



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18418/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9 April 2018
Prepared 12 April 2018

Decision & Reasons Promulgated
On 24 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR MONOJ RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Ms K McCarthy, counsel instructed by Everest Law Solicitors
For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nepal, date of birth 26 April 1988, appealed against the ECO's decision of 16 June 2016 to refuse entry clearance for the purposes of joining his family in the UK. The appeal came before First-tier Tribunal Judge Farrelly who on 29 August 2017 dismissed his appeal.

2. On 26 January 2018 I promulgated my decision that the Original Tribunal Judge's decision could not stand because evidence had not been sufficiently addressed particularly in view of the significance of dependence, in the light of the case of *Kugathas v SSHD* [2003] EWCA Civ 311, and the case law including *Ghising* [2012] UKUT 160. The evidence was substantively unchallenged as to the ailing health of the Appellant's mother in the UK and the physical problems that she had faced. It is also clear from the evidence of Soni Rai, present in the UK, date of birth 16 May 1990, who adopted her statement of 28 July 2017 as to the ill health of her mother and the extent to which she was receiving medical treatment in the UK.
3. There was no substantive challenge to the level of contact maintained between the Appellant and his family in the UK including his sister and his mother. In addition, the evidence was really not challenged as to the facts that the Appellant had not worked in Nepal; he had continued to be supported financially and emotionally by her mother; the money to help with the Appellant's needs was sent to him as well as him having access to his mother's Gurkha pension directly in Nepal; the extent to which the Appellant had been away from home in schooling did not detract from the dependence upon his mother; the Appellant is unmarried and cultural factors in Nepal, under which unmarried children remain in their parents' household, fell to be taken into account; the evidence of emotional ties and regular telephone contact between the Appellant and his mother maintained by Viber and/or evidence by telephone cards demonstrated that continuing relationship.
4. The Appellant also was in Nepal as a consequence of the 'historic injustice' as it is described, and it is clear that he and his parents would have applied at the same time for leave to enter the United Kingdom. They would have come to the UK together as a family unit had they all been able to enter the UK at the material time.
5. The Appellant's mother entered the UK when there was no policy under which adult dependent children, such as the Appellant, of Gurkha soldiers could enter the UK. The

Appellant was left behind while his mother entered the United Kingdom for settlement and indeed, it is possible had she not done so the opportunity would have been lost.

6. Following a change in policy in January 2015 adult dependent relatives could apply, as the Appellant did, to enter for the purposes of settlement with his mother. The application was refused. The application was made with reference to Article 8 ECHR applying Home Office policy's IDI Chapter 15 Sections 2A, 13.2, as amended, and in line with the case law, not least *Gurung* and *Ghising* [2013] UKUT 00567.
7. Therefore, in considering this matter and hearing submissions I took into account and applied the case of *Razgar* [2007] 2 AC 167 and as has been made clear there is no test of exceptionality for the engagement of Article 8 ECHR, simply that the Rules make provisions to address it in generality, and there will be a few cases where the Rules do not directly apply through the prism of the Rules and therefore Article 8 needs to be considered unfettered by the provisions of the Immigration Rules.
8. It is clear that family life can exist without dependence and it encompasses something more than normal emotional ties, dependence is one way such ties can exist but their existence is not required. Dependence means real support, effective support or committed support rather than indispensable support.
9. I find that there was real, effective and committed support. It is clear that the Appellant did have a period away from his parents during schooling and that is not to be ignored but quite simply its significance is not to be overstated. He remained, under the control of his family and parents nonetheless. The Appellant remains unmarried and the evidence is unchallenged as to the extent of emotional ties and regular telephone contact he has with. I accept on the evidence before me that the Appellant and his mother continue to share a relationship which is that of family life, albeit its enforced separation is a feature of it. I therefore accept that Article 8(1) rights are engaged and the effect of the Respondent's decision is a significant interference in

those rights being established again in the United Kingdom. It is clear that the Respondent's decision is in accordance with the law and serves proper Article 8(2) ECHR purposes.

10. In considering the proportionality of the decision of the Respondent I have regard to the Military Covenant and historic injustice which has ultimately been to a degree reflected in changes in policy by the Secretary of State to address the contribution made by the Brigade of Gurkhas in the context of the case of *Limbu* [2008] EWHC 2261 (Admin) and *Gurung* [2013] EWCA Civ 8 together with the issue as to whether there was any real choice, in the sense contemplated by the case of *Rai*, as to the separation being truly voluntarily. In this case it seemed that that was by financial circumstances in which the Appellant's mother found herself when the Appellant's father died and the fact that there was no policy under which the Appellant could apply to enter the UK with his mother. I agree that the separation of the Appellant from his mother was not a genuine choice on their part.
11. In considering the proportionality of the decision I take account of Sections 117A–B of the Nationality, Immigration and Asylum Act 2002 as amended. I therefore have regard to the matters identified in Section 117B and I do not know the strength of the English spoken by the Appellant but if it is inadequate the inadequacy arrives from the lack of opportunity to settle in the UK. It seems likely that if he had there would be fluency by now but I see nothing to indicate from his education or otherwise he has a lack of ability to learn English and to that extent it seems to me the financial dependency on his mother will come to an end and he is likely to find employment. I accept his unemployment in Nepal is the product of the economy there rather than a lack of willingness to work.
12. Plainly the public interest in maintaining immigration control is an important factor to which great weight should be given, but on the other hand the interests of immigration control do not necessarily inherently outweigh the historic injustice. The denial of entry was an injustice which needed to be corrected. In the light of *Gurung* and *Ghising*

I conclude that righting the wrongs as identified in *Patel* [2010] EWCA Civ 17 remains an important part of the obligation upon the UK. In the circumstances it seems to me that this is a case where the interests of the child of a former Gurkha outweigh the general public interest. I bear in mind that the judgment involves striking a balance. There was no claim that the Appellant has a bad immigration history or criminal behaviour or criminality in Nepal which militated against the public interest in the UK. I take into account that the Appellant has a strong claim for settlement and absent of any other personal matters which militate against his circumstances, I conclude that the Respondent's decision is disproportionate and the public interest is met by the history injustice.

13. The appeal has also succeeded on the basis of evidence concerning the Appellant's mother's health which is of some relevance to the assessment of the impact upon him of the illness that she suffers from and its adverse effects upon her ability to give evidence. The supplementary bundle produced for the purposes of the hearing contained a statement from the Appellant's mother which I have taken into account, not least in assessing the Appellant's dependency upon her but also the role that she continues to play in his life.

NOTICE OF DECISION

The appeal is allowed under Article 8 ECHR.

No request was made for anonymity nor is one required.

Signed

Date 4 June 2018

Deputy Upper Tribunal Judge Davey

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 reduced fee award of £140.

Signed

Date 4 June 2018

Deputy Upper Tribunal Judge Davey

P.S. I regret the delay in promulgation which is due to the case file being mislocated.