



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10068/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 April 2018

Decision & Reasons Promulgated
On 03 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

SURYAMAN LIMBU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Presenting Officer

For the Respondent: Mr D Balroop, counsel instructed by Everest Law solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission granted by First-tier Tribunal Judge Shimmin on 11 January 2018, against the decision of Judge Khawar of the First-tier Tribunal promulgated on 17 July 2017, allowing the appeal of the Respondent against a decision dated 10 March 2016 refusing to grant entry clearance.
2. The Respondent is a national of Nepal born on 11 March 1985. He sought entry clearance in order to join his father Mr Rai Kumar Limbu, a former Ghurkha soldier. This application was refused in a decision dated 10 March 2016, both in respect of the Home Office policy set out in Annex K of the Immigration Directorate Instructions,

chapter 15, Section 2A at 13.2 and in respect of Article 8 of the European Convention on Human Rights.

3. The grounds in respect of which permission was granted assert as follows:
 - (1) that the judge found that the Appellant is emotionally dependent on the Sponsor at [38], but this was not explained and there was a failure by the Respondent to provide evidence to show emotional dependency bearing in mind the judgment in Kugathas [2003] EWCA Civ 31;
 - (2) the Tribunal had disregarded the fact that the Respondent and Sponsor had lived apart for eleven years and although there may be a financial relationship there was nothing to show an emotional dependency beyond normal emotional ties;
 - (3) the evidence as to financial dependency was insufficient in light of the judgment in AAO v Entry Clearance Officer [2011] EWCA Civ 840 at 35 which is essentially the Kugathas test; and
 - (4) that the Tribunal erred in having no regard to the public interest considerations set out in Section 117B of the NIAA 2002.
4. There was no Rule 24 response submitted on behalf of the Respondent.
5. At the hearing before me, Mr Kotas sought to rely on the first three grounds of appeal however in respect of ground 4 and the assertion that the Tribunal had erred in failing to apply the public interest considerations as set out in Section 117B of the NIAA 2002, he accepted that this had been addressed in the judgment of the Court of Appeal in Rai [2017] EWCA Civ 320 per Lord Justice Lindblom where the court had held as follows:

“55. With effect from 28 July 2014 Section 117A of the NIAA 2002 requires that where a court or Tribunal is considering the public interest and whether an interference with Article 8 rights is justified it must have regard in cases not involving deportation to the matters set out in Section 117B including that the maintenance of effective immigration control is in the public interest. Section 117B(1) provides that it is in the public interest that those seeking entry into the United Kingdom speak English Section 117B(2) and that it is in the public interest that those seeking entry be financially independent Section 117B(3).

56. Mr Jesurum pointed out that the Upper Tribunal Judge did not consider the matters arising under those provisions of the 2002 Act. He submitted however that in view of the ‘historic injustice’ underlying the Appellant’s case such considerations would have made no difference to the outcome and certainly no difference adverse to him. Ms Patry submitted that if the Upper Tribunal’s decision was otherwise lawfully made the considerations arising under Section 117A and B could not have made a difference in his favour.

57. The submissions made on either side seem right. 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”.

6. Mr Kotas further submitted that there was a substantial period of separation between the Sponsor and the Respondent and it was not apparent from reading the decision how family life had subsisted during that period.
7. Mr Balroop submitted that [15] of the decision deals with the contact which was almost daily between the Sponsor and the Respondent. At [10] the judge has set out the circumstances which were quite compelling as to how the Sponsor came to be separated from his son in that he came to the United Kingdom in 2006 ostensibly for a visit, however his wife had kidney problems and they ended up remaining in the United Kingdom for treatment. At that time the Respondent was living with another sibling in the family home in Nepal, however he has been on his own since 2012.
8. Mr Balroop drew my attention to the findings at [34] and [35] that the judge accepted the level of contact between the Sponsor and Respondent and that the Sponsor was financially supporting his son and that there was a joint bank account.
9. Mr Balroop referred to the decision in Rai (op cit) and submitted that the judge’s finding at [40] contained sufficient reasoning to conclude that family life continued despite the separation. He submitted that the judge made a clear finding and it was open to him to do so. There was no reply by Mr Kotas.

My Findings

10. I find no material error of law in the decision of the First-tier Tribunal Judge. In respect of ground 1 and the assertion that there was no explanation or reasoning for the judge’s finding at [38] that the Respondent was dependent on his father and vice versa this is not the case. The Judge held as follows at [28] and [40]:
 - “38. *The Sponsor also explained that he and the Appellant are emotionally dependent upon each other in that they love each other very much and the Appellant is his youngest son. Further that if the Appellant does not succeed in obtaining entry to the United Kingdom he the Sponsor will end up having to consider returning back to Nepal in order to look after his son ...*
 40. *On the totality of the evidence both oral and documentary proffered in this case I am satisfied that the Appellant’s relationship with the Sponsor goes beyond normal emotional ties because there is clear evidence of real, effective and/or committed support. Consequently the Appellant has established Article 8 protected family life which continues to date”.*
11. The judge heard oral evidence from the Sponsor which was in essence not challenged by the Entry Clearance Officer at the oral hearing and gave sustainable reasons for accepting that evidence and finding that there is “*clear evidence of real, effective and/or committed support*” based on “*the totality of the evidence both oral and documentary*” [40].

12. The second ground of appeal asserts that the judge had disregarded the fact that the Sponsor and his son had lived apart for eleven years however that is not the case as is clearly set out by the judge at [23]:

“The principle issue in this case is the question of whether the Appellant has established and retained an Article 8 protected life with the Sponsor despite the fact that the Sponsor has lived in the United Kingdom since 2006 and the Appellant was 30 years of age as at the date of application”.

13. The third ground again reverts to the Kugathas test and the fact that financial dependency, which the judge accepted was present, was not enough in itself. However, it was not disputed that the judge correctly directed himself at [25] in relation to the decisions in Ghising [2013] UKUT 00567 (IAC); Gurung [2013] EWCA Civ 8 and Rai (op cit) and that he found, sustainably, that the Respondent was both financially and emotionally dependent on his father and Sponsor.
14. The judge at [27] found the Sponsor to be an entirely credible witness and also found that despite being cross-examined at some length, no material discrepancies emerged during his oral evidence in relation to his witness statements and the documentary evidence, thus he accepted his oral evidence in its entirety.
15. He noted the significant volume of documentary evidence submitted in corroboration of the account at [29], including at [30] bank statements in relation to a joint account which shows monthly cash deposits from rental income. He took into account the fact that at [32] the Sponsor did not intend to leave his son behind when he and his wife first entered the UK with visit visas in 2006 but this changed in light of the fact that the Sponsor’s wife and mother of the son was diagnosed with kidney failure and required dialysis.
16. At [35] the judge found that the Sponsor’s oral evidence was entirely plausible and consistent with the documentary evidence of the Viber records which showed the frequency of the contact between the Sponsor and his son and the fact that on occasions they speak to each other daily.
17. The judge was entitled to take into account at [39] the fact that the Respondent has not formed a family or relationship of his own and has no girlfriend and this was part of the context of his conclusion that the relationship goes beyond normal emotional ties and that the failure to admit the Appellant was not proportionate.
18. Mr Kotas helpfully conceded the fourth ground of appeal in light of the judgment of the Court of Appeal in Rai set out above.
19. Read as a whole, it is clear that the First tier Tribunal Judge took account of all the material matters raised on behalf of the Entry Clearance Officer, including emotional and financial dependency and the fact that father and son had been separated since 2006 and gave clear and sustainable reasons for finding in favour of the Respondent.

Notice of Decision

For the reasons set out above I find no material error of law in the decision of the First-tier Tribunal. That decision is upheld.

I direct that entry clearance be granted pursuant to Section 87(1) of the NIAA 2002.

No anonymity direction is made.

Signed *Rebecca Chapman*

Date 29 April 2018

Deputy Upper Tribunal Judge Chapman