. The Respondent was unrepresented at the hearing before the judge. An allegation of deception had been raised by the Entry Clearance Officer in the refusal notice relating to an apparently false document. At paragraphs 16 to 19 of his decision the judge found in favour of the Appellant on this issue. This matter is no longer live.

3. At paragraph 20 the judge goes on to set out findings of primary fact. These include the following:

   (a) The Appellant was single and had never been married;

   (b) his father was in fact an ex-Gurkha soldier, having served for a number of years and attaining the rank of corporal;

   (c) the Appellant's parents had been granted leave to enter the United Kingdom in 2010 under the Respondent's policy. They had arrived in the United Kingdom on 1 August 2010 when the appellant was aged 25;

   (d) the Appellant has four siblings, one of whom is in the British Army, while the others still reside in Nepal;

   (e) since leaving Nepal the Appellant's parents had maintained frequent indirect communications with him and had visited in 2013 and 2015;

   (f) the appellant was financially supported by his parents, and this included provision for his rent and other living expenses.

4. At paragraph 23 the judge states that there was no relevant medical evidence and he was not satisfied that the appellant had any special or "exceptional" needs which required specific assistance or dependence upon his parents. At paragraph 25 it is concluded that there was no family life between the appellant and his parents "over and above that which ordinarily exists between an adult child and his parents". In paragraph 28 it is stated that even if there had been family life the Respondent's decision would be proportionate.

The ground of appeal and grant of permission

5. The grounds of appeal assert that the judge has got it wrong in respect of whether there was family life or not, and in respect of the assessment of the historic injustice issue. Permission to appeal was granted by First-tier Tribunal Judge McGinty on 25 July 2017.

The hearing before me

6. Mr Jaisri relied upon his grounds of appeal. Mr Armstrong submitted that there were no errors and that the judge had made sufficient findings of fact.

Decision on error of law

7. I find that there are material errors of law in the judge's decision.

8. The first of these relate to the approach taken to the question of family life. The test as to whether there is family life between parents and adult children does indeed remain that set out in Kugathas [2003] EWCA Civ 31. However, the application of this test must be seen in light of subsequent case law including, for example Ghising [2012] UKUT 00160 (IAC) and, more recently, Rai [2017] EWCA Civ 320. Although the judgment in Rai postdates the judge's decision, it clearly represents the correct approach at whatever time an assessment is being made. Rai makes a number of important points. First, there is no test of exceptionality when assessing whether family life exists (paragraph 36). Looking at paragraph 23 of the judge's decision, it appears as though the judge may well have in fact been applying an elevated threshold, requiring an exceptional feature of some sort, when undertaking his assessment. This indicates an error in approach.

9. Rai also deals with the issue of ex-Gurkha servicemen (and often their spouses as well) leaving Nepal to come to the United Kingdom once settlement was granted and leaving behind adult children. The Respondent often regards this as being a matter of "free choice" as it were, and holds this against the existence of family life. In this case, the judge appears to have done the same thing. At paragraph 25 he states, "the starting point for this conclusion [that family life did not exist] is the appellant's parents' decision to move to the United Kingdom without the appellant in 2010". However as Rai points out at paragraphs 38-42, the decision to leave was simply the exercising of a right of settlement which should have been granted to ex-Gurkhas many years ago: the Appellant's parents were in a sense righting a historic wrong. Although I appreciate the fact that I am assessing the judge's decision with the hindsight of Rai, it remains the case that significant weight being placed upon parents' departure under the government's policy may well be indicative of an error in approach to the question of whether family life continued after the parents' departure.

10. The judge has made a number of findings of fact at paragraph 20. These must have formed the basis for his assessment of whether family life existed. There is nothing to suggest that he had rejected the evidence that the Appellant lived with his parents from birth until the point of their departure in 2010. In light of this and the findings just referred to, it is somewhat difficult to see why the judge came to the conclusion that family life was not present. The appropriate test is in essence whether the support provided by the parents to the Appellant over the course of time was "committed" and/or "effective". In light of the findings actually made, it would appear though this threshold was met: the Appellant was not earning money of his own, the parents were paying for all essential needs including his accommodation, and this financial support had been ongoing since the parents' departure in 2010. In addition to all of this, there was a positive finding that frequent indirect communications had been maintained, together with two visits by the parents to Nepal in 2013 and 2015.

11. Taking all of the above matters into account, there has been an error in approach relating to the question of family life by way of misdirection and a lack of adequate reasons in light of the facts as found.

12. As to the alternative conclusion on proportionality at paragraph 28, there is a clear material error here. No reference is made to the very significant factor of the historic injustice, a factor that has been reaffirmed in a number of cases ranging from Ghising, to Gurung [2013] EWCA Civ 8, and onto Rai most recently. The error relating to the family life issue is therefore material.

13. I set aside the judge's decision.

Re-making the decision

14. Both representatives were agreed that I could and should remake the decision on the basis of the evidence before me.

15. Mr Armstrong confirmed that there was no challenge to the sponsor's credibility, and that the judge's findings at paragraph 20 could be used as a basis for my own decision. Mr Jaisri confirmed that the Appellant's situation now was the same as at the time before the judge and there was no new evidence to be submitted. Mr Armstrong did not raise any challenge to either the evidence or the relevant case law.

16. I have had regard to the materials contained within the Respondent's bundle together with that contained in the Appellant's bundle.

17. I make the following findings of fact based in large part upon the judge's findings at paragraph 20 and the unchallenged evidence before me. The appellant lived with his parents in Nepal from birth until they left that country in August 2010. Thereafter, they have maintained regular indirect communications and had visited him on two occasions for not insignificant periods. They have continuously provided essential financial support to the Appellant. This support is both committed and effective. The Appellant has no income of his own and relies wholly upon funds provided by his parents. His parents came to this country in 2010 because they had been granted settlement. It is clear from the evidence that they would have come to the United Kingdom many years earlier, together with their children, if they had been able to do so. I also find that the fact of the entry clearance application being made only a couple of months after the publication of the Respondent's policy on adult dependent relatives in January 2015 is indicative of the close bonds between the family members. The Appellant is single, and has no particular medical conditions.

18. In light of the above I find that there was family life between the Appellant and his parents before they left Nepal in 2010, and that this life has subsisted ever since. In so finding I apply the Kugathas test seen in the context of relevant case law I have referred to earlier, in particular paragraphs 36 to 42 of Rai.

19. The Respondent's refusal of entry clearance constituted an interference (or a lack of respect for) the Appellant's family life. The Respondent's decision was in accordance

with the law and pursued the legitimate aim of maintaining effective immigration control.

20. I turn to the issue of proportionality. I take into account the provisions of the Respondent's policy contained in Annex K, Chapter 15, Section 2A, paragraph 13.2 of the relevant IDI. The Appellant satisfies all of the requirements save for one, namely that there had been more than a two-year gap between his parents leaving in 2010 and then returning to see him in 2013. I take this factor into account. There are no issues of criminality or misconduct in this case whatsoever. The public interest is clearly a very important factor and one to which I attach significant weight. The Appellant is not and on arrival probably would not be financially independent in his own right, and nor do I have evidence that his level of English of a reasonable standard. These two factors would count against him as well.

21. Having said that, and in light of paragraphs 55 to 57 of Rai, I do not conclude that the mandatory factors set out in section 117B of the 2002 Act have such a cumulative effect as to outweigh the very powerful factor that is the historic injustice. The importance of this factor has been recognised in numerous decisions of the Upper Tribunal and higher courts over the years. It tips the scales in the Appellant's favour in this case.

22. I conclude, taking everything into account, that the Respondent's decision was, and is, a disproportionate interference with the Appellant's protected Article 8 rights.

23. The Appellant therefore succeeds in his appeal on Article 8 grounds.

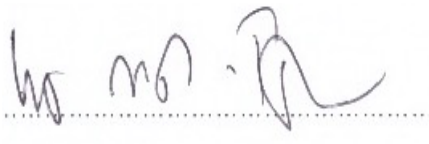
Notice of Decision

The decision of the First-tier Tribunal contains material errors of law.

I therefore set it aside.

I re-make the decision by allowing the appeal on Article 8 grounds.

No anonymity direction is made.

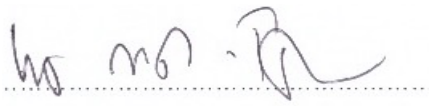
Signed  Date: 2 October 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00. The Appellant has essentially succeeded on the basis on which the application was made. The evidence before me has not been challenged by the Respondent.

Signed  Date: 2 October 2017

Deputy Upper Tribunal Judge Norton-Taylor