



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05674/2016

THE IMMIGRATION ACTS

Heard at Field House

On 8th May 2018

16th July 2018

13th September 2018

**And decided on the papers on 10th October
2018**

Decision & Reasons

Promulgated

On 15th October 2018

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**MR DEVIRAM SUNUWAR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant:

Mr C Avery (8th May 2018)

Ms A Fijiwala (16th July 2018)

Mr T Wilding (13th September 2018)

(Senior Home Office Presenting Officers)

For the Respondent: Mr R Jesurum (instructed by Everest Law Solicitors) on 8th
May 2018 and 6th July 2018)

Not represented on 13th September 2018

DECISION AND REASONS

This is an appeal to the Upper Tribunal by the Entry Clearance Officer, with permission, in relation to a judgment of the First-tier Tribunal, Judge Coll, promulgated on 10th July 2017 in which she allowed the appeal.

For the purposes of this judgment I shall continue to refer to the Entry Clearance Officer as the Respondent and Mr Sunuwar as the Appellant.

I am deciding this case without a hearing for reasons which will become apparent later in this judgment.

The Appellant in this case is a citizen of Nepal, 34 years of age at the date of his application to the Entry Clearance Officer. He had sought settlement in the United Kingdom as the adult dependent child of a former Gurkha. His father was born on 18 May 1938 and is currently therefore 80 years of age. The Entry Clearance Officer's decision was taken on 16th January 2016.

The background to the application was that the Sponsoring father had applied for indefinite leave to enter the UK with his daughter under the Secretary of State's 2009 policy for former Gurkhas. At that time his daughter was 23 years of age and the Appellant 29. The Sponsor's application was granted but his daughter's application was refused.

The Sponsor entered the UK on 30th July 2010 and in 2011 his daughter was successful in an appeal to the First-tier Tribunal. She subsequently entered the United Kingdom leaving the present Appellant in Nepal.

The Entry Clearance Officer refused the application because: -

- (a) The Appellant failed on suitability grounds because he had failed to disclose material facts, having untruthfully claimed not to have left Nepal in the preceding 10 years when he had in fact left to work in Malaysia.
- (b) The Appellant did not satisfy Annex K of the Immigration Rules because he was over 30 years old at the date of application, lived separately for the Sponsor for over two years and is not emotionally or financially dependent on him.
- (c) The Respondent's reasons for refusal outweighed the consideration of historical injustice in the article 8 proportionality assessment and
- (d) The Appellant had not established family life with the Sponsor over and above that between adult child and parent. This was said to be further evidenced by the Sponsor's decision to move to the UK without him.

At the hearing before the First-tier Tribunal the Judge heard evidence from the Sponsor and his daughter. She made various findings of fact and set out the relevant case law concerning Article 8 and the historic injustice cases in relation to former Gurkhas in particular. In carrying out the balancing exercise the Judge at paragraph 50 found further factors in the Appellant's favour over

and above those set out in section 117B of the Immigration and Asylum Act 2002. She found further factors in the Appellant's favour to be:-

- (e) "His close family unit is in the UK: The Appellant as a single man is closest to his original family unit, his father (Sponsor) and his sister.
- (f) Sacrifice by Sponsor: The Sponsor dedicated many years of his family life in order to serve the Crown. The Gurkhas suffered greater separation from their family than soldiers of other British Army units (see R (Purja) v MoD [2004] 1 WLR 289. The Sponsor served well in excess of the four years necessary to qualify for settlement and was promoted to become Sergeant.
- (g) Health and well-being of the daughter: The daughter is most willing to carry on selflessly looking after her father. She however is showing the signs physically and mentally of considerable strain. If she is to carry on in good health and continue to support the Sponsor as he moves into his 80s, she will need to be relieved of being the 24/7 carer. Her brother's entry into the UK for settlement will achieve that.
- (h) The best interests and welfare of the Sponsor as an elderly man: Although I may not regard the Sponsor as a child or treat him as such in elevating his best interests to be the most important factor, it is incontestable that he is likely to become increasingly frail in his 80s. he is 79 and already requires round-the-clock care. The Appellant will be able to ensure that he receives ongoing care since he will work as a team of carers with his sister. At present the burden of care falls mostly on the daughter with little state contribution".

Having so found the Judge went on to allow the appeal on Article 8 grounds only. Regrettably the Judge made an error at paragraphs 51 and 52 referring to the Appellant's removal when this case was about entry; not removal. That is however not material.

It is appropriate at this point to indicate the difficulties faced by the Sponsor. He has profound sensory neural hearing loss which he incurred whilst being a rifle instructor with the Gurkhas. He does not know sign language and has limited ability to lipread. He communicates primarily through written Nepali. He also has mobility problems due to osteoarthritis and suffers from Tinnitus, visual impairment and dementia. He is in receipt of attendance allowance.

The Judge noted the considerable strain on his daughter in being his carer and noted that she looked exhausted and demoralised.

Permission to appeal was granted by a Judge of the Upper Tribunal who found merit in the assertion that the Judge's findings on family life and the purchase of Article 8 were inconsistent with the principles in Kugathas [2003] EWCA Civ 31.

Thus, the matter came before me for the first time on 8 May 2018. On that occasion I found the Judge had erred in her assessment of whether Article 8

was engaged, concentrating as she did on the Sponsor's frailty and care needs rather than the Appellant's dependency upon his father. The reasoning was thin and concentrated more on the situation of father and daughter in the UK than on the Appellant's situation. I set aside the decision and adjourned the matter for further evidence to be filed before I dealt with it at a resumed hearing. I did however preserve the findings of fact and the issue for me to decide at the resumed hearing was whether those findings of fact meant that Article 8 was engaged.

When the matter came before me on 16 July 2018 the matter had to be adjourned as the Tribunal had not booked a Nepali interpreter and one could not be obtained on the day. With great regret therefore, the matter had to be adjourned.

The matter then came before me on 13th September 2018. On that occasion the Sponsor and his daughter, with helpers, attended the hearing but there was no representative. One of the helpers contacted the solicitors who then sent an urgent fax to the Tribunal indicating that they had not received any notice of the resumed hearing. I can confirm that the file indicated that the notice of hearing was sent to an incorrect address for the representatives.

Thus, most regrettably the matter had to be adjourned for a third time.

I was very concerned that the Appellant in this case, now 80 years of age, had travelled now three times from Reading for the purposes of this appeal. It is now well over two years since the Entry Clearance Officer's decision. The Sponsor has considerable disabilities and is a vulnerable witness. It is highly unsatisfactory that he should have had to attend on three occasions, on two of which the matter was adjourned through no fault of his or his son the Appellant.

Being aware that on occasions the Home Office concede that appeals should be allowed on Article 8 grounds in light of the historic injustice I consulted another senior Home Office Presenting Officer, Mr I Jarvis who very helpfully agreed to review the file.

The Appellant's representatives had filed, for the resumed hearing in the Upper Tribunal, an addendum bundle which contained witness statements from the Sponsor, his daughter and a friend. It also included a large volume of records of communication between the Appellant and his UK family.

It is apparent that there is very frequent contact between the Appellant and his father. The evidence of all of the witnesses was that the family are extremely close. Had it been possible, the Sponsor would have come to the UK upon his discharge from the Gurkhas in 1995 at which time both children would have been minors. The Sponsor served with the Gurkhas for 19 years. He continues to financially support his son in Nepal and the separation is causing extreme hardship to all three members of the family. The Appellant is uneducated and not working.

Mr Jarvis, having reviewed the file, emailed me on 3rd October 2018 saying this: -

“I write on behalf of the ECO in this case - it is understood that the UT has previously identified material error in the FtT decision and the matter remains to be decided by yourself. I have today been able to have access to the Home Office files which contain the recent detailed evidence bundles from the Appellant and Sponsor. Having had the opportunity to read through that evidence which, predominantly, was not before the ECO at the time of making the decision, the ECO is now able to accept that the Appellant has made out his burden in establishing family life for the purposes of Article 8 (1) ECHR and as such, there being no public interest issues raised against the Appellant, the ECO accepts that the appeal should be allowed on the basis of the positive interaction of the historic injustice with Article 8 (2).”

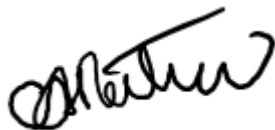
I am most grateful for the efforts of Mr Jarvis in this case, particularly as it means that the Appellant and Sponsor will be subject to no further delays nor the Sponsor any further journeys from Reading to central London. In light of the Entry Clearance Officer’s stance I allow the appeal on Article 8 grounds.

Notice of Decision

The appeal is allowed to the extent that the Decision and Reasons of the First-tier Tribunal is set aside. In redeciding the Appellant’s appeal against the Entry Clearance Officer’s decision it is allowed on Article 8 grounds with the consent of the Entry Clearance Officer.

No anonymity direction is made.

As the appeal has been allowed on the basis of evidence not put before the Entry Clearance Officer I make no fee award.



Signed

Date 10th October 2018

Upper Tribunal Judge Martin